IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE SYNGENTA AG MIR 162 CORN LITIGATION THIS DOCUMENT RELATES TO: ALL CASES CONFORMING TO THE PRODUCER AND NON-PRODUCER PLAINTIFFS' AMENDED CLASS ACTION MASTER COMPLAINTS[†]	Master File No. 2:14-MD-02591-JWL-JPO MDL No. 2591

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

[†] Pursuant to the Court's May 29, 2015 Order, this Motion to Dismiss applies to the Producer and Non-Producer Plaintiffs' Amended Class Action Master Complaints, Dkts. 450 & 451, and to all other Plaintiffs who have filed or will file a Notice to Conform as directed by the Order.

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INTRODUCTION

These lawsuits should be recognized for what they are: unprecedented attempts to turn a seed manufacturer into an insurer paying out on a policy that Plaintiffs never bought to protect themselves from market drops in the price of corn—and from the actions of grain exporters and other market participants that are wholly beyond Syngenta's control.

In the summer of 2013, a bumper corn crop depressed prices dramatically, causing the very losses Plaintiffs seek to recover in this case. 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. Plaintiffs contend that China caused the drop in the price of corn, and that Syngenta should be made legally responsible. The premise of Plaintiffs' case is that Syngenta (and presumably everyone else) had to look to the laws of *China* to determine how Viptera could be sold and handled in the U.S.—even though it is undisputed that Viptera was fully approved for sale without restriction in the U.S., and China consumed only about 0.3% of U.S.-produced corn at the time Viptera went to market. Plaintiffs assert that absent approval from China, Syngenta had a duty under state tort law either to control the way *everyone else* in the corn industry handled Viptera to ensure that it did not enter the U.S. corn supply, or else to refrain from selling Viptera *at all.* Adopting that unprecedented approach would give numerous foreign countries a veto over the use of GM crop science in the U.S. That radical result stretches tort law past the breaking point and should not be imposed by this Court on the tort law of the 22 States involved here.

There is no dispute that when Syngenta began selling Viptera in 2010, it had been found safe and was fully approved for sale by the U.S. Government. It was also well known in the industry that China had not yet approved Viptera. As a result, some grain elevators—like Bunge—chose not to accept Viptera. They concluded it was in their economic interest to try to

meet the special standards of the Chinese export market. Others—including the Non-Producer Plaintiffs—took a different approach. Based on the "costs" involved to test for and segregate Viptera, Non-Prod. Compl. ¶ 296, they chose to accept Viptera for what, by law, it was: fungible U.S. "yellow corn" as defined by the USDA. They bought Viptera corn without distinction and mixed it with the other corn in their facilities. 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.

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. After China subsequently started rejecting U.S. corn shipments, Plaintiffs sued Syngenta, claiming that Syngenta had a duty to ensure that *everyone* in the industry segregated Viptera so that Plaintiffs could produce a specialized export product for China—"Viptera-free" corn.

In addition to suffering from a host of individual defects, Plaintiffs' causes of action are broadly foreclosed by three fundamental doctrines cutting across tort law.

First, Plaintiffs cannot show proximate cause as a matter of law. 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). And the last step in the chain turns on Plaintiffs' speculation that China's actions lowered the price of U.S. corn.

Incanting the word "foreseeable" over various links in that chain does not establish

proximate cause. To the contrary, Plaintiffs' complaints raise all the problems that typically foreclose proximate cause as a matter of law: multiple intervening actions by third parties; a speculative theory of damages at the end of the attenuated chain, which would require trying to isolate the effect (if any) of China's actions on the price of corn from other forces (such as oversupply); and virtually insurmountable problems of proof given that one link in the chain rests entirely on discovering the *real* reasons for China's action in turning away U.S. corn. Precisely such problems lead courts to hold that lack of proximate cause precludes claims against a manufacturer of a safe, non-defective product for harms that supposedly result from the way *others* handle the product after the point of sale.

Second, Plaintiffs cannot establish that Syngenta had a legal duty to prevent Viptera from entering the corn supply to protect their desire in hindsight to serve the specialty Chinese export market. Plaintiffs' suggestion that Syngenta had a duty to reorganize the entire industry framework for growing and distributing corn—*including controlling the actions of the Non-Producer Plaintiffs themselves*—is literally unprecedented. The standard rule is that a party has no duty to control the conduct of another, and under that rule courts regularly reject the idea that manufacturers of safe, non-defective products have a duty to control the way third parties handle products after the point of sale. 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. No court has ever purported to create a parallel regulatory regime for determining which GM traits can and cannot be sold freely after federal approval, and this Court should not be the first.

To the extent Plaintiffs assert that Syngenta had a duty not to sell Viptera *at all* until it

had Chinese approval, that theory is even more far-fetched. State tort law does not rewrite basic principles of sovereignty by forcing American companies to kowtow to bureaucrats in Beijing—or any other foreign capital—in order to find out which biotechnology products American companies can sell to American farmers to produce more crops and lower food prices for American families.

Third, Plaintiffs' claims are barred by the economic loss doctrine. Plaintiffs' claimed injuries consist solely of disappointed expectations in not receiving the price Plaintiffs had hoped for when selling corn. Such disappointed commercial expectations are not recoverable in tort.

Plaintiffs' repeated references to prior cases involving *unapproved* GM traits are irrelevant on their face. Those cases involved GM traits that had been improperly released into the U.S. food supply *before they had been approved for human consumption.* Only two courts have addressed claims like the ones in this case—claims that the *lawful* sale of an *approved* GM seed harmed farmers or exporters because the spread of the GM trait foreclosed their ability to serve a specialized export market according to the laws of a foreign sovereign. Both courts rejected as a matter of law the legal theories that Plaintiffs seek to experiment with here. In the first, a federal district court held that plaintiffs' claims were entirely barred by the economic loss doctrine. *See Sample v. Monsanto Co.*, 283 F. Supp. 2d 1088, 1093 (E.D. Mo. 2003). In the second, a Canadian court applied the same common law principles applicable here and held as a matter of law that the plaintiffs could not show proximate causation or duty *and* that the claims were all barred by the economic loss doctrine as well. *See Hoffman v. Monsanto Canada (Hoffman I)*, 2005 SKQB 225, 2005 SK.C. LEXIS 330 (Can. Sask. Q.B. May 11, 2005) (attached as Exhibit A). Those decisions provide the proper approach for analyzing this case, and this Court should similarly dismiss Plaintiffs' claims.

BACKGROUND

Because Plaintiffs' complaints hinge on the premise that genetically modified crops must be segregated from those that are not, a brief discussion of the regulatory backdrop is relevant to addressing Plaintiffs' claims—especially because that background exposes the unprecedented nature of Plaintiffs' theories and the crippling restrictions on advanced biotechnology that would result if their claims are allowed to proceed.

A. Biotechnology And Genetically Modified Crops In The United States[1]

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."[2] 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 easier while safeguarding crops against disease," including "allow[ing] for a significant reduction" in the use of pesticides.[3]

The benefits of biotechnology have prompted a dramatic increase in the use of GM seeds over the past two decades. For some crops, such as corn, this has translated into near-universal usage across the United States. Today, GM corn makes up 93% of all corn planted in the United States.[4] The use of GM technology has also produced corresponding increases in crop yields.[5]

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[1] The facts relevant to this motion come from the complaints, documents that are "referred to in the complaint[s] and [are] central to the plaintiff[s'] claim[s]," *GFF Corp. v Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997), and matters of government and public record, *Rose v. Utah State Bar*, 471 F. App'x 818, 820 (10th Cir. 2012)—all of which are subject to judicial notice—in addition to publicly available information provided solely for background and that is not necessary to the resolution of this Motion to Dismiss.

[2] USDA, *Department of Agriculture's Consolidated Financial Statements for Fiscal Years 2010 and 2009, available at* http://www.usda.gov/oig/webdocs/50401-70-FM.pdf.

[3] USDA, Biotechnology Frequently Asked Questions, *available at* http://www.usda.gov/wps/portal/usda/usdahome?navid=AGRICULTURE&contentid=BiotechnologyFAQs.xml.

[4] USDA, *Adoption of Genetically Engineered Crops in the U.S.* (2014), *available at* http://ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us.aspx.

[5] USDA, *Adoption of Genetically Engineered Crops by U.S. Farmers Has Increased Steadily for Over 15 Years* (Mar. 4, 2014), *available at* http://www.ers.usda.gov/amber-waves/2014-march/adoption-of-genetically-engineered-

As the USDA has explained, biotechnology can help "keep pace with demands for food while reducing production costs."[6] 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.[7]

Manufacturers of GM traits like the ones at issue here are statutorily restricted from launching GM traits until they have been fully vetted and approved by the USDA, the EPA, and the FDA—as Viptera and Duracade undisputedly were.[8] Through its "complex method of evaluation"[9] and testing, the USDA may determine that the GM trait is safe and remove any statutory restrictions by "deregulating" the GM trait, either in whole or in part.

B. Syngenta's Development Of U.S.-Approved Viptera And Duracade Corn

Syngenta has developed, manufactured, and sold GM seeds for decades, and its advances include two corn seed traits called MIR162 and Event 5307. Each trait protects corn crops from insects and pests, thus increasing crop yields and reducing the need for pesticides. MIR162 was incorporated into Syngenta's Viptera corn seed, making it resistant to above-ground pests like Lepidoptera (caterpillars). 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.

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crops-by-us-farmers-has-increased-steadily-for-over-15-years.aspx#.VXfIevlVhBc.

[6] USDA, Biotechnology Frequently Asked Questions, *available at* http://www.usda.gov/wps/portal/usda/usdahome?navid=AGRICULTURE&contentid=BiotechnologyFAQs.xml.

[7] *See, e.g.*, Blake A. Biles, *Agricultural Biotechnology: The U.S. Perspective*, 18 ABA Nat. Resources & Env't 12, 43 (2003) ("According to the Coordinated Framework [issued by the Executive Office of the President in 1986], products created using genetic engineering are presumed to be as safe (concerning both public health and the environment as their conventional counterparts unless evidence indicates otherwise.").

[8] 7 U.S.C. § 7711(a) ("[N]o person shall import, enter, export, or move in interstate commerce any plant pest, unless the importation, entry, exportation, or movement is authorized under general or specific permit and is in accordance with such regulations as the [USDA] may issue . . ."). Under USDA regulations, genetically modified organisms are generally regulated as plant pests until approved. 7 C.F.R. § 340.1.

[9] USDA, *USDA's Biotechnology Deregulation Process* (June 28, 2011), *available at* http://blogs.usda.gov/2011/06/28/usda%E2%80%99s-biotechnology-deregulation-process/

According to the complaints, Syngenta began testing MIR162 in 1999 through field trials approved by the USDA. 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. Prod. Compl. ¶ 119; Non-Prod. Compl. ¶ 66. For the next eight years, Syngenta conducted "at least 119 field trials of MIR162 corn under at least 20 permits" from the USDA. Prod. Compl. ¶ 121; Non-Prod. Compl. ¶ 68. The complaints do not allege any unapproved releases of MIR162 during the field testing. Once sufficient laboratory and field testing established that Viptera was safe for humans, animals, and the environment alike, Syngenta petitioned the USDA in 2007 to deregulate MIR162. *See generally* Pet. for Determination of Nonregulated Status for Insect-Resistant MIR162 Maize, SYN-IR162-4 (Aug. 31, 2007) ("Deregulation Petition").

Three years later, in 2010, the USDA approved MIR162 for deregulation without any restrictions on how it was to be sold, grown, or handled.[10] The USDA also concluded that MIR162 did not pose risks to humans, animals, or the environment.[11] 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.[12] By deregulating a GM trait like MIR162, the USDA "allow[s] it to be sold commercially." *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d 1004, 1015 n.2 (E.D. Mo. 2009). As a result, the USDA's unrestricted approval made Viptera, just like every other U.S.-approved GM corn product, a lawful and

[10] *See* USDA APHIS, *Syngenta Biotechnology, Inc.; Determination of Nonregulated Status for Corn Genetically Engineered for Insect Resistance*, 75 Fed. Reg. 20560 (Apr. 20, 2010).

[11] *See* USDA, *Nat'l Envt'l Policy Act Decision & Finding of No Significant Impact, MIR162 Maize*, at 5 (April 9, 2010), http://www.aphis.usda.gov/brs/aphisdocs2/07_25301p_com.pdf.

[12] *Id.*

integral part of the U.S. corn supply under the USDA's broad definition of "yellow corn."[13]

When Syngenta later developed Event 5307 for its Duracade corn product, Syngenta followed the same process. 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. Prod. Compl. ¶ 292; Non-Prod. Compl. ¶ 247. Syngenta petitioned the USDA for deregulation of Event 5307 in April 2011,[14] and in 2013, the USDA fully deregulated Event 5307 without any restrictions on its use.[15]

MIR162 and Event 5307 not only received USDA approval, but also were approved by the EPA and the FDA. The EPA regulates the use, sale, and labeling of pesticides, including those found in GM traits such as MIR162 and under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). *See* 7 U.S.C. §§ 136a, 136w. Syngenta secured EPA approval of MIR162 in November 2008[16] and Event 5307 in July 2012.[17] The FDA, which oversees food and feed safety of GM plants,[18] was satisfied with Syngenta's conclusion that "food and feed derived from MIR162 are as safe and nutritious as food and feed derived from conventional maize" (and likewise with respect to Event 5307).[19] Thus, by April 20, 2010, it is undisputed

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[13] *See* 7 C.F.R. § 810.402(c)(1) (defining "yellow corn" as "[c]orn that is yellow-kerneled and contains not more than 5.0 percent of corn of other colors," with "[y]ellow kernels of corn with a slight tinge of red [being] considered yellow corn").

[14] *See* Pet. for Determination of Nonregulated Status for Rootworm-Resistant Event 5307 Corn, Pet. No. 5307-USDA-1 (Apr. 22, 2011), *available at* http://www.aphis.usda.gov/brs/aphisdocs/10_33601p.pdf.

[15] USDA, *Determination of Nonregulated Status for Event 5307 Corn* (Jan. 29, 2013), http://www.aphis.usda.gov/brs/aphisdocs/10_33601p_det.pdf.

[16] EPA, *Notice of Pesticide Registration, MIR162 Maize* (Nov. 26, 2008), http://www3.epa.gov/pesticides/chem_search/ppls/067979-00014-20081126.pdf

[17] EPA, *Notice of Pesticide Registration, 5307 Corn* (July 31, 2012), http://www.epa.gov/pesticides/chem_search/ppls/067979-00022-20120731.pdf.

[18] *See* FDA, *FDA's Role in Regulating Safety of GE Foods* (May 14, 2013), http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm352067.htm.

[19] FDA, *Biotechnology Consultation Note to the File BNF No. 000113, Maize Event MIR162* (Dec. 1, 2008),

that Viptera had received all approvals required for it to be sold without restriction in the United States, and Duracade had received all required approvals for unrestricted sale by January 29, 2013. There is no dispute in this case about the safety or efficacy of Viptera and Duracade.

C. Syngenta Commercializes Viptera Consistent With Industry Guidelines For Selling New Biotechnology

1. The BIO Stewardship Policy

Given the increasingly globalized market for many commodity crops, one issue perennially raised by new GM technologies arises from the fact that a given GM trait typically will not secure approval from regulatory authorities in different countries all at the same time. Thus, a trait may be approved for commercialization in an exporting country before it has received approval for import in all other countries. Because of this issue of asynchronous approvals, various players in the biotechnology and grain industries have suggested "stewardship" guidelines for developers to consider in deciding when to commercialize a new product. One of the earliest was the Biotechnology Industry Organization ("BIO") "Product Launch Stewardship Policy," first approved on May 10, 2007.[20] The BIO Policy sets out recommendations for member companies but expressly refuses to create any binding obligations. *See* 2009 BIO Policy at 1 n.2 ("Under BIO's bylaws and applicable antitrust law, individual member companies ***are not bound*** by this Association policy or its annexes.") (emphasis added). The BIO Policy suggests that, before launching a new GM trait, member companies should assess which countries are "key import markets," which requires, among other things, assessing the volume of trade for the crop at issue. *Id.* at 4. The Policy neither defines what makes an

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available at http://www.fda.gov/Food/FoodScienceResearch/Biotechnology/Submissions/ucm155598.htm; FDA, *Biotechnology Consultation Note to the File BNF No. 000128, Maize Event 5307* (Jan. 30, 2012), *available at* http://www.fda.gov/Food/FoodScienceResearch/Biotechnology/Submissions/ucm304082.htm.

[20] BIO updated the BIO Policy on December 10, 2009—the one and only update prior to Syngenta's decisions to commercialize Viptera, *available at* https://www.bio.org/sites/default/files/Product_Launch_Stewarship_12_10_09_0.pdf.

import market "key" nor stipulates any particular market-assessment metrics. Of the "key export markets," the BIO Policy suggests that, before launching a new GM seed, manufacturers consider obtaining import approval from only those "key export markets" with "functioning regulatory systems"—defined as countries with "a track record of systematic authorizations with *consistent and predictable timelines* and processes." 2009 BIO Policy at 4 & n.6 (emphasis added).

The BIO Policy does not list (and never has listed) China as a key import country or a country from which import approval should be obtained prior to commercialization. In fact, the 2009 BIO Policy specifically listed only the United States, Canada, and Japan as "key markets," *see id.* at 4, and noted only that other countries might be considered later. *See id.* at 4 n.6. China has never been added to the BIO Policy.

2. Syngenta Commercializes Viptera Consistent With The BIO Policy

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. Based on an internal document, Plaintiffs try to portray Syngenta as being "concerned with 'commercialization as soon as possible.'" Prod. Compl. ¶ 82; Non-Prod. Compl. ¶ 29. Even apart from the fact that there is nothing wrong with bringing an approved product to market as soon as possible after many years of development, Plaintiffs fail to disclose that the cited document actually "recommend[ed] moving forward with commercialization *as soon as we are BIO compliant*."[21] It is undisputed that, consistent with the BIO Policy, Syngenta obtained

[21] *See* Lep-Resistance MIR162 Corn and Stacks H-I Progression Review at § 10.5 (Dec. 16, 2009) (attached as Exhibit E) (emphasis added). While not necessary to the resolution of this motion, Syngenta respectfully attaches this and two other documents as background, *see infra* nn.30 & 32, given Plaintiffs' selective and misleading references to those documents in the complaints. *See, e.g.*, *GFF Corp.*, 130 F.3d at 1384 (a document "referred to in the complaint and [] central to the plaintiff's claim" may be considered on a motion to dismiss).

approval from the United States, Canada, and Japan before Viptera was launched—the very countries that BIO had identified at the time. 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.

China does not even permit an application for approval of a trait to be filed until the trait has been approved for human consumption in the exporting country.[22] Syngenta applied for import approval from China as soon as it was permitted to do so in March 2010. Prod. Compl. ¶ 139; Non-Prod. Compl. ¶ 86. 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.[23]

3. Competing "Stewardship" Guidelines From Other Trade Associations

Other biotechnology industry associations have developed similar non-binding stewardship guidelines like the BIO Policy. The Excellence Through Stewardship ("ETS") "Guide for Product Launch Stewardship," *see* Prod. Compl. ¶ 103; Non-Prod. Compl. ¶ 50, leads with a disclaimer that the Guide is "solely an educational tool" and "does not define or create legal rights or obligations."[24] The ETS Guide simply "provides guidance" for companies to

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[22] *See* USDA Foreign Agricultural Service, GAIN Report No. CH12046 (July 13, 2012) (China "requires that a product must be fully approved from an exporting country before an application can be filed for approval in China"), http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Agricultural%20Biotechnology%20Annual_Beijing_China%20-%20Peoples%20Republic%20of_7-13-2012.pdf.

[23] Plaintiffs' repeated efforts to tout China's significance to the U.S. corn market are belied by the USDA's own statistics in the public record. *See* USDA Economic Research Service Feed Grains Database, *available at* http://www.ers.usda.gov/data-products/feed-grains-database/feed-grains-custom-query.aspx. For example, in 2010, there were 12,425,330,000 bushels of corn produced in the U.S, and 1,025,396 metric tons of that corn exported from the U.S. to China. Converting the latter data point to bushels (40,367,790) and then dividing it by the total number of bushels produced in the U.S. shows that only 0.32% of U.S. corn produced in 2010 was exported to China. *See also Victoria Cruises, Inc. v. Changjiang Cruise Overseas Travel Co.*, 630 F. Supp. 2d 255, 263 n.3 (E.D.N.Y. 2008) ("The Court can take judicial notice of government statistics.") (collecting cases).

[24] Excellence Through Stewardship, Guide for Product Launch Stewardship for Biotechnology-Derived Plant Products at 2 (July 2010), http://excellencethroughstewardship.org/wp-content/uploads/Approved-Product-Launch-Stewardship-Guide-Revised-07-22-10.pdf.

consider as they develop their own internal stewardship policies.[25] Likewise, CropLife International has established "Product Launch Stewardship" guidelines that, like the BIO Policy, recommend that CropLife International members should meet regulatory requirements in "key countries" with "functioning regulatory systems."[26] Neither the ETS nor the CropLife guidelines mention China.

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. For example, Plaintiffs cite a joint letter to APHIS from the North American Export Grain Association ("NAEGA")[27] and National Grain and Feed Association ("NGFA")[28] to suggest that biotechnology developers should delay commercialization until they have "obtained sufficient import authorizations from foreign governments." Prod. Compl. ¶ 105; Non-Prod. Compl. ¶ 52. Plaintiffs fail to note that the letter was sent on April 29, 2013—after Viptera had been on the market for two years.[29]

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[25] *Id.* at 4.

[26] *See* Prod. Compl. ¶ 99; Non-Prod. Compl. ¶ 46. Syngenta quotes from the "Product Launch Stewardship" guidelines presently available on CropLife International's website. *See* CropLife International, Product Launch Stewardship, *available at* http://croplife.org/plant-biotechnology/stewardship-2/product-launch-stewardship/. Because the guidelines are undated, it is unclear what they recommended at the time Syngenta commercialized Viptera, if they even existed at that time.

[27] NAEGA's membership consists of export companies and grain traders, including several that have sued Syngenta individually. *See* "Current Members," *available at* http://naega.org/?page_id=845 (including Archer Daniels Midland Co., Bunge North America Inc., Cargill Inc., and Louis Dreyfus Commodities).

[28] NGFA's membership is larger than NAEGA's but similar. *See* "NGFA Member Organizations," *available at* http://www.ngfa.org/membership/members/ (including Archer Daniels Midland Company, Bunge North America Inc., Cargill Inc., Louis Dreyfus Commodities, as well as various statewide farming and handling associations). Syngenta and other biotechnology developers are members of NGFA, but the NGFA Executive Committee consists entirely of handlers, transporters, and farming organizations. *See* "Executive Committee," *available at* http://www.ngfa.org/about-ngfa/ngfa-team/.

[29] Plaintiffs also point to NGFA's Policy on Agriculture Biotechnology. Prod. Compl. ¶ 104; Non-Prod. Compl. ¶ 51. That undated statement says only that commercialization should occur after achieving "authorizations from U.S. export markets" and provides no guidance on which approvals are actually suggested among the over 100 countries to which U.S. corn is exported every year.

D. Most Grain Elevators And Exporters—Including Non-Producer Plaintiffs—Treat Viptera As Fungible Corn, Commingle It, And Ship It To China

Beginning in 2010, with U.S. and other approvals in hand, Syngenta sold Viptera seeds to independent dealers and directly to growers in the United States for the 2011 growing season. Prod. Compl. ¶ 150; Non-Prod. Compl. ¶ 97. Plaintiffs allege that the farmers planting Viptera did so in a way that permitted cross-pollination with neighboring fields.

At the time, it was well known that China had not yet approved Viptera for import. As Plaintiffs point out, industry organizations, such as NGFA and NAEGA, were well aware of that fact at all relevant times, including in 2010 and 2011. Prod. Compl. ¶ 155; Non-Prod. Compl. ¶ 102. Citing a July 2011 China trip report from the president of the U.S. Grains Council, Plaintiffs also assert that it was well known that, given the way commodity corn was handled in the U.S., "[t]he likelihood of U.S. corn" with MIR162 "entering the China market . . . [was] substantial." Prod. Compl. ¶ 177; Non-Prod. Compl. ¶ 124. But Plaintiffs fail to mention that the same document also contains the following "take away[s]": (1) that Chinese approval for MIR162 would be "market and political driven"—*i.e.*, not science-based; (2) that "[i]f corn prices decline below or near where the Chinese purchased the corn, it is likely to [be] re-priced"—in other words, China would find a way to break the contracts, thus creating "inherent market risk for traders and importers"; and (3) "[i]t will be *critical* to make certain that *contracts* specify clearly for what will or won't be tested."[30]

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. Bunge "posted s at its grain elevators that it would not accept Agrisure Viptera® corn" until Chinese approval was secured and explained that it was doing so

[30] U.S. Grains Council Trip Report by Thomas Dorr at 3 (July 22, 2011) (attached as Exhibit F) (emphases added).

because it "had significant contracts with Chinese markets which it wanted to fulfill." Prod. Compl. ¶ 225; Non-Prod. Compl. ¶ 172.[31]

Unlike Bunge and others, *see* Non-Prod. Compl. ¶ 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. They did not refuse Viptera corn (like Bunge and others) or ask for any contractual assurance from growers about the seed they had used. They decided not to test for Viptera or to try to segregate Viptera to make sure that their corn complied with Chinese standards. As Plaintiffs put it, they made the economic assessment that the "costs" were not worth it. Non-Prod. Compl. ¶ 296. And that made sense because as noted above, the Chinese market accounted for only about one-third of 1% of U.S. corn production when Viptera was launched in the U.S. *See supra* note 23.

During this time, Syngenta kept market analysts and its investors updated on the status of Chinese approval. For example, in April 2012, Syngenta hosted an earnings call for investors.[32] Plaintiffs seize on a statement from Syngenta AG CEO Michael Mack that, as to "outstanding approval for China" "we *expect* to have [it] quite frankly within the matter of a couple of days," Ex. C at 12 (emphasis added), and try to portray it as misleading. Plaintiffs fail to mention that, just two sentences later, he cautioned listeners that "the regulatory authorities are not something we can handicap definitively," *id.*, and that the entire call was preceded by the "usual cautionary statement" that the "presentation contains forward-looking statements, which can be identified

[31] As Plaintiffs note, Syngenta Seeds sued Bunge and attempted to secure a preliminary injunction requiring Bunge to accept Viptera corn. *See* Non-Prod. Compl. ¶¶ 170-72 (citing *Syngenta Seeds, Inc. v. Bunge N. Am., Inc.*, 820 F. Supp. 2d 953 (N.D. Iowa 2011)). The court refused that request and thus established the principle that Bunge—and all other grain elevator operators—remained entirely free to protect their economic interests in exporting to China by refusing to accept Viptera corn in their facilities. Bunge is not a plaintiff in this case.

[32] *See* Tr. of Q1 2012 Syngenta Earnings Call, *available at* http://www.syngenta.com/global/corporate/SiteCollectionDocuments/pdf/transcripts/q1-2012-transcript-syngenta.pdf (attached as Exhibit C) (quoted in Prod. Compl. ¶ 275; Non-Prod. Compl. ¶ 222).

by terminology such as" the word "*expect*," *id.* at 1 (emphasis added).

If anything, Mr. Mack's statement about the uncertainty of predicting the Chinese regulatory process was prescient. While Plaintiffs allege that China had a functioning regulatory system when Syngenta applied for import approval in 2010, *see* Prod. Compl. ¶ 140; Non-Prod. Compl. ¶ 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. Under Chinese law, the application for Viptera should have been addressed within 270 days.[33] By April 2012, it had been pending for more than 700 days. In December 2012, the U.S. Trade Representative acknowledged China's "apparent slow-down in issuing approvals" for biotechnology products.[34] 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).[35]

E. The Price Of Corn Drops And China Then Bans U.S. Corn

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. 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,

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[33] *See* Chinese Ministry of Agric., Implementation Regulations on the Safety of Import of Agricultural Genetically Modified Organisms, art. 17 (Jan. 5, 2002), *available at* http://bch.biodiv.org/database/attachedfile.aspx?id=561; State Council of the People's Republic of China, Regulations on Safety of Agricultural Genetically Modified Organisms art. 36 (Jan. 5, 2002), *available at* http://bch.biodiv.org/database/attachedfile.aspx?id=557.

[34] United States Trade Representative, 2012 Report to Congress on China's WTO Compliance at 89 (Dec. 2012), *available at* https://ustr.gov/sites/default/files/uploads/2012%20Report%20to%20Congress%20-%20Dec%2021%20Final.pdf; *see also id.* at 88 (noting that "other U.S. concerns with China's biotechnology regulations and implementing rules remain").

[35] USDA Foreign Agricultural Service GAIN Report Number 14032 at 8 (Dec. 31, 2014), *available at* http://gain.fas.usda.gov/Recent%20GAIN%20Publications/Agricultural%20Biotechnology%20Annual_Beijing_China%20-%20Peoples%20Republic%20of_12-31-2014.pdf.

moderately higher use, and record global supplies."[36] Corn futures reflected the same expectations.[37] 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.[38] 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.[39]

After that 34% price drop, China abruptly "started testing for" the presence of MIR162 and began rejecting shipments of U.S. corn. Prod. Compl. ¶ 347; Non-Prod. Compl. ¶ 313. 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* Non-Prod. Compl. ¶ 241. 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* Prod. Compl. ¶ 347; Non-Prod. Compl. ¶ 313.

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.

China eventually approved Viptera in December 2014.[40]

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[36] USDA, *Economic Research Service Feed Outlook, Record Feed Grain Production Projected for 2013/14* at 3 (May 14, 2013), *available at* http://usda.mannlib.cornell.edu/usda/ers/FDS/2010s/2013/FDS-05-14-2013.pdf.

[37] *See* Monthly Commodity Futures Price Chart—Corn (CBOT), *available at* http://futures.tradingcharts.com/prairielinks/CN/M.

[38] *See* Food and Agriculture Organization of the United Nations Statistics Division Data, *available at* http://faostat3.fao.org/browse/Q/QC/E (attached as Exhibit D).

[39] *See* USDA National Agricultural Statistics Service, *Quick Stats for Corn*, *available at* http://quickstats.nass.usda.gov/data/printable/84286845-EA4D-3EA6-A1C6-4D88693AE168.

[40] *See supra* note 35.

F. Duracade

Syngenta did not launch Duracade until the planting season for the 2014 harvest, and only after the USDA fully deregulated the product in February 2013. Prod. Compl. ¶ 295; Non-Prod. Compl. ¶ 250; *see supra* Part B. Thus, Duracade did not enter the U.S. corn supply until months after China began rejecting shipments of corn from the U.S. Plaintiffs do not allege that *any* shipment of U.S. corn to China has ever been rejected due to the presence of Duracade, nor do they plead any facts to show any impact or injury from Duracade/Event 5307.

STATEMENT OF QUESTIONS PRESENTED

Can Plaintiffs' claims survive a motion to dismiss given that duty and proximate cause are lacking as a matter of law, the economic loss doctrine bars most of their claims, and the only two courts to consider similar claims against a manufacturer of an approved GM seed have rejected claims that selling an approved seed in one country can subject the manufacturer to liability in tort due to the claimed loss of exports to another country where the seed has not yet been approved?

CHOICE OF LAW

For purposes of the issues raised in this Motion to Dismiss, there are no conflicts in the tort laws applied by the relevant states, except where expressly noted. As a result, this Motion cites exemplar cases applying fundamental principles of tort law that apply across the relevant jurisdictions. *See, e.g.*, *AKH Co. v. Universal Underwriters Ins. Co.*, No. 13-2003-JAR, 2015 WL 1297568, at *2 (D. Kan. Mar. 23, 2015) ("The first step in any conflicts analysis is to determine whether an actual conflict exists . . . because if there is no actual conflict, then the Court need not decide the choice of law issue."). Out of an abundance of caution, however, Syngenta outlines the choice of law principles that would apply here and that, for state-law

issues, would point to using the law of each Plaintiff's home state.[41]

For Plaintiffs' state-law claims, a federal court exercising diversity or supplemental jurisdiction "applies the substantive law, including the choice of law rules, of the forum state." *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1103 (10th Cir. 1999). That means that an MDL court "must apply the choice-of-law rules of the states where the actions were originally filed." *Johnson v. Cont'l Airlines Corp.*, 964 F.2d 1059, 1063 n.5 (10th Cir. 1992). Here, the individual plaintiffs—including plaintiffs that have filed notices to conform—originally filed their actions in one of 22 different states. Those states apply a total of five different choice-of-law rules, all of which point to applying the law of each Plaintiff's home state.

A plurality of the 22 states apply the "most significant relationship" test.[42] As relevant here, courts in these states look to (1) the place where the injury occurred and (2) the place where the conduct causing the injury occurred.[43] Both factors point to each plaintiff's home state.

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[41] When a federal district court presides over multidistrict litigation, "the transferee court's circuit governs questions of federal law." *In re Urethane Anitrust Litig.*, MDL No. 1616, 2013 WL 65988, at *1 (D. Kan. Jan. 4, 2013) (Lungstrum, J.). Thus, to the extent there is any variation in the law among the federal circuits, Tenth Circuit law governs Plaintiffs' Lanham Act claim and any other questions of federal law that may arise. *See id.* at *1.

[42] These states include Colorado, Illinois, Iowa, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, and Texas. *See First Nat'l Bank in Fort Collins v. Rostek*, 514 P.2d 314, 319-20 (Colo. 1973) (en banc); *Townsend v. Sears, Roebuck and Co.*, 879 N.E.2d 893, 898 (Ill. 2007); *Veasley v. CRST Intern., Inc.*, 553 N.W.2d 896, 897 (Iowa 1996); *Sutherland v. Kennington Truck Serv., Ltd.*, 562 N.W.2d 466, 471 (Mich. 1997); *McDaniel v. Ritter*, 556 So.2d 303, 310 (Miss. 1989); *Kennedy v. Dixon*, 439 S.W.2d 173, 184 (Mo. 1969) (en banc) *Erickson v. U-Haul Intern.*, 767 N.W.2d 765, 773 (Neb. 2009); *Schleuter v. N. Plains Ins. Co.*, 772 N.W.2d 879, 885 (N.D. 2009); *Morgan v. Biro Mfg. Co., Inc.*, 474 N.E.2d 286, 289 (Ohio 1984); *Brickner v. Gooden*, 525 P.2d 632, 637 (Okla. 1974); *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63, 67 (S.D. 1992); *Hataway v. McKinley*, 830 S.W.2d 53, 59 (Tenn. 1992); *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 849 (Tex. 2000). In Louisiana, the test is similar. *See* La. Civ. Code Art. 3542 (stating that choice of law turns on "the pertinent contacts of each state to the parties and the events giving rise to the dispute, including the place of the conduct and injury, the domicile, habitual residence, or place of business of the parties, and the state in which the relationship, if any, between the parties was centered").

[43] The other two factors—(3) the residence or place of business of the parties and (4) the place where the relationship, if any, between the parties is centered—do not affect the outcome. The third factor either sits in equipoise (i.e., the plaintiff is from one state and the defendants another) or favors the plaintiff's resident state (i.e., the plaintiff and at least one defendant reside in the same state), and no relationship exists between the parties. *See* Prod. Compl. ¶¶ 12-63.

First, Plaintiffs allege "economic harm to farmers and other participants in the corn industry," Prod. Compl. ¶ 323; *see* Non-Prod. Compl. ¶ 278, and courts have repeatedly held that, "where the injury is purely economic, the place of the injury usually is where the plaintiff resides and sustains the economic impact of the loss." *Knaus v. Guidry*, 906 N.E.2d 644, 663 (Ill. App. Ct. 2009) (internal quotation marks omitted); *see also Am. Guar. & Liab. Ins. Co. v. U.S. Fid. & Guar. Co.*, 668 F.3d 991, 997 (8th Cir. 2012) ("[P]laintiff's location [i]s the place where an economic injury occurs[.]"). Second, Plaintiffs attempt to hold Syngenta liable for "premature commercialization," Prod. Compl. ¶ 83; Non-Prod. Compl. ¶ 62, for selling its "Agrisure Viptera® and Agrisure Duracade™ corn seeds" in "all states in which Plaintiffs have farming operations," *id.* ¶ 69; *see* Non-Prod. Compl. ¶ 15.[44]

Alabama, Indiana, Kansas, and North Carolina would similarly point to the law of each Plaintiff's home state because they each "determine the substantive rights of an injured party according to the law of the state where the injury occurred." *Fitts v. Minn. Min. & Mfg. Co.*, 581 So.2d 819, 823 (Ala. 1991).[45] And, like other states, these states consider the location of economic harm to be "the state in which the plaintiff suffered the economic impact." *APR, LLC v. Am. Aircraft Sales, Inc.*, 985 F. Supp. 2d 1298, 1306 (M.D. Ala. 2013); *Coldren v. Am. Gen. Life Ins. Co.*, No. 3:12-cv-28-RLY-WGH, 2012 WL 6045592, at *4 (S.D. Ind. Dec. 5, 2012).

Arkansas, Minnesota, and Wisconsin, which look to the "Leflar factors," *see Schubert v. Target Stores, Inc.*, 201 S.W.3d 917, 921-22 (Ark. 2005); *Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 469 (Minn. 1994); *State Farm Mut. Auto. Ins. Co. v. Gillette*, 641 N.W. 2d 662, 676

[44] Plaintiffs also allege misrepresentations that, as explained below, *see infra* Part XII.A.1, occurred in multiple states and countries. Given the dispersed nature of this conduct, no single location outweighs the place of the injury, especially because at least part of the alleged misconduct occurred in each Plaintiff's home state.

[45] *See Dowis v. Mud Slingers, Inc.*, 621 S.E.2d 413, 414 (Ga. 2005); *Simon v. United States*, 805 N.E.2d 798, 802 (Ind. 2004); *Ling v. Jan's Liquors*, 703 P.2d 731, 735 (Kan. 1985); *Boudreau v. Baughman*, 368 S.E.2d 849, 853-54 (N.C. 1988).

(Wis. 2002), would also point to the law of each Plaintiff's home state.[46] Here, the most relevant of those factors would be the advancement of the forum's governmental interest, because each state has a strong interest in compensating its own residents for tortious conduct. *See Jepson*, 513 N.W.2d at 472 ("Minnesota places great value in compensating tort victims."); *Schubert*, 201 S.W.3d at 922-23 ("Arkansas has a real interest in protecting its people from negligent behavior."); *Gillette*, 641 N.W. 2d at 677 ("Wisconsin has a strong interest in compensating its residents who are victims of torts."). None of the other four factors affects the outcome because, as explained below, general principles of tort law that are applicable across all of the states foreclose Plaintiffs' claims. This means that (1) the decision would "be the same regardless of where the litigation occurs," *Schubert*, 201 S.W.3d at 922-23, (2) application of each state's law to its own residents would not "promote forum shopping," *Schumacher v. Schumacher*, 676 N.W.2d 685, 691 (Minn. Ct. App. 2004), (3) "the law of either state could be applied without difficulty," *id.*, and (4) no other state has the better rule of law, *see id.* at 691-92.

Finally, Kentucky would undoubtedly apply its law to all of its residents. Under Kentucky choice-of-law rules, the substantive law "should not be determined on the basis of a weighing of interests, but simply on the basis of whether Kentucky has enough contacts to justify applying Kentucky law." *Arnett v. Thompson*, 433 S.W.2d 109, 113 (Ky. Ct. App. 1968). Because residents of Kentucky allegedly suffered harm in their home state, Kentucky law would apply. *See McGraw-Hill Global Educ., LLC v. Griffin*, Civ. Act. No. 5:14-CV-00042-TBR, 2014 WL 5500505, at *7 (W.D. Ky. Oct. 30, 2014) ("[A]ny significant contact with Kentucky [is] sufficient to allow Kentucky law to be applied.").

[46] To the extent that North Dakota relies on the choice-influencing factors as part of its significant contacts analysis, those factors would point to each plaintiff's home state for these same reasons. *See Schleuter*, 772 N.W. 2d at 885 ("First, we identify the relevant contacts which might logically influence the decision on the applicable law, and then we apply the choice-influencing considerations.").

ARGUMENT

I. Syngenta Cannot Be Held Liable For Not Segregating Viptera From The Corn Supply By Controlling The Conduct Of Farmers, Grain Handlers, And Exporters.

Plaintiffs' claims fail as a matter of law because Syngenta owes no duty to control the way third parties handle a seed like Viptera that has unrestricted approval in the U.S. simply because it has not been approved in China. Nor can Plaintiffs establish that Syngenta was the proximate cause of their injuries based on alleged cross-pollination or commingling that occurred *after* the point of sale and thus outside of Syngenta's control. Courts have uniformly declined to impose liability on a manufacturer for failure to control the way *others* use the manufacturer's safe, non-defective product—including in the only case to consider a GM manufacturer's liability for the alleged loss of export markets as a result of launching a GM seed that is approved in the country of origin but not overseas.

A. The Existence Of Duty And Proximate Cause Depends On Policy-Based Factors That Limit Liability Regardless Of Foreseeability As A Matter Of Law.

Plaintiffs' claims for negligence, nuisance, trespass to chattels, and tortious interference rest on the premise that Syngenta can be held liable for failing to control a chain of independent parties involved in growing and distributing corn to ensure that none of them would allow corn grown from fully approved Viptera seed to enter the U.S. corn supply. That premise suffers from several fatal flaws cutting across Plaintiffs' causes of action. *First*, Plaintiffs cannot show that Syngenta had a legal duty to control the conduct of third parties including growers, grain elevator operators, and exporters who actually commingled corn grown from Viptera seed in the corn supply. *Second*, Plaintiffs cannot show proximate cause as a matter of law because Syngenta's actions are too remote from their alleged harm. There are too many intervening actions by independent third parties between Syngenta's sale of Viptera seed in 2010 and

Plaintiffs' alleged injuries when China rejected U.S. corn shipments in November 2013. Both duty and proximate cause ultimately depend on purely legal policy judgments defining how far liability should extend, and these are fundamentally questions of law for the Court. Whether the question is analyzed in terms of duty or proximate causation, courts have consistently rejected similar claims that manufacturers should be liable for controlling the way third parties handle their safe, non-defective products after the point of sale. This Court should similarly reject Plaintiffs' radical theory that Syngenta can be liable in tort for failing to reorganize the entire industry framework for growing, harvesting, shipping, and exporting corn. Plaintiffs' approach would essentially require Syngenta to establish a new U.S. system for what they now claim they wanted to do—grow and market a specialty product for export based on the laws of China rather than U.S. standards for fungible U.S. corn.

There is no support in existing law for imposing a duty on a manufacturer like Syngenta to reorganize the way third parties handle the manufacturer's safe, non-defective product. Duty "is [] a question of law and never one for the jury," *Marlar v. Daniel*, 247 S.W.3d 473, 476 (Ark. 2007).[47] Contrary to the impression Plaintiffs attempt to create, moreover, merely alleging that the commingling of Viptera in the corn supply and the consequences that might follow for the China market were "foreseeable" is not sufficient to create a duty for Syngenta. *See, e.g., Leeper v. Asmus*, 440 S.W.3d 478, 489 n.5 (Mo. Ct. App. 2014) ("[F]oreseeability alone is not enough to establish a duty. . . . [T]here must also be some right or obligation to control the activity, which presents the danger."); *Hutchings v. Bauer*, 599 N.E.2d 934, 935 (Ill. 1992) ("[D]uty is not to be bottomed on the factor of foreseeability alone. Instead, we must balance the foreseeability of the

[47] *See also, e.g., Skinner v. State*, 149 So. 3d 342, 347 (La. Ct. App. 2014); *Gaytan v. Wal-Mart*, 853 N.W.2d 181, 192 (Neb. 2014); *Bajwa v. Metro. Life Ins. Co.*, 804 N.E.2d 519, 526 (Ill. 2004); *accord* Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, The Law of Torts § 164 (2d ed.) ("Judges rather than juries determine whether the defendant was under a duty of care at all and if so what standard of care applied.").

harm against the burdens and consequences that would result from the recognition of a duty.").[48] It is well settled that the law generally imposes "no duty to control the conduct of a third person to prevent him from causing harm to another absent a special relationship" with the third party or the injured party. *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 513 N.E.2d 387, 398 (Ill. 1987); *see* Restatement (Second) of Torts § 315. And merely manufacturing and selling a product does *not* create any such special relationship. As courts have observed in rejecting theories that would require manufacturers to control the conduct of their products' purchasers, "judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another." *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1119 (Ill. 2004).[49]

Plaintiffs' allegations also fail to show proximate cause because their alleged injury is too remote from Syngenta's actions.[50] Although proximate cause is also often discussed in terms of foreseeability, proximate cause does not extend to *every* foreseeable event following an action. Instead, proximate cause is restricted by public policy concerns that place a limit on how far courts permit liability to extend. *See, e.g.*, *Simmons v. Garces*, 763 N.E.2d 720, 732 (Ill. 2002)

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[48] *See also, e.g.*, *A.W. v. Lancaster Cnty. Sch. Dist. 0001*, 784 N.W.2d 907, 916, 918 (Neb. 2010) ("Simply put, whether a duty exists is a *policy* decision . . . . We expressly hold that foreseeability is not a factor to be considered by courts when making determinations of duty."); *Williams v. Cingular Wireless*, 809 N.E.2d 473, 478 (Ind. Ct. App. 2004) ("Simply because an action may have some degree of foreseeability does not make it sound public policy to impose a duty."); *Hamilton v. Beretta, U.S.A. Corp.*, 750 N.E.2d 1055, 1062 (N.Y. 2001) ("[A] duty and the corresponding liability it imposes do *not* rise from mere foreseeability of the harm."); *Kirk*, 513 N.E.2d at 396 (explaining that foreseeability is "not the only consideration" in determining whether a duty exists and that "a court's determination of duty reflects the policy and social requirements of the time and community").

[49] *See also, e.g.*, *J.A.H. ex rel. R.M.H. v. Wadle & Assocs., P.C.*, 589 N.W.2d 256, 258 (Iowa 1999) (existence of a duty depends on "three factors": "(1) the relationship between the parties, (2) reasonable foreseeability of harm to the person who is injured, and (3) public policy considerations"); *Williams*, 809 N.E.2d at 476 ("Indiana courts analyze three factors in determining whether to impose a duty at common law: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns.").

[50] Plaintiffs' actions sounding in negligence, nuisance, trespass to chattels, and tortious interference all require proximate cause. *See, e.g.*, *Ashley Cnty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 663 (8th Cir. 2009) (nuisance); *Texas Int'l Prop. Assocs. v. Hoerbiger Holding AG*, 624 F. Supp. 2d 582, 593 (N.D. Tex. 2009) (tortious interference); *Hale v. Brown*, 197 P.3d 438, 440 (Kan. 2008) (negligence); *Muho v. Citibank, N.A.*, No. 14-cv-03219-YGR, 2015 WL 106677, at *5 (N.D. Cal. Jan. 7, 2015) (trespass to chattels).

(proximate cause is "a policy decision that limits how far a defendant's legal responsibility should be extended for conduct that, in fact, caused harm") (internal quotation marks omitted); *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2642 (2011) ("[T]he phrase 'proximate cause' is shorthand for the policy-based judgment that not all factual causes contributing to an injury should be legally cognizable causes.").[51] Events that are too remote, following an extended chain of events, cannot satisfy proximate cause. In determining remoteness, courts routinely consider, among other factors, the directness between the conduct and injury, which party is best positioned to bear the risk of harm, whether the defendant specifically intended to harm the plaintiff, the speculative nature of damages, and the complexity of apportioning damages.[52]

B. Applying These Factors, Courts Routinely Hold That Duty And Proximate Cause Cannot Be Established To Hold A Manufacturer Liable For Third Parties' Post-Sale Use Of Its Safe, Non-Defective Product.

Based on these principles, courts routinely reject attempts to hold manufacturers responsible for injuries allegedly resulting from third parties' post-sale use of safe, non-defective products—both for lack of proximate cause and lack of duty.

For example, when municipalities tried to hold manufacturers of cold medicine liable for damages resulting from third parties' use of the medicine in making methamphetamine, the Eighth Circuit dismissed all claims for lack of proximate cause. *Ashley Cnty., Ark.*, 552 F.3d at 663 (Arkansas law). The plaintiffs' theories closely paralleled those alleged here. The plaintiffs argued that even though Sudafed and similar products were FDA-approved, the manufacturer should have "take[n] steps to restrict access to the products," by controlling the way that retailers

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[51] *See also, e.g., Texas Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 21 F. Supp. 2d 664, 668 (E.D. Tex. 1998) ("[P]roximate cause reflects at its most basic level concerns for convenience, public policy, and justice."); 57A Am. Jur. 2d Negligence § 466 ("While the precise language may vary from one opinion to the next, even within the same jurisdiction, numerous cases recognize that policy considerations are a major or vital factor in determining the existence of proximate cause.").

[52] *See, e.g., Texas Carpenters Health Benefit Fund*, 21 F. Supp. 2d at 669-73; *City of Phila. v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 904 (E.D. Pa. 2000).

sold the medicine (*e.g.*, keeping it behind the pharmacy counter), and thus should have effectively "channeled" the product away from potential meth cooks. *Id.* at 669. The Eighth Circuit squarely rejected the idea that the manufacturer could be treated as the proximate cause of harm triggered by how others subsequently used the product. The "actions of the methamphetamine cooks and those further down the illegal line of manufacturing and distributing methamphetamine are sufficient to stand as the cause of the injury"—not the actions of manufacturers—and that was true "*even if the manufacturers knew* that cooks purchased their products to use in manufacturing methamphetamine." *Id.* at 670 (emphasis added) (internal quotation marks omitted). In so holding, the court emphasized that the steps plaintiffs proposed "required implementation at the independent retail sales level," and the manufacturer lacked "sufficient control over the retailers . . . [to] require [them] to implement the suggested measures." *Id.* at 663. Ultimately, recognizing that "[p]roximate cause is bottomed on public policy as a limitation on how far society is willing to extend liability," the court refused to extend proximate cause to impose liability on a manufacturer of an otherwise-lawful product based on the way third parties used that product—holding that adopting such a theory, because to do so would open a "Pandora's box to [an] avalanche of actions that would follow" against all sorts of manufacturers for alleged misuses of their products. *Id.* at 671.

Similarly, courts have rejected the theory that a cell-phone retailer can be liable for injuries caused by a purchaser using a cell phone while driving. A retailer of a lawfully distributed, safe, non-defective product "cannot control what people do with the [product] after they purchase [it]," and thus "[i]mposing a duty on [a retailer] to prevent car accidents . . . would effectively require the companies to stop selling phones entirely." *Williams v. Cingular*

Wireless, 809 N.E.2d 473, 478–79 (Ind. Ct. App. 2004).[53] Adopting a theory that sellers have "a legal duty to third parties to anticipate improper use of their products" would mean that "no product" that could cause harm by others' post-sale use "could be marketed"—allowing similar claims against sellers of "GPS devices[] and even car radios" to flood the courts and "turn[ing] products liability law on its head." *Durkee*, 765 F. Supp. 2d at 749.

Identical principles have also been applied by numerous courts to reject tort claims against gun manufacturers based on theories that the manufacturers should take measures to restrict the sale of firearms by independent retailers so as to limit injuries from the use of guns. With respect to duty, these courts have applied the settled rule that a "defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control." *Hamilton v. Beretta, U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001). A manufacturer usually has "no control over its retailers[,] dealers," and others in the distribution chain to force them to change their post-sale use of firearms, and thus cannot be held responsible for failing to try to force the rest of the distribution chain to take steps to prevent downstream harm. *First Commercial Trust Co., N.A. v. Colt's Mfg. Co.*, 77 F.3d 1081, 1083 (8th Cir. 1996) (Arkansas law) (rejecting negligence claim against firearms manufacturer for failing to have a safe-sales policy and for failing to train retailers to avoid sales to "probable misusers" of handguns). And even where a manufacturer is alleged to have some control, the law does not create a "duty of care born of their purported

[53] *See, e.g.*, *Durkee v. C.H. Robinson Worldwide, Inc.*, 765 F. Supp. 2d 742, 750–51 (W.D.N.C. 2011) ("Existing precedent from the appellate courts of North Carolina support the legal conclusion that there is no duty to design or manufacture a product so as to anticipate that a user will misuse the product to harm another."); *Estate of Doyle v. Sprint/Nextel Corp.*, 248 P.3d 947, 951 (Okla. Ct. Civ. App. 2010) (no duty for telephone company to "protect [a motorist] from [a cell-phone purchaser's] negligent driving and/or warn of the potential dangers associated with using a cell phone while driving"); *see also, e.g.*, *City of Bloomington v. Westinghouse Electric Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) (Indiana law) (chemical manufacturer could not be held liable for contamination caused by purchaser's dumping of chemicals because tort law does not impose liability on manufacturers of lawful, non-defective products for claims "arising from the use of their products subsequent to the point of sale").

ability to lessen the risks of illegal gun trafficking because they have the power to restrict marketing and product distribution." *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192 (1st Dept. 2003). It makes no difference whether injuries from the misuse of firearms are foreseeable, because "a duty and the corresponding liability it imposes do *not* rise from mere foreseeability of the harm." *Hamilton*, 750 N.E.2d at 1062 (emphasis in original).

Multiple policy factors all weighed heavily against finding a duty on the gun manufacturers, including the flood of litigation against other manufacturers in other industries that could be expected if such a duty were created, *see, e.g.*, *People ex rel. Spitzer*, 761 N.Y.S.2d at 196, and the magnitude of the liability—which would have the practical effect of imposing a policy decision by judicial decree shutting down the sale of an otherwise lawful product.[54]

As for proximate cause, courts have long held that the causal chain "is simply too attenuated" to justify imposing liability on gun manufacturers because any harm depends on how downstream third parties use the product after the manufacturer relinquishes control. *Camden Cnty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536, 541 (3d Cir. 2001) (rejecting tort liability as a matter of law where "independent third parties cause[d]" the harm). Courts thus refuse to impose liability because the manufacturers' "business practices merely create a condition that makes the eventual harm possible." *Young v. Bryco Arms*, 821 N.E.2d 1078, 1091 (Ill. 2004).[55] And courts recognize that the "same concerns" that animate the duty

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[54] *Cf., e.g., Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984) (Illinois law) ("Imposing liability for the sale of handguns, which would in practice drive manufacturers out of business, would produce a handgun ban by judicial fiat in the face of the decision by Illinois to allow its citizens to possess handguns."); *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1215 (N.D. Tex. 1985) (Texas law) ("There is simply no way that a manufacturer could devise a safe and effective system of distributing handguns—without ceasing distribution entirely, even to persons who want them for legitimate reasons.").

[55] The few cases that declined to reject claims against gun manufacturers as a matter of law involved allegations that the manufacturers knowingly facilitated an illegal gun-trafficking market or marketed defective or dangerous products. *See, e.g.*, *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568, at *15 (Mass. Super. Ct. July 13, 2000) (alleged "affirmative conduct" constituting "the creation of the illegal, secondary firearms

analysis "underlie [the] conclusion that it is inadvisable as a matter of public policy to" treat the defendants' actions as the legal cause of downstream injuries. *City of Chi.*, 821 N.E.2d at 1138.

C. The Same Principles Limiting Duty And Proximate Cause Show That Plaintiffs Cannot Establish Either Here.

The same reasoning applied in the cases above shows that Plaintiffs' allegations here are insufficient as a matter of law to establish duty or proximate cause.

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.[56] The usual approach under tort law is to place the duty "on the person in the best position to avoid the loss." *Turner v. Fehrs Neb. Tractor & Equip. Co.*, 609 N.W.2d 652, 658 (Neb. 2000).[57] Here, as in the pharmaceutical, cell-phone, and gun cases, the manufacturer (Syngenta) has no authority to control how independent third parties downstream handle corn and the resulting corn grain—especially including county elevators, terminal elevators, and exporters. Plaintiffs have not even alleged that Syngenta has a contractual relationship with those independent actors. 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. Those third parties, including the Non-Producers themselves, are in the best position to devise and implement any such system.

Second, the theory that Syngenta had a duty to ensure that *everyone else* took steps to

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market").

[56] To the extent Plaintiffs intend to suggest a duty to refrain from selling Viptera *at all* (which is within Syngenta's control), that theory is addressed below. *See infra* Part II.

[57] *See also, e.g.*, *Abdo v. Trek Transp. Co.*, 582 N.E.2d 247, 252 (Ill. App. Ct. 1991) ("[W]hen a third party is in the best position to prevent a plaintiff's injury, there is no justification for imposing liability upon [the defendant]."); *Hamilton*, 750 N.E.2d at 1061 (same).

isolate Viptera is especially mistaken given that, once Viptera had been approved, it was permissible *by law* for Viptera to be present in U.S. corn because U.S. regulations make no distinction between non-GM and GM corn with approved traits. Indeed, the USDA's broad definition of "yellow corn," combined with Viptera's unrestricted approval in the U.S., necessarily permitted the presence of Viptera. *See supra* note 13. If some growers or handlers wanted to sell or export corn free from Viptera, then that is the sale of a specialty product distinct from what is treated *by law* as fungible U.S. corn. The usual background rule, however, is that a person who wants to conduct a specialized or especially sensitive enterprise bears the burden of establishing protections that will enable him to do so. *See generally* W. Prosser, The Law of Torts, § 87, at 579 (4th ed. 1971) ("The plaintiff cannot, by devoting his land to an unusually sensitive use, . . . make a nuisance out of conduct of the adjoining defendant which would otherwise be harmless."); *see also, e.g.*, *Belmar Drive-In Theatre Co. v. Ill. State Toll Hwy. Comm.*, 216 N.E.2d 788, 791 (Ill. 1966) ("[A] person cannot increase the liability of his neighbor by applying his own property to special and delicate uses."). 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."[58] 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."[59]

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[58] USDA National Organic Program, Policy Memorandum From Miles McEvoy, Deputy Administrator, to stakeholders and interested parties re: Genetically Modified Organisms (Apr. 15, 2011), *available at* http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5090396.

[59] USDA, *Nat'l Envt'l Policy Act Decision & Finding Of No Significant Impact for Syngenta Seeds, Inc. Alpha-Amylase Maize Event 3272*, at 39 (Comment 5), *available at* http://www.aphis.usda.gov/brs/aphisdocs/05_28001p_fonsi_rtc.pdf.

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 options for avoiding pollination from other corn."[60] 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.[61]

The Non-Producers' claims are particularly specious since they assert that Syngenta had a duty to ensure that *the Non-Producers themselves* did not commingle Viptera and non-Viptera corn. The Non-Producers could have taken steps to keep Viptera corn out of their elevators if they wanted to. They could have refused to accept Viptera, just as they allege that Bunge did.

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[60] USDA, *Finding Of No Significant Impact for Syngenta Seeds, Inc. Alpha-Amylase Maize Event 3272*, at 41 (Comment 5), *available at* http://www.aphis.usda.gov/brs/aphisdocs/05_28001p_fonsi_rtc.pdf.

[61] *E.g.*, USDA, *USDA's Response to Public Comments on Syngenta SYN-05307-1 Corn*, at 24 (Comment 7), *available at* http://www.aphis.usda.gov/brs/aphisdocs/10_33601_rtc.pdf (emphasis added); USDA, *Nat'l Env'tl Policy Act Decision & Finding of No Significant Impact for Bayer CropScience LP Event FG72 Soybean*, at 49 (Issue 16), *available at* http://www.aphis.usda.gov/brs/aphisdocs/09_32801p_fonsi.pdf (emphasis added); USDA, *Nat'l Env'tl Policy Act Decision & Finding of No Significant Impact for Stine Seed Farm, Inc. Event HCEM485*, at 27 (Issue 8), *available at* http://www.aphis.usda.gov/brs/aphisdocs/09_06301p_fonsi.pdf (emphasis added). The decision in *Bunge* does not suggest anything to the contrary. *See Syngenta Seeds, Inc. v. Bunge N. Am., Inc.*, 820 F. Supp. 2d 953 (N.D. Iowa 2011). When the *Bunge* court stated that Syngenta "accepted the risk of commercializing Viptera," *id.* at 990, it was addressing an entirely different question (and in the context of a preliminary injunction)—merely explaining that Syngenta took the risk that some purchasers in the free market might decide that they did not want to buy corn with a GM trait like Viptera and they could lawfully refuse to accept Viptera corn. *See id.* (deciding whether Bunge "made a legitimate and reasonable business decision not to accept Viptera corn in order to service the Chinese import market"). The court did not face, and did not address, the entirely different question whether Syngenta had a duty in tort law to police the conduct of others so as to facilitate the ability of third party grain elevators to purchase and sell a specialized product like "Viptera-free" corn.

See Non-Prod. Compl. ¶ 170. 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 sub-segment of U.S. corn production.[62]

Third, Plaintiffs' extraordinarily extended chain of supposed causation raises intractable issues of apportioning liability and damages, as well as avoiding speculative or duplicative damage awards—all of which typically prompt courts to cut off proximate causation as a matter of law.[63] 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 China rejected corn shipments in November 2013) depends on too many steps as a matter of law, including intervening actions by indisputably independent third parties such as China. 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

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[62] Plaintiffs assert that Syngenta "sought to *stop* Non-Producers including exporters and grain elevator operators from attempting to 'channel' Agrisure Viptera away from China" by bringing "a lawsuit against Bunge, a grain elevator operator," for "refus[ing] to accept Agrisure Viptera corn." Prod. Compl ¶ 223; Non-Prod. Compl. ¶ 170 (same). To the extent Plaintiffs base their claims on that lawsuit, such claims are barred by the First Amendment's Petition Clause, which protects lawsuits as a form of the right to petition the government. *See, e.g.*, *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 525–26 (2002) (litigation is protected by the right to petition unless it is objectively and subjectively sham litigation).

[63] *E.g.*, *City of Phila. v. Beretta U.S.A. Corp.*, 277 F.3d 415, 423 (3rd Cir. 2002) (emphasizing that speculative damages and "the risks of duplicative recoveries and the danger of complex apportionment" are factors considered in determining whether an asserted cause is too remote to support proximate causation); *Texas Carpenters Health Benefit Fund*, 21 F. Supp. 2d at 669-73 (similar).

(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. Treating Syngenta as the proximate cause of that entire convoluted chain of events stretches the concept past the breaking point.

Under Plaintiffs' theory, this Court would ultimately face the impossible task of apportioning responsibility for Plaintiffs' alleged injuries among Syngenta, growers who allegedly allowed cross-pollination, and the multiple elevators along the way who were actually responsible for "commingling" corn—including the Non-Producer Plaintiffs themselves. *See* Non-Prod. Compl. ¶ 130 (corn is "further commingled as it is gathered, stored and shipped through a system of local, regional and terminal grain elevators") (quoting *In re StarLink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828, 834 (N.D. Ill. 2002)). The Court would then also have to ensure that there was no duplicative recovery among Producer Plaintiffs and Non-Producer Plaintiffs for the same alleged drop in the price of corn. Plaintiffs' damages theory is also utterly speculative and would require an attempt to isolate the supposed effect that China's actions had on the price of corn from the myriad other factors (including the worldwide glut of corn in 2013) that affect market price. 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.[64] But the

[64] *See, e.g.*, 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"), *available at* http://www.grains.org/news/20140727/letter-secretary-vilsack; Niu Shuping & Fayen Wong, *Bird flu, weak pork prices extend China's corn glut*, Reuters (Mar. 2, 2014) ("China says the shipments were rejected because of the yet unapproved GMO strain, but trade sources say the clampdown is being used to shield farmers from the supply glut and weak prices, raising concerns Chinese authorities may drag out the approval process."), *available at* http://www.reuters.com/article/2014/03/03/china-corn-idUSL3N0LP2UT20140303.

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. These are all precisely the problems with an overly extended chain of causation that routinely require a finding that proximate cause is lacking as a matter of law.

Fourth, Plaintiffs' theory would impose extraordinary liability on GM seed manufacturers for alleged ripple effects in the market that have no logical stopping point. *Cf. City of Chi.*, 821 N.E.2d at 1126 (the "magnitude of the burden" placed on defendant is a relevant factor in assessing duty). Plaintiffs' theories would effectively transform GM manufacturers into insurers for their otherwise-lawful, non-defective products—a result flatly at odds with settled principles of tort law.[65]

Fifth, imposing such liability would effectively put courts in the position of usurping policy determinations concerning which GM traits can and cannot be released in the United States. As a practical matter, Plaintiffs' theory would shut down the marketing of any GM seed as long as there was a risk of litigation like this. Halting the introduction of a seed like Viptera, however, would run flatly counter to the policy determination that the USDA made in approving Viptera and the general policy approach the U.S. Government has adopted of treating approved GM products exactly the same as conventional crops.[66]

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[65] *See, e.g.*, *Martin*, 743 F.2d at 1204 (rejecting liability that "would virtually make [the manufacturers] the insurer for such products as explosives, hazardous chemicals, or dangerous drugs even though such products are not negligently made nor contain any defects"); *Patterson*, 608 F. Supp. at 1213 ("If this unconventional and unfounded theory is accepted, then—contrary to one of the basic principles of products liability—handgun manufacturers would become insurers for all injuries resulting from their products."); *Perkins v. F.I.E. Corp.*, 762 F.2d 1200, 1269 (5th Cir. 1985) (rejecting "[t]he argument that the manufacturer should become an insurer of all uses of those products, both legitimate and illegitimate, simply by virtue of having marketed them").

[66] *Cf. Martin*, 743 F.2d at 1204 (Illinois law) ("Imposing liability for the sale of handguns, which would in practice drive manufacturers out of business, would produce a handgun ban by judicial fiat in the face of the decision by Illinois to allow its citizens to possess handguns.").

Indeed, the extensive existing regulation of GM traits strongly counsels against thrusting courts into the role that Plaintiffs' theories would have them adopt. *See, e.g.*, *Young*, 821 N.E.2d at 1090 (fact that sale of firearms is already "highly regulated by law" counsels against judicial creation of additional duties); *Ashley Cnty., Ark.*, 552 F.3d at 669 (same for pharmaceuticals). Three federal agencies regulate GM crops, and Syngenta commercialized Viptera only after obtaining unrestricted domestic approval through extensive testing in "119 field trials of MIR162 corn under at least 20 [government] permits" over eight years. Prod. Compl. ¶¶ 119, 121, 135; Non-Prod. Compl. ¶¶ 66, 68, 82.

Plaintiffs' lawsuit is, in effect, an invitation for the courts to become super-regulators, grafting additional obligations onto GM traits without regard to the USDA's decisions by holding that, unless other countries have approved a particular trait, the entire system for growing and distributing corn in the U.S.—or for that matter, soybeans, wheat, or many other crops—should be reorganized to facilitate the desires of a market segment that wants to export to that foreign country. Here, for example, Plaintiffs want the Court to impose, by judicial fiat, the very same restrictions on Viptera that the government imposed on the unapproved StarLink corn and Liberty Link rice products—even though the USDA declined to put those restrictions on Viptera. To paraphrase the conclusion of another court in a parallel context, "courts are the least suited, least equipped, and thus the least appropriate branch of government to regulate and micro-manage the manufacturing, marketing, distribution, and sale of" GM seeds. *People ex rel. Spitzer*, 761 N.Y.S.2d at 199.

It would be particularly inappropriate for the courts to take on that role given the attention that Congress and multiple state legislatures have given to proposals that would address exactly the subject of this lawsuit—liability of GM seed manufacturers based on the spread of their products. 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." *See* Appendix A1. 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). New York, Nebraska, Minnesota, Massachusetts, Montana, North Dakota, Oregon, West Virginia, and Vermont have all considered and refused to enact similar bills.[67] That legislative activity not only confirms that Plaintiffs' theories are meritless (legislation would be unnecessary if the common law already imposed liability), but also underscores that the task of weighing the public policy implications of liability for GM seed manufacturers is best left to the political branches—all of which have refused to impose the sort of liability that Plaintiffs seek to impose here.

Indeed, as a federal court applying state common law, this Court should be especially reluctant to be the first to alter state public policy and expand tort law for the 22 States at issue here. *See, e.g.*, *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1280 (10th Cir. 2000); *Ashley Cnty., Ark.*, 552 F.3d at 673 ("It is not the role of a federal court to expand state law in ways not foreshadowed by state precedent.") (internal quotation marks omitted).

Sixth, and finally, the Court should reject Plaintiffs' proposed expansion of state tort law because it would foist a flood of litigation on state courts, as manufacturers in any number of industries would now risk liability for the perceived ills arising from the way third parties use (or misuse) their otherwise-lawful, non-defective goods. As other courts have observed, once duty and proximate cause are found to exist in a case such as this, the same theories could be brought

[67] A list of relevant bills introduced in state legislatures is appended in Appendix A.

"against countless other types of commercial enterprises," raising claims about supposed harms from lawful, non-defective products "regardless of the distance between the 'causes' of the 'problems' and their alleged consequences." *People ex rel. Spitzer*, 761 N.Y.S.2d at 203; *Ashley Cnty., Ark.*, 552 F.3d at 671-72 (warning against "a proliferation of lawsuits not merely against these defendants but against other types of commercial enterprises—manufacturers, say, of liquor, anti-depressants, SUVs, or violent video games—in order to address a myriad of societal problems" (internal quotation marks omitted)). It is neither necessary nor appropriate for a federal court to undertake the radical expansion of state tort law that Plaintiffs demand.

D. The Only Court To Apply A Common Law Analysis To Parallel Claims Against A Manufacturer Of An Approved GM Seed Held That Neither Duty Nor Proximate Cause Could Be Established As A Matter Of Law.

Although U.S. courts have not yet addressed the question of imposing liability for selling U.S.-approved GM seeds on the theory that they have not yet been approved abroad,[68] Canadian courts applying the same common law principles that govern this case have already rejected the exact same claims that Plaintiffs raise here. *See Hoffman I*, 2005 SK.C. LEXIS 330, *aff'd*, *Hoffman v. Monsanto Canada* (*Hoffman II*), 2007 SKCA 47, 2007 SK.C. LEXIS 194 (Can. Sask. C.A. May 7, 2007) (attached as Exhibit B). *Hoffman* involved Monsanto's GM canola seed that, "after years of [] field testing," had been fully approved by the Canadian government for "unconfined release." *Hoffman II*, 2007 SK.C. LEXIS 194 ¶ 60. Alleging cross-pollination, non-GM canola farmers sued to recover (1) losses incurred by organic farmers, whose cross-pollinated crops could no longer command a premium price for organic canola, and (2) (in a claim exactly paralleling those asserted here) losses allegedly incurred by farmers due to "loss of

[68] *Sample v. Monsanto* involved similar tort claims by against a GM seed manufacturer for selling a U.S.-approved GM seed, but the court did not address duty or proximate cause because it held that plaintiffs' claims were barred by the economic loss doctrine. 283 F. Supp. 2d 1088, 1093-94 (E.D. Mo. 2003); *see also infra* Part III.

the European market for all Canadian canola" because Monsanto launched the product in Canada before getting import approval from the EU. *Hoffman I*, 2005 SK.C. LEXIS 330 ¶¶ 21-22.

The Canadian court rejected the plaintiffs' trespass, nuisance, and negligence claims as a matter of law based on lack of duty and lack of proximate cause. It found "no existing judicial or legislative authority" imposing a duty on the manufacturer to prevent lawful GM canola seed from cross-pollinating with other crops by regulating farmers' growing practices. *Id.* ¶ 52. In so holding, the court assumed that cross-pollination was foreseeable, *see id.* ¶¶ 61, 63, but recognized that duty was not governed by foreseeability alone, *see id.* ¶¶ 66–67. As the court explained, there was no relationship giving rise to a duty of care between the GM manufacturer and the plaintiffs. *See id.* In addition, the court concluded that the mere sale of the GM canola seed could not be treated as the cause of plaintiffs' alleged harm, because the harm "required the intervention of neighbouring farmers who cultivated GM canola." *Id.* ¶ 114. Finding that proximate cause was lacking as a matter of law, the court cautioned that the "implications of holding a manufacturer . . . liable in *nuisance* for damage caused by the use of its product . . . by another would be very sweeping indeed." *Id.* ¶ 122 (emphasis added); *see also id.* ¶ 114 (explaining that plaintiffs' theory "would be equivalent to holding the manufacturers of pesticide responsible for the nuisance caused by the harmful drift of the pesticide" after a third party's use of it).[69]

The two prior cases that Plaintiffs cite involving GM seeds, *see, e.g.*, Prod. Compl. ¶¶ 88-89; Non-Prod. Compl. ¶¶ 35-36, are irrelevant because both involved the release of *unapproved* traits into the environment in violation of governing regulations in factual contexts where the

[69] The appellate court also noted that the "fact each of the defendants, after years of Canadian field testing, obtained the approval of the Government of Canada to the unconfined release of their varieties of genetically modified canola provides a powerful policy reason for not fastening on them the duty" to segregate or to refrain from commercializing. *Hoffman II*, 2007 SK.C. LEXIS 194 ¶ 60.

manufacturer still had control. In *StarLink*, the GM manufacturer (Aventis) could be treated as a cause for the spread of its StarLink corn because StarLink was not approved for human consumption, and as an express condition of the limited approval, the government imposed on Aventis an "affirmative duty to enforce StarLink farmers' compliance with" restrictions on StarLink, including segregation from other corn. *StarLink*, 212 F. Supp. 2d at 847. The court held that the duty imposed on Aventis gave it "some measure of control over StarLink's use" and was a "critical factor" that "negate[d]" the usual "concerns [that] courts have expressed about holding manufacturers liable for post-sale nuisances." *Id.* The court thus reasoned that "[t]he *unique obligations* imposed by the limited registration arguably put Aventis in a position to control the nuisance." *Id.* (emphasis added). There are no similar facts here because Viptera enjoyed unrestricted U.S. approval and Syngenta thus had no duty to keep Viptera separate from the corn supply in the U.S.

In *Genetically Modified Rice*, the theory of the case was not that the GM manufacturer was responsible for the conduct of *others* given its role as manufacturer; instead, the manufacturer itself (Bayer) had caused the improper release of the unapproved trait when conducting its own field trials. *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1022. Bayer thus violated the USDA's GMO Regulations, which "unambiguously provide performance standards that do not allow adventitious presence of GM material outside the GM plants being tested" before approval is granted. *Id.* Again, there are no similar facts here.

E. Plaintiffs' Allegations Do Not Show That Syngenta Voluntarily Undertook A Duty To Isolate Viptera.

Plaintiffs also cannot concoct a duty by claiming that Syngenta voluntarily undertook a duty to ensure channeling of Viptera. Plaintiffs allege that Syngenta made (1) statements in its Deregulation Petition suggesting that Syngenta would implement channeling through its

stewardship agreements with growers and (2) public statements about its role in "stewardship." *See* Prod. Compl. ¶¶ 107-11, 131; Non-Prod. Compl. ¶¶ 54-58, 78. Any theory that a duty arose from those statements fails as a matter of law.

First, it is well settled that the law "limit[s] liability for the injury in a voluntary undertaking to 'physical harm,'" and courts thus routinely reject claims for "economic harm" allegedly resulting from a voluntary undertaking. *Simms v. Jones*, 879 F. Supp. 2d 595, 604 (N.D. Tex. 2012); *see generally* Restatement (Second) of Torts § 323 (liability for voluntarily undertaken duty limited to physical harm).[70] Plaintiffs' complaints leave no doubt that their only alleged injury is "economic harm" supposedly resulting from the loss of the Chinese corn market. *E.g.*, Prod. Compl. at 5 & ¶ 323; Non-Prod. Compl. at 5 & ¶ 278; *cf. infra* Part III.

Second, Syngenta's statements in its Deregulation Petition are constitutionally protected under the First Amendment's Petition Clause and cannot serve as the basis for a duty resulting in liability. *See, e.g.*, *TEC Cogeneration Inc. v. Fla. Power & Light Co.*, 76 F.3d 1560, 1573 (11th Cir. 1996). To the extent there may be an exception for fraudulent statements in adjudicative proceedings, that exception applies only to statements that were "material, in the sense that they *actually altered the outcome of the proceeding*." *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 843 (7th Cir. 2011) (emphasis added) (collecting cases). As a matter of law, Syngenta's alleged misrepresentations could not have been material to the USDA's decision to deregulate Viptera because the USDA "has no power to regulate the adverse economic effects that could follow [a GM trait's] deregulation." *Ctr. for Food Safety v. Vilsack*, 718 F.3d 829,

[70] *See also, e.g.*, *Vancura v. Katris*, 939 N.E.2d 328, 347 & n.6 (Ill. 2010) (holding that liability for a negligently performed voluntary "undertaking is explicit[ly] limit[ed] [] to situations in which the plaintiff has suffered 'physical' or 'bodily' harm," and thus does not extend to "economic damages"); *accord Hatleberg v. Norwest Bank Wis.*, 700 N.W.2d 15, 24 (Wis. 2005); *Theisen v. Covenant Med. Ctr., Inc.*, 636 N.W.2d 74, 82 (Iowa 2001); *Northfield Ins. Co. v. St. Paul Surplus Lines Ins. Co.*, 545 N.W.2d 57, 63 (Minn. Ct. App. 1996); *Shaner v. United States*, 976 F.2d 990, 994 (6th Cir. 1992) (Ohio law).

841 (9th Cir. 2013).

Third, and most fundamentally, Plaintiffs' theory fails because a voluntary undertaking creates a duty only if "[t]he promise [] induce[s] detrimental reliance" by the plaintiff that is reasonable. *Doe v. Hunter Oaks Apts., L.P.*, 105 So.3d 422, 427 (Miss. Ct. App. 2013). *see also, e.g., Daugherty v. Fuller Eng'g Serv. Corp.*, 615 N.E.2d 476, 480 (Ind. Ct. App. 1993) (same); *Chisolm v. Stephens*, 365 N.E.2d 80, 86 (Ill. App. Ct. 1977) (same). Plaintiffs, however, have nowhere alleged facts to show that they relied on Syngenta's statements, much less that they *detrimentally* relied. The Non-Producers, for example, do not allege that, in the absence of Syngenta's statements, they would have tested and segregated the corn they accepted or refused to accept Viptera in the first place. Nor *could* Plaintiffs allege detrimental reliance. To justify reliance, "plaintiff[s] must be unaware of the actual circumstances and not equally capable of determining such facts." *Chisolm*, 365 N.E.2d at 86. The complaints themselves make clear that Plaintiffs are sophisticated industry players who were well aware that cross-pollination and commingling can occur, 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. *See* Prod. Compl. ¶¶ 181-83, 231; Non-Prod. Compl. ¶¶ 128-30, 178. Thus, Syngenta's statements "did nothing to prevent plaintiff[s] from obtaining information . . . or from taking precautionary steps on [their] own behalf." *Chisolm*, 365 N.E.2d at 87. That forecloses a claim of reasonable reliance.

The Canadian court in *Hoffman* considered a parallel argument that Monsanto had undertaken a duty to channel its GM canola seed "to ensure that no GM canola entered the export market because, at that time, the Japanese and European markets had not approved the defendants' GM canola." *Hoffman I*, 2005 SK.C. LEXIS 330 ¶ 82. The court rejected that theory as a matter of law because "no duty of care arises from a gratuitous undertaking in the

absence of some element of detrimental reliance." *Id.* ¶¶ 84-88. The same result applies here.

II. As A Matter Of Law, Syngenta Had No Duty To Refrain From Selling Viptera.

A. The Law Does Not Impose A Duty On Manufacturers To Refrain From Selling A Safe, Non-Defective Product Based On How Third Parties Might Use It After The Point Of Sale.

To the extent Plaintiffs claim that Syngenta had a duty to refrain from selling Viptera *at all* (as opposed to a duty to control the conduct of third parties in their handling of corn and corn grain downstream), that theory is also meritless. For many of the same reasons that courts refuse to impose a duty on manufacturers to control the post-sale use by others of safe, non-defective products, they also refuse to impose a duty on manufacturers to refrain from selling such products altogether. *See, e.g.*, *Ashley Cnty., Ark.*, 552 F.3d at 673; *Bond v. E.I. DuPont De Nemours & Co.*, 868 P.2d 1114, 1120 (Colo. App. 1993) (Teflon manufacturer "had no duty to refrain from selling its [non-defective] product"); *People ex rel. Spitzer*, 761 N.Y.S.2d at 200 (rejecting "a duty upon a manufacturer to refrain from the lawful distribution of a non-defective product").[71] Indeed, in circumstances exactly parallel to those here, Canadian courts in *Hoffman* held that the common law does not impose any duty on a GM manufacturer to refrain from selling a GM seed that is fully approved in the country where it is sold. *See Hoffman I*, 2005 SK.C. LEXIS 330 ¶ 71.

Most of the same considerations addressed in Part I apply equally here and foreclose the unprecedented theory that Syngenta had a duty not to sell Viptera at all. Plaintiffs' claims would

[71] *See also, e.g.*, *Williams*, 809 N.E.2d at 478 (refusing to impose a duty on a cell-phone retailer for harm caused by distracted drivers because "[p]lac[ing] a duty on [the seller] because they might be involved in a car accident would be akin to making a car manufacturer stop selling otherwise safe cars because the car might be negligently used in such a way that it causes an accident"); *Stanford By and Through Stanford v. Wal-Mart Stores, Inc.*, 600 So.2d 234, 240 (Ala. 1992) (no duty to refrain from selling a product that was not "inherently dangerous"); *Watters v. TSR, Inc.*, 904 F.2d 378, 381 (6th Cir. 1990) (Kentucky law) ("[W]e are confident that the courts of Kentucky would never permit a jury to say that simply by marketing a parlor game, the defendant violated its duty to exercise ordinary care.").

thrust the judiciary even more clearly into the role of usurping policy decisions properly left to the political branches, because they ask the Court to impose a rule that Viptera could not be sold in the U.S. until it had been approved in China. That result would directly conflict with the USDA's determination that Viptera *could* be sold in the U.S. without restriction. It would also effectively give China a veto over which GM traits can and cannot appear in U.S. corn. It should go without saying, however, that the U.S. Government, not China, gets to decide which biotechnology products *American* farmers can buy from manufacturers in *America* to increase *American* crop yields and provide more food at better prices for *American* consumers. Indeed, given that the U.S. is the world's largest corn exporter, Plaintiffs' position would give China the power to deny the biotechnology benefits of higher yields and lower prices not only to the United States, but also to much of the rest of the world. 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. The common law of tort does not provide the courts with a mechanism for taking over the USDA's role in determining which biotechnology products can and cannot be sold in the U.S. and effectively transferring that decision to foreign sovereigns.

Embarking on the course Plaintiffs have charted would also embroil the judiciary in an ongoing flood of policy choices. Courts would have to decide for each and every significant export crop (1) how to define "key" export markets that should be given Plaintiffs' proposed veto over new biotechnology in the U.S.; (2) how to determine which governments have "functioning regulatory systems" such that they are worthy of being granted that veto power by American courts; and (3) whether changes in a country's circumstances have caused it to lose (or gain) status as a "key" market or a "functioning regulatory system." *Cf.* Nov. 27, 2012 BIO Policy at 4 n.5 ("Since regulatory systems continue to evolve and change globally, countries'

systems may become functional or dysfunctional.").[72] Courts simply do not have the experience or expertise to construct and micromanage such a parallel regulatory system governing the introduction of biotechnology products. That is a role for the political branches. *See supra* Part I.C.

At bottom, what Plaintiffs are really seeking to impose is a novel theory of strict products liability for a manufacturer of a concededly safe, non-defective product. But manufacturing and distribution are governed by products-liability law, which limits liability to *defects* in design, manufacturing, or marketing and rejects liability for selling a safe, non-defective product. *See supra* Parts I.B, II.A. For that reason, courts have rejected attempts like Plaintiffs' to invent new duties under the common law that would circumvent recognized restrictions on products-liability law.[73] This Court should likewise refuse Plaintiffs' unprecedented demands.

B. Alleged "Industry Standards" Did Not Impose A Legal Duty On Syngenta.

None of the supposed industry standards that Plaintiffs cite imposes a duty on Syngenta to refrain from selling an approved GM seed simply because the trait has not been approved in a foreign country accounting for exports of about one-third of 1% of the relevant U.S. crop. *See supra* note 23. Plaintiffs point to the BIO Policy's guideline that GM products should not be launched without import approval from "key" export markets with "functioning regulatory systems," as well as advocacy statements by other private trade associations. *See* Prod. Compl. ¶¶ 95, 98-105; Non-Prod. Compl. ¶¶ 42, 45-53. Industry customs and standards, however, "may not be used to establish a duty in the first place"; instead, they are only "relevant evidence of the

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[72] *Available at* https://www.bio.org/sites/default/files/Product-Launch-Stewardship-11272012.pdf.

[73] *See, e.g.*, *City of St. Louis v. Cernicek*, No. 02CC-1299, 2003 WL 22533578, at *2 (Mo. Cir. Ct. Oct. 15, 2003) (dismissing claims against firearms manufacturer in part because plaintiff's "attempt here is not only to blur, but obliterate, the line that separates *public nuisance* claims from those based on *product liability* law"); *Camden Cnty. Bd. of Chosen Freeholders*, 273 F.3d at 540 ("[T]he courts have enforced the boundary between the well-developed body of product liability law and public nuisance law."); La. Rev. Stat. § 9:2800.52 (Louisiana Products Liability Act sets forth "the exclusive theories of liability for manufacturers for damage caused by their products").

standard of care *after* the law has already recognized a duty of care." *Van Duyn v. Cook-Teague P'ship*, 694 N.E.2d 779, 782 (Ind. Ct. App. 1998) (emphasis added); *see also, e.g.*, *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 307 (Minn. 1996) ("[T]he evidence of industry custom would be relevant as to a standard of care, but did not establish a duty . . . ."). As the Fifth Circuit has explained: "Custom may help define the standard of care a party must exercise after it has undertaken a duty, but custom alone cannot create a legal relationship between the parties." *Fla. Fuels, Inc. v. Citgo Petroleum Corp.*, 6 F.3d 330, 334 (5th Cir. 1993).

The supposed industry standards that Plaintiffs invoke also show that it would make no sense to treat them as binding legal duties. For example, far from setting "minimum standards of responsible behavior" as alleged by Plaintiffs, Prod. Compl. ¶ 102; Non-Prod. Compl. ¶ 49, the BIO Policy is an advocacy statement that expressly does not bind any member companies and sets nothing more than "general policy statements and recommended processes." 2009 BIO Policy at 1 & n.2. Similarly, the "policies" issued by other trade associations recognize that they are non-binding recommendations. *See supra* Background, Part C.3. In fact, these other "policies" are nothing more than self-serving statements from different sectors of the grain industry advancing conflicting views on what industry custom *should* be and conveniently asserting that someone *else* should bear the cost of addressing issues raised by asynchronous approvals in different markets. For example, exporters represented by the North American Export Grain Association believe that "[u]nder no circumstances can or should the grain handling, processing or export industry sectors . . . be expected to shoulder the financial risks associated with market disruptions." Non-Prod. Compl. ¶ 52. Some of these statements, moreover, are irrelevant to analyzing any duty that Syngenta had when it launched Viptera, because they were not even issued until years *after* Syngenta began selling Viptera in 2010. *See*

Prod. Compl. ¶ 105 (citing an April 2013 NAEGA-NGFA joint statement); *id.* ¶ 104 (citing the current NGFA policy).

Nor can Plaintiffs transform any supposed industry standard they cite into a legal duty not to sell Viptera by claiming that Syngenta adopted the standard. *Cf.* Prod. Compl. ¶ 115.

First, as explained above, the law limits liability for a voluntarily undertaken duty to physical harm, not the purely economic harm Plaintiffs allege here. *See supra* Part I.E.

Second, a gratuitous promise cannot create a legal duty absent detrimental reliance. *See supra* Part I.E (collecting cases). Plaintiffs make no allegations showing that they refrained from taking any actions (to prevent cross-pollination or commingling, for example) because they were relying on a supposed promise from Syngenta. To the contrary, Plaintiffs were fully aware that Syngenta was selling Viptera, and they try to foster the impression that Producers *could not* do anything to prevent cross-pollination, Prod. Compl. ¶¶ 179-83, and that the Non-Producers "are generally not equipped to test and segregate corn varieties," Non-Prod. Compl. ¶ 131.

Third, a voluntarily undertaken duty is "limited to the extent of the undertaking" and courts "apply a narrow construction" to it. *Bailey v. Edward Hines Lumber Co.*, 719 N.E.2d 178, 184 (Ill. Ct. App. 1999) (internal quotation marks omitted); *see also, e.g.*, *Doe v. Hunter Oaks Apts., L.P.*, 105 So.3d at 428. A general statement adopting the BIO Policy in 2007 could not possibly be construed as a promise to delay commercialization of Viptera simply because China had not approved it for import. The BIO Policy merely stated in general terms that commercialization should await approval in "key" markets without providing any definition of what makes a market "key." It also specified only the United States, Canada, and Japan—not China—as key export markets. *See* 2009 BIO Policy at 4. 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. Given the rule of strict

construction that would apply to a voluntarily assumed duty, even if Syngenta had promised to abide by the vague standard in the BIO Policy, that could not reasonably be interpreted as a *promise* to refrain from selling Viptera absent approval from a market such as China.

III. Plaintiffs' Claims For Negligence, Nuisance, And Negligent Misrepresentation Are Barred By The Economic Loss Doctrine.

Plaintiffs' tort claims are also barred under the economic loss doctrine. As applied by most States, that doctrine broadly holds that "solely economic losses are generally not recoverable in tort actions." *In re Chi. Flood Litig.*, 680 N.E.2d 265, 274 (Ill. 1997).[74] The doctrine is not limited to situations where the plaintiff is in contractual privity with the defendant or has some means to contract around a particular risk.[75] Instead, "a plaintiff seeking to recover purely economic losses" cannot recover in tort, "regardless of the plaintiff's inability to recover under an action in contract." *In re Chi. Flood Litig.*, 680 N.E.2d at 275; *see also Sample*, 283 F. Supp. 2d at 1093 (economic loss doctrine applies even "if the parties did not have the opportunity to allocate the risk of loss through contractual means"); *StarLink*, 212 F. Supp. 2d at 842 (lack of contract remedy for farmers suing manufacturer of GM corn did not bar application of economic loss doctrine).

The breadth of the rule reflects the principles it promotes. In part, the rule arises from the fact that the function of tort law is to establish duties to protect society from physical "harm to person or property" and that "the general duty of care to refrain from acts unreasonably

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[74] *See also Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 503 (Iowa 2011) ("As a general proposition, the economic loss rule bars recovery in negligence when the plaintiff has suffered only economic loss."); *7240 Shawnee Mission Holding, LLC v. Memon*, No. 08-2207, 2009 WL 3185344, at *9 (D. Kan. Sept. 30, 2009) ("In Kansas, a negligence action is unavailable if only economic damages are sought.").

[75] *See, e.g.*, *Annett Holdings*, 801 N.W.2d at 504 (describing application of the doctrine where plaintiff is a "stranger" to defendant and explaining that "the doctrine is by no means limited to the situation where the plaintiff and the defendant are in direct contractual privity"); *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 846 (Wis. 1998) ("[T]he economic loss doctrine bars . . . tort claims even in the absence of privity of contract."). Relevant variations in state law are noted in Appendix B.

threatening *physical harm* is not paralleled by any comparable duty when the harm threatened is merely *economic*." *Daanen & Janssen*, 573 N.W.2d at 846, 847 (emphases added); *accord Anderson Elec., Inc. v. Ledbetter Erection Corp.*, 503 N.E.2d 246, 248 (Ill. 1987) ("A buyer's interest to enjoy the benefit of his bargain is not an interest that tort law traditionally protects."). [76] That limitation on tort law reflects the recognition that "the economic consequences of any single accident are virtually limitless." *In re Chi. Flood*, 680 N.E.2d at 274. Liability in tort for purely economic losses would threaten to create "liability in an indeterminate amount for an indeterminate time to an indeterminate class," *Indianapolis-Marion Cnty. Public Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 730 (Ind. 2010), and thus "would transform all manufacturers into insurers with seemingly unlimited tort liability." *Daanen & Janssen*, 573 N.W.2d at 850. The economic loss doctrine prevents such unlimited liability. *See, e.g.*, *Chi. Flood*, 680 N.E.2d at 274; *Annett Holdings*, 801 N.W.2d at 504.

Plaintiffs' claims here are exactly the sorts of claims for pure economic losses—for "disappointed commercial expectations"—that cannot be recovered in tort. *Anderson Electric*, 503 N.E.2d at 247. They seek the difference in price they claim could have been gained from selling corn if Viptera had not been in the U.S. corn supply. Indeed, the Producers themselves characterize their damages as "economic harm," Prod. Compl. ¶ 323, and point to the alleged "market price impact" of China's ban on U.S. corn as their injury. *Id.* ¶ 324. As another court has observed, "[f]armers' expectations of what they will receive for their crops are just that, expectations." *Starlink*, 212 F. Supp. 2d at 842. Absent an exception from the general rule, such

[76] *See also E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 871-76 (1986) (explaining the "distinction the law has drawn between tort recovery for physical injuries" and relying upon contract or other commercial law to address economic injuries and holding that under negligence law a defendant owed "no duty . . . to avoid causing purely economic loss"); Prosser & Keeton on the Law of Torts, § 92 at 657 (5th ed. 1984) ("Generally speaking, there is no general duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things.").

claims for expectation interests in a commercial transaction are unrecoverable in tort.

Nor can Plaintiffs invoke the exception to the economic loss doctrine that applies where there has been a physical injury to a person or property. *See, e.g.*, *Westfield Ins. Co. v. Birkey's Farm Store, Inc.*, 924 N.E.2d 1231, 1243 (Ill. Ct. App. 2010). As explained below, neither the Producers nor the Non-Producers has alleged any facts showing specific injury to property that qualifies for this exception. Instead, this is a case where Plaintiffs have failed to allege facts showing "actual property loss that was above and beyond their disappointed commercial expectations." *Donovan v. Cnty. of Lake*, 951 N.E.2d 1256, 1265 (Ill. App.Ct. 2011).

A. The Producers Have Not Alleged Any Injury To Their Property Sufficient To Avoid The Economic Loss Doctrine.

1. The Producers' alleged injury turns on broad allegations of market-wide price changes, not specific harm to their own property.

The Producers cannot avoid the economic loss doctrine because they have not actually alleged harm that depends on injury to *their* property. They do not specifically allege that *their* corn was physically harmed by Viptera. Their causes of action for negligence and nuisance, for example, do not allege that each Plaintiff's corn was cross-pollinated by or commingled with Viptera and thus became less marketable than other U.S. corn.[77] *See, e.g.*, Prod. Compl. ¶¶ 523-28; *id.* ¶¶ 561-64 (alleging Syngenta created a private nuisance "[b]y contaminating the U.S. corn supply"). Instead, they claim that the market price for *all* U.S. corn was generically affected by the "pervasive contamination of the U.S. corn supply," Prod. Compl. ¶ 319, and by China's actions in boycotting *all* U.S. corn, *id.* ¶ 361. To avoid the economic loss doctrine, however, the Producers cannot rely on such generic allegations about the "corn supply"; instead,

[77] Plaintiffs' only allegations concerning property damage consist of a generic line repeated a few times throughout the complaint: "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." *See, e.g.*, Prod. Compl. ¶ 319.

each must allege specific "physical injury to something in which he has at least some ownership or property interest." *Neb. Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 128 (Iowa 1984); *cf. Chi. Flood Litig.*, 680 N.E.2d at 276 ("The conclusory allegation of unspecified property damage is insufficient to show . . . damages recoverable in tort, and cannot withstand a motion to dismiss.").

Another district court already faced parallel claims alleging supposed "contamination" of a crop supply with U.S.-approved GM seeds and squarely held that the economic loss doctrine barred farmers' tort claims. *See Sample v. Monsanto Co.*, 283 F. Supp. 2d 1088 (E.D. Mo. 2003). *Sample* involved GM corn and soybeans that, like Viptera, had been fully approved for human consumption in the U.S. There, the plaintiffs abandoned allegations that their crops had been specifically damaged by cross-pollination or commingling because they recognized that such allegations would raise individual issues dooming a class. *See id.* at 1091. Instead, the plaintiffs proceeded on the theory—parallel to Plaintiffs' theory here—that "non-GM farmers lost revenue because the European community rejected Monsanto's genetically modified products and boycotted *all* American corn and soy as a result." *Id.* (emphasis added). The court held that "the economic loss doctrine preclude[d] recovery" because the farmers were not alleging harm based on "physical 'contamination' or injury to their property." *Id.*

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.

2. Allegations that the Producers' corn was cross-pollinated by or commingled with Viptera would not avoid the economic loss doctrine.

Even if the Producers' complaint were read to allege that each Plaintiff's corn was "harmed" by cross-pollination or commingling with Viptera, for multiple reasons that would not

be enough to show the requisite property damage to avoid the economic loss doctrine.

As an initial matter, to the extent the Producers point to commingling of corn in grain elevators, they provide no factual allegations at all to support a conclusion that the Producers still had a property interest in the corn after it had been sold and delivered to a grain elevator.[78]

In any event, any cross-pollination and commingling did not physically "damage" the Producers' corn because Viptera was fully approved in the U.S. The USDA definition of yellow corn makes no distinction between non-GM and GM corn. *See supra* note 13. Thus, Viptera corn could be sold in the U.S. at the same price and in the same way as all other fungible corn. Plaintiffs' only complaint is that they hypothetically could have secured a higher price if there had been no Viptera. That is the paradigm of a purely economic loss, not physical injury, and exposes Plaintiffs' inability to allege facts showing "actual property loss that was above and beyond their disappointed commercial expectations." *Donovan*, 951 N.E.2d at 1265.

As the court in *Sample* held in identical circumstances, there was "no evidence to demonstrate that the physical injury requirement would be met *even if* GM seeds were 'commingled' with non-GM seeds in a cooperative grain elevator" precisely because there was no allegation that commingling rendered the crop unfit for consumption. *Sample*, 283 F. Supp. 2d at 1093 & n.2 (emphasis added). The Canadian court in *Hoffman* reached the same result. There, the plaintiffs claimed that GM canola had cross-pollinated with their non-GM crops, which they wished to sell at a premium as organic crops and on the European market. The court held that, where a GM seed has been approved for human consumption, "the alleged damage is not of physical harm to the plaintiffs' crops, but arises from the alleged inability to meet the requirements of organic certifiers or of foreign markets for organic canola." *Hoffman I*,

[78] Under most standard contract formats for the sale of corn, title passes to the grain elevator upon delivery. Producers do not allege that they were contracting with grain elevators merely for storage.

2005 SK.C. LEXIS 330 ¶ 72.[79] The "harm" of receiving a different price for a commodity that is still fully saleable for human use was not sufficient to avoid the economic loss doctrine.

These outcomes reflect the fact that courts have long held that the economic loss doctrine bars a plaintiff from recovering on the basis that his goods end up being of lesser quality (and thus produce less profit) than he had hoped. *See Ins. Co. of NA v. Cease Elec. Inc.*, 688 N.W.2d 462, 467 (Wis. 2004) ("'Economic loss' for purposes of the doctrine is defined as 'the 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.'"). Here, the only "damage" Producers assert is that their corn ended up having different characteristics commanding an allegedly lower price from what they claim in hindsight to have expected. That is not sufficient to circumvent the economic loss doctrine.

In addition, the fact that any commingling of Producers' corn took place in connection with the transaction in which they sold their corn to grain elevators makes the application of the economic loss doctrine all the more clear. It is settled that, to avoid the economic loss rule in connection with a transaction, there must be physical injury to property *other than* the property that is the subject of the transaction. *See, e.g.*, *Lexington Ins. Co. v. W. Roofing Co., Inc.*, 316 F. Supp. 2d 1142, 1147 (D. Kan. 2004). Here, however, the corn is precisely the subject of the transaction with grain handlers who purchase the corn and move it through the distribution system. It is also settled law that, "[w]hen an [alleged] defect in a component part damages the product into which that component was incorporated, economic losses to the product as a whole

[79] Cases involving GM seeds that were *not* approved for human consumption are entirely distinguishable. For example, in *StarLink*, the court reasoned that non-StarLink corn crops are "damaged when they are pollinated by StarLink corn" or commingled because it "renders what would otherwise be a valuable food crop unfit for human consumption." 212 F. Supp. 2d at 841. As the *Sample* court held, that rationale cannot apply where a GM crop has, like Viptera, been approved for human consumption. *See* 283 F. Supp. 2d at 1093 n.2. *Bayer Cropscience LP v. Schafer*, 385 S.W.3d 822, 833 (Ark. 2011), and *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1013, are distinguishable on the same basis.

are not losses to 'other property.'" *Jorgensen Farms, Inc. v. Country Pride Coop., Inc.*, 824 N.W.2d 410, 419 (S.D. 2012). Under this principle, courts have held, for example, that where fertilizer contaminated a crop of wheat with rye (thus preventing the farmer from selling the crop at a higher price as certified seed), that did not constitute injury to "other property" because the fertilizer was merely a component part that went into the finished product—the crop of wheat. *Id.* at 413, 418-19; *see also W. Roofing*, 316 F. Supp. 2d at 1148-49 (entire building was one product of which an allegedly defective screen in the roofing drainage system was just one component). The same principle applies here. Producers sell their corn knowing that it will be combined with other corn into one fungible product. If some of the corn making up the final product alters the overall mix and affects the price, that is not injury to separate property.

Yet another principle limiting the injury-to-other-property exception is that the injury cannot result merely from the failure of a commercial transaction to provide the results expected. For example, if a plaintiff contracts for construction of a grain storage facility and the facility fails thereby damaging the grain, that is not an injury to *other* property. *See, e.g.*, *Corsica Coop. Ass'n v. Behlen Mfg. Co.*, 967 F. Supp. 382, 385-86 (D.S.D. 1997). As the Supreme Court of Illinois has put it, "the economic loss rule applies even to plaintiffs who have incurred physical damage to their property if the damage is caused by disappointed commercial expectations." *Chi. Flood*, 680 N.E.2d at 275. Here, any commingling of corn resulted from the transactions in which the Producers sold their crops to grain elevators, and the Producers are now effectively claiming disappointed expectations in that they believe they would have been better off if the grain elevators had not permitted commingling. Such disappointed expectations in the Producers' dealings with grain elevators are not a ticket for evading the economic loss rule.

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. At least one grain elevator operator, Bunge, has refused to accept Viptera corn since 2011. If the Producers thought it would be to their economic advantage to ensure that their non-Viptera corn would not be commingled, they could have sold to buyers like Bunge or bargained for a guarantee from whomever purchased their corn that it would not be commingled with Viptera. Allowing Producers to recover now in tort when they failed to bargain for such guarantees in advance would turn the policies underpinning the economic loss rule on their head and provide perverse incentives for Producers to avoid using contracts to protect their economic expectations. *See, e.g.*, *Daanen & Janssen*, 573 N.W.2d at 848. Indeed, it would be particularly perverse to allow the Producers to turn Syngenta into the insurer for their claimed losses when it is the grain elevators that physically accomplished any commingling of Viptera and non-Viptera corn and are the parties with whom Producers should have contracted to avoid such an outcome.[80]

B. The Non-Producers Have Not Alleged Physical Injury To Their Property Sufficient To Avoid The Economic Loss Doctrine.

For largely similar reasons, the Non-Producers have also failed to allege any injury to property sufficient to escape the economic loss doctrine. Like the Producers, the Non-Producers rely on generic assertions about "pervasive contamination of the U.S. corn supply," Non-Prod. Compl. ¶ 274, rather than specific allegations of harm to *their* property. And to the extent they make a few conclusory assertions that their corn and equipment were damaged, *see id.* ¶ 384, those assertions are still wholly decoupled from their theory of injury, which points to a market-wide price drop for *all* U.S. corn, not damage to *their* corn in particular.

[80] The nexus between alleged commingling and the Producers' transactions with grain elevators also means that the economic loss doctrine applies to claims of commingling even in those States that limit the doctrine to situations where a plaintiff had an opportunity to address a risk by contract. *See* Appendix B, Category 3. For such States, the Producers can avoid the economic loss doctrine only to the extent they specifically allege that their own corn was cross-pollinated by Viptera corn—something the complaints fail to allege any facts to support.

In any event, even if the Non-Producers alleged specific harm to corn in their possession, that does not amount to a claim of physical "damage" because Viptera was fully approved in the U.S. pursuant to U.S. regulations that draw no distinction between non-GM products and approved GM. *See supra* notes 7, 13. Instead, the Non-Producers are seeking a remedy solely for their expectation that they could turn around and sell corn for a higher price. *See* Non-Prod. Compl. ¶ 327 (Non-Producers "received a lower price for their corn than they would have received if China's imports of U.S. corn had not effectively stopped"). To recover in tort, however, "there must be a showing of harm above and beyond disappointed expectations. A buyer's desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects." *Anderson Elec. Inc.*, 503 N.E.2d at 247-48.

Significantly, the Non-Producers' claims *all* arise from the scenario where the economic loss doctrine applies most clearly: the purchase of goods. The Non-Producers make money by "buy[ing] from farmers and re-sell[ing] further down the supply chain." Non-Prod. Compl. ¶ 328. Their claim is that some of the corn they bought contained Viptera. That means, however, that the Non-Producers are not alleging that Viptera damaged "*other* property," as required to avoid the economic loss doctrine. Instead, they are claiming that the very goods they bought (the corn) "fail[ed] to perform to the level expected" and cost them potential profits. *City of Lenox v. Mitek Indus.*, 519 N.W.2d 330, 333 (S.D. 1994). That is precisely the sort of claim that is barred by the economic loss doctrine.

Nor does the fact that the Non-Producers may have commingled Viptera corn from some sources with non-Viptera corn from elsewhere bolster their argument. It is settled law that, where one component or ingredient allegedly "injures" an overall product of which it is a part, that does not qualify as injury to "other property." *See, e.g.*, *Jorgensen*, 824 N.W.2d at 419; *W. Roofing*, 316 F. Supp. 2d at 1147-49. Here, the Non-Producers combine corn from multiple

sources to create the product they sell: fungible corn. Even if some of the corn they purchased was supposedly "defective" (because it contained Viptera), mixing that corn together to create a final product cannot, as a matter of law, produce injury to "other property." *See, e.g.*, *Wasau Tile, Inc. v. Country Concrete Corp.*, 593 N.W.2d 445, 454 (Wis. 1999) (where manufacturer of pavers complained that "the pavers were damaged because one or more of their ingredients were of insufficient quality," there was no damage to "other property").[81]

The policies underpinning the economic loss doctrine also apply with particular force to the Non-Producers because they could have protected against commingling in their contracts for purchasing corn—including by seeking warranties that the corn was Viptera free. *See Daanen & Janssen*, 573 N.W. 2d at 850 ("Since Daanen was free to negotiate for warranty protection with [third parties], the policies underlying the [economic loss] doctrine applied with full force to its claim regardless of whether it was in privity with [Defendant]."). Indeed, as the president of the U.S. Grains Council made clear, exporters could also have protected themselves in their contracts with their Chinese purchasers, because it was clear that "it will be *critical* to make certain that contracts specify clearly for what will or won't be tested." Ex. F at 3 (emphasis added). Part of the purpose of the economic loss doctrine is to encourage commercial purchasers to rely on contracts to address economic risks. *Daanen*, 573 N.W.2d at 847-49. Allowing recovery in tort and making Syngenta (and other manufacturers of GM seeds) the universal

[81] *See also Int'l Flavors & Fragrances v. McCormick & Co.*, 575 F. Supp. 2d 654, 660-64 (D.N.J. 2008) (plaintiff that had purchased paprika infested with cigarette beetles from defendant could not show injury to "other property" where it had included the paprika in its barbeque sauce and the barbeque sauce was ruined). The same result is required under the principle that damage caused by the failure of a purchased product to perform as expected is not damage to "other property." *See, e.g., Dixie-Portland Flour Mills, Inc. v. Nation Enters., Inc.*, 613 F. Supp. 985, 988-89 (N.D. Ill. 1985) (purchaser of flour contaminated with sand could not recover in tort despite the assertion that other ingredients were "harmed" and wasted when they were mixed with the flour; the "qualitative" defect in the flour "at core . . . merely injures a purchaser's expectations"); *see also StarLink*, 212 F. Supp. 2d at 841 (the "modern trend" is to hold that if "damage is of a type that the buyer could have foreseen resulting from the product failing to perform, it does not constitute harm to other property").

insurers for everyone else in the grain industry would give the Non-Producers the benefit of a protection they did not bargain (or pay) for when they were purchasing corn, eliminate incentives for them ever to rely on contracts to address these risks, and prevent the system of contracts between various players in the market from ever developing to address the purely economic risks at issue here. These are exactly the results the economic loss doctrine is designed to avoid.[82]

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

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") expressly preempts Plaintiffs' theory that Syngenta failed "to adequately warn and instruct farmers on . . . the substantial risk that growing Viptera would lead to loss of the Chinese Market."[83] *See* 7 U.S.C. § 136v(b) ("[A] State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."). FIFRA preempts any state rule—including a common law duty—that satisfies two conditions: (1) "it must be a requirement for labeling or packaging" that (2) "is in addition to or different from those required under [FIFRA]." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 444 (2005). Plaintiffs' failure-to-warn theory would impose requirements that trigger both concerns.

First, failure-to-warn claims "are premised on common-law rules that qualify as 'requirements for labeling or packaging,'" because they purport to "set a standard for a product's labeling." *Id.* at 446. *Second*, 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

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[82] The fact that the Non-Producers' claims all arise from a transaction (purchasing corn) that permitted them to address their risk contractually also means that the economic loss doctrine bars their claims even in States that apply the doctrine solely where parties had an opportunity to address a risk by contract. *See* Appendix B, Category 3.

[83] Prod. Compl. ¶¶ 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; Non-Prod. Compl. ¶ 418; *see also* Prod. Compl. ¶¶ 478, 704, 775.

protect health and the environment." 7 U.S.C. § 136(1)(G). Indeed, Plaintiffs do not even allege that Viptera causes harm to health or the environment. Thus, Plaintiffs' theory that Syngenta failed to warn Viptera farmers is preempted because it "would impose a labeling requirement that diverges from those set out in FIFRA." *Bates*, 544 U.S. at 452; *see StarLink*, 212 F. Supp. 2d at 836 ("FIFRA therefore preempts any claims based on the inadequacy of StarLink's label or defendants' failure to warn StarLink farmers.").

V. All Claims Must Be Dismissed To The Extent They Rely On Event 5307/Duracade.

Plaintiffs have failed to state any claim regarding Event 5307/Duracade "because they cannot show, as a matter of law, that defendants' [Duracade-related] conduct was the proximate cause of their injuries." *Gaines-Tabb v. ICI Explosives USA, Inc.*, 160 F.3d 613, 618 (10th Cir. 1998). Plaintiffs allege that their injuries started when, "[i]n November 2013, China began rejecting shipments of U.S. corn which tested positive for the presence of *MIR162*." Prod. Compl. ¶ 296; Non-Prod. Compl. ¶ 251 (emphasis added). As a result, Plaintiffs' sole alleged injury—what Plaintiffs call the "*MIR 162-related* trade disruption"—started many months before the "commercialization of Agrisure Duracade™ for the 2014 planting season." Prod. Compl. ¶¶ 297-98; Non-Prod. Compl. ¶¶ 252-53 (emphasis added). Because Plaintiffs do not allege that China has ever rejected U.S. corn containing Event 5307/Duracade or that Event 5307/Duracade caused any trade disruption or other injury, their claims must be dismissed to the extent that they are based on that product. *See Gaines-Tabb*, 160 F.3d at 620.

VI. Plaintiffs' Trespass-To-Chattels Claims Must Be Dismissed As A Matter Of Law.

Both the Producers and Non-Producers fail to allege facts sufficient to make out multiple elements of a claim for trespass to chattels. As relevant here, that tort requires showing: (1) an intentional action by the defendant directed at chattels; (2) that the plaintiff had ownership or possession of the chattels; and (3) that the defendant's action physically intermeddled with the

chattels—that is, that it damaged them by "impair[ing] [them] as to [their] condition, quality, or value." Restatement (Second) of Torts §§ 217, 218; *see, e.g., US Fax Law Center, Inc. v. iHire, Inc.*, 374 F. Supp. 2d 924, 928 (D. Colo. 2005) (trespass to chattels requires "an intentional interference with the possession or physical condition of a chattel in possession of another"). Plaintiffs' allegations fail to establish those elements in several respects.

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 resulted in Viptera corn coming into contact with other corn. But it was not *Syngenta's* actions that accomplished any such cross-pollination or commingling several steps down the distribution chain. The Producers do not and cannot allege that Syngenta directed any Viptera pollen onto their lands. As their complaint acknowledges, *see* Prod. Compl. ¶ 69, Syngenta's role is to sell seeds, primarily to dealers and distributors, who then sell them to farmers. If anyone intermeddled with the Producers' corn by bringing about cross-pollination, it was the farmers on land neighboring the Producers' land, not Syngenta. The Producers also cannot pretend that Syngenta was somehow acting in concert with farmers who plant Viptera corn. As one court explained in rejecting a claim of trespass against the manufacturer of an herbicide where the herbicide drifted onto neighboring farm land, "there is no authority suggesting that a person who merely sells one item to another is acting in concert with that person when that person eventually uses . . . the purchased item." *Ward v. Ne. Tex. Farmers Co-op Elevator*, 909 S.W.2d 143, 151 (Tex. Ct. App.—Texarkana 1995), *abrogated on other grounds by Envt'l Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2014). As a result, the general rule is that "courts do not impose trespass liability on sellers for injuries caused by their product after it has left the ownership and possession of the sellers." *City of Bloomington, Ind.*, 891 F.2d at 615; *see also Parks Hiway Enters., LLC v. CEM Leasing, Inc.*,

995 P.2d 657, 664 (Alaska 2000) (same).[84]

Plaintiffs' allegations are particularly weak, moreover, given the intent requirement for trespass. Trespass to chattels requires "an intent to act *with reference to the chattel*." *Wis. Power & Light Co. v. Columbia Cnty.*, 87 N.W.2d 279, 282 (Wis. 1958) (emphasis added).[85] But neither the Producer nor Non-Producer complaints plausibly supports a conclusion that, simply by selling Viptera seed, Syngenta had any intent whatsoever to do anything to anyone else's corn. Nor can the Producers bridge that gap merely by incanting the formula that Syngenta allegedly knew "to a substantial certainty" that cross-pollination would result from the independent actions of growers planting Viptera. *E.g.*, Prod. Compl. ¶ 431. It could equally be said that it is "substantially certain" that when herbicides or pesticides are applied by farmers, some may drift and damage crops in neighboring fields. That does not make the manufacturers liable for the actions of farmers. Indeed, faced with claims exactly parallel to those raised in this case, Canadian courts applied standard common law principles to hold that trespass will not lie against a GM seed manufacturer based on claims of cross-pollination, because "much more than 'natural and inevitable forces' must intervene between merely marketing GM [seed] and its arrival on the plaintiffs' land." *Hoffman I*, 2005 SK.C. LEXIS 330 ¶ 131.

Any commingling of corn in the Non-Producers' facilities is even further removed from Syngenta's actions. The Non-Producers do not allege that Syngenta somehow dumped Viptera

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[84] *See also Acosta Orellana v. CropLife Int'l.*, 711 F. Supp. 2d 81, 94 (D.D.C. 2010) (dismissing plaintiffs' trespass claim because "nowhere in the amended complaint do the plaintiffs allege, or even remotely suggest, that the CropLife Defendants ever personally sprayed" the fungicide at issue); *Jordan v. S. Wood Piedmont Co.*, 805 F. Supp. 1575, 1582 (S.D. Ga. 1992) (manufacturer of chemical cannot be held liable for trespass based on another party's use of the chemical); *Dine v. W. Exterminating Co.*, CIV. A. No. 86-1875, 1988 WL 25511, at *9 (D.D.C. March 9, 1988) (vendor of pesticide cannot be held liable in trespass based on later application by another party, because vendor did not "directly cause" an invasion of plaintiff's land).

[85] *See also* Restatement (Second) of Torts § 217 cmt. e ("The *actor* may commit a trespass by an act which brings *him* into an *intended physical contact* with a chattel in the possession of another . . . or by *intentionally directing* an object or missile against it . . . .") (emphases added).

corn into their grain elevators. Instead, they are complaining that they bought corn from multiple sources, that they made no effort to turn away Viptera corn (unlike Bunge), that some of the corn they purchased *already had* Viptera in it when it was purchased, and that they decided to mix all the corn together (rather than testing for Viptera). By their own pleadings, any commingling was the result of the Non-Producers' *own actions*. The suggestion that their *own conduct* can somehow be transformed into a trespass by Syngenta is patently specious.

Second, the Producers do not even clearly allege that Viptera physically came into contact with (and intermeddled with) *their* corn. As explained above, *see supra* Part III.A.1, there are no allegations that each of the Producers conducted testing for the presence of Viptera in his crops, or that Viptera actually cross-pollinated *his* corn. Instead, the Producers claim only that they were injured by the generic presence of Viptera in the U.S. corn supply and an alleged market-wide drop in prices resulting from a blanket Chinese import ban. 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. The Producers fail to allege any facts that would plausibly show that they all continued to have ownership or possession of corn at the time of a supposed trespass, when the corn had already been sold and was in someone else's grain elevator. That is fatal to any claim for trespass to chattels based on commingling. *See generally* Restatement (Second) of Torts § 217; *see also, e.g.*, *Universal Tube & Rollform Equip. Corp. v. YouTube, Inc.*, 504 F. Supp. 2d 260, 269 (N.D. Ohio 2007) ("To make a claim for trespass, one must have a possessory interest in the property in question.").

Third, neither the Producers nor the Non-Producers has adequately alleged that any

supposed intermeddling resulted in actual damage to their corn.[86] Because Viptera was fully approved in the U.S., Viptera corn cannot be said to be "damaged." By law, the USDA definition of yellow corn permitted the presence of Viptera, *see* 7 C.F.R. § 810.402(c), and Viptera corn was treated the same, could be sold the same, and brought the same price as all other U.S. fungible corn. Plaintiffs, in fact, do not even allege that their corn was uniquely damaged when it became intermingled with Viptera. They do not claim that it was Viptera in their particular corn that caused them to receive a lower price for their crop or that they could have sold Viptera-free U.S. corn on some separate market. Instead, their complaint is that *all* U.S. corn—whether or not it specifically was mixed with Viptera—suffered a market-wide price drop due to a Chinese boycott. This case is thus entirely unlike *Starlink*, where the plaintiffs' *edible* corn was damaged because it was irretrievably mixed with the *inedible* Starlink trait, which was unapproved for human consumption. *See Starlink*, 212 F. Supp. 2d at 941. Because Plaintiffs' corn could be used for all the same purposes and brought the same price as other fungible corn, Plaintiffs simply cannot make out a claim that physical contact with Viptera somehow changed the "condition or quality" of the corn as necessary for a trespass claim.

VII. The Producers' Private-Nuisance Claims Must Be Dismissed As A Matter Of Law.

A claim for private nuisance requires that (1) the defendant control or substantially participate in carrying on an activity that (2) unreasonably interferes (3) with another's interest in the private use and enjoyment of land.[87] The Producers' complaint fails on each element.

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[86] *See generally United States v. Jones*, 132 S. Ct. 945, 957 n.2 (2012) (Alito, J., concurring) ("At common law, a suit for trespass to chattels could be maintained if there was a violation of 'the dignitary interest in the inviolability of chattels,' but today there must be 'some actual damage to the chattel before the action can be maintained.'") (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Law of Torts 87 (5th ed. 1984)); Restatement (Second) of Torts § 218 cmt. e ("The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel.").

[87] *See* Restatement (Second) of Torts § 821D; *see also, e.g.*, *Lethu Inc. v. City of Hous.*, 23 S.W.3d 482, 489 (Tex.

First, Plaintiffs have not alleged any facts to support a conclusion that Syngenta controlled or substantially participated in carrying on the activity that amounted to the alleged nuisance. *See generally* Restatement (Second) of Torts § 834; *see also, e.g.*, *Cloverleaf Car Co. v. Philips Petroleum Corp.*, 540 N.W.2d 297, 300-01 (Mich. Ct. App. 1995). Plaintiffs have not alleged facts showing that, after Viptera seeds were sold, Syngenta continued to control the conduct of corn growers or, later still, grain handlers at the time of any alleged cross-pollination or commingling. Courts have long held in similar situations that, because a "seller in a commercial transaction [like Syngenta] relinquishes ownership and control of its products when they are sold," it *cannot* be held liable for post-sale nuisances allegedly caused by the way others use its safe, non-defective products. *Cloverleaf Car Co.*, 540 N.W.2d at 301 ("Because Phillips had no control over what happened to the gasoline after it was delivered, it cannot incur liability as the supplier of the gasoline."); *L'Henri, Inc. v. Vulcan Materials Co.*, 53 V.I. 794, 2010 WL 924259, at *6 (D.V.I. Mar. 11, 2010) ("there is no support" for saying that a manufacturer "participated to a substantial extent in carrying on" a nuisance where it, "after the time of manufacture and sale, no longer had the power to abate the nuisance").[88]

Second, alleged cross-pollination (or commingling) with Viptera cannot be treated as an *unreasonable* interference with Producers' use of their land, given that Viptera had unrestricted federal approval to become part of the general corn supply and does nothing inherently harmful

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Ct. App. —Houston [1st Dist.] 2000, pet. denied); *Goforth v. Smith*, 991 S.W.2d 579, 587 (Ark. 1999).

[88] *See also, e.g.*, *Traube v. Freund*, 775 N.E.2d 212, 216 (Ill. App. Ct. 2002) (manufacturer of pesticide cannot, as a matter of law, be held liable in nuisance for contamination of lake resulting from farmers' use of the pesticide in part because "the absence of a manufacturer's control over a product at the time the nuisance is created generally is fatal to any nuisance or negligence claim"); *City of Bloomington, Ind.*, 891 F.2d at 614 (dismissing nuisance claim because Monsanto did not "retain[] the right to control the [chemicals it sold] beyond the point of sale"); *E.S. Robbins Corp. v. Eastman Chem. Co.*, 912 F. Supp. 1476, 1494 (N.D. Ala. 1995) (dismissing nuisance claim alleging that chemical supplier was liable for spills that occurred after delivery because it "had no control over the off-loading of product by its carriers or [the plaintiff]"); *Jordan*, 805 F. Supp. at 1583 (rejecting tort claims, including nuisance, alleging that a chemical supplier was responsible for post-sale use of the chemicals that led to contamination);.

to Producers' corn. Corn containing Viptera is still fungible yellow corn as defined by the USDA and is marketable at the same price as all other U.S. corn. As explained above, to the extent the Producers claim that they wanted to produce "Viptera-free corn," they are opting to devote their land to producing a specialty product. But that does not enable them to treat the cultivation of corn meeting ordinary U.S. standards as a nuisance in violation of tort law. To the contrary, it is black letter law that the touchstone for determining what is an "unreasonable" interference depends on "normal uses" of land, and an alleged interference "is not a nuisance if it interferes only with especially sensitive . . . uses" of land. 2 Dobbs, Hayden & Bublick, The Law of Torts § 399, at 619 (2d ed. 2011); Restatement (Second) of Torts § 821F cmt d & illus. 2.[89] Growing corn to satisfy Chinese standards for international imports rather than U.S. standards applicable in the U.S. constitutes a specially sensitive use of land and cannot support a claim of nuisance against neighboring farmers or anyone else. *Cf. Hoffman I*, 2005 SK.C. LEXIS 330 ¶ 121 (rejecting nuisance claim by organic canola farmers given that, even though cross-pollination with GM trait deprived farmers of premium organic price, "[i]t is not alleged that contamination of organic crops by GM canola is harmful per se or that it renders the crops unfit for consumption or otherwise harmful").

Third, the nuisance claim is also fatally flawed because the Producers do not even allege that their injuries arise from an interference with the use and enjoyment of *their land*. As noted above, while the Producers make general assertions about cross-pollination, they do not claim that their injuries depend on establishing interference by means of cross-pollination on each of

[89] *See also, e.g.*, *Belmar Drive-In Theatre Co.*, 216 N.E.2d at 791 ("A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbor doing something lawful on his property, if it is something which would not injure an ordinary trade or anything but an exceptionally delicate trade."); *Amphitheaters, Inc. v. Portland Meadows*, 198 P.2d 847, 853 (Or. 1948) ("[I]f I carry on a manufacture or other business which is so sensitive to adverse influences that it suffers damage from smoke, fumes, vibrations, or heat, which would in no way interfere with the ordinary occupation of land, the law of nuisance will not confer upon me any such special and extraordinary protection.").

the individual properties owned by thousands of putative class members. *See supra* Part III.A.1. Instead, they point only to the alleged presence of Viptera in "the U.S. corn supply" generally. *E.g.*, Prod. Compl. ¶ 461. To the extent the Producers try to base a private-nuisance claim on the general presence of Viptera in the corn supply—or even on commingling in grain elevators *after* harvesting—their theory fails as a matter of law. Private nuisance unequivocally requires interference with the use and enjoyment of *Plaintiffs' own land*.[90] That requires alleging facts showing an interference with their individual real properties, not generally asserting that harvested corn was commingled in a grain elevator and that the price of corn dropped as a result.

StarLink, which allowed a nuisance claim to proceed against a GM seed manufacturer, provides no support for the Producers. *First*, as explained above, given the "unique obligations imposed by the limited registration" of StarLink, including a USDA-imposed "affirmative duty to enforce StarLink farmers' compliance with" restrictions on growing StarLink, the GM manufacturer "arguably [was] in a position to control the nuisance." *StarLink*, 212 F. Supp. 2d at 847; *see supra* Part I.D. There are no similar facts here, because Viptera had unrestricted approval and there was no duty on Syngenta to ensure segregation by Viptera growers.[91]

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[90] *See, e.g.*, *Anderson v. State, Dep't of Natural Res.*, 693 N.W.2d 181, 185, 192 (Minn. 2005) (beekeepers could not bring a nuisance claim for spraying of pesticide where beekeepers "do not own the land on which they place their hives" and thus "lack[] the requisite property interest" for a private-nuisance claim); *Hutchens v. MP Realty Grp.-Sheffield Square Apts.*, 654 N.E.2d 35, 38 (Ind. Ct. App. 1995) (private-nuisance liability requires a "proprietary interest in the land on which [the plaintiff's] injuries occur"); *Hot Rod Hill Motor Park v. Triolo*, 293 S.W.3d 788, 791 (Tex. Ct. App.—Waco 2009, pet. denied) (rejecting private-nuisance claim where plaintiff did not have a property interest in any of the houses affected by the alleged nuisance); *Culwell v. Abbott Const. Co., Inc.*, 506 P.2d 1191, 1196 (Kan. 1973) (rejecting private-nuisance allegations because "nowhere does it appear that [the plaintiff] was injured in relation to a right which he enjoyed by reason of his ownership of an interest in land").

[91] *StarLink* also cited three cases holding that a nuisance claim could be stated against a manufacturer for post-sale use of its goods, but none is apposite here. *Young v. Bryco Arms* allowed nuisance claims against gun manufacturers, but was later reversed by the Illinois Supreme Court precisely on the ground that proximate cause could not be traced to the manufacturer as a matter of law. 765 N.E.2d 1 (Ill. App. Ct. 2001), *rev'd*, 821 N.E.2d 1078, 1087-88 (Ill. 2004). *Northridge v. W.R. Grace & Co.* recognized a post-sale nuisance claim against an asbestos manufacturer, but rested on the theory (inapplicable here) that the product itself was harmful and polluting. 556 N.W.2d 345, 352 (Wis. Ct. App. 1996). Finally, *Page Cnty. Appliance Center, Inc. v. Honeywell, Inc.*, recognized a post-sale nuisance claim, but turned on the fact that the manufacturer maintained post-sale control over the use of a radiation-emitting computer by voluntarily undertaking an "ongoing contract to service and maintain the

Second, cross-pollination by StarLink corn plainly involved an *unreasonable* interference because cross-pollination "render[ed] what would otherwise be a valuable food crop unfit for human consumption" according to the USDA's own requirements. *Id.* at 841.

Third, the plaintiffs in *Starlink*, unlike the Producers here, expressly based their theory of injury on "alleg[ations] that pollen from neighboring farms did enter their premises" and thus interfered with their *land.* *Id.* at 846. The decision in *StarLink* is thus entirely distinguishable from this case. *See Hoffman I*, 2005 SK.C. LEXIS 330 ¶¶ 118-121 (distinguishing *StarLink*).

VIII. The Producers' Threadbare Recitation Of The Elements Of Tortious Interference Fails To State A Claim.

The Producers' tortious interference claims fail because they do not allege any *facts* whatsoever as to any particular Plaintiffs and instead offer nothing more than "[t]hreadbare recitals of the elements of [the] cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). By relying merely on "labels and conclusions and a formulaic recitation of the elements of a cause of action," *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (internal quotation marks omitted), the Producers have failed to adequately allege facts establishing multiple elements of a tortious interference claim. Specifically, the Producers fail: (1) to identify any specific business relationships that are the subject of the claim; (2) to provide any factual allegations plausibly suggesting that Syngenta acted *intentionally* to cause third parties to stop doing business with Plaintiffs; (3) to identify any *improper means* supposedly used by Syngenta; and (4) to allege the requisite injury: namely, that third parties stopped doing business (or refused to do business) with the Producers.[92]

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computer." 347 N.W.2d 171, 177 (Iowa 1984).

[92] *See, e.g.*, *Walter Energy, Inc. v. Audley Capital Advisors LLP*, No. 1131104, 2015 WL 731152, at *5 (Ala. Feb. 20, 2015); *Overturff v. Read*, 442 S.W.3d 862, 867 (Ark. Ct. App. 2014); *Harris v. Gaylord Entm't Co.*, No. M2013-00689-COA-R3-CV, 2013 WL 6762372, at *4 (Tenn. Ct. App. Dec. 19, 2013); *Tuffy's, Inc. v. City of Okla. City*,

A. The Producers Fail To Adequately Allege Existing Or Prospective Business Relationships.

The Producers' tortious interference claims fail at the outset because their complaint does not allege facts that identify any "precise business expectancy or contractual relationship" that is the subject of the claims. *Country Corner Food and Drug, Inc. v. First State Bank and Trust Co. of Conway, Ark.*, 966 S.W.2d 894, 898 (Ark. 1998).[93] Instead, the Producers rely solely on generic, conclusory assertions that they "had business relationships and a reasonable expectancy of continued relationships with purchasers of corn." *E.g.* Prod. Compl. ¶ 422. That is not sufficient, because a plaintiff "must specifically identify a third party with whom the plaintiff had a reasonable probability of a future economic relationship." *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 221-22 (Minn. 2014); *see also Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 144 P.3d 276, 281 n.2 (Wash. 2006) (en banc) (explaining that because a tortious interference claim requires "a relationship between parties contemplating a contract, it follows that we must know the parties' identities"). Merely projecting "future business with unidentified customers" or a general expectation for the "level of business to continue in the future" is not enough. *Gieseke* at 221-22.[94] The conclusory

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212 P.3d 1158, 1165 (Okla. 2009); *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 598 n. 21 (Ind. 2001); *Trade 'N Post, L.L.C. v. World Duty Free Ams., Inc.*, 628 N.W.2d 707, 717 (N.D. 2001) (tortious interference with business); *Anderson v. Regents of Univ. of Cal.*, 554 N.W.2d 509, 518-19 (Wis. Ct. App. 1996); *Briner Elec. Co. v. Sachs Elec. Co.*, 680 S.W.2d 737, 740 (Mo. Ct. App. 1984) (tortious interference with business expectancy).

[93] *See also, e.g.*, *Overturff v. Read*, 442 S.W.3d 862, 868 (Ark. Ct. App. 2014) (affirming dismissal of tortious interference claim because appellee's "business expectancy was not shown to be sufficiently precise or concrete"); *Snyder v. Am. Kennel Club*, 661 F. Supp. 2d 1219, 1237 (D. Kan. 2009) (claim failed because "general conclusory allegations of the type made by the plaintiffs, *i.e.*, potential contracts with unspecified AKC dog owners, are insufficient to show the existence of a business relationship or expectancy with the probability of future economic benefit"); *Gov't Emps. Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700, 705-06 (E.D. Va. 2004) (allegations of "a general expectancy that consumers will purchase insurance from the [plaintiff's] Website" are "too broad and conclusory to plead a specific, existing contract or expectancy with a specific party").

[94] *See also, e.g.*, *Coach Servs., Inc. v. 777 Lucky Accessories, Inc.*, 752 F. Supp. 2d 1271, 1273 (S.D. Fla. 2010) (dismissing tortious interference counterclaim because counterclaimant's "allegation that it was planning to sell its sunglasses to 'various customers' is too vague and abstract"); *Comfax Corp. v. N. Am. Van Lines, Inc.*, 587 N.E.2d 118, 124-25 (Ind. Ct. App. 1992) ("bald assertions of possible business opportunities" insufficient to show valid

assertions in the complaint suggest no more than a generalized hope that the Producers could continue doing business with unidentified purchasers to whom they had sold in the past. That does not give rise to a protected business expectancy. *See, e.g.*, Callmann on Unfair Competition, Trademarks, and Monopolies § 9:11 (4th ed.) ("The majority rule is that the plaintiff must identify particular contractual negotiations. Past business relationships with former customers are usually not sufficient to establish a cognizable prospective relationship.").

B. The Producers Fail To Allege Any Facts Suggesting That Syngenta *Intended* To Interfere With Their Business Relationships.

The Producers also fail to allege facts showing that Syngenta acted with the requisite intent. Tortious interference requires that "the defendant must act with a purpose to interfere with the contract" or prospective relationship. *Cudd v. Crownhart*, 364 N.W.2d 158, 160 (Wis. App. 1985); *see also Gonzalez v. Sessom*, 137 P.3d 1245, 1249 (Okla. Civ. App. 2006) (tortious interference requires "the purpose to interfere with [plaintiff's] employment relationship").

But the Producers have not alleged a single fact plausibly supporting a conclusion that Syngenta set out deliberately to induce "corn purchasers" to stop doing business with them. Instead, the Producers once again merely recite the elements of the claim, as they assert that "Syngenta's conduct was intentional, and was improper and wrongful because . . . [it] was intentional." Prod. Compl. ¶ 425; *see also id.* ¶¶ 450, 533, 670, 764, 813, 845. Similarly, they baldly assert that Syngenta acted "with oppression, fraud, wantonness, and malice." Prod. Compl. ¶ 428. Such "pleadings containing only bald conclusions, unsupported by allegations of fact, are legally insufficient and may be summarily dismissed without a hearing." *Free v. Wilkinson*, No. 87-3112-0, 1990 WL 11002, at *1 (D. Kan. Jan. 4, 1990).

It is not surprising that the Producers rely on conclusory assertions, because the idea that

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prospective business relationship).

Syngenta would *intentionally* disrupt business relationships between farmers and corn purchasers makes no sense. Syngenta sells corn seed. Farmers buy more corn seed when they can readily sell their harvest at a good price. Market disruptions that prevent farmers from selling their corn create a disincentive for planting more corn and thus ripple back through the market in ways that are harmful to Syngenta itself. That aptly highlights why the tortious interference claim is a complete mismatch for the basic relationship between Syngenta and the Producers. Tortious interference claims typically arise against a *competitor* and involve claims that the competitor has diverted the plaintiff's customers or suppliers *to its own advantage*.[95] Syngenta was not, and is not, a competitor of the Producers, and the Producers have not alleged any facts suggesting how Syngenta derives an advantage from the Producers being unable to sell their corn. As a result, the complaint wholly fails to adequately allege facts supporting the element of intent.

C. The Producers Fail To Allege Improper Means.

A claim for tortious interference also requires that the defendant must accomplish the interference through "improper means"—that is, through means that are "independently wrongful." *Cmty. Title Co. v. Roosevelt Fed. Sav. and Loan Ass'n*, 796 S.W.2d 369, 373 (Mo. 1990) (en banc).[96] The Producers fail to allege any such improper means here.

To the extent they point to supposed "misrepresentations and omissions of material fact," Prod. Compl. ¶ 425, their assertions are misguided. Alleged "misrepresentations" would support a claim for tortious interference only if they were directed at preventing third parties from conducting business with the Producers. *See, e.g.*, *Grund v. Donegan*, 700 N.E.2d 157, 161 (Ill.

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[95] *See, e.g.*, *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853) (singer under contract to sing at plaintiff's theater induced by rival theater owner defendant to break contract with plaintiff and sing for defendant instead).

[96] *See also Mountain Home Flight Serv., Inc. v. Baxter Cnty., Ark.*, 758 F.3d 1038, 1044 (8th Cir. 2014) (under Arkansas law, tortious interference requires "show[ing] that the interference was improper"); *Tuffy's, Inc. v. City of Okla. City*, 212 P.3d 1158, 1165 (Okla. 2009) (tortious interference "requires . . . using unfair or improper means"); *Watson Rural Water Co., Inc. v. Ind. Cities Water Corp.*, 540 N.E.2d 131, 139 (Ind. Ct. App. 1989) ("[A]n element necessary to prove this cause of action is that a defendant acted illegally in achieving his end.").

App. Ct. 1998) ("In order to state a cause of action for tortious interference with prospective economic advantage, the plaintiff must allege action by the defendant *directed towards the party with whom the plaintiff expects to do business*.") (emphasis added). But the Producers do not point to anything of the sort. Supposed misrepresentations to U.S. regulators,[97] investors, and purchasers of corn seed about the pace of Chinese approval are irrelevant because the Producers do not and cannot allege that those statements were intended to prevent counterparties from doing business with the Producers, or that they logically could have that effect.

Nor can the Producers satisfy the requirement of "improper means" by repackaging their claims for negligence, nuisance, and trespass and pointing to supposed "contaminat[ion] [of] plaintiffs' fields, storage units, [and] equipment" or "interference with plaintiffs' use of their property." Prod. Compl. ¶ 425. The same infirmities in those claims explained above demonstrate that they do not show any "independently wrongful" conduct to support a tortious interference claim. Especially to the extent the Producers point to the presence of Viptera on their properties, that cannot be treated as an intentional act *by Syngenta*, because Viptera was long out of Syngenta's control before it found its way on to their land. *See supra* Part VI.

At bottom, the Producers are trying to treat the lawful sale of a U.S.-approved product in the U.S. as if it constituted "improper means." That is incorrect as a matter of law. The concept of "improper means" is restricted to preserve the ability of actors in a free market to pursue their own economic advantage.[98] Treating the lawful sale of an approved product as an "improper

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[97] Syngenta's statements to the government in its Deregulation Petition also cannot be the basis for a tort claim because they are privileged under the First Amendment Petition Clause. *See supra* Part I.E.

[98] *See, e.g.*, *Berger v. Cas'y Feed Store, Inc.*, 543 N.W.2d 597, 599 (Iowa 1996) ("A party does not improperly interfere with another's contract by exercising its own legal rights in protection of its own financial interests."); *Companio v. Hawkeye Bank & Trust of Des Moines*, 588 N.W.2d 462, 466 (Iowa 1999) (bank's desire "to improve its own financial condition and improve the service to its client" cannot be "improper means"); *Bridgeway Commc'ns, Inc. (WMML Radio Station-1410 AM) v. Trio Broad., Inc. (WBLX Radio Station-93 FM)*, 562 So.2d 222, 223 (Ala. 1990) (no improper means where "defendants were engaged in lawful competition to increase their

means" would turn the policy objectives of the law on their head and allow businesses to use tortious interference claims to impair the robust operation of free markets.

D. The Producers Wholly Fail To Allege The Requisite Injury: Specific Instances Of Termination Of Or Refusal To Enter Business Relationships.

Finally, tortious interference requires that the defendant must actually have "induc[ed] or caus[ed] a breach or termination of the relationship or expectancy." *McNeill v. Sec. Ben. Life Ins. Co.*, 28 F.3d 891, 893 (8th Cir. 1994). In other words, "[a]bsent some factual allegation that [defendant's] actions *ended or prevented a business relationship*," a plaintiff "does not state a claim." *Wilkey v. Hull*, 366 F. App'x 634, 638 (6th Cir. 2010) (emphasis added).

The Producers fail to allege any facts suggesting that corn purchasers broke their contracts or stopped doing business with the Producers. Instead, in most of their claims they make only the formulaic assertion that "Syngenta induced or caused a disruption of [plaintiffs'] expectancy" without any factual allegations describing the "disruption," Prod. Compl. ¶¶ 424, 449, 669, 844, and in one of their claims they assert only that Syngenta vaguely caused an "interference," *id.* ¶ 532. A threadbare assertion of an unspecified "disruption" of unspecified relationships—unsupported by any assertion that some corn purchasers broke their contracts or refused to deal with Plaintiffs—is insufficient as a matter of law.[99]

IX. Trans Coastal's Claim For Negligent Interference Fails.

Trans Coastal's claim for negligent interference with prospective economic relations under California law fails for two reasons.

First, Trans Coastal fails to adequately allege that Syngenta's conduct was

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own business"); *Pampered Chef v. Alexanian*, 804 F. Supp. 2d 765, 807 (N.D. Ill. 2011) ("Lawful competition does not constitute unjustifiable interference."); *Office Machines, Inc. v. Mitchell*, 234 S.W.3d 906, 909 (Ark. Ct. App. 2006) (rejecting tortious interference claim because defendants "were engaged in privileged competitive activity").

[99] *See, e.g., Classic Commc'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 956 F. Supp. 910, 921 (D. Kan. 1997) ("[A]n action for tortious interference with contract does not extend to claims of adverse impact or increased burden which fall short of inducing or causing actual breach.").

"independently wrongful."[100] Trans Coastal alleges only that the commercialization of Viptera itself was "wrongful conduct" and also points to alleged "misrepresentations." Non-Prod. Compl. ¶¶ 431-32. But for the same reasons explained above in connection with *intentional* interference with economic relations, neither the mere act of selling Viptera nor Syngenta's supposed misrepresentations (none of which were even allegedly directed at Trans Coastal's counterparties) can suffice to establish independently wrongful conduct. *See supra* Part VIII.C.

Second, the claim also fails because Syngenta did not owe Trans Coastal a duty of care.[101] Absent contractual privity, a plaintiff must demonstrate a special relationship to establish a duty of care. *See J'Aire Corp. v. Gregory*, 598 P.2d 60, 63 (Cal. 1979). Under the multi-factor test from *Biakanja v. Irving*, 320 P.2d 16, 18-19 (Cal. 1958), there is no special relationship here. Trans Coastal's allegations do not support a conclusion that Syngenta *intended* to affect Trans Coastal's business relationships, *see id.* at 19. There is no close connection between Syngenta's actions and the whole chain of events, including actions by China, resulting in Trans Coastal's alleged harm. *See id.* And Syngenta certainly did not engage in any conduct worthy of "moral blame" absent any facts to show that Syngenta intended to harm Trans Coastal or anyone else. *See id.* Finally, for all the reasons explained above, public policy does not support finding a duty of care that would effectively hold American biotechnology advancements hostage to the interests of an exporter like Trans Coastal that has developed a self-described "niche" role selling corn to Chinese importers. Non-Prod. Compl. ¶ 348.

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[100] *See Nat'l Med. Transp. Network v. Deloitte & Touche*, 72 Cal. Rptr. 2d 720, 736 (Cal. Ct. App. 1998) (holding that "'independently wrongful' element" applies to the "tort of negligent interference with prospective economic advantage"); *see also Integrated Storage Consulting Servs., Inc. v. NetApp, Inc.*, No. 5:12-CV-06209-EJD, 2013 WL 3974537, at *10, *11 (N.D. Cal. July 31, 2013) (dismissing plaintiff's negligent interference with prospective economic relations claim for failing to allege "'wrongful conduct' as defined by *Korea Supply*"—conduct that is "unlawful as 'proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard'") (quoting *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1159 (2003)).

[101] *Impeva Labs, Inc. v. Sys. Planning Corp.*, No. 5:12-CV-00125-EJD, 2012 WL 3647716, at *7 (N.D. Cal. Aug. 23, 2012) ("The existence of a duty is necessary to the maintenance of a negligent interference claim.").

X. Plaintiffs' Lanham Act Claims Should Be Dismissed.

A. Plaintiffs Lack Standing To Pursue Their Lanham Act Claims.

1. Plaintiffs lack Article III and statutory standing because they have not adequately alleged a causal link between Syngenta's statements and their alleged injuries.

Plaintiffs lack both Article III and statutory standing to bring their Lanham Act claims for the straightforward reason that they have failed to allege facts showing a plausible causal connection between their claimed injuries and statements by Syngenta that supposedly constitute "false advertising" under the Act. 15 U.S.C. § 1125(a).

Article III standing requires, among other things, "a fairly traceable connection between the plaintiff's injury and the complained-of conduct." *Hutchinson v. Pfeil*, 211 F.3d 515, 521 (10th Cir. 2000) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998)). Plaintiffs fail that test because they have not pled facts supporting a plausible conclusion that any of their alleged injuries are "fairly traceable" to Syngenta's alleged misrepresentations. It is settled law that, when "there is nothing to connect the only concrete and particularized injury . . . to the allegedly false and misleading advertising," a plaintiff does not have constitutional standing for a Lanham Act claim. *Me. Springs, LLC v. Nestlé Waters N. Am., Inc.*, No. 2:14-cv-00321, 2015 WL 1241571, at *7 (D. Me. Mar. 18, 2015); *see also Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 333 (5th Cir. 2002) (same); *Hutchinson*, 211 F.3d at 521-22 (same).

Here, for all the reasons explained above, Syngenta's sale of Viptera cannot, as a matter of law, be deemed the proximate cause of Plaintiffs' injuries. *See supra* Part I. Plaintiffs' Lanham Act theory requires an even *more* attenuated chain of causation. It requires tracing through all the steps noted above—through farmers' actions allegedly allowing cross-pollination; through the actions of grain elevators in buying corn and mixing it together; through exporters'

actions shipping corn with Viptera to China knowing that China had not approved it; through China's actions in rejecting Viptera; and through the utterly speculative theory that China's actions affected the world price of corn—and then adding *another link* in the chain on top of that. The Lanham Act theory asserts that this entire chain of events was actually "caused" by misleading statements from Syngenta, which prompted growers to buy Viptera. Attempting to stretch the chain of causation that extra step crosses the line from the facially insufficient to the farcical. Plaintiffs do not even allege that anyone reviewed the challenged statements when deciding to purchase Viptera. Their allegations are simply "too speculative to confer standing for a false advertising claim." *Hutchinson*, 211 F.3d at 520.

For the same reasons, Plaintiffs lack statutory standing as well. Statutory standing to bring a Lanham Act claim requires an "injury [] proximately caused by a violation of that statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1382 (2014). Thus, the Supreme Court unmistakably requires plaintiffs suing under § 1125(a) of the Lanham Act to "show economic or reputational injury flowing directly from the deception wrought by the defendant's advertising." *Id.* at 1391. Because they have failed to plead facts establishing a direct causal connection between the global price of corn and Syngenta's statements, Plaintiffs cannot establish the mandatory nexus necessary for statutory standing.

Rather than pleading facts to show any causal connection, Plaintiffs rely on conclusory allegations, such as the assertion that Producer "Plaintiffs and the other Class members' damages were proximately caused by Syngenta's misleading representations as described herein." Prod. Compl. ¶ 390; Non-Prod. Compl. ¶ 385. Conclusory allegations of this sort—which amount to nothing more than bare assertions of a legal conclusion—cannot be credited and cannot sustain a claim. *See, e.g., Shue v. Laramie Cnty. Det. Ctr.*, 594 F. App'x 941, 943 (10th Cir. 2014) (quoting *Moya v. Schollenbarger*, 465 F.3d 444, 455 (10th Cir. 2006)).

2. Plaintiffs lack statutory standing because they do not fall within the zone of interests protected by the Lanham Act.

Plaintiffs also lack statutory standing because the facts alleged in the complaints are not sufficient to show that either the Producers or Non-Producers "fall within the zone of interests protected by" the Lanham Act. *Lexmark*, 134 S. Ct. at 1387.

The Lanham Act's stated purpose is "to protect persons engaged in [interstate] commerce against unfair competition." 15 U.S.C. § 1127. Based on that purpose, the Supreme Court has made clear that statutory standing under the Act is reserved for those in a competitive relationship in the market—for those who stand to have their competitive position harmed by the defendant's unfair practices. *See Lexmark*, 134 S. Ct. at 1395. "Competitors are within the class that may invoke the Lanham Act because they may suffer 'an injury to a commercial interest in sales or business reputation proximately caused by [a] defendant's misrepresentations.'" *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2234 (2014) (quoting *Lexmark*, 134 S. Ct. at 1395). And while the Court recently clarified in *Lexmark* that the plaintiff and defendant need not be *direct* competitors, it still requires a fundamentally competitive relationship for statutory standing. 134 S. Ct. at 1390; *POM Wonderful*, 134 S. Ct. at 2234 (2014). In *Lexmark*, for example, the plaintiff's business depended on supplying parts for Lexmark's competitors. *See id.* at 1383–84. To the extent Lexmark's practices squeezed out competitors, the plaintiff directly lost business. Thus, "although Lexmark and Static Control were not direct competitors, they were competitors nonetheless." *Pain Ctr. of SE Ind., LLC v. Origin Healthcare Solutions LLC*, No. 1:13-cv-00133, 2014 WL 6750042, at *11 (S.D. Ind. Dec. 1, 2014). In the wake of *Lexmark*, the Supreme Court has continued to be unequivocal: "the cause of action is for competitors, not consumers." *POM Wonderful*, 134 S. Ct. at 2234. Here, the Producers fall outside the Act's zone of interests because they are not in a competitive relationship with

Syngenta at all.

Non-Producers are even *further* removed from the zone of interests because their role is essentially that of secondary consumers who purchase a finished product (corn) produced by the primary consumers (farmers) who buy Syngenta's product (seed). The Supreme Court has made clear that consumers are excluded from protection under the Lanham Act. *POM Wonderful*, 134 S. Ct. at 2234. "A consumer who is hoodwinked into purchasing a disappointing product . . . cannot invoke the protection of the Lanham Act." *Lexmark*, 134 S. Ct. at 1390. Given the basic nature of their complaint, the Non-Producers thus fall wholly outside the protections of the Act.

B. The Allegedly False Statements Are Not Actionable "Commercial Advertising Or Promotion" Under The Lanham Act.

Plaintiffs' Lanham Act claims also fail because none of the allegedly false statements Plaintiffs identify constitutes "commercial advertising or promotion," as required to be actionable under the Act. Under the four-part test applied by the Tenth Circuit, to qualify as "commercial advertising or promotion" under Section 43(a) of the Lanham Act, a representation must be: "(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"; and (4) "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*, 859 F. Supp. 1521, 1535-36 (S.D.N.Y. 1994)).

Here, Plaintiffs claim Syngenta made five allegedly false representations:

(i) Statements in the MIR162 Deregulation Petition (Prod. Compl. ¶¶ 124-32, 378; Non-Prod. Compl. ¶¶ 71-79, 373);

(ii) Statements by Syngenta AG CEO, Michael Mack, in a quarterly earnings conference call (Prod. Compl. ¶¶ 275, 378; Non-Prod. Compl. ¶¶ 222, 373);

(iii) Request Form for Bio-Safety Certificates Issued by the Chinese Ministry of Agriculture ("Bio-Safety Request Form") (Prod. Compl. ¶¶ 279-80; Non-Prod. Compl. ¶¶ 226-27);

(iv) Plant With Confidence Fact Sheet (Prod. Compl. ¶¶ 281-83, 378-79; Non-Prod. Compl. ¶¶ 228-30, 373-74); and

(v) Statements by Syngenta's Chuck Lee in an August 17, 2011 letter to Viptera growers (Prod. Compl. ¶ 250; Non-Prod. Compl. ¶ 197).[102]

None of these alleged representations meets all four parts of the *Proctor & Gamble* test.

First, all of these statements fail the second prong of the test because, as explained above, Syngenta and Plaintiffs are not "in commercial competition" with one another. *See supra* Part X.A.2. Indeed, even if the recent *Lexmark* decision suggests that this prong of the test should be modified to focus not on direct competition, but on whether the plaintiff's and defendant's relative positions in the market put the plaintiff in the "zone of interests" of the Lanham Act with respect to the defendant,[103] that test would not be satisfied here. As explained above, Plaintiffs fall outside the "zone of interests" protected by the Act. *Id.*

Second, Plaintiffs fail to allege any facts supporting a conclusion that the Deregulation Petition, earnings call, and Bio-Safety Request Form contained statements made "for the purpose of influencing consumers to buy defendant's goods or services." Instead, they rely once again on a conclusory recitation of the legal standard, asserting that "Syngenta's statements were likely to influence purchasing decisions by domestic corn producers." Prod. Compl. ¶ 385; Non-Prod.

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[102] Vague assertions that Syngenta made "other statements indicating that approval from China for MIR162 corn was expected at times when Syngenta knew it was not," Prod. Compl. ¶ 378; Non-Prod. Compl. ¶ 373, cannot salvage the Lanham Act claim. *See, e.g.*, *Crestron Elecs., Inc. v. Cyber Sound & Sec. Inc.*, Civ. Cse No. 11-3492, 2012 WL 426282, at *13 (D.N.J. Feb. 9, 2012) (dismissing Lanham Act claim "due to its vague and imprecise allegations regarding [counter-defendant's] statements"); *Pinnacle Sys., Inc. v. XOS Techns., Inc.*, No. C-02-03804, 2003 WL 21397845, at *6 (N.D. Cal. May 19, 2003) (dismissing Lanham Act claim because allegations were too "vague" and "nonspecific").

[103] *See, e.g.*, *Tobinick v. Novella*, No. 9:14-CV-80781, 2015 WL 1191267, at *5 n.10 (S.D. Fla. Mar. 16, 2015) ("After the Supreme Court's decision in *Lexmark* [] it does not appear that the second prong of the *Gordon & Breach* test, which requires that the defendant be in commercial competition with the plaintiff, remains good law."). Syngenta is not aware of any decision in the Tenth Circuit addressing this issue.

Compl. ¶ 380. That ignores the functional purpose of each of these statements. With respect to the Deregulation Petition, "[c]ourts have consistently found that statements made to government regulators do not constitute commercial advertising . . . because statements made to regulators generally are not intended to influence consumer choice." *Presby Envtl., Inc. v. Adv. Drainage Sys., Inc.*, Civ. No. 13-cv-355, 2014 WL 4955666, at *9 (D.N.H. Sept. 30, 2014) (dismissing Lanham Act Claim); *see also Caldon, Inc. v. Adv. Measurement & Analysis Grp., Inc.*, 515 F. Supp. 2d 565, 578 (W.D. Pa. 2007) ("[M[isrepresentations made in only [] regulatory submissions do not qualify as commercial speech under the Lanham Act."). Similarly, the earnings call statements were directed toward potential investors and analysts, not customers.[104] Finally, Plaintiffs' own complaint admits the Bio-Safety Request Form was "provided [] to grain exporters and resellers," Non-Prod. Compl. ¶ 427—but those entities are not Syngenta's customers. Plaintiffs allege no facts suggesting that the Form was provided to growers before the point of sale, much less that merely providing a Form for requesting regulatory documents was intended to influence purchasing decisions—especially when the Form was simply a vehicle for requesting export certificates, and Plaintiffs do not allege that Syngenta ever claimed to have Chinese export approval in response to anyone who submitted the Form.

Third, Plaintiffs make no factual allegations to support a conclusion that the Deregulation Petition, earnings call statements, and Bio-Safety Request Form were "disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry." *Proctor & Gamble*, 222 F.3d at 1273-74. Here again, Plaintiffs resort primarily to a bare

[104] *See, e.g.*, *Sigma Dynamics, Inc. v. E. Piphany, Inc.*, No. 9:14-cv-80781, 2004 WL 2648370, at *3 (N.D. Cal. June 25, 2004) ("Statements made during an earnings conference call primarily to influence investors that may have an incidental effect of promoting goods to customers are not within the reach of the Lanham Act."); *see also Tercica, Inc. v. Insmed Inc.*, No. C 05-5027, 2006 WL 1626930, at *17 (N.D. Cal. June 9, 2006) (no claim where statements were made to investors, not consumers).

regurgitation of the legal standard. *See, e.g.*, Prod. Compl. ¶ 386 ("Syngenta's statements were widely distributed, which is, at least, sufficient to constitute promotion within the grain industry."); Non-Prod. Compl. ¶ 381. That is not enough to state a claim. Nor is it sufficient for Plaintiffs to assert, with respect to the Deregulation Petition, that "a copy of the [Petition] may be made available to the public as part of the public comment process." Prod. Compl. ¶ 126, Non-Prod. Compl. ¶ 73. Plaintiffs must allege facts showing more than that a statement may have been *available* on a government website. They must adequately plead that the statement actually reached members of the relevant purchasing public. *Neonatal Prod. Grp., Inc. v. Shields*, No. 13-cv-2601, 2014 WL 6685477, at *13 (D. Kan. Nov. 26, 2014). The allegations concerning the earnings call statements are insufficient because those statements were directed at investors, not consumers.[105] *See Sigma Dynamics*, 2004 WL 2648370, at *3 (dismissing Lanham Act claims as to statements made during earnings calls because "the complaint contains no allegations that consumers [] attend the conference calls"); *Tercica*, 2006 WL 1626930, at *17 (same). Finally, although the Producers vaguely allege that the Bio-Safety Request Form was "distributed," Prod. Compl. ¶¶ 279-80, 477, 703, 774, they allege no facts suggesting to whom or how widely it was distributed.

The Non-Producers fare no better. They assert that Syngenta "provided [the Bio-Safety

[105] Even if Plaintiffs had adequately pled that the earnings call statement had reached members of the relevant purchasing public, that statement by Michael Mack along with Chuck Lee's August 17, 2011 letter were appropriately qualified as forward-looking statements and predictions that are not actionable under the Lanham Act. *See Eastman Chem. Co. v. Plastipure, Inc.*, No. 13-51087, 2014 WL 7271384, at *3 (5th Cir. Dec. 22, 2014) ("Predictions of future events are [] non-actionable expressions of opinion" under the Lanham Act); *see also Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999) ("Statements of opinion are not generally actionable under the Lanham Act."). Mack immediately followed his prediction on "expect[ed]" Chinese approval by explicitly stating "regulatory authorities are not something that we can handicap definitively." *See* Ex. C at 12. Lee similarly stated solely that Syngenta "anticipate[d]" Chinese approval seven months in the future. Both statements were unquestionably predictions of future events and thus beyond the reach of the Lanham Act. *Reckitt Benckiser Inc. v. Motomco Ltd.*, 760 F. Supp. 2d 446, 456 (S.D.N.Y. 2011) ("[A]s long as [speaker] discloses the forward-looking and uncertain nature of its expectations, such statements are beyond the reach of the Lanham Act and better left to the market.").

Request Form] to grain exporters and resellers," but they acknowledge that Trans Coastal received it only after "contact[ing] Syngenta representatives to request" it. Non-Prod. Compl. ¶ 427. Those allegations fail to suggest widespread dissemination of the Form, and they do not show *any* dissemination of it to the relevant group of consumers at all—"grain exporters and resellers" are not consumers of Syngenta' products.

XI. Trans Coastal's Misrepresentation Claims Should Be Dismissed.

A. Trans Coastal Has Not Adequately Pled Fraudulent Misrepresentation.

Trans Coastal's fraudulent misrepresentation claim fails because, once again, its allegations amount to little more than a threadbare recitation of the elements of the claim. As a result, the allegations not only fail under *Twombly/Iqbal*, but also fall far short of the heightened pleading standard under Federal Rule of Civil Procedure 9(b), which requires a party to "state with particularity the circumstances constituting fraud." To plead fraudulent misrepresentation, Trans Coastal must allege specific facts showing, among other elements: (1) "a false statement of material fact"; (2) made with "an intent to induce the plaintiff to act"; and (3) "action by the plaintiff in justifiable reliance on the truth of the statement." *Doe v. Dilling*, 888 N.E.2d 24, 35-36 (Ill. 2008).[106] Trans Coastal cannot satisfy any of these requirements.

First, Trans Coastal fails to identify the specific misrepresentations on which its claim is based. Instead, it asks the Court and Syngenta to comb through over 350 paragraphs of background pleading and guess which of the various statements described along the way were supposedly made fraudulently. *See* Non-Prod. Compl. ¶¶ 437-46. That approach is not sufficient under Rule 9. "The complaint must set forth the time, place and contents of the false

[106] Counts VI and VII in the Non-Producers' complaint do not specify which state's law they are brought under. *Cf.* Count V (specifying California law). Because Trans Coastal has its principal place of business in Illinois and its alleged injuries presumably occurred in Illinois, Illinois law should apply.

representation, the identity of the party making the false statements and the consequences thereof." *Heavy Petroleum Partners, LLC v. Atkins*, 457 F. App'x 735, 742-43 (10th Cir. 2012) (internal quotes omitted). Failing to pinpoint relevant details for each statement on which Trans Coastal intends to claim fraud is fatal to its claim.

Even assuming the "statements" underlying Trans Coastal's claim include (1) the MIR162 Deregulation Petition, Non-Prod. Compl. ¶¶ 71-79; (2) remarks from Syngenta AG CEO Michael Mack on an earnings call with investors, Non-Prod. Compl. ¶¶ 222, 392; (3) the Bio-Safety Request Form, Non-Prod. Compl. ¶¶ 226-27, 427; and (4) an August 17, 2011 letter from Chuck Lee to Viptera growers, Non-Prod. Compl. ¶ 197, Trans Coastal fails to allege critical details with respect to each of the statements, such as who at Trans Coastal reviewed the statements, when, and to what end. With respect to the Deregulation Petition, the earnings call, and the Lee letter, Trans Coastal does not allege "the method by which the misrepresentation was communicated to the plaintiff" nor "when" (or even if) Trans Coastal became aware of these statements before contemplating this lawsuit. *Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 923 (7th Cir. 1992); *see also Hedges v. Allstate Vehicle & Prop. Ins. Co.*, No. 14-1269, 2014 WL 5465306, at *4 (D. Kan. Oct. 28, 2014) (complaint lacked "the necessary detail" because "[p]laintiff ha[d] not alleged when or where particular statements (or omissions) were made"). Although Trans Coastal alleges it received the Bio-Safety Request Form after requesting it from Syngenta, *see* Non-Prod. Compl. ¶ 427, it does not identify the date or even the year that happened—including whether it was before or after accepting corn grown from Viptera seed. Without such specifics, it is impossible to determine "the consequences" of any misrepresentation as required by Rule 9. *Heavy Petroleum Partners*, 457 F. App'x at 742-43; *see also D&K Ventures, LLC v. MGC, LLC*, No. 09-2084, 2009 WL 1505539, at *7 (D. Kan. May 27, 2009) (allegations deficient where plaintiff failed to "giv[e] the precise dates or

circumstances of the particular representations" and did "not sufficiently identif[y] the persons by whom and to whom the statements were made").

Moreover, to the extent Trans Coastal intends to rely on the statements by Syngenta AG CEO Michael Mack in an earnings call concerning when he "expect[ed]" approval in China, or Chuck Lee's letter to growers indicating when he "anticipate[d]" approval, those were predictions of a future event, not statements of fact, and cannot support a fraud claim.[107] *See Lefebvre Intergraphics, Inc. v. Sanden Mach. Ltd.*, 946 F. Supp. 1358, 1364 (N.D. Ill. 1996).

Second, Trans Coastal utterly fails to allege any facts to show that the statements identified above were designed to induce action *by Trans Coastal*. Trans Coastal provides no reason to believe that statements made in a government filing in 2007—years before Viptera was ever sold to a farmer—or in a call with investors could have been intended to induce Trans Coastal to do anything. As an exporter, Trans Coastal is not a purchaser of Syngenta's seeds and Trans Coastal does not even allege any business interactions with Syngenta. The boilerplate assertion that Syngenta's unspecified statements were made "for the purpose of inducing . . . Trans Coastal[] to act upon the purported approval of Agrisure Viptera® for import into China" cannot support a claim. Non-Prod. Compl. ¶ 440.

Third, the complaint does not point to any specific actions whatsoever showing that Trans Coastal *relied* on statements from Syngenta. Instead, Trans Coastal vaguely asserts that its "reliance was a substantial factor in determining actions taken with respect to Agrisure Viptera®." Non-Prod. Compl. ¶ 445. Baldly alleging "reliance" while failing to describe any

[107] As the transcript of that earnings call shows, Mr. Mack immediately followed this comment by cautioning that "[o]f course, the regulatory authorities are not something that we can handicap definitively[.]" *See* Ex. C at 12. In addition, at the outset of the call, Syngenta explicitly warned that the call "contains forward-looking statements, which can be identified *by terminology such as 'expect'*" and that "[s]uch statements may be subject to risks and uncertainties that could cause actual results to differ materially from these statements." *Id.* at 1 (emphasis added).

"actions" actually taken is not sufficient. "The allegation that plaintiffs 'relied' without more is simply a conclusory statement that gives no insight into facts that plaintiffs would ever be able to prove supporting that claim." *Dloogatch v. Brincat*, 920 N.E.2d 1161, 1168 (Ill. App. Ct. 2009).

Finally, Trans Coastal alleges that "Syngenta [] knew but failed to disclose" certain information with respect to MIR162's import approval status in China, the Chinese corn market, and the channeling of corn. Non-Prod. Compl. ¶ 442. An omission cannot support a claim of fraud, however, if the supposedly omitted information was already known to Trans Coastal. *See, e.g.*, *JPMorgan Chase Bank, N.A. v. E.-W. Logistics, L.L.C.*, 9 N.E.3d 104, 121 (Ill. App. Ct. 2014). Here, it is especially absurd for Trans Coastal to complain that Syngenta "failed to disclose that China was a significant and growing import market" or that there "was not . . . an effective system in place for isolation or channeling of Viptera," given that Trans Coastal is a sophisticated exporter in the grain handling business and claims to have hundreds of millions of dollars in revenue "substantial[ly]" due to "exports to China." Non-Prod. Compl. ¶¶ 347, 351, 399. In any event, "to prove fraud by the omission of a material fact, 'it is necessary to show the existence of a special or fiduciary relationship, which would raise a duty to speak.'" *Weidner v. Karlin*, 932 N.E.2d 602, 605 (Ill. App. Ct. 2010) (quoting *Lidecker v. Kendall Coll.*, 550 N.E.2d 1121, 1126 (Ill. App. Ct. 1990)). Trans Coastal has not alleged any facts to show such a relationship—nor can it, because Trans Coastal does not allege any dealings with Syngenta at all.

B. The Negligent Misrepresentation Claim Fails For The Same Pleading Defects And Is Also Barred By The Economic Loss Doctrine.

"The tort of negligent misrepresentation has essentially the same elements as fraudulent misrepresentation," *Doe v. Dilling*, 888 N.E.2d at 45, except that "[t]he defendant need not know that the statement is false," and a plaintiff "must also allege that the defendant owes a duty to the plaintiff to communicate accurate information," *id.* Given the similarity between the causes of

action, the same pleading defects described above are also fatal to Trans Coastal's negligent misrepresentation claim. *See supra* Part XI.A. Trans Coastal fails to plead the supposed misrepresentations with particularity,[108] fails to adequately allege receipt or awareness of the statements at issue, and fails to identify a single action showing reliance. Nor has Trans Coastal alleged any facts plausibly suggesting that Syngenta owed it a duty to communicate particular information.

Trans Coastal's negligent misrepresentation claim is also barred by the economic loss doctrine. To avoid that doctrine on a negligent misrepresentation claim, "the plaintiff must demonstrate that the defendant: (1) is in the business of supplying information for the guidance of others in their business dealings; (2) provided false information; and (3) supplied the information for the guidance of the plaintiff's business transactions." *Tyler v. Gibbons*, 857 N.E.2d 885, 888 (Ill. App. Ct. 2006). Trans Coastal does not even attempt to allege that Syngenta is in the business of supplying information or that it supplied information for Trans Coastal's guidance. *Cf. id.* at 889 (provider of "chemical products and equipment to agricultural producers" could not be treated as business providing information).

XII. Plaintiffs' Consumer Protection Claims Must Be Dismissed.

Plaintiffs' claims under various state consumer protection statutes all fail for lack of proximate cause. *See, e.g.*, *Hall v. Walter*, 969 P.2d 224, 237 (Colo. 1998) (en banc); *see supra* Part I. These claims also should be dismissed for the independent state-specific reasons below.

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

Plaintiffs allege, on behalf of a nationwide class and every putative state class, that

[108] The Tenth Circuit has approved dismissal of a negligent misrepresentation claim on the ground that the plaintiff "fatally failed to plead his . . . negligent misrepresentation claims with particularity as required by Fed. R. Civ. P. 9(b)." *Heaton v. Am. Brokers Conduit*, 496 F. App'x 873, 876 (10th Cir. 2012). In any event, Trans Coastal's threadbare recitation of the elements of the claim fails even under *Twombly/Iqbal* alone.

Syngenta violated the Minnesota Unfair Trade Practices Act ("MUTPA") and the Minnesota Prevention of Consumer Fraud Act ("MCFA"). Prod. Compl. ¶¶ 393-414; Non-Prod. Compl. ¶¶ 388-409. These claims fail as a matter of law for three reasons.

1. Plaintiffs have not alleged sufficient facts for MUTPA and MCFA to be lawfully applied to the claims of non-Minnesota residents.

As a threshold matter, Plaintiffs fail to allege facts sufficient to show that Minnesota's consumer protection statutes may lawfully be applied to the claims of non-Minnesota residents, either in the putative nationwide class or in any of the putative non-Minnesota state classes.

For a state consumer protection statute to be applied to a class sweeping in transactions and injuries *outside* the State, three hurdles must be crossed: (1) the statute must apply extraterritorially under state law; (2) the State must have sufficiently significant contacts with *all* members of the class and their transactions for application of its laws to comport with due process; and (3) ordinary choice of law rules must warrant applying the State's law. *See In re St. Jude Med., Inc.*, 425 F.3d 1116, 1120-21 (8th Cir. 2005); *see also Cruz v. Lawson Software, Inc.*, Civ. No. 08-5900, 2010 WL 890038, at *7 (D. Minn. Jan. 5, 2010) ("*St. Jude* . . . provides that a Minnesota statute must both be subject to extraterritorial application ***and*** able to be applied under the constitutional analysis and choice of law test before it can be applied to a nationwide class.") (emphasis in original). Plaintiffs cannot cross any of those hurdles.

As an initial matter, MUTPA and MCFA cannot apply extraterritorially here. The Minnesota Supreme Court has never applied them extraterritorially, *see St. Jude*, 425 F.3d at 1121, and Minnesota adheres to "the general rule which limits the operation of statutory law to the state of its enactment." *In re St. Paul & K.C. Grain Co.*, 94 N.W. 218, 225 (Minn. 1903); *see Olson v. Push, Inc.*, Civ. No. 14-1163, 2014 WL 4097040, at *2 (D. Minn. Aug. 19, 2014) ("Minnesota law does impose a presumption against the extra-territorial application of state

law."). The leading case applying a Minnesota consumer protection statute to a nationwide class, *see Mooney v. Allianz Life Ins. Co. of N. Am.*, 244 F.R.D. 531 (D. Minn. 2007), provides no precedent here. In *Mooney*, the court conducted no analysis to determine whether the MCFA could apply extraterritorially, and under the particular facts of that case it is doubtful whether extraterritorial application was actually required. The sole defendant was a Minnesota corporation that had allegedly distributed fraudulent materials from Minnesota, and every putative class member had entered into a contract with the Minnesota defendant. This case is wholly different. Out of six defendants, only one is a Minnesota corporation, *see* Prod. Compl. ¶ 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. Moreover, the putative class members do not allege any interactions with Syngenta Seeds at all. Their claims are based on statements that Syngenta Defendants made to *other* people *outside* Minnesota that supposedly encouraged sales of Viptera *outside* Minnesota that allegedly harmed Plaintiffs *outside* Minnesota. There is no precedent for applying Minnesota statutes in such a case. *Cf. Friedman v. Dollar Thrifty Auto. Grp.*, Civ. Act. No. 12-cv-02432, 2013 WL 5448078, at *6 (D. Colo. Sept. 27, 2013) (dismissing consumer protection claim because statute did not apply extraterritorially).

Even if the MUTPA and MCFA could be applied extraterritorially as a matter of *state* law, Plaintiffs have failed to allege sufficient facts to permit Minnesota law to be applied to a nationwide class consistent with the Due Process and Full Faith and Credit Clauses.[109] "For a State's substantive law to be selected in a constitutionally permissible manner, that State must

[109] Both a constitutional analysis and a choice-of-law analysis are required because it is well settled that "[s]tate consumer-protection laws vary considerably, and courts must respect th[o]se differences rather than apply one state's law to sales in other states with different rules." *In re St. Jude*, 425 F.3d at 1120 (quoting *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002)).

have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981); *see also Phillips Petroleum v. Shutts*, 472 U.S. 797, 818 (1985). Such contacts were found in *Mooney* where the sole defendant was incorporated and headquartered in Minnesota, the allegedly fraudulent marketing materials were "created and distributed . . . from Minnesota," and every putative class member had purchased an annuity from the Minnesota defendant and remitted payments to Minnesota. *Mooney*, 244 F.R.D. at 535. Given the importance in the due process analysis of the parties' expectations at the time of the challenged conduct, the fact that every class member interacted directly with the Minnesota defendant was particularly significant in *Mooney* because it meant that each class member "would have expected" that Minnesota law might apply to any dispute. *Id.*; *see also Shutts*, 472 U.S. at 822 ("When considering fairness in this context, an important element is the expectation of the parties.").

None of those facts is present here. As noted above, only one of the six defendants is a Minnesota corporation. Nor do Plaintiffs allege that the Minnesota entity was the nerve center that set Syngenta's policies. To the contrary, they allege that Syngenta AG, the Swiss parent, exercises an "unusually high degree of control" over *all* the other Syngenta entities. While Syngenta's U.S. corn seed business is based in Minnesota, the complaint itself alleges that it was Syngenta's headquarters in Switzerland that directed decisions about commercializing Viptera. Prod. Compl. ¶ 79. Those allegations, when taken as true for purposes of this motion, establish that decisions relevant to Plaintiffs' claims did not emanate from Minnesota.

The supposedly deceptive statements on which Plaintiffs rely also confirm a lack of significant contacts with Minnesota. For example, Plaintiffs point to the statement of Syngenta AG CEO Michael Mack in an earnings call in April 2012, but Mack participated in that call from

Switzerland in his role as CEO of a *Swiss* company.[110] Similarly, Plaintiffs complain of supposedly misleading statements in Syngenta's Deregulation Petition. But that was prepared and filed by Syngenta Biotechnology, Inc., a Delaware corporation with its principal place of business in North Carolina, and it was submitted to a government agency office in Maryland and made public on a government website.[111]

Plaintiffs themselves, moreover, had no contacts with Minnesota whatsoever. They are complaining about statements primarily made outside Minnesota to others outside Minnesota, that supposedly encouraged farmers primarily outside Minnesota to buy more Viptera, which allegedly harmed Plaintiffs outside Minnesota when the price of corn dropped. Nothing in that chain of events could create an "expectation" that Minnesota law might apply to *all* non-residents' consumer complaints against all six Syngenta Defendants. *Shutts*, 472 U.S. at 822.

Because Plaintiffs fail to allege that all non-residents' claims have a significant aggregation of contacts with Minnesota, their "allegations are not enough to invoke Minnesota law against" the six Syngenta Defendants. *Murphy v. DirecTV, Inc.*, N. 2:01-cv-06465, 2011 WL 3325891, at *3-4 (C.D. Cal. Feb. 11, 2011). Applying Minnesota law to the actions of non-Minnesota corporations *outside* Minnesota in their interactions with *non*-Minnesota residents supposedly resulting in injury *outside* Minnesota to *other non*-Minnesota residents cannot be reconciled with the constraints imposed by the Due Process and Full Faith and Credit Clauses.

It follows *a fortiori* that Minnesota law also cannot be applied under the relevant choice-of-law principles. When a federal court exercises either diversity or supplemental jurisdiction over state-law claims, the court "applies the substantive law, including the choice of law rules, of

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[110] *See* 2012 Q1 Trading Statement (Apr. 18, 2012) ("Basel, Switzerland"), *available at* http://www.syngenta.com/global/corporate/en/news-center/events-and-presentations/Pages/1stquarter2012.aspx.

[111] *See* Syngenta Biotechnology, Inc., Petition for Determination of Nonregulated Status for Insect-Resistant MIR162 Maize (Aug. 31, 2007), http://www.aphis.usda.gov/brs/aphisdocs/07_25301p.pdf

the forum state." *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1103 (10th Cir. 1999). That means that an MDL court "must apply the choice-of-law rules of the states where the actions were originally filed." *Johnson v. Cont'l Airlines Corp.*, 964 F.2d 1059, 1063 n.5 (10th Cir. 1992). Here, Minnesota law would not be chosen under the choice-of-law rules applied by any of the States where the actions were originally filed.[112]

A plurality of the relevant forum States applies the most significant relationship test. *See supra* Choice of Law. For all the reasons described above, the lack of significant contacts between non-residents' claims and Minnesota shows that Minnesota is not the State with the most significant relationship to the claims. The activities giving rise to the claims did not take place primarily in Minnesota, *see Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1179 (10th Cir. 2009), nor did the alleged injuries occur in Minnesota, *see Doering ex. rel. Barrett v. Copper Mountain, Inc.*, 259 F.3d 1202, 1211 (10th Cir. 2001).[113] And each Plaintiff's home State will have a strong interest in applying its own consumer protection laws to any alleged injury to its residents.[114]

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[112] The relevant forum States for the Producers' class-action claims are Kansas, Missouri, Louisiana, North Carolina, Texas, and Ohio, and the relevant forum States for the Non-Producers' class-action claims are Kansas, Illinois, Louisiana, and Minnesota. Only Plaintiffs named in the Amended Class Action Master Complaints assert the class-action claims. *See* Order Relating to Consolidated Pleadings, Dkt. 287 at 6 ¶ 2(d) (Mar. 10, 2015) ("By filing such a Notice to Conform, no individual Plaintiff shall be deemed to have adopted any class-action allegations."). All but seven of the named plaintiffs filed their cases in Kansas. *See id.* at 4 ¶ 2(a) ("New Plaintiffs named in the Master Complaint shall be deemed to have filed suit in the District of Kansas for purposes of pretrial proceedings."); Compl., *Five Star Farms v. Syngenta AG*, No. 14-cv-2571-JWL-JPO, Dkt. 1 (D. Kan. Nov. 11, 2014). The seven named plaintiffs that did not originally file in Kansas filed in Missouri, Louisiana, North Carolina, Texas, Ohio, Illinois, or Minnesota. *See* Compl., *Wilson Farm Inc., v. Syngenta AG*, No. 4:14-cv-01908, Dkt. 1 (E.D. Mo. Nov. 11, 2014); Pet., *Clark Hill Farms v. Syngenta AG*, No. 14-220, (La. 6th Jud. Dist. Nov. 18, 2014); Compl., *Jack H. Winslow Farms, Inc. v. Syngenta AG*, No. 4:15-cv-00016-D, Dkt. 1 (E.D.N.C. Jan. 21, 2015); Compl., *Bull Hide Creek Farm v. Syngenta AG*, No. 6:15-cv-13, Dkt. 1 (W.D. Tex. Jan. 21, 2015); Compl., *Kaffenbarger Farms, Inc. v. Syngenta AG*, No. 3:15-cv-00022-WHR, Dkt. 1 (S.D. Ohio Jan. 21, 2015); Compl., *Trans Coastal Supply Co., v. Syngenta AG*, No. 2:14-cv-02221-CSB-DGB, Dkt. 1 (C.D. Ill. Sept. 12, 2014); Compl., *Rail Transfer, Inc. v. Syngenta Corp.*, No. 0:14-cv-04477-RHK-SER, Dkt. 1 (D. Minn. Oct. 24, 2014).

[113] Based on this factor alone, neither Kansas nor North Carolina would point to Minnesota for non-Minnesota residents' claims because both States apply the substantive law of "the state where the injury occurred." *Boudreau*, 368 S.E. 2d at 853-54; *Ling v. Jan's Liquors*, 703 P.2d 731, 735 (Kan. 1985). Similarly, in the consumer protection context, Louisiana selects the substantive law of "each putative class member's home state." *Kreger v. Gen. Steel Corp.*, Civ. Act. No. 07-575, 2010 WL 2902773, at *13 (E.D. La. July 19, 2010).

[114] *See Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011) ("[T]he state with the strongest

Because Minnesota law cannot be applied to the claims of non-Minnesota residents, the class claims for the putative nationwide class and non-Minnesota state classes must be dismissed.

2. MUTPA and MCFA do not apply because the direct purchasers of Syngenta's goods are merchants.

Plaintiffs also cannot assert claims under Minnesota's consumer protection laws because the direct purchasers of Syngenta's goods are *merchants*, not consumers. "[T]he Minnesota consumer protection statutes do not apply to a merchant." *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 401 F.3d 901, 920 (8th Cir. 2005).[115] Merchants are defined as "entities that deal in goods of the kind or otherwise by occupation hold themselves out as having knowledge or skill peculiar to the practices or goods involved," *Solvay Pharms., Inc. v. Global Pharms.*, 298 F. Supp. 2d 880, 887 (D. Minn. 2004), or entities who purchase a good "for the purpose of reselling it," *Ly v. Nystrom*, 615 N.W.2d 302, 310 (Minn. 2000). Where, as here, the plaintiffs are not direct purchasers of the defendants' products, the relevant question is whether the direct purchaser is a merchant in the context of the goods that were sold. *See Pugh v. Westrich*, No. A04-657, 2005 WL 14922, at *3 (Minn. Ct. App. Jan. 4, 2005).

Here, the direct purchasers of Syngenta's goods (corn seed) plainly qualify as merchants. Dealers and distributors, by definition, purchase seed to resell it and thus are merchants. *See Solvay*, 298 F. Supp. 2d at 887 ("wholesalers" and "distributors" are merchants "as they are entities that deal in goods of the kind"). Similarly, the growers to whom Syngenta sells directly are merchants because they "deal in goods of the kind" by purchasing the corn seed, growing the

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interest in [consumer protection lawsuits] is the State where the consumers—the residents protected by ***its consumer***-protection laws—are harmed by it.") (emphasis in original); *cf. Tyler v. Alltel Corp.*, 265 F.R.D. 415, 427 (E.D. Ark. 2010) ("States tend to be jealous of their right to protect their own citizens in consumer transactions.").

[115] *See also Securian Fin. Grp., Inc. v. Wells Fargo Bank N.A.*, Civ. No. 11-2957, 2014 WL 6911100, at *6 (D. Minn. Dec. 8, 2014) ("Courts examining MCFA and MUTPA claims have indeed distinguished between 'merchants' and consumers.").

corn, and selling the corn to grain elevators and other buyers.[116] Because the direct consumers of Syngenta's seeds qualify as merchants, it is black-letter Minnesota law that Plaintiffs' claims under the MUTPA and MCFA must be dismissed. *See, e.g.*, *Pugh*, 2005 WL 14922 at *3.

3. Plaintiffs' claims would not benefit the public.

Plaintiffs' claims also fail because Plaintiffs have not alleged facts sufficient to show that their causes of action "benefit[] the public" at large. *Ly*, 615 N.W.2d at 314 ("[T]he Private AG Statute applies only to those claimants who demonstrate that their cause of action benefits the public."). A public benefit will be found only "when the plaintiff seeks relief primarily aimed at altering the defendant's conduct," *Buetow v. A.L.S. Enters., Inc.*, 888 F. Supp. 2d 956, 961 (D. Minn. 2012), which typically requires seeking injunctive relief and always requires the relief to be forward-looking. *See id.*

Plaintiffs' requested relief fails on both counts because it consists solely of "compensatory damages and attorneys' fees." Prod. Compl. ¶ 414; Non-Prod. Compl. ¶ 409. That relief would benefit Plaintiffs, but would do nothing for the public as a whole. *See Zutz v. Case Corp.*, No. Civ. 02-1776, 2003 WL 22848943, at *4 (D. Minn. Nov. 21, 2003) ("Plaintiffs seek only compensatory damages. Where recovery is sought for the exclusive benefit of the plaintiff, there is no public benefit."). Nor can Plaintiffs claim this relief would put a stop to ongoing misrepresentations, because they have not alleged any supposedly ongoing misrepresentations. *Cf. Collins v. Minn. Sch. of Bus., Inc.*, 636 N.W.2d 816, 820 (Minn. Ct. App. 2001). The only specific misrepresentations Plaintiffs allege concern the timing of China's approval of MIR162, *see, e.g.*, Prod. Compl. ¶¶ 395-99, and China has since approved MIR162.

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[116] *See Tisdell v. ValAdCo*, Nos. C0-01-2054 *et al.*, 2002 WL 31368336, at *10 (Minn. Ct. App. Oct. 16, 2002) ("operators of large commercial farms" are not consumers because that "would be extending the [MCFA] beyond its intended purpose"); *Huntting Elevator Co. v. Biwer*, No. C9-98-548, 1998 WL 747170, at *2 (Minn. Ct. App. Oct. 27, 1998) (corn "producer acted as merchant in selling his grain products to the grain elevator").

B. Colorado Consumer Protection Act

The Producers' purported claim under the Colorado Consumer Protection Act ("CCPA") must be dismissed for the straightforward reason that the CCPA expressly precludes Plaintiffs from seeking monetary relief on a class-wide basis. *See* Col. Rev. Stat. § 6-1-113(2) (statute applies "*[e]xcept in a class action*") (emphasis added). Courts have read this language to mean that "the CCPA creates no statutory liability for a defendant in a private class action." *Martinez v. Nash Finch Co.*, 886 F. Supp. 2d 1212, 1219 (D. Colo. 2012); *see Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*, No. C-13-1803, 2014 WL 1048710, at *10 (N.D. Cal. March 14, 2014).

C. Illinois Consumer Fraud And Deceptive Business Practices Act

As "non-consumer[s]" of Syngenta's products, the Producers lack standing to bring a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") because they have not alleged facts showing a "consumer nexus." *Thraser-Lyon v. Ill. Farmers Ins. Co.*, 861 F. Supp. 2d 898, 912 (N.D. Ill. 2012). A "consumer nexus" requires allegations showing, among other things, "how defendant's particular [action] involved consumer protection concerns; and . . . how the requested relief would serve the interests of consumers." *Id.* (citation omitted). The Producers cannot meet either requirement.

Their allegations show no harm to consumers, meaning "the ultimate buyers of the finished product." *Williams Elec. Games, Inc. v. Garrity*, 366 F.3d 569, 579 (7th Cir. 2004); *see Walsh Chiropractic, Ltd. v. StrataCare, Inc.*, 752 F. Supp. 2d 896, 913 (S.D. Ill. 2010) (plaintiff must provide "factual support for how th[e] alleged scheme affected actual non-business *consumers*"). Instead, the Producers' theory is that "the ultimate buyers" (*i.e.*, the consuming public) paid *less* for corn than they would have absent Syngenta's actions because Syngenta's actions produced *lower* market prices for corn. *See, e.g.*, Prod. Compl. ¶ 361. Because the Producers' allegations fail to show any harm to consumers, this claim falls outside the scope of

the ICFA. *See Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 868 (7th Cir. 1999) (rejecting ICFA claim because "allow[ing] the seller to obtain damages . . . when no consumer has been hurt is unlikely to advance the consumer interest").

Nor would the Producers' requested relief serve consumers' interests. The Producers seek damages on behalf of a class of commercial corn growers and attorneys' fees. Prod. Compl. ¶¶ 362-74, 520-22, 894. Because "none of these requests would benefit [consumers] in the least," the Producers "do not have statutory standing to bring this claim." *Prescott v. Argen Corp.*, No. 13 CV 6147, 2014 WL 4638607, at *7 (N.D. Ill. Sept. 17, 2014).

Setting aside the Producers' standing problem, their ICFA claim fails because Syngenta's actions were authorized by multiple regulatory agencies. *See* 815 ILCS 505/10b(1). Section 10b of the ICFA exempts a defendant's conduct from liability if the "[a]ctions or transactions [were] specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 32 (Ill. 2005). In effect, the Producers allege that Syngenta violated the ICFA by (1) commercializing Viptera and Duracade prior to obtaining Chinese approval; (2) selling Viptera and Duracade without a stewardship or channeling program; and (3) not including a warning to instruct farmers on the dangers of cross-pollination and commingling. *See* Prod. Compl. ¶ 513. But the USDA, the EPA, or the FDA authorized each of these actions when Viptera was deregulated with no restrictions on its approval. *See Price*, 848 N.E.2d at 42 ("[W]hile the authorization must be specific—related to a particular thing—it need not be express.").

By deregulating a GMO, the USDA "allow[s] it to be sold commercially." *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d at 1015 n.2.[117] The USDA thus authorized the

[117] *See also* USDA, *Nat'l Envt'l Policy Act Decision and Finding of No Significant Impact, MIR162 Maize*, at 5

sale of Viptera on April 12, 2010, and the sale of Duracade on January 29, 2013.[118] In addition, the USDA considered and rejected alternatives to full deregulation, including partial deregulation that would impose geographic restrictions on where the products could be planted and isolation distance requirements for Duracade.[119] As a result, the ICFA cannot impose liability on Syngenta for its decision to commercialize Viptera or Duracade post-deregulation or for its alleged failure to implement an adequate stewardship program.

For the same reasons that failure to warn claims are preempted by FIFRA, *see supra* Part IV, it follows that the ICFA cannot impose liability on the basis of an allegedly inadequate label that failed to disclose "the dangers of contamination by MIR162." Prod. Compl. ¶ 513; *see Price*, 848 N.E.2d at 51; *Lanier v. Assoc. Fin., Inc.*, 499 N.E.2d 440, 447 (Ill. 1986).

D. Nebraska Consumer Protection Act

The Producers lack standing to bring a claim under the Nebraska Consumer Protection Act ("NCPA") because they have not alleged that they purchased Syngenta's product either directly or indirectly. *See, e.g.*, *Kanne v. Visa USA, Inc.*, 723 N.W.2d 293, 300-01 (Neb. 2006).

They have also failed to plead a violation of the statute, which "expressly exempts certain activities of heavily regulated businesses." *Hage v. Gen. Serv. Bureau*, 306 F. Supp. 2d 883, 889-90 (D. Neb. 2003). That exemption applies to an activity at least "indirectly" regulated by state or federal authority. *See, e.g.*, *Wrede v. Exch. Bank of Gibbon*, 531 N.W.2d 523, 530 (Neb. 1995) (applying exemption where "the form of certificate used was at least indirectly approved

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(April 12, 2010) (recognizing that deregulation would allow commercialization), *available at* http://www.aphis.usda.gov/brs/aphisdocs2/07_25301p_com.pdf.

[118] *See* USDA APHIS, *Syngenta Biotechnology, Inc.; Determination of Nonregulated Status for Corn Genetically Engineered for Insect Resistance*, 75 Fed. Reg. 20560 (Apr. 20, 2010); USDA, *Determination of Nonregulated Status for Event 5307 Corn* (Jan. 29, 2013), http://www.aphis.usda.gov/brs/aphisdocs/10_33601p_det.pdf.

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

by virtue of the authority of the state"). "[T]he exception to the Nebraska statute is broader than federal preemption, and applies to all conduct regulated by federal agencies." *In re ConAgra Foods Inc.*, 908 F. Supp. 2d 1090, 1104 (C.D. Cal. 2012). Because, as explained above, the USDA and EPA regulate the timing of commercialization, decide whether stewardship practices are necessary, and affirmatively approve the warning labels for GMOs, Syngenta's conduct here falls within the NCPA's exemption. *See id.* (food mislabeling claim fell within NCPA exemption because FDA has regulatory authority over food labels).

E. North Carolina Unfair And Deceptive Trade Practices Act

The Producers also fail to sufficiently allege facts establishing standing to assert a claim under the North Carolina Unfair and Deceptive Trade Practices Act ("NCUTPA"). The statute "was enacted to protect consumers" and only "extend[s] to businesses in appropriate contexts." *Williams v. Charlotte Copy Data, Inc.*, 591 S.E.2d 598, at *2 (N.C. Ct. App. 2004). Namely, "one business is permitted to assert a[n] [NCUTPA] claim against another business only when the businesses are competitors (or potential competitors) or are engaged in commercial dealings with each other." *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520 (4th Cir. 1999); *see Williams*, 591 S.E. 2d at *3; *Synergy Fin., LLC v. Zarro*, 329 F. Supp. 2d 701, 710 (W.D.N.C. 2004). Syngenta (a company that sells seed) does not compete with the Producers (commercial farms that grow and sell corn), and the Producers explicitly allege that they are not engaged in commercial dealings with Syngenta. *See* Prod. Compl. ¶¶ 12-63. "The [NCUTPA], therefore, cannot be used here because there is no competitive or business relationship that can be policed for the benefit of the consuming public." *Food Lion*, 194 F.3d at 520.

Even if the Producers had standing, they have not alleged facts supporting a claim, which requires an "unfair or deceptive act" that has an effect "on the consuming public." *Marshall v. Miller*, 276 S.E. 2d 397, 401, 403 (N.C. 1981). The Producers have not alleged that Syngenta's

actions *harmed* the consuming public; instead, under their theory, Syngenta's actions produced lower corn prices for consumers. Those allegations fail to show an unfair or deceptive act as a matter of North Carolina law.[120] *See Dalton v. Camp*, 548 S.E. 2d 704, 711 (N.C. 2001) ("[W]hether an act is unfair or deceptive is a question of law for the court.").

F. North Dakota Unlawful Sales Or Advertising Practices Act

The Producers have not stated a claim under North Dakota's Unlawful Sales Or Advertising Practices Act because that statute is limited to "deceptive or fraudulent acts [made] 'in connection with the sale' of merchandise." *Benz Farm, LLP v. Cavendish Farms, Inc.*, 803 N.W.2d 818, 825 (N.D. 2011). None of the alleged misrepresentations the Producers identify was made in connection with the sale of merchandise. For example, the Deregulation Petition, *see* Prod. Compl. ¶ 773, was submitted to a government agency a full three years before any Viptera sales and thus could not have been made in connection with the sale of merchandise. The Producers also erroneously rely on (1) statements made to investors (not consumers) in an earnings call, *id.* ¶ 772; (2) a biosafety certificate request form that producers would have no reason to see (if ever) until *after* they had purchased Syngenta's product,[121] *id.* ¶ 774; and (3) a fact sheet targeted to producers already "experiencing the advantages of Agrisure Viptera,"[122] *id.* These statements cannot support a claim because they "were not made to [consumers], nor were they made 'in connection with the sale or advertisement of any merchandise.'" *Thimjon Farms P'ship v. First Int'l Bank & Trust*, 837 N.W.2d 327, 338 (N.D. 2013).

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[120] The Producers do not expressly allege that Syngenta committed deceptive acts, *see* Prod. Compl. ¶ 723, but to the extent they intend to rely on alleged misrepresentations stated elsewhere in the complaint, that approach fails for the additional reason that they do not allege facts showing reliance by any consumer. *See Tucker v. Boulevard At Piper Glen LLC*, 564 S.E.2d 248, 251 (N.C. Ct. App. 2002).

[121] The Bio-Safety Request Form's stated purpose is "to assist Recipient in obtaining authorization for shipments containing [Syngenta's] Corn Product(s) into China," http://www3.syngenta.com/country/us/en/agriculture/Stewardship/Documents/Biosafety-Certificate-Request-Form.pdf.

[122] Plant with Confidence, http://www.syngenta-us.com/viptera_exports/images/Agrisure-Viptera-Fact-Sheet.pdf.

CONCLUSION

For the foregoing reasons, the Producer Plaintiffs' and Non-Producer Plaintiffs' Amended Class Action Master Complaints should be dismissed with prejudice.

Dated: June 19, 2015

Respectfully submitted,

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APPENDIX A:
FEDERAL AND STATE LEGISLATIVE PROPOSALS
TO ADDRESS LIABILITY FOR GM CROPS

Jurisdiction	Year(s)	Legislation
Federal (U.S. Congress)	2002 2003 2005 2008 2010 2011	Genetically Engineered Organism Liability Act, H.R. 4816, 107th Cong. 2d (2002), H.R. 2919, 108th Cong. 1st (2003), H.R. 5271, 109th Cong. 2d (2005), H.R. 6637 § 203(a), 110th Cong. 2d (2008), H.R. 5579 § 203(a), 111 Cong. 2d (2010), H.R. 3555 § 203(a), 112th Cong. 1st (2011) (failed bills that would have made "biotech compan[ies] [] liable to any party injured by the release of a genetically engineered organism into the environment if that injury results from that genetic engineering")
California	2005	Assem. B. 984, 2005 Leg., Reg. Sess. (Cal. 2005) (eliminated bill provision 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")
Hawaii	2014	S.B. 2737 § 2, 27th Leg. Sess. (Haw. 2014) (bill that would have required GM manufacturer to provide certain minimum notice to purchasers of the "possible legal and environmental risks")
Massachusetts	2003	S.B. 1912 (Mass. 2003) (voted-down bill that would have held GMO manufacturers liable in tort for damages caused by use of their products)
	2001	S.B. 1789 (Mass. 2001) (similar)
Minnesota	2000	HF 3820, 81st Leg. (Minn. 2000) (failed bill to make manufacturers liable for "[a]ny transfer of genetic material from a growing crop of an agriculturally related GMO to a growing crop of nongenetically modified plant organisms, whether by cross pollination or other means" that results in "diminishe[d] value" of the crops)
Montana	2005	S.B. 218, 2005 Leg. Reg. Sess. (Mon. 2005) (failed proposal to make "manufacturer[s] liable for injury suffered by any party because of the release of genetically engineered wheat into Montana")

Jurisdiction	Year(s)	Legislation
Nebraska	2000	L.B. 959 § 3, 96th Leg., 2d Reg. Sess. (Neb. 2000) (failed bill that would have established liability for "[t]he transfer of a genetically engineered trait from a genetically engineered growing crop, by cross pollination or other means, to a growing crop which is not genetically engineered")
New York	2013	Assem. Bill 6509 § 1, 236th Leg. Sess. (N.Y. 2013) (failed bill that would have made "[a] manufacturer of genetically engineered plants, planting stocks, or seeds . . . liable to any person for any damages . . . due to cross-contamination caused by the manufacturer's products," including "market price reductions incurred by farmers resulting from loss of crop exports, including foreign and domestic markets")
North Dakota	2005	S.B. 2235, 2005 Leg. Reg. Sess. (N.D. 2005) (voted-down bill "to establish liability related to the planting of genetically engineered wheat")
Oregon	2013	H.B. 2736 § 3, 77th Leg. Assem. (Or. 2013) (failed bill that would have made GM manufacturers liable in "private nuisance if the release causes the presence of the plant on property owned or occupied by a person who did not intend for the plant to be present on the property")
Vermont	2006	S. 18, 2006 Leg., Reg. Sess. (Vt. 2006) (vetoed bill that would have allowed farmers to sue GMO seed manufacturers for economic damage caused by cross-contamination)
West Virginia	2013	H.B. 2207, 81st Reg. Sess. (W. Va. 2013) (failed bill 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")

APPENDIX B:
STATE APPROACHES TO ECONOMIC LOSS DOCTRINE

1. The following States apply the economic loss doctrine even where there is no contractual privity between the plaintiff and defendant. These states would apply the doctrine as described in the text of Part III.

Illinois	*See, e.g., In re Chi. Flood Litig.*, 680 N.E.2d 265, 274-75 (Ill. 1997).
Indiana	*See, e.g., Indianapolis-Marion Cnty. Pub. Library v. Charlier Clark & Linard, P.C.*, 929 N.E.2d 722, 729–30 (Ind. 2010); *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742, 748 (Ind. 2010) ("[T]he existence or non-existence of a contract is not the dispositive factor for determining whether a tort action is allowable . . . .").
Iowa	*See, e.g., Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 98 (Iowa 2012) ; *Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 502-03 (Iowa 2011).
Kansas	*See, e.g., Nw. Ark. Masonry, Inc. v. Summit Specialty Prods., Inc.*, 31 P.3d 982, 988 (Kan. Ct. App. 2001).
Kentucky	*See, e.g., Cincinnati Ins. Co. v. Staggs & Fisher Consulting Eng'rs., Inc.*, 2013 WL 1003543, at *3-*4 (Ky. Ct. App. Mar. 15, 2013); *Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 852 (6th Cir. 2002).
Missouri	*See, e.g., Captiva Lake Invs., LLC v. Ameristructure, Inc.*, 436 S.W.3d 619, 628 (Mo. Ct. App. 2014).
North Dakota	*See, e.g., Dakota Gasification Co. v. Pascoe Bldg. Sys.*, 91 F.3d 1094, 1100-01 (8th Cir. 1996).
Ohio	*See, e.g., Corporex Dev. & Constr. Mgmt. Inc. v. Shook, Inc.*, 835 N.E.2d 701, 704-05 (Ohio 2005).
Tennessee	*See, e.g., Messer Griesheim Indust. v. Eastman Chem. Co.*, 194 S.W.3d 466, 471 (Tenn. Ct. App. 2005).
Texas	*See, e.g., Clark v. PFPP Ltd. P'ship*, 455 S.W.3d 283, 289-90 (Tex. Ct. App. - Dallas 2015); *Pugh v. Gen. Terrazzo Supplies, Inc.*, 243 S.W.3d 84, 94-95 (Tex. Ct. App.—Houston [1st Dist.] 2007).
South Dakota	*See, e.g., City of Lennox v. Mitek Indus., Inc.*, 519 N.W. 2d 330, 333-34 (S.D. 1994); *Nw. Pub. Serv. v. Union Carbide Corp.*, 115 F. Supp. 2d 1164, 1167 (D.S.D. 2000).

Wisconsin — *See, e.g., Digicorp, Inc. v. Ameritech Corp.*, 662 N.W.2d 652, 654, 666 (Wis. 2003) ; *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 846 (Wis. 1998).

2. The following States have adopted the economic loss doctrine, but have not had occasion to address applying it in a situation where contractual privity was lacking. This Court should predict that they would follow the majority rule and hold that the economic loss doctrine applies.

Alabama — *See, e.g., Bay Lines, Inc. v. Stoughton Trailers, Inc.*, 838 So.2d 1013, 1019-20 (Ala. 2002); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873, 2008 WL 5217594, at *16-17 (E.D. La. Dec. 12, 2008).

Oklahoma — *See, e.g., Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649, 653 (Okla. 1990) ; *United Golf, LLC v. Westlake Chem. Corp.*, No. 05-CV-0495-CVE-PJC 2006 WL 2807342, at *3-6 (N.D. Okla. Aug. 15, 2006).

Mississippi — *See, e.g., State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 736 So.2d 384, 387 (Miss. Ct. App. 1999); *Adcock v. S. Austin Marine, Inc.*, No. 2:08 cv263KS-MTP, 2009 WL 3633335, at *5 (S.D. Miss. Oct. 30, 2009).

Nebraska — *See, e.g., Nat'l Crane Corp. v. Ohio Steel Tube Co.*, 332 N.W. 2d 39, 44 (Neb. 1983).

3. The following States have limited the rationale for the economic loss doctrine to apply only where a party has some alternative avenue for protecting itself by contract. *See supra* nn.80, 82.

Colorado — *See Engeman Enters. LLC v. Tolin Mech. Sys. Co.*, 320 P.3d 364, 368-69 (Colo. Ct. App. 2013).

Michigan — *See Quest Diagnostics, Inc. v. MCI Worldcom, Inc.*, 656 N.W.2d 858, 864, 866 (Mich. Ct. App. 2002) ("[T]here must be a transaction that provides an avenue by which the parties are afforded the opportunity to negotiate to protect their respective interests . . . there is no support for applying the doctrine in the absence of [such] a transaction.").

North Carolina — *See Lord v. Customized Consulting Specialty, Inc.*, 643 S.E.2d 28, 32-33 (N.C. Ct. App. 2007).

4. Minnesota has codified the economic loss doctrine by statute in the context of the sale of goods. *See* Minn. Stat. § 604.101; *id.* Subd. 2 ("This section applies to any claim by a buyer against a seller for harm caused by a defect in the goods sold or leased . . . .").

To the extent the Non-Producers complain about the corn they bought containing Viptera, the statute covers their claims and the claims are barred by the economic loss doctrine. *Cf. id.* Subd. 2(1) (statute applies "regardless of whether the seller and the buyer were in privity").

To the extent Producers are complaining about cross-pollination of corn on their lands, the statute is wholly inapplicable and the common law economic loss doctrine bars their claims. *See, e.g., Praktika Design & Projectos Ltda. v. Marvin Lumber & Cedar Co.*, Civ. No. 06-957 (JRT/RLE), 2007 WL 1582710, at *3 (D. Minn. May 30, 2007) (applying common law version of economic loss doctrine where statute did not apply because contract was not for sale of goods). *But see Ptacek v. Earthsoils, Inc.*, 844 N.W.2d 535, 539 (Minn. Ct. App. 2014) (holding, without analysis, and contrary to express terms in codified Reporter's Notes, that the statute did not cover a negligence claim for defective goods and that no common law economic loss doctrine survived outside the statute to bar negligence claim).

5. Louisiana has not adopted a bright line economic loss rule. Instead, Louisiana incorporates considerations underpinning the doctrine into the duty/risk analysis in determining whether a duty is owed in tort. *See PPG Indus., Inc. v. Bean Dredging*, 447 So.2d 1058, 1061-62 (La. 1984) (holding dredging contractor who negligently damaged natural gas pipeline could not be held liable for economic losses incurred by the pipeline owner's contract customer); *Wiltz v. Bayer CropScience, Ltd.*, 645 F.3d 690, 703 (5th Cir. 2011) (holding that the producers of a rice pesticide were not liable under Louisiana law to buyers and processors of crawfish for economic losses associated with the decline of the crawfish population). Applying that analysis here would produce the same result as the economic loss doctrine.

6. Arkansas has not adopted the economic loss doctrine in strict products liability cases and has reserved the question whether the doctrine applies in negligence cases. *See Bayer CropScience LP v. Schafer*, 385 S.W. 3d 822, 832-33 (Ark. 2011).

CERTIFICATE OF SERVICE

I certify that on June 19, 2015, I electronically filed the foregoing with the Clerk of this Court by using the CM/ECF system, which will accomplish service through the Notice of Electronic Filing for parties and attorneys who are Filing Users.

/s/ Thomas P. Schult
Thomas P. Schult