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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

In re: Syngenta Litigation and Syngenta Class Action Litigation This Document Relates to: INDIVIDUAL CLAIMS CLASS ACTION	Case Type: Civil Other Honorable Laurie J. Miller Court File Nos.: 27-CV-15-3785 and 27-CV-15-12625 **BASSFORD REMELE, P.A.'S MEMORANDUM OF LAW REGARDING ALLOCATION OF ATTORNEYS' FEES**

INTRODUCTION

Many factors contributed to the historic $1,510,000,000 recovery on behalf of American corn producers, grain elevators, and ethanol plants, but perhaps the most unique and ultimately most impactful factor was the unprecedented level of coordination between leadership of the Minnesota and Kansas actions. From even before the appointment of counsel in the Minnesota case, leadership of the Kansas MDL and eventual lead counsel in the Minnesota action pledged to work together to prosecute their clients' claims against Syngenta. Counsel made this decision despite the clear differences in the anticipated structure of their respective actions. The Minnesota case was to be a large mass tort action comprising tens of thousands of individual cases with a Minnesota-only class action. Conversely, the Kansas case was primarily intended to proceed with a number of class actions and only a small number of individually filed cases. Despite these differences, the Minnesota and Kansas leadership groups worked hand-in-hand to prepare and ultimately try the cases that led to this historic settlement.

The agreement to coordinate the prosecution of the Minnesota and Kansas actions was guided by the *Manual for Complex Litigation (Fourth)* [hereinafter "*Manual*"], which

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encourages "coordination among counsel . . . to reduce duplication and potential conflicts and to coordinate and share resources" and recognizes the importance of "agreements or understandings . . . between attorneys" to promote these goals and decrease conflicts among counsel. Manual §§ 10.225, 14.121. For that reason, the members of the "Remele/Sieben Group" of applicants, who were to lead the Minnesota litigation, reached out to Kansas leadership regarding the prospect of an agreement to coordinate their efforts. Ultimately, the members of the Remele/Sieben Group negotiated and executed a Joint Prosecution Agreement ("JPA") with the Kansas MDL leadership. The JPA provided a structure for sharing common benefit work, cooperation, and coordination of the prosecution of the claims against Syngenta, and established a framework for allocating compensation related to such activities.[1] And while the JPA was never officially "approved" by any court, both the Minnesota and Kansas courts were aware of the terms of that agreement and issued Common Benefit Orders that were consistent with the JPA.

The JPA was not an academic exercise. From the execution of the agreement through the settlement, the Minnesota and Kansas leadership managed the litigation pursuant to its terms. Consistent with the JPA, Minnesota leadership paid $1,115,894 to the Kansas leadership for shared experts and discovery expenses. [*See* Remele Decl., ¶ 10.] In addition, after the settlement of the first case tried in Minnesota, Minnesota leadership remitted a portion of the recovery to Kansas leadership pursuant to the JPA. Further, Minnesota and Kansas leadership coordinated all offensive discovery pursuant to the framework set out in the JPA, including the review of

[1] Following a Minnesota state district court judge's appointment of the Minnesota Plaintiffs' Executive Committee, all but one member of the appointed leadership team in Minnesota executed a First Addendum to the Amended and Restated Joint Prosecution Agreement along the same terms as the original JPA. The only MN PEC member who refused to sign the agreement was Clayton Clark, who eventually resigned his leadership position and began filing his cases in Illinois to avoid paying any common benefit fees for the work performed in prosecuting his clients' cases against Syngenta.

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millions of Syngenta documents and the depositions of Syngenta and third-party witnesses. Not only did this coordination allow for increased efficiency in terms of dealing with Syngenta and its attorneys, but it also economized the use of judicial resources in both Minnesota and Kansas. In sum, from the very beginning of this case, and throughout the litigation, the Kansas and Minnesota leadership groups have acted to increase cooperation and decrease conflicts, all for the ultimate benefit of their respective clients. That strategy allowed the plaintiffs to utilize the unique mass tort/class action structure, as well as the parallel state and federal tracks, to obtain a favorable result for U.S. corn farmers.

Now that the case against the defendant has concluded, as is often the case in this type of litigation, the attorneys have aimed their focus at each other. And while some amount of revisionism and competition is natural, we respectfully remind the Court of the singular cooperation that led to this excellent result. The unique dual-track nature of this case, along with the power of tens of thousands of individual lawsuits, ensured that Syngenta was fighting this litigation on two fronts. At the same time, the cooperation between Minnesota and Kansas leadership avoided duplication of efforts, preserved judicial resources, and decreased intra-plaintiff conflicts during prosecution of the case. This Court now has the opportunity to incentivize similar cooperation in future hybrid litigation and to set the standard for the allocation of attorneys' fees in such cases.

In the course of finalizing the settlement agreement and associated documentation, there has been a great deal of discussion among certain groups of counsel in support of voiding the JPA and its allocation of attorneys' fees and expenses. As set forth in detail below, Bassford Remele, as Co-Lead Counsel to individual claimants in the Minnesota action, we submit that

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voiding the JPA would set bad precedent for future complex litigation, and would be inequitable on the facts of this case.

The coordinated Syngenta litigation is unquestionably unique. Prior to this case, we are aware of no other instance in which the lead counsel of two parallel consolidated cases attempted to address the common issues that led to conflict in large litigation, including how to allocate fees between class and individual counsel. Here, that issue was addressed *at the beginning of the case* for the express purpose of obviating the conflict that is now before the Court.[2]

The Court has a unique opportunity to craft a template for the allocation of fees in future mass tort/class action hybrid cases by recognizing the importance of agreeing on fee allocation at the front end of the litigation, thereby lessening future conflict and increasing the cooperation and conservation of judicial resources that are essential in large litigation. Moreover, by obviating or disregarding the JPA, the Court would be sending a message to future litigants that front-end agreements to cooperate in complex litigation may not be enforced, providing a substantial disincentive for future cooperation. Such a message would be particularly egregious where, as here, Minnesota and Kansas leadership spent nearly three years litigating their parallel cases pursuant to the terms of the JPA, and exchanging hundreds of thousands of dollars pursuant to that contract to foster continued cooperation and coordination. Finally, obviating or disregarding the JPA would have the added adverse consequence of disrupting the existing framework in the JPA for giving litigants their choice of forum as to where to pursue their claims. Over 70,000 individual claims were filed in Minnesota. The litigants who filed those

[2] Kansas leadership will undoubtedly argue that in entering into the JPA, it did not foreclose its ability to also seek a class-attorney fee award. To be sure, the JPA does not preclude such an action. However, the Court's inquiry in determining fees is ultimately an equitable one. Therefore, as discussed in detail below, it will be difficult, if not impossible, for the Court to determine a total equitable fee allocation without seeing all of the final claims data.

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claims in Minnesota did so for one reason: they believed that because of the JPA, they had certainty as to how their claims would be prosecuted and how fees and expenses would be allocated pursuant to their contingent contracts.

For all these reasons, we believe that an equitable fee allocation can occur only after the claim period has closed and the respective courts have the raw claims data available to determine which clients have participated in the settlement. By waiting for final claims data, the Court will be able to analyze the relative success of the Minnesota and Kansas actions in obtaining an actual recovery for their clients and thereby determine the exact amount of the common benefit assessment required by the JPA. In addition, by delaying a final decision until all claims data is available, the respective camps of attorneys will have the opportunity to analyze that same data and supplement their arguments, providing the Court with additional authority based upon the actual "facts on the ground" at the conclusion of the claims process.

BACKGROUND OF THE MINNESOTA LITIGATION

One of the many difficult aspects of the Court's task in this case is to equitably determine the allocation of fees to counsel involved in cases that the Court did not have the opportunity to oversee. To this end, the Court should consider the work performed in the Minnesota action and the impact of that work on the ultimate global resolution of the litigation.[3]

The Minnesota Syngenta litigation began in late 2014. At that time, a number of Minnesota corn farmers began filing lawsuits against Syngenta in Minnesota state court. All of those cases asserted state-law tort claims, and given Syngenta's status at the time as a Minnesota domiciliary, these state-court cases were intended to create a "second front" in the nation-wide

[3] We join in and adopt the arguments advanced by co-lead counsel Daniel Gustafson and William Sieben regarding the effort undertaken in Minnesota and the substantial common benefit that resulted for all plaintiffs in the coordinated actions.

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litigation against Syngenta. As this Court knows, those Minnesota cases, as well as others, were removed by Syngenta on the theory that the claims implicated the "federal common law of foreign relations." Attorneys from Bassford Remele, Watts Guerra, and other firms vigorously opposed these removals, and worked closely with the Kansas MDL leadership to secure the remand of these cases to state court. [*See* Federal MDL Doc. 395.]

A. Formation of the JPA Establishes the Framework for Cooperation and Sharing of Common Benefit Fees.

Given the volume of cases being filed in Minnesota state courts, it became clear to all involved that some form of consolidation would be required if remand was granted. To that end, and having already worked collaboratively with Kansas MDL leadership on the remand process, attorneys Lewis A. Remele, Jr., Francisco Guerra IV, Mikal C. Watts, Richard M. Paul III, Robert K. Shelquist, and William R. Sieben,[4] approached the Kansas leadership regarding the prospect of a JPA to coordinate the prosecution of parallel claims following remand. In June 2015, after substantial negotiations between the two sides, the Kansas leadership and members of the Remele/Sieben Group agreed to terms and executed the JPA. [Sealed Mot. by Watts Guerra for Leave to File "Confidential" Docs. Publicly, Exh. A.][5] The purpose of the JPA was best explained by the Kansas MDL Co-Lead Counsel in their Statement in Support of the Remele/Sieben Group that was filed in the Minnesota action. [*See* Remele Decl., Ex. A.] There, Kansas leadership explained that the JPA was intended to "foster coordination and cooperation of the groups' work together in connection with the prosecution of the Syngenta claims," and to

[4] This group of counsel eventually became known as the "Remele/Sieben Group" and is referred to as such throughout this submission.

[5] Co-Lead Counsel in the Minnesota case, Watts Guerra, will submit a motion to permit them to file the JPA under seal with the Court. Because that document has not been filed as of the time of this submission, we are unable to use a document number to reference that submission specifically.

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"preemptively address[] issues that may arise in connection with Federal MDL and Minnesota MDL common benefit assessments." [*Id.* at ¶¶ 3-4.] Further, the JPA was enacted to "avoid all material duplication of effort, leverage the work product of both MDLs, and avoid a common benefit arbitrage between the Federal MDL and the Minnesota MDL that will promote distrust and dysfunction." [*Id.* at ¶ 9.] The JPA and the Kansas Co-Lead Statement in Support of the Remele/Sieben Group were submitted to Judge Sipkins in Hennepin County, Minnesota as a part of the Remele/Sieben Group's application for leadership.

On August 5, 2015, Judge Sipkins issued an Order Appointing Lead Counsel, naming all of the members of the Remele/Sieben Group, along with five members of the competing slate, to the Minnesota Plaintiffs' Executive Committee ("PEC") and naming Lewis A. Remele, Jr. and Frank Guerra Co-Lead Counsel, with Daniel Gustafson and William Sieben as Interim Co-Lead Counsel to the putative Minnesota class. [*See* Remele Decl., Ex. B.] In that Order, Judge Sipkins specifically discussed the JPA and its commitment to cooperation as a factor in his decision appointing leadership. [*Id.* at 8.] Following the appointment of the PEC, the Minnesota Co-Lead Counsel and Co-Lead Class Counsel negotiated the First Addendum to Amended and Restated Joint Prosecution Agreement ("JPA First Addendum") to extend the JPA's framework of cooperation to members of the PEC that were not part of the Remele/Sieben Group. [*See* Sealed Mot. by Watts Guerra for Leave to File "Confidential" Docs. Publicly, Exh. B.]

In addition, the execution of the JPA First Addendum was intended to address fee issues, including those resulting from any Minnesota class recovery, early in the litigation. This was necessary because the JPA, which required only an 11% percent common benefit assessment, covered only coordination by Kansas and Minnesota leadership of the *individual* actions filed in Minnesota. To remedy this, the JPA First Addendum includes provisions ensuring that

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Minnesota leadership would pursue claims on behalf of the Minnesota class, while agreeing that any fees recovered from the Minnesota class would be split 65% to Minnesota and 35% to Kansas. Because of the commonality between the individual and class claims, Minnesota leadership viewed any class fees that might be recovered from the Minnesota class to be part of the entire allocation of common benefit fees that might be awarded for its work on both individual and class claims.

All but one member of the Minnesota PEC agreed to the terms of JPA First Addendum, and the document was executed in January of 2016. PEC member Clayton Clark chose to resign his position in the Minnesota leadership rather than agree to cooperate and pay for the common benefit work performed by counsel in the Federal MDL. Following his resignation, Mr. Clark and his colleague, Martin Phipps, eventually began filing claims in Illinois for the apparent purpose of avoiding having to pay for, or contribute to, any common benefit work.

With the PEC established and the issues of coordination and common benefit fees addressed by the JPA, the Minnesota leadership immediately began work on behalf of its tens of thousands of individual farmer clients and the putative Minnesota class. The composition of the Minnesota PEC reflected the unique nature of the Minnesota case. Judge Sipkins' decision to appoint members from both slates of prospective leadership ensured that there was an adequately sized team of lawyers to advance the litigation, and that such lawyers had expertise in both mass tort and class litigation. This mix was useful because unlike either the Kansas or Illinois cases, Minnesota is the only venue in the coordinated Syngenta litigation that had both a significant number of individual cases and a class action. As the Court is aware, the number of individual cases ultimately filed in Minnesota state court vastly outnumbers the size of the Minnesota class itself, and totals over 70,000 individually filed cases from across the country.

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B. The Court-Issued Common Benefit Orders Are Consistent With the JPA and Provide a Guide for the Reasonable Allocation of Fees.

With the JPA in place and the Minnesota PEC appointed, among the Minnesota Court's first priorities was the establishment of a Common Benefit Order. On October 29, 2015, Minnesota leadership submitted its proposed Common Benefit Order. On December 5, 2015, the Minnesota Court issued its Common Benefit Order. [Remele Decl., Ex. C.] The Minnesota Common Benefit Order was drafted to closely track the Common Benefit Order issued in the Federal MDL, and to align with the terms of the JPA. [*See id.* at 6 ("Nothing in this section is intended to be inconsistent with the JPA or the Federal MDL Common Benefit Order . . . .").] The Common Benefit Orders, while not necessarily binding in the case of a class settlement, were the result of substantial discussions and revisions amongst counsel and reflect the intentions of signatories to the JPA. Accordingly, the Common Benefit Orders provide the Court with a guide for the reasonable and equitable division of fees.

C. The Work Performed in the Minnesota Litigation Created a Second Front in the Syngenta Litigation and Applied Substantial Pressure on Defendants.

From late 2015 through settlement, the Minnesota case placed substantial litigation and settlement pressure on Syngenta and was a substantial contributing factor to the ultimate success obtained on behalf of American corn farmers. Minnesota leadership recognized from the beginning that the liability issues relating to the individual claims and the class claims were essentially common, and that all offensive discovery, excepting specific damages issues, would apply equally to both individual and class claims. As a result, Minnesota leadership agreed to pursue all of its work on a common basis, without distinguishing between class and individual

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work.[6] Further, Minnesota leadership determined from the outset that any fees allocated to the Minnesota PEC for common benefit work would be submitted on a common basis, and no distinction would be made between the work done on individual claims versus class claims. Ultimately, this coordination proved very successful.

The Minnesota leadership drafted substantive briefings on over 50 separate legal questions and motions from the beginning of the case through the global settlement during the Minnesota class trial. This work included drafting over 200 pages of briefing in support of and opposing the summary judgment motions filed in the first Minnesota bellwether case, over 110 pages of briefing in support of and opposing summary judgment motions filed in the Minnesota class case, drafting a motion to amend to add a claim for punitive damages that consisted of over 100 exhibits, and obtaining favorable results on behalf of the plaintiffs on nearly every legal issue raised with the court. But beyond the volume of work performed, there can be little doubt of the *impact* that the work in the Minnesota case had in advancing the overall litigation. Given the volume of work, there is no practical means by which to recount the importance of the day to day work performed by Minnesota leadership that advanced the case against Syngenta. However, there are a few issues that bear special attention.

Establishing the Threat of Nationwide Punitive Damages

Unlike in the Kansas MDL, the Minnesota plaintiffs were required to bring a motion to amend their Complaint to add a claim for punitive damages. Under Minnesota law, a party may amend their Complaint to add a claim for punitive damages by presenting *prima facie* evidence of the defendants' deliberate disregard for the rights of others. *See* Minn. Stat. § 549.20, subd.

[6] The JPA and its common benefit assessment provision incentivized Minnesota leadership to work cooperatively and not distinguish between work related to the individual claims and the class claims.

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1(a); *Olson v. Snap Prods., Inc.*, 29 F. Supp. 2d 1027, 1034 (D. Minn. 1998). In October 2016, with discovery still ongoing, the Minnesota leadership filed its Motion for Leave to Amend the Second Amended Complaint to Assert a Claim for Punitive Damages on behalf of the five bellwether cases that had been scheduled for trial. Those bellwether cases involved plaintiffs asserting state-law tort claims from four separate states: Nebraska, Minnesota, Ohio, and Iowa.

The Minnesota punitive damages brief presented nearly twenty pages of factual evidence and referenced approximately 100 documents demonstrating that Syngenta acted with deliberate disregard for the rights of American corn farmers. This motion was among the first, if not *the* first, opportunity for plaintiffs in the coordinated Syngenta litigation to present evidence to a court regarding Syngenta's conduct in a motion for substantive relief. The parties argued the punitive damages motion in December 2016.

On January 9, 2017, the Minnesota Court issued its Order permitting the Minnesota bellwether-trial plaintiffs to amend their Complaints to add a claim for punitive damages, and requested supplemental briefing regarding choice-of-law issues concerning the application of Minnesota law to the claims of the non-Minnesota bellwether trial plaintiffs. The Minnesota Court's punitive damages order provided an in-depth analysis of the evidence presented and concluded that "Syngenta knew that releasing Viptera prior to securing import approval in China created a high probability of trade disruption," but that despite that knowledge, Syngenta proceeded with the commercialization and then "acted to conceal its actions and shift blame to the grain trade, or China, or to the farmers themselves for the consequences." [Remele Decl., Ex. D at 33.] The Court summarized its view of Syngenta's conduct based on its review of the evidence, stating that "Syngenta was willing to risk the loss of the Chinese market for U.S. corn, despite knowledge of the financial consequences that a trade disruption would have on American

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corn farmers." [*Id.*] The Minnesota punitive damages Order was a substantial success for the plaintiffs in Minnesota, as well as for plaintiffs throughout the coordinated Syngenta litigation.

As directed by the Court, the parties then briefed the question whether Minnesota law on punitive damages should apply to the claims on the non-Minnesota bellwether trial plaintiffs. The application of Minnesota punitive damages law was particularly important to the Minnesota litigation because *Mensik*, the first bellwether case set for trial, involved the claims of a Nebraska corn farmer. Nebraska law prohibits punitive damages. *See Golnick v. Callender*, 860 N.W.2d 180, 190 (Neb. 2015). The *Mensik* bellwether case was scheduled to be the first case tried in the entire coordinated litigation. Thus, having the ability to pursue punitive damages in that case would increase Syngenta's exposure, but more importantly, favorably impact the prospect of settlement by securing the right to seek punitive damages even in those states that banned exemplary damages. On April 11, 2017, the Minnesota Court issued its Order permitting the remaining non-Minnesota bellwether trial plaintiffs to amend their Complaints to add claims for punitive damages. [*See* Remele Decl., Ex. E.] The Court's Order permitting the assertion of punitive damages to claims arising from states that did not permit exemplary damages created the threat of nationwide punitive damages in the Minnesota litigation. With over 70,000 individual plaintiffs on file in Minnesota, the threat of punitive damages in *each* of those cases provided a strong incentive for Syngenta to pursue settlement negotiations.

Establishing the Viability of Viptera and Duracade Producer Claims

Farmers that grew corn containing Syngenta's Viptera and Duracade seed products were specifically excluded from the class definitions in both Minnesota and the Federal MDL. [*See* Federal MDL Doc. 2547 at 30-33; November 11, 2016 Order and Memorandum of Class Certification, at 13.] As such, any Viptera or Duracade grower seeking to recover for their losses

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was required to assert individual claims. In recognition of that fact, Minnesota leadership advocated for the inclusion of a Viptera or Duracade grower in the initial set of bellwether trials to provide the plaintiffs and Syngenta the opportunity to determine the viability of Viptera/Duracade producer claims. Farmer Daniel Mensik of Nebraska was selected to serve as the bellwether trial plaintiff for Viptera/Duracade grower claims. The Minnesota Court not only included the *Mensik* case in the initial set of bellwether trials, but scheduled the *Mensik* case as the first trial in the nation. As such, the *Mensik* case was prepared for an eventual trial, including briefing his claims on summary judgment.

Throughout the litigation, Syngenta took the position that Viptera/Duracade grower claims were barred by the application of stewardship agreements with Syngenta customers, which contained disclaimers and limitations of damages, as well as so-called "bag tags" with similar language that Syngenta argued created a contract upon the opening of the Syngenta seed bag. Under Syngenta's theory, the claims of all Viptera/Duracade growers would be barred due to the provisions of these contracts. The parties briefed the Stewardship Agreement issue on summary judgment in the *Mensik* case, which was filed concurrently with the Federal MDL's motion for summary judgment on behalf of the Kansas class of plaintiffs. Syngenta dedicated over 10% of its brief in opposition to summary judgment in the *Mensik* case to the defense of its Stewardship Agreement arguments. However, the Minnesota Court's April 11, 2017 Order roundly rejected Syngenta's position, holding that "the Stewardship Agreement will not be enforced as a matter of law." [Remele Decl., Ex F at 32.] As such, the Minnesota leadership was able to successfully defeat Syngenta's primary legal argument against Viptera/Duracade growers, greatly increasing the pool of plaintiffs with viable claims against Syngenta and increasing Syngenta's overall exposure.

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Establishing a Higher Per-Bushel Damages Model

In addition to increasing Syngenta's exposure by establishing the viability of Viptera/Duracade grower claims, the Minnesota litigation was able to expand Syngenta's potential liability by increasing the per-bushel damages claimed by individual claimants in the Minnesota action as compared to their class counterparts. This was accomplished through the expert analysis and report of Dr. Mohan Rao, who served as the damages expert for the individual claimants in the Minnesota case. As this Court knows, leadership for the Minnesota and Federal classes retained Drs. Bruce Babcock and Colin Carter as expert witnesses on the issue of damages.

Convinced that the value of their clients' claims was higher, Minnesota Co-Lead Counsel began discussions with Dr. Rao regarding his view of the potential damages. Ultimately, Dr. Rao's analysis concluded that the plaintiffs' per-bushel damages from the loss of the Chinese export market were nearly three times those calculated by Drs. Babcock and Carter for the primary damages period of November 2013 through December 2014.[7] Syngenta's attempts to exclude Dr. Rao's analysis in the Minnesota litigation were denied, and Dr. Rao was prepared to testify on behalf of bellwether-plaintiff Mensik during the first-in-the-country trial scheduled for April 2017. Unfortunately, the *Mensik* case resulted in a mistrial and Dr. Rao never got the opportunity to testify prior to global settlement. Nonetheless, Dr. Rao's expert analysis and retention on behalf of the more than 70,000 individual plaintiffs in the Minnesota litigation

[7] Dr. Rao's expert report calculated that per-bushel damages resulting from the loss of the Chinese export market at $.50 for the period of November 18, 2013 through December 7, 2014, and $.15 from December 8, 2014 through August 26, 2016. By contrast, Dr. Babcock calculated that damages as (at most) $.157 per bushel for marketing years 2013/14, $.19 for marketing years 2014/15, and $.116 for marketing years 2015/16. Dr. Carter calculated his damages at $.148 per bushel for marketing years 2013/14, $.13 for marketing years 2014/15, and $.085 for marketing years 2015/16.

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drastically increased Syngenta's overall exposure and assisted in achieving the historic settlement.

Preventing the Allocation of Fault to Third-Parties and Plaintiffs

The Minnesota litigation also scored a substantial legal victory in defeating Syngenta's attempt to allocate or compare fault to non-party grain handlers Cargill and ADM, to the People's Republic of China, and to the plaintiffs themselves. As recognized by the Minnesota Court in its Order on plaintiffs' motion to amend to add a claim for punitive damages, one of Syngenta's primary defenses was to allocate fault to others in an attempt to decrease its responsibility and liability for its actions. [*See* Remele Decl., Ex. D at 33.] In two separate summary judgment motions, the Minnesota leadership defeated Syngenta's allocation of fault and comparative fault defenses, thereby substantially decreasing Syngenta's opportunity to deflect blame at trial. [*See, e.g.*, Remele Decl., Ex. F at 25–28; *id.*, Ex. G at 20–28.] The practical effect of these rulings became increasingly clear during the trial on the Minnesota class' claims, in which Syngenta was repeatedly prevented from arguing that third parties were to blame for the loss of the Chinese export market.

Completing and Submitting Over 67,000 Plaintiff Fact Sheets to Defendants

Unlike the Kansas or Illinois actions, the Minnesota litigation required the preparation and submission of tens of thousands of Plaintiff Fact Sheets to Syngenta. All told, over 67,000 Plaintiff Fact Sheets ("PFSs") were submitted to Syngenta by plaintiffs with claims filed in the Minnesota litigation. [Remele Decl., ¶ 11.] Firms with clients in the Minnesota litigation expended 67,253 hours to complete and submit PFSs to comply with the Court's Order. [*Id.*] While this work may not be "Common Benefit Work" as that term is defined in the respective

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Common Benefit Orders,[8] there can be little doubt of the positive impact this work had in securing settlement of the global Syngenta litigation. The PFS process served to show Syngenta that the plaintiffs were prepared to vigorously prosecute their claims and to actively participate in the case.

D. The Minnesota Litigation Results in the First Settlement of a Syngenta Claim in the Nation.

Following the mistrial of the *Mensik* bellwether trial on April 26, 2017, the *Mensik* case was rescheduled for trial on July 10, 2017, immediately following the conclusion of the Kansas class trial in the Federal MDL. On June 28, 2017, bellwether-plaintiff Mensik verbally accepted a settlement offer from Syngenta and agreed to dismiss his claims. Syngenta's settlement of the *Mensik* case was the first settlement in the coordinated Syngenta litigation, and the first instance in which Syngenta demonstrated a willingness to settle any claims.

E. The Global Syngenta Litigation Is Settled Only Days Before the Minnesota Class Plaintiffs Rest Their Case.

On September 11, 2017, the Minnesota class trial began in Hennepin County District Court. During the trial, Minnesota leadership selected a jury, took the adverse testimony of two of Syngenta's most critical witnesses, directed the testimony of non-retained expert Dr. Randal Giroux, and directed the testimony of two of the three class representatives. Following a brief delay in the Minnesota trial schedule to permit settlement negotiations, the global settlement was announced on September 26, 2017. The global settlement occurred just days prior to the Minnesota class plaintiffs resting their case and after nearly two weeks of trial. The Minnesota class litigation, which was jointly staffed and prosecuted by Minnesota class and individual

[8] As discussed *infra*, the Minnesota Co-Leads have submitted time received from scores of lawyers representing individual claimants who have argued that the time spent on PFS constitutes common benefit time. The Minnesota Leadership requests guidance from the Court as to whether these efforts do constitute common benefit time.

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counsel, placed substantial pressure on Syngenta to agree to final settlement in order to avoid a second devastating trial defeat following the success of Kansas leadership just months earlier.

OVERVIEW OF RECOMMENDED FEE AND EXPENSE ALLOCATION

Bassford Remele, as Co-Lead Counsel for the Minnesota individual plaintiffs, offers the following proposed basic framework for allocating attorneys' fees and expenses as part of the global settlement. We understand that the Court has indicated that every farmer will receive the same per-bushel recovery regardless of whether they pursued their claims individually or as an absentee class member.

The recommended framework is premised on three primary assumptions:

1) One-third of the total settlement will be used for the payment of attorneys' fees and expenses.[9]

2) The Court will wait until final claims data is available to determine an equitable allocation of fees.

3) Any non-common benefit fees or expenses will be offset by common benefit fees and expenses, whether in the form of an assessment or in the reduction of a contingent fee percentage.

With these assumptions in mind, Bassford Remele proposes a fee and expense allocation framework that relies on two overarching positions: (1) the Court should rely on the JPA to set a benchmark common benefit fee percentage and subsequently apply an appropriate multiplier for common benefit fees, and (2) the Court should enforce the contingent fee contracts entered into between plaintiffs and their individually retained attorneys.

[9] We understand that other attorneys have formally noticed a motion to request that the Court establish this percentage as a fund to pay fees and expenses. We join in that motion and request the same relief.

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A. The Court Should Enforce the Joint Prosecution Agreement By Using it to Set a Benchmark Common Benefit Fee Percentage.

The Court should enforce the JPA, as amended and executed between the Minnesota and Kansas leadership groups. As this Court is aware, the JPA requires that individual claimants pay 11% of any recovery into a common benefit fund, of which 5.5% would to go to Minnesota leadership and 5.5% would go to Kansas leadership. Further, the JPA requires that any Minnesota class recovery be split 65% to Minnesota leadership and 35% to Kansas leadership.

Given the unique posture of this case, there are two methods for calculating the common benefit fee that would allow this Court to effectively honor the JPA and encourage coordination in future hybrid actions. First, the Court could strictly enforce the JPA by calculating common benefit fees as 11% of the total recovery obtained by Plaintiffs with individual cases filed in Minnesota, split that amount evenly between Minnesota and Kansas, and add multipliers based on lodestar and other relevant factors to arrive at a common benefit fee allocation that would be fair to both Minnesota and Kansas leadership. Alternatively, the Court could follow recent case law and apply the same common benefit benchmark percentage to the total settlement amount ($1,510,000,000), split that amount evenly between Minnesota and Kansas leadership, and use multipliers to adjust the common benefit fees so that they are fair to both Minnesota and Kansas leadership and consistent with the allocation under the JPA. Under either method, the common benefit fees would be paid from the one-third of the total settlement set aside for payment of fees, and therefore, the method chosen will have no impact on recovery by class versus individual plaintiffs.

Regardless of which approach the Court uses, the Court should delay its allocation of common benefit fees until all claims data is available. Without that data, the Court will not know which group of plaintiffs—individuals with filed cases versus absentee class members—

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ultimately files claims or the relative total recovery for those two groups. Further, claims data is necessary for the Court to know the value of the 11% assessment on individual recoveries provided for in the JPA. Once the Court has that data, it will better be able to determine an equitable allocation of common benefit fees between Minnesota and Kansas.

B. The Court Should Recognize and Enforce the Contingent Fee Agreements.

The Court should recognize and enforce the contingent fee agreements entered into between plaintiffs and individually retained attorneys, which form the basis of the JPA common benefit assessment discussed above, with the following exceptions:

First, as will be discussed in detail below, the Court has inherent legal and discretionary authority to adjust the percentage in contingent fee contracts. As Co-Lead Counsel for Minnesota individual claimants, Bassford Remele proposes that, to the extent the Court reduces the contingent fee percentage awarded pursuant to the contracts to reflect an appropriate common benefit assessment or offset, the reduction should be graduated to recognize and reward the attorneys that did the most work to advance the case and procure the settlement. Accordingly, counsel representing Minnesota claimants should receive the highest contingent percentage. Counsel representing Illinois claimants, who also pursued individual claims against Syngenta, should receive the next highest percentage. The percentage awarded in Illinois should be substantially lower than that received by Minnesota counsel in recognition of the fact that Illinois counsel did not proceed beyond the earliest stages of litigation, did not actively participate in discovery or motion practice, and had a minimal influence on the ultimate settlement of the case. Finally, all other lawyers representing individual plaintiffs who did not file claims prior to the settlement should receive the lowest contingent fee percentage. We leave it to the Court's discretion to determine the appropriate percentage for each category.

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Second, to the extent this Court offsets a common benefit fee award percentage against contingent fees, the same offset should apply to all contingent fees regardless of whether the attorney signed the JPA. To hold otherwise would allow attorneys who refused to coordinate with Minnesota and Kansas leadership to "free ride" off the work completed by those groups. We believe that this basic framework, as analyzed in more detail below, will permit the Court to fairly and adequately compensate all counsel, encourage and incentivize future cooperation in hybrid actions, and honor the agreements that formed the foundation for success in this case.

ANALYSIS

I. THE COURT HAS BROAD AUTHORITY TO AWARD ATTORNEYS' FEES.

This Court has broad authority to award attorneys' fees incurred for the benefit of the settlement class, including reasonable fees to both the court-appointed leadership groups and the attorneys retained by individual plaintiffs. This includes the inherent authority to award common benefit fees, to review and approve contingent fees, and to enforce agreements between counsel relating to common benefit fees.

A. The Court Has Authority to Award Common Benefit Fees.

This Court has inherent authority to award attorneys' fees incurred for the common benefit of the settlement class. This authority is derived in part from the equitable doctrines of *quantum meruit* and unjust enrichment. *See, e.g.*, *In re Vioxx Prod. Liab. Litig.*, 760 F. Supp. 2d 640, 647–48 (E.D. La. 2010) [hereinafter *Vioxx*] (citing *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190, at *4 (E.D. Mo. Feb. 24, 2010) [hereinafter *Genetically Modified Rice*], *aff'd*, 764 F.3d 864 (8th Cir. 2014)); *In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, MDL No. 05–1708 (DWF/AJB), 2008 WL 3896006, at *4 (D. Minn. Aug. 21, 2008) [hereinafter *Implantable Defibrillators*]. The *Manual* further provides that courts have authority to award fees "where a common fund has been created

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by the efforts of a plaintiff's attorney and [that this authority] rests on the principle that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Manual* § 14.121.

"MDL courts have consistently cited the common fund doctrine as a basis for assessing common benefit fees in favor of attorneys who render legal services beneficial to all MDL plaintiffs." *Vioxx,* 760 F. Supp. 2d at 647–48. In doing so, courts have recognized that one of the primary reasons to award common benefit fees is to prevent unfair "free-riding" and to require all who benefitted from the work to share in the expense. *See, e.g., In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-MD-02323-AB, 2018 WL 1635648, at *2 (E.D. Pa. Apr. 5, 2018) [hereinafter *NFL*]; *Genetically Modified Rice.*, 2010 WL 716190, at *5. As stated by the U.S. Supreme Court, "persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." *Boeing Co. v. Van Genert*, 444 U.S. 472, 478 (1980).

In addition, this Court has the power to award common benefit fees as part of its authority to manage complex litigation. Courts have held that such power derives from both the managerial power over consolidated litigation, as well as from a court's inherent equitable authority. *See Genetically Modified Rice*, 2010 WL 716190, at *4; *Implantable Defibrillators*, 2008 WL 3896006, at *5; *see also Manual* § 22.62. Moreover, the authority to award fees as part of managing complex litigation is recognized by Fed. R. Civ. P. 23(h), which states that a court "may award reasonable attorneys' fees" in the context of a class action. Courts have expanded the authority granted by Fed. R. Civ. P. 23 to the mass tort context by reasoning that mass torts "ha[ve] many of the characteristics of a class action and may properly be characterized as a

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quasi-class action subject to general equitable powers of the court." *In re Zyprexa Prods. Liab. Litig.*, 424 F.Supp.2d 488, 491 (E.D. N.Y. 2006).

B. The Court Has Authority to Set Contingent Fees.

The Court also has authority to determine the reasonableness of the contingent fees contracted for between attorneys and individual clients. *See, e.g., In re Michaelson*, 511 F.2d 882, 888 (9th Cir. 1975) ("The court has the authority to inquire into fee arrangements to protect clients from excessive fees and suspected conflicts of interest."); *Karim v. Finch Shipping Co.*, 233 F. Supp. 2d 807 (E.D. La. 2002), *aff'd*, 374 F.3d 302 (5th Cir. 2004) ("Among the broad equitable powers of a federal court is its supervisory capacity over an attorney's contingent fee contracts."). In this case, the individually retained attorneys not only did work for the benefit of their own clients, but their work ultimately served to benefit the entire settlement class. Therefore, the Court's inherent authority to adjust contingent fees, combined with its authority to award common benefit fees, provides the Court with the discretion necessary to fashion fee awards in a way that is equitable to all parties involved.

II. AGREEMENTS BETWEEN COUNSEL RELATING TO THE DIVISION OF ATTORNEYS' FEES ARE ENFORCEABLE AND ENCOURAGE COOPERATION AND COORDINATION AMONGST COUNSEL.

Although the Court clearly has broad authority to award common benefit fees, the case law is less clear regarding a Court's authority to abrogate agreements between counsel relating to how court-awarded fees will be divided. *See, e.g., Rutenbeck v. Grossenbach*, 867 P.2d 36, 37 (Colo. App. 1993) ("As long as the agreement to divide the fee was based on a good faith division of services and responsibility at the time of contracting, the fee agreement should be binding."). Moreover, abrogating the fee-sharing agreement between counsel in this case (in the form of the JPA) would only serve to discourage cooperation and coordination in future cases.

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This Court should give broad deference to the fee sharing agreements incorporated in the JPA. The *Manual* and case law from around the country uniformly state that prospective agreements regarding fee sharing amongst counsel advance the public policy of encouraging coordination among attorneys involved in mass actions. First, section 14.215 of the *Manual* states that "[e]arly in the litigation, the court should define designated counsel's functions, determine the method of compensation . . . and establish the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions." Second, section 14.121 acknowledges the importance of "understandings reached with counsel at the time of appointment concerning the amount or rate for calculating fees" and "any agreements or understandings, including side agreements, between attorneys and their clients or other counsel involved in the litigation." Third, in discussing judicial review of fee applications, section 14.231 suggests "[e]stablishing at the outset of the case the method of compensation and, if possible, any percentage formula that will be used." Finally, section 22.62 stresses the importance of "organizing counsel to help coordinate cases among state and federal courts." Thus, the *Manual* is clear that addressing fee allocation early in a case is crucial to ensuring coordination and cooperation rather than division and divisiveness.

Well aware of this authority and acquainted with the threat of fee litigation, the leadership groups in Minnesota and Kansas followed the *Manual*'s recommendations by entering into the JPA to promote coordination and avoid fee disputes. Following the adoption of the JPA, both this Court and the Minnesota Court recognized the importance of these agreements by entering Common Benefit Orders adopting similar provisions and, in Minnesota, specifically noting that "[n]othing in this section is intended to be inconsistent with the JPA or the Federal MDL Common Benefit Order . . . ." [Remele Decl., Ex. C at 6.] Therefore, at a minimum, this

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Court should give substantial deference to the self-ordering negotiated by counsel when allocating fees between the leadership groups. A fee award or allocation that conflicts with the JPA would discourage parties from following the *Manual* and coordinating efforts in the future.

III. ENFORCING THE JPA AND THE INDIVIDUAL CONTINGENT FEE CONTRACTS DOES NOT PRECLUDE AWARDING EQUITABLE COMMON BENEFIT FEES.

There are recent cases that grapple with the inherent tension that results in cases requiring the allocation of fees and expenses where there are individually retained attorneys with contingent agreements as well as court-appointed counsel seeking class fee awards. *See, e.g.*, *NFL*, 2018 WL 1635648 (E.D. Pa. Apr. 5, 2018); *Evans v. TIN, Inc.*, Civ. No. 11-2067, 2013 WL 4501061, at *1 (E.D. La. Aug. 21, 2013); *Vioxx*, 760 F. Supp. 2d 640 (E.D. La. 2010). These cases provide the Court a reasonable framework from which to proceed with the division of fees in this case. However, while these cases certainly provide helpful guidelines, none of them is directly analogous because none involve a JPA executed by leadership in which the two primary sets of counsel have already agreed to a formula for allocating fees and expenses.

There can be no true dispute that the legal work that ultimately led to Syngenta's settlement of this case was completed by the leadership in the Minnesota and Kansas cases. Accordingly, in determining the fair allocation of fees and expenses to be awarded, the Court should focus on the fee and expense framework constructed by those two leadership groups at the outset of the litigation. The Minnesota and Kansas leadership groups executed the JPA specifically to avoid the conflicts associated with reconciling the application of a fee methodology that involves both contingent fee recoveries in individual cases and class recoveries from class action settlements or recoveries. Therefore, the JPA should provide the starting point for the Court's allocation methodology because it represents the intentions of the two leadership groups *at the outset of the case*.

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During the prior negotiations regarding fee allocation in this case, various individuals have advocated that the JPA was abrogated by the settlement and is no longer enforceable. Without addressing the legal question whether a settlement can abrogate a private contract under which parties have operated for almost three years, abrogating the JPA makes little sense. The JPA represents a clear manifestation of agreement between Kansas and Minnesota leadership as to how to address the allocation of fees. The JPA provides this Court with a straightforward starting point from which the Court may begin its fee and expense allocation analysis. Once the final claims data becomes available, this Court will be able to analyze the fee allocation provided for by the JPA, and then use its discretion to adjust that fee allocation by using multipliers and its inherent discretion to review fee contracts in order to arrive at an allocation it deems fair and equitable in compensating for both private contingent fee agreements and common benefit work.

IV. THE COURT SHOULD AWARD CONTINGENT FEES WITH A COMMON BENEFIT OFFSET.

As this Court knows, more than 70,000 individual plaintiffs filed suit in the Minnesota litigation. Each of those plaintiffs was represented by one or more attorneys who worked to advance the interests of their clients and the case as a whole. Unlike many cases involving individual counsel and court-appointed leadership, the individually retained attorneys in Minnesota did substantial work that advanced the litigation as a whole. Individually retained attorneys drafted complaints and notices to conform, assisted in completing discovery in the bellwether discovery process, gathered documents, submitted over 67,000 PFSs to Syngenta's counsel, and are now guiding their clients through the claims process. No other jurisdiction in the coordinated Syngenta litigation required a similar level of involvement of individually retained attorneys. As such, we respectfully submit that the contingent fee agreements between the individually retained attorneys and their clients in the Minnesota action should be honored. To

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the extent that the Court determines that a reduction of the overall contingent award is warranted, we submit that the Court should tier the contingent awards to reflect the work completed by individually retained counsel in the Minnesota case as compared to in other venues, for all the reasons noted above.

A. Awarding Contingent Fees in Conjunction with Common Benefit Fees.

Awarding contingent fees in conjunction with common benefit fees is also supported by recent case law. In both *NFL* and *Vioxx*, the courts used a three-step process for awarding contingent fees. In those cases, the courts first determined the reasonable common benefit fee using the percentage of the fund method summarized below. Next, the courts analyzed the work performed in the case as though it was completed *solely* by individually retained attorneys without the benefit of court-appointed leadership, and determined the reasonable contingent fee based on that analysis. Finally, those courts then offset the common benefit fee percentage (calculated in step one) against the reasonable contingent fee percentage (calculated in step two). The final number following the offset represented the total cap on contingent fee recoveries in those cases. This method should be similarly employed in this case to ensure that contingent fee recoveries are awarded in a manner that is equitable to all counsel.

In addition to providing guidance on the procedure for awarding contingent fees and offsetting those fees against common benefit awards, the *NFL* and *Vioxx* decisions provide guidance on the appropriate contingent fee to award in complex cases like this. In the *NFL* case, the Eastern District of Pennsylvania issued two fee decisions, one regarding common benefit fees awarded and the second dealing with contingent fees for individually retained plaintiffs' attorneys ("IRPAs"). *See NFL*, MDL No. 2323, 2018 WL 1635648, at *1 (E.D. Pa. Apr. 5, 2018). These decisions provide this Court with the best example of the procedure by which the

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Court should analyze and ultimately allocate both common benefit and contingent fees in this case.

As discussed previously, the first decision in the *NFL* case used the percentage of the fund method and applied a benchmark percentage of 11% of the total recovery, analyzed the appropriateness of the percentage based on various factors, and then completed a lodestar check for reasonableness. *NFL*, 2018 WL 1635648, at *3–9. This Court should follow that same methodology in calculating common benefit fees in this case.[10]

After determining the appropriate common benefit fee award (as a percentage of the total recovery), the *NFL* court turned its attention to contingent fees in its second decision. At the outset, the court recognized the reality that, in that case, like here, "two sets of attorneys—IRPAs and Class Counsel—have worked to achieve results for individual Class Members." *NFL*, 2018 WL 1658808 at *2. The Court then held that "a one-third contingent fee best approximate[s] the risk and work that the two sets of attorneys (Class Counsel and IRPAs) undertook in this case." *Id*., at *3 (quoting the Expert Report of Professor William B. Rubenstein). In other words, the court determined 33% was a reasonable contingent fee. *Id*. at *1. The Court then then offset the 11% awarded as common benefit fees by capping contingent fees at 22%. *Id*.

While this Court should follow the *NFL* framework with respect to both common benefit and contingent fees, the factual differences in this case warrant higher fee percentages than were awarded in that case. Like here, *NFL* involved court-appointed leadership and individually retained attorneys that did *some* work to benefit the settlement class. However, in that case the

[10] It is understood from prior discussions that the Court does not intend to award fees in a manner that would result in a different per bushel recovery for plaintiffs with individually retained counsel versus absentee class members, as was the case in the *NFL* and *Vioxx* cases. However, the basic framework utilized by those Courts can be employed in a manner that provides for the same level of per bushel recovery for all plaintiffs and a fair and reasonable allocation of both contingency and common benefit fees.

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work of the individually retained plaintiffs' attorneys was limited to shepherding their clients through the claims process. As such, the Court limited the total fee to 33% (11% common benefit and 22% contingent) because the work completed by the IRPAs was limited in scope. *NFL*, 2018 WL 1658808 at *3. That is not the case here. In Minnesota, IRPAs did substantial substantive work, such as collecting documentation and completing PFSs, in addition to assisting their clients with complete of the claims process. Simply put, the IRPAs in this case did far more work than their counterparts in *NFL*.

Second, in *NFL*, 47% of the plaintiffs that filed claims to the settlement fund had IRPAs. *Id*. at *1. Here, we do not yet have claims data to demonstrate which clients successfully recovered. However, if we are correct and the percentage of recoveries is higher for plaintiffs with individual counsel that argues in favor of a higher contingent award for those IRPAs.

Finally, the *NFL* court awarded costs in addition to the contingent fee award to IRPAs. In this case, the vast majority of IRPAs paid all costs for their respective clients and agreed to recover those costs out of the contingent fee. This factual difference further supports a high contingency award. For all of these reasons, the Court should utilize a higher percentage in awarding contingent fees, particularly to those lawyers in Minnesota who completed substantial work that advanced the case.

The *Vioxx* decision supports the basic framework set forth in the *NFL* case, while also providing an insightful and useful background of the common fund doctrine. In that case, the court noted that the "modern trend" was for "class actions [to] morph into multidistrict litigation." *Vioxx*, 760 F. Supp. 2d at 647. The Syngenta litigation represents the most fulsome iteration of that trend: class actions in a multidistrict litigation proceeding parallel to a

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consolidated state court mass tort/class action hybrid. Ultimately, the *Vioxx* court set the contingent fee at 40% and offset that amount by the 8% it awarded as a common benefit fee.

B. The Court Should Award Attorneys in Minnesota the Highest Level of Contingent Fee.

The threat of 70,000 individual lawsuits no doubt influenced Syngenta's decision to settle this case. This is the strategic purpose of mass tort litigation: to overwhelm the defendant with the volume of claims, thus applying pressure in a way that class actions cannot. In this case, that was particularly true where the plaintiffs were Syngenta's pool of potential customers, creating a substantial business issue for the defendants. Ultimately, the presence of the individual plaintiffs and the work performed by them or on their behalf maximized the settlement value for *all* claims. But beyond that, there are additional reasons that counsel representing Minnesota claimants who filed cases before the settlement deserve enforcement of their contingent fee agreements.

First, the majority of contingent fee contracts entered into by Minnesota counsel are not solely between members of the leadership group and individual plaintiffs. Rather, the fee agreements in the Minnesota case often involve large networks of local referring lawyers who are likely not going to be compensated by the allocation of common benefit funds. In other words, the contingent fees under a majority of the Minnesota contingent fee contracts are being split among multiple law firms, the majority of which are not members of the Minnesota leadership.

Second, in January of 2016, Judge Sipkins granted Syngenta's motion seeking that each individual plaintiff making a claim in Minnesota complete and file a PFS. The Minnesota PFS required the IRPAs to gather a great deal of information from and on behalf of their clients and then work with their clients to accurately and completely fill out that document. Voiding or

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greatly reducing the contingent fee agreements in this case will result in substantial inequity, whereby large numbers of local referring lawyers will be left without any form of compensation despite investing substantial time and resources into the case.

We anticipate that some may argue that the individual lawyers that are not members of the Minnesota leadership should *not* be awarded a contingent fee in this case. That argument disregards the inescapable fact the Minnesota litigation required a substantial amount of work from all lawyers representing individual Minnesota claimants—referral and lead counsel alike. When the claims data becomes available, we anticipate that those numbers will reflect that the efforts of the individually retained lawyers in Minnesota served to dramatically increase the likelihood of their clients obtaining a recovery. Any contingent fee cap should recognize that work and value by awarding the highest level of contingent fees on individual claims filed in Minnesota.

Utilizing the same logic, the contingent fee percentage awarded to the lawyers that filed claims in Illinois should be substantially less than the percentage allowed in Minnesota. The Illinois attorneys were not required to engage in the same volume of discovery, did not prepare for or prosecute any trials, and most significantly, were not required to complete and submit PFSs, as was required in Minnesota. Furthermore, the Illinois group, led by Clayton Clark and Martin Phipps, intentionally refused to cooperate with either Minnesota or Kansas leadership because they did not want to pay the common benefit assessment established by the JPA, choosing to "go it alone" rather than participate in the work that ultimately led to the favorable settlement. That type of conduct should not be rewarded. As such, the contingent fee percentage awarded to Illinois attorneys should be substantially lower than those awarded in Minnesota. In that same vein, attorneys that did not file their claims until after the announcement of the

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settlement should receive a very small contingent percentage. Those lawyers intentionally chose to not file their cases in *any* court in an attempt to minimize the costs and work necessary to serve their clients and to avoid paying common benefit assessments.

V. RECENT CASE LAW PROVIDES A FRAMEWORK FOR STRUCTURING THE AWARD OF COMMON BENEFIT FEES THAT RECOGNIZES BOTH THE JPA AND THE CONTINGENT FEE CONTRACTS.

Historically there have been two methods commonly used by courts to compute common benefit fees in common fund cases such as this—the lodestar method and the percentage of the fund method. *See Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994) (applying the lodestar method); *In re Copley Pharm., Inc.*, 1 F. Supp. 2d 1407 (D. Wyo. 1998) (applying the percentage of the fund method). Over the last forty years, courts "have increasingly recognized that the Lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation" and that use of the percentage of the fund method presents numerous advantages. *Manual* § 14.121; *In re Copley Pharm., Inc.*, 1 F. Supp. 2d at 410–12 (providing a history of the shift towards use of the percentage of the fund method). Several circuits have entirely repudiated the use of the lodestar method, and the vast majority of modern cases on the issue of distribution of common fund awards have applied the percentage of the fund method. *See, e.g.*, *Gottlieb v. Barry*, 43 F.3d 474, 488 (10th Cir. 1994); *NFL*, 2018 WL 1635648 at *3; *Vioxx*, 760 F. Supp. 2d at 652. In this case, use of the percentage of the fund method would be consistent with the JPA and the Common Benefit Orders.

Once the Court determines to use the percentage of the fund method, the next step is to select a benchmark percentage. Many Courts have held that 25% represents a typical benchmark percentage in common fund cases. *See, e.g., Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993). The *Manual* notes that in "mega fund" cases such as this, benchmark percentages have ranged

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from 4.1% to 17.92%. *Manual* § 14.121 (*citing In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 339 (3d Cir. 1998)). In *NFL*, the court established a benchmark percentage of 11% on a total settlement of $1.5 billion. *NFL*, 2018 WL 1635648 at *5. In *Vioxx*, the court established a benchmark percentage of 8% on a total settlement of $4.85 billion. *Vioxx*, 760 F. Supp. 2d at 645.

Once the benchmark percentage has been selected, the next step is to determine if use of a multiplier to adjust the benchmark percentage is warranted based on the application of various factors. Many courts apply 12 so-called *Johnson* factors,[11] as articulated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). *See, e.g.*, *Vioxx*, 760 F. Supp. at 650; *Evans*, 2013 WL 4501061 at *4–11. Other courts consider the similar factors articulated in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000).[12] *See, e.g.*, *NFL*, 2018 WL 1635648 at *3–4. Section 14.121 of the *Manual* states that "the court should identify relevant factors" and that "[t]he factors used in making the award will vary." The *Manual* goes on to provide a list of possible factors, including:

[11] The *Johnson* factors are: (1) the time and labor involved; (2) the novelty and difficulty of the legal and factual questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other work by the attorneys; (5) the customary fee; (6) any prearranged fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.*

[12] The factors articulated in *Gunter* include: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; (7) the awards in similar cases; (8) the value of benefits attributable to the efforts of Class Counsel relative to the efforts of other groups, such as government agencies conducting investigations; (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained; and (10) any innovative terms of settlement. *See, e.g.*, *NFL*, 2018 WL 1635648, at *3.

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- the size of the fund and the number of persons who actually receive monetary benefits;

- any understandings reached with counsel at the time of appointment concerning the amount or rate for calculating fees; any budget set for the litigation; or other terms proposed by counsel or ordered by the court;

- any agreements or understandings, including side agreements, between attorneys and their clients or other counsel involved in the litigation.

Id. Here, the Court should determine which factors are relevant in *this* case, and apply those factors to determine whether the Minnesota and Kansas leadership groups are entitled to a multiplier on the benchmark percentage. Whether applying the *Johnson* or *Gunter* factors, or some other set of factors identified by the Court, much of the relevant analysis will require claims data to determine an appropriate multiplier.

Finally, in recent analogous cases, courts have performed a lodestar cross-check in order to determine the reasonableness of the overall fee award determined by the percentage of the fund method. *See, e.g.*, *NFL*, 2018 WL 1635648 at *8; *Vioxx*, 760 F. Supp. 2d at 658-59; *Evans*, 2013 WL 4501061 at *1. As stated by the Court in *NFL*, "[s]ince the lodestar cross-check is 'not a full-blown lodestar inquiry' the evaluation can be based on summaries and less precise formulations." *NFL*, 2018 WL 1635648 at *8 (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307n.16 (3d. Cir. 2005)). A lodestar cross-check consists of taking the hours logged by the attorneys requesting common benefit fees, applying a reasonable rate, and comparing the amount produced with the amount determined under the percentage of the fund method. *See id.*; *Vioxx*, 760 F. Supp. 2d at 659.

Applying the framework set out in the *NFL*, *Vioxx*, and *Evans* decisions, or some modification of that analysis, results in an equitable fee division between the Minnesota and Kansas leadership in this case.

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1. Setting the Benchmark Percentage.

As has been done in many, if not most, of the recent analogous cases involving this issue, this Court should apply the percentage of the fund method to calculate the amount of common benefit attorneys' fees to be awarded. Given the provisions of the JPA, this Court should utilize an 11% benchmark percentage, split evenly between Minnesota and Kansas, as the starting point of its analysis. The 11% common benefit assessment selected by the leadership groups in the JPA, and considered by the Courts in entering the Common Benefit Orders, is squarely within the 4.1% to 17.92% range discussed in the *Manual* for "mega fund" cases and consistent with recent case law. *See Manual* § 14.121 (citing *In re Prudential Ins. Co.*, 148 F.3d at 339-40); *NFL*, 2018 WL 1635648 at *5; *Vioxx*, 760 F. Supp. 2d at 661.

Importantly, the Court faces an initial threshold question as to whether the 11% benchmark percentage is applied solely to recoveries by plaintiffs with individual lawsuits, or whether it should be applied to the entire settlement. If the 11% assessment is applied only to the recovery of plaintiffs with individual claims, there is little question that the amount will be insufficient to fully compensate Minnesota and Kansas counsel for their common benefit work in this case. Conversely, if the 11% benchmark is applied to the *entire* settlement, it still may not provide for fair and adequate compensation, but the multiplier required to remedy the shortfall will be lower. Regardless of which calculation method is chosen, the Court can utilize the lodestar cross-check and multiplier process to remedy the shortfall.

2. Establishing the Multiplier in Minnesota and Kansas.

Once the Court sets a benchmark percentage, it should develop a list of factors that are relevant to determining the multiplier in Minnesota and Kansas respectively. In effect, these factors will be used to determine the relative allocation of common benefit fees between

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Minnesota and Kansas by analyzing the work completed by each group and the relative effect of that work on obtaining settlement and driving actual recovery by plaintiffs in this case.

As discussed above, case law has established various lists of factors that may be relevant to determining the proper multiplier. *Gunter*, 223 F.3d at 195 n.1; *Johnson*, 488 F.2d, at 717–19. The 10th Circuit has endorsed the use of the *Johnson* factors, but as stated by the *Manual*, "[t]he factors used in making the award will vary" from case to case. *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 453 (10th Cir. 1988); *Manual* § 14.121. Here, there are a number of factors uniquely important to this case that should be considered when determining the multiplier that should be applied in Minnesota and Kansas.

a. The Total Recovery By Farmers Who Pursued Claims in Minnesota vs. Total Recovery By Absentee Class Members

Pursuant to both the *Johnson* factors and the *Manual*, this Court should consider the total recovery by claimants from the respective cases in determining the multiplier. This will permit the Court to analyze the total amount and number of recoveries by individually represented plaintiffs with cases in the Minnesota action, and compare that number with the number and amount of recoveries by absentee class members. *See Johnson*, 488 F.2d at 718 (providing that courts should consider "the amount involved and the results obtained"); *Manual* § 14.121 (providing that courts should consider "the number of persons who actually receive monetary benefits"). Said another way, the Court should look at the claims data to determine whether the Minnesota attorneys were more successful than their Kansas counterparts in terms of obtaining an *actual recovery* for the farmers they represent.

There is no disputing that the Minnesota and Kansas leadership groups coordinated their efforts, and the work completed by both groups served to benefit all U.S. corn farmers who ultimately file a claim. It is also undoubtedly true that the two leadership groups will disagree

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about who did what percentage of the work, and the relative impact of that work. Nonetheless, the claims data in this case is the *only* metric by which the Court will be able to determine who actually succeeded in obtaining recoveries on behalf of their clients.

We suspect that final claims data will show that a large percentage of the overall recovery will be received by farmers who pursued their claims in the Minnesota consolidated action rather than by absentee class members. It is generally understood that the average response rate for consumer class actions is extremely low because a high percentage of absentee class members either fail to read the class notice or ignore it based on an assumption that the recovery will not be worth the time it takes to fill out the claim form and return it. *See e.g.*, Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a), pp. 16–17 (2015) (finding an average claim rate of 21% for all consumer class actions between 2008 and 2012). There is no reason to think this case is any different, and we suspect that the claims data is likely to show that many absentee class members will not obtain any relief. The relatively low participation rate of class members was exactly why the Minnesota leadership chose to pursue this case as a mass tort in which tens of thousands of individual farmers were educated, mobilized, and guided through the process of obtaining a recovery. The assertion of individual claims ensured that the plaintiffs were engaged in the prosecution of the claims against Syngenta and increased the litigation pressure on Syngenta that ultimately increased the overall recovery in this case.

The purpose of this case was to obtain compensation for U.S. corn farmers for the losses they incurred as a result of Syngenta's negligent commercialization of Viptera and Duracade. That is the ultimate goal that leadership in the Minnesota and Kansas actions worked tirelessly to obtain. As such, it is incongruous that this Court would allocate fees without knowing which

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clients actually recovered and the rate at which the attorneys succeeded in achieving the ultimate purpose of the case. To be clear, this is *not* intended to diminish the work done in Kansas, which was essential to the result in this litigation. The Minnesota leadership was consistently impressed with the work completed in the Kansas case, and there is no disputing the excellent results they obtained there. Rather, the purpose is to stress that the ultimate value of the work performed in this case must consider the actual recoveries obtained on behalf of clients. For this reason, the Court should delay its determination regarding the appropriate multiplier for the respective leadership groups until claims data is available.

b. The Work Completed By Attorneys Seeking Common Benefit Fees

Both the *Johnson* factors and the *Manual* recognize that common benefit fees should be awarded based on the work completed, including the time and labor involved, the novelty and difficulty of the legal and factual questions involved, and the skill requisite to perform the legal service properly. *See Johnson*, 488 F.2d at 717–19; *Manual* § 14.121.

It is beyond dispute that the novelty and difficulty of the legal and factual questions involved, and the skill required to perform the legal work, was extremely high in this case. As discussed above, despite the complex issues and a vigorous and well-funded defense effort by Syngenta, the Minnesota and Kansas leadership groups coordinated efforts in order to obtain an excellent result for U.S. corn farmers. Therefore, the issue that is likely to be at dispute is not whether this was a complex case or whether the successful prosecution of the case required a high level of skill, but rather the relative value of the work done in Minnesota as compared to the work done in Kansas.

After the success in obtaining actual recoveries on behalf of their clients, the second most important factor in how much each group is entitled to as a common benefit fee is the amount of

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legal work completed by the groups respectively. On this issue, we anticipate a disagreement with our colleagues in Kansas. Nonetheless, the Minnesota leadership recognizes that the Kansas leadership likely performed slightly more legal work in this case simply because the Kansas leadership was appointed first, and was engaged in the early stages of litigation at the time the Minnesota litigation became active. However, while we recognize this difference, we respectfully submit that the actual variance between the work of the Minnesota and Kansas leadership groups is relatively minor.

The Kansas and Minnesota leadership groups were both required to complete substantially similar legal work due to the parallel nature of the two cases, the differences in the laws of the various jurisdictions at issue, and the different strategic and tactical choices made by the leadership in each case. Both groups drafted and opposed numerous dispositive motions, both engaged in substantial jury research and focus groups, both participated in offensive discovery against Syngenta and third-parties, both completed defensive discovery on behalf of a large number of clients, both retained and prepared expert witnesses for their cases, and both prepared cases for trial and prosecuted those cases at trial against the same Syngenta counsel. In sum, both leadership groups successfully completed all of the various legal tasks that are necessary to prosecute and try a piece of complex commercial litigation. To be sure, the Kansas leadership obtained the only trial verdict in this case and should be recognized for the excellent result obtained in that trial. But the fact remains that due to the parallel nature of this case, neither the Kansas nor the Minnesota leadership groups could simply ride the coattails of their colleagues in the other venue. Some of the unique results obtained in the Minnesota litigation are described in detail in the background section of this submission, all of which demonstrate the critical legal work performed in the Minnesota case.

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While there will likely be plenty of post hoc arguments from attorneys in both Minnesota and Kansas that their work was primarily responsible for the favorable outcome in this case, those arguments all disregard the reality that the Minnesota and Kansas leadership coordinated their work in such a manner that rendered the differences in work performed minimal. This factor, while important, is secondary to the consideration of the rate at which the respective leadership groups were successful in obtaining an *actual recovery* on behalf of their clients in this case.

3. The Lodestar Cross-Check.

The final step in the framework established by *NFL*, *Vioxx*, and *Evans* is a lodestar cross-check to confirm the reasonableness of the common benefit fee award determined by the percentage of the fund method. *NFL*, 2018 WL 1635648 at *8; *Vioxx*, 760 F. Supp. 2d at 650-51; *Evans*, 2013 WL 4501061 at *1. Here, given the volume of work performed in this case, we think it is highly likely that the lodestar cross check will reveal that whatever common benefit fee benchmark percentage is selected by the Court, and whatever portion of the recovery it applies to, the total will be insufficient to cover the fees incurred for the common benefit of all plaintiffs. Therefore, once the Court has claims data available, its award of a multiplier should be consistent with actual recoveries, the lodestar cross check, and the additional factors discussed above.

VI. PLAINTIFF FACT SHEET COMPLIANCE AND THE ALLOCATION OF COMMON BENEFIT FEES.

As part of its lodestar submission, the Minnesota leadership group included hundreds of hours submitted by attorneys who spent time complying with Judge Sipkins' Order compelling the production of PFSs. Minnesota leadership requests guidance from the Court on how it should handle these submissions.

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Work on PFS compliance arose in two independent forms. First, the individually retained attorneys assisted their own clients in collecting the required data and completing the PFS. Second, the members of the Minnesota PEC spent time assisting with the completion of PFSs for individual clients that were represented by other lawyers. Minnesota leadership has concluded that the time spent by lawyers or firms assisting the completion of PFSs for clients represented by other lawyers or firms is common benefit time because it was completed not to ensure the recovery of a contingency fee but rather to advance the overall litigation. The more difficult question is whether the time spent by individual lawyers to assist their own individual contingency clients in completing PFSs should be considered common benefit time.

To be sure, a valid argument exists that the completion of PFSs by lawyers on behalf of their own individual clients benefitted the overall litigation by ensuring that a large pool of individual claims existed to apply pressure on Syngenta to settle the litigation. On the other hand, individual lawyers that receive a contingent fee for representing their individual clients are already being compensated for their work on PFSs via their contingent fee, rendering an award of a common benefit fee potentially duplicative. Further complicating this issue is the fact that we do not yet have the benefit of this Court's decision on how it will proceed regarding the award of contingent and common benefit fees. Accordingly, as part of the Court's global plan to allocate fees and expenses, we request that the Court provide Minnesota leadership with guidance as to how to handle the time incurred by individually retained attorneys in compiling information and completing PFSs.[13]

[13] Minnesota is the only venue where this arises since it is the only venue that has a majority of individual filings along with a class action. It is also the only venue where a significant PFS project was undertaken.

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VII. ALLOCATION OF COMMON BENEFIT FEES WITHIN THE MINNESOTA LEADERSHIP GROUP.

Once this Court determines the overall allocation of common benefit fees to the Minnesota litigation, Minnesota Co-Lead Counsel and Co-Lead Class Counsel should prepare a recommended allocation for submission to the Minnesota Court recommending the allocation of those fees. The ultimate decision regarding the final allocation of fees in the Minnesota case would, of course, rest with Judge Miller.

CONCLUSION

For all the foregoing reasons, we respectfully request that this Court award an appropriate contingent fee, and apply the common benefit allocation framework summarized above. By doing so, this Court will incentivize cooperation and coordination in future actions, decrease the likelihood of fee disputes in this case, and equitably compensate the counsel responsible for this historic settlement.

BASSFORD REMELE
A Professional Association

Date: July 10, 2018

By s/Lewis A. Remele, Jr.
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Co-Lead Counsel in the Minnesota Consolidated Litigation

4816-9571-4157, v. 1

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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **FOURTH JUDICIAL DISTRICT**

In re: Syngenta Litigation and Syngenta Class Action Litigation This Document Relates to: INDIVIDUAL CLAIMS CLASS ACTION	Case Type: Civil Other Honorable Laurie J. Miller Court File Nos.: 27-CV-15-3785 and 27-CV-15-12625 **DECLARATION OF LEWIS A. REMELE, JR. IN SUPPORT OF MOTION REGARDING ALLOCATION OF ATTORNEYS' FEES**

I, Lewis A. Remele, Jr., declare and state as follows:

1. I am a shareholder at the law firm of Bassford Remele, P.A. ("Bassford"), and am duly authorized by the owners, managers, or board of directors of the firm to make this declaration on its behalf.

2. I submit this declaration in support of Bassford's Motion Regarding Allocation of Attorneys' Fees. I have personal knowledge of the matters set forth herein, and, if called as a witness, could and would testify competently thereto.

3. Attached hereto as Exhibit A is a true and correct copy of the Federal MDL Co-Lead Counsel's Statement in Support of Remele/Sieben Group dated July 17, 2015.

4. Attached hereto as Exhibit B is a true and correct copy of the Minnesota Court Order Appointing Lead Counsel dated August 5, 2015.

5. Attached hereto as Exhibit C is a true and correct copy of The Minnesota Court Common Benefit Order dated December 7, 2015.

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6. Attached hereto as Exhibit D is a true and correct copy of the Minnesota Court Order granting leave to amend complaint to add punitive damages for plaintiffs Kuechenmeister and Ledeboer.

7. Attached hereto as Exhibit E is a true and correct copy of the Minnesota Court Order granting leave to amend complaint to add punitive damages for Plaintiff's Mensik, Van Tilburg Farms, and Maher.

8. Attached hereto as Exhibit F is a true and correct copy of the Minnesota Court Order Regarding Summary Judgment Motions for Plaintiff Mensik.

9. Attached hereto as Exhibit G is a true and correct copy of the Minnesota Court Order Regarding Summary Judgment Motions for the Minnesota Class.

10. The Minnesota leadership group paid $1,115,894.20 in expenses to the Kansas leadership group pursuant to the Joint Prosecution Agreement.

11. Over 67,000 Plaintiff Fact Sheets were submitted to Syngenta by plaintiffs with claims filed in the Minnesota consolidated action. Firms submitted 67,253 hours to Minnesota leadership for time spent working to complete Plaintiff Fact Sheets.

Executed on this 10th day of July, 2018, at 100 South 5th Street, Suite 1500, Minneapolis, MN 55402.

s/Lewis A. Remele, Jr.
Lewis A. Remele, Jr.

4836-5739-9149, v. 1

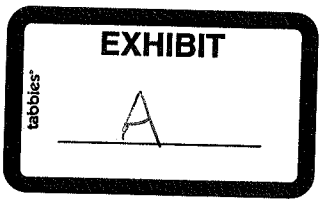
27-CV-15-3785

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT
In re: Syngenta Litigation This Document Relates to: **ALL ACTIONS**	Court File No.: 27-cv-15-3785 Court File Type: Civil **FEDERAL MDL CO-LEAD COUNSEL'S STATEMENT IN SUPPORT OF REMELE/SIEBEN GROUP**

Co-Lead Counsel in *In re Syngenta AG MIR162 Corn Litigation* (MDL No. 2591), pending in the United States District Court for the District of Kansas, (the "Federal MDL")[1] join together to respectfully submit this unified Statement in Support of the Remele/Sieben Group to serve as the plaintiffs' leadership in this the Minnesota MDL (the "Minnesota MDL"). In support thereof, the Federal MDL Co-Leads state as follows:

1. As this Court is aware, multidistrict litigation can be a massive undertaking involving not only a multitude of parties, but also counsel. Where, as here, there are significant proceedings in both federal and state court, it is vitally important for the efficient and fair administration of justice that the proceedings be coordinated and that leadership in both proceedings have a commitment to cooperation. This Court has already indicated that it "intends to work closely with Judge Lungstrum in an effort to coordinate these matters with the MDL as

[1] The four Federal MDL Co-Leads are: Don M. Downing, Gray, Ritter & Graham, P.C.; Patrick J. Stueve, Stueve Siegel Hanson LLP; William B. Chaney, Gray, Reed & McGraw P.C. and Scott A. Powell, Hare Wynn Newell & Newton. The Federal MDL Executive Committee members are: Jayne Conroy, Simons Hanley Conroy LLC; Christopher M. Ellis, Bolen Robinson & Ellis LLP; David F. Graham, Sidley Austin LLP; Richard M. Paul, Paul McInnes LLP; Robert K. Shelquist, Lockridge Grindal Nauen PLLP; John W. Ursu, Greene Espel PLLP; Stephen A. Weiss, Seeger Weiss LLP; Scott E. Poynter, Emerson Poynter LLP; and Thomas V. Bender, Walters Bender Strohbehn & Vaughan, P.C.



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much as possible." (Pretrial Order #1 on Procedural Issues at p. 2.) The Federal MDL Co-Leads hope and expect to have the same close working relationship with Minnesota MDL leadership.

2. From before the Minnesota MDL's formation, the Federal MDL Co-Leads and the Remele/Sieben Group have been in discussions about how best to coordinate and cooperate in the conduct of the Federal MDL and the Minnesota MDL. Among other cooperative efforts, the Federal MDL Co-Leads and the Remele/Sieben Group worked closely together throughout the remand briefing, preparation for oral argument, and oral argument in the Federal MDL, which resulted in the remand of the Minnesota state-court cases that gave rise to this MDL. From start to finish, the Remele/Sieben Group was tightly integrated in the effort to obtain the eventual remand order that gave rise to this MDL. At oral argument, Mr. Remele joined the Federal MDL Co-Leads at counsel's table to address the questions, if any, of the Federal MDL court to counsel for the plaintiffs seeking remand to their Minnesota state courts of origin.

3. Further, on June 18, 2015, the Federal MDL Co-Leads entered into a joint prosecution agreement with the Remele/Sieben Group to foster coordination and cooperation of the groups' work together in connection with the prosecution of the Syngenta claims, in general, and the Remele/Sieben Group's prosecution of their more than 17,000 collective clients' Syngenta claims, in particular (the "Joint Prosecution Agreement").

4. The Joint Prosecution Agreement provides for the sharing of a document repository and related work product, coordination of written and deposition discovery, and preemptively addresses issues that may arise in connection with Federal MDL and Minnesota MDL common benefit assessments, among other terms.

5. To further foster coordination, cooperation, and the free flow of information, the Federal MDL Co-Leads also authorized two members of the Federal MDL Executive Committee

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to be included in the Remele/Sieben Group (namely, Richard M. Paul III and Robert K. Shelquist).

6. The Federal MDL Co-Leads have also had communications with the Johnson/Phipps Group to attempt to foster coordination and cooperation and attempt to reach a joint prosecution agreement. The reaction from that group has been very different. Early in the Federal MDL, the Federal MDL Co-Leads entered into near-identical joint prosecution agreements with each of Watts Guerra LLP ("Guerra" of the Remele/Sieben Group) and Phipps Anderson Deacon LLP ("Phipps" of the Johnson/Phipps Group). Unfortunately, disputes arose regarding those agreements; but, in response to those disputes, Guerra and the other members of the Remele/Sieben Group joined together and entered into the Joint Prosecution Agreement[2] to resolve the disputes and pave the way for coordination and cooperation between the Federal MDL Co-Leads and the Remele/Sieben Group. By contrast, Phipps refused to negotiate resolution of the disputes, and counsel is presently briefing the dispute in the Federal MDL.

7. Importantly, in order for the Federal MDL and the Minnesota MDL to operate efficiently, the Federal MDL Co-Leads and the eventual Minnesota leadership must, from the outset, embrace the objective to avoid a duplication of effort and a competitive culture that pits the Federal MDL and the Minnesota MDL against one another. The Federal MDL and the Minnesota MDL should operate in unison and minimize the disruption to the parties and courts in connection with the prosecution of the Syngenta claims. To this end and based upon their cooperative work together thus far and the Joint Prosecution Agreement, the Federal MDL Co-Leads have confidence in their ability to coordinate and cooperate with the Remele/Sieben Group.

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[2] The Joint Prosecution Agreement was an amendment to the existing joint prosecution agreement with Guerra, in which the rest of the Remele/Sieben Group joined for the first time in June.

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8. Previous discussions with Phipps and the abdication of its obligations under a fully executed joint prosecution agreement have convinced Federal MDL Co-Leads that Phipps intends to try to avoid any obvious use of Federal MDL common benefit work product for the sole purpose of attempting to avoid a common benefit assessment in connection with such use; and, as a natural consequence of this objective, it intends to attempt to duplicate in Minnesota much or all of the Federal MDL common benefit work product. Further, the Federal MDL Co-Leads believe that the Johnson/Phipps Group intends to propose a common benefit assessment in Minnesota that is lower than the common benefit assessment contemplated in the Federal MDL with the express objective to create a competition between the Federal MDL and the Minnesota MDL to attract cases. Such notions of competition - versus coordination and cooperation - do not serve the interests of the Federal MDL Court and this Court and should be discouraged from the outset.

9. The Remele/Sieben Group has made plain by its actions and by the terms of the Joint Prosecution Agreement that, if appointed to lead the Minnesota MDL, it has no interest in a competition between the MDLs, but rather intends to avoid all material duplication of effort, leverage the work product of both MDLs, and avoid a common benefit arbitrage between the Federal MDL and the Minnesota MDL that will promote distrust and dysfunction.

For these reasons, the Federal MDL Co-Leads respectfully support the Remele/Sieben Group's application to lead the Minnesota MDL.

Dated: July 17, 2015

Respectfully Submitted,

/s/ Patrick J. Stueve
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CO-LEAD COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 17, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

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

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STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

In re: Syngenta Litigation

Case Type: Civil Other
Hon. Thomas M. Sipkins

This Document Relates to: ALL ACTIONS

FILE NO. 27-CV-15-3785

ORDER APPOINTING LEAD COUNSEL

The above-entitled matter came on for a scheduling conference before the Honorable Thomas M. Sipkins, Judge of District Court, on July 31, 2015.

The following attorneys appeared on behalf of one or more Plaintiffs: Edward W. Allred, Eric D. Barton, Garrett D. Blanchfield, Paul Byrd, Clayton A. Clark, William L. Coulthard, Michael J. Gayan, David H. Grounds, Francisco Guerra, IV, Daniel E. Gustafson, Daniel M. Homolka, Tyler W. Hudson, Michael K. Johnson, Will Kemp, Dana G. Kirk, Adam J. Levitt, Scott A. Love, Richard M. Paul III, Martin J. Phipps, James J. Pizzirusso, Scott A. Powell, Lewis A. Remele, Jr., Hart L. Robinovitch, William R. Sieben, Aimee H. Wagstaff, Thomas W. Wagstaff, and Mikal C. Watts.

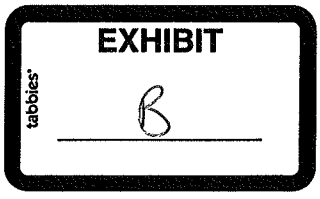
Attorneys Edwin J. U, David T. Schultz, D. Scott Aberson, and Patrick Haney, appeared on behalf of Defendants.

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

ORDER

IT IS HEREBY ORDERED THAT:

1. Lewis A. Remele, Jr. and Francisco Guerra, IV, are appointed Co-Lead Counsel. Plaintiffs' Co-Lead Counsel shall have the following duties during all phases of this litigation:



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a. formulate, determine, and present the position of Plaintiffs on substantive and procedural issues that arise during the litigation;

b. present such positions in written submissions and oral arguments to the Defendants and Court;

c. organize and supervise the efforts of Plaintiffs' counsel to ensure that the prosecution of Plaintiffs' claims is conducted effectively and economically;

d. delegate work responsibilities and monitor the activities of Plaintiffs' counsel to assure that schedules are met and unnecessary expenditures of time and expense are avoided;

e. speak on behalf of Plaintiffs at all court conferences and hearings;

f. initiate and conduct discussions and negotiations with counsel for Defendants on all matters, including settlement;

g. coordinate the initiation of and conduct discovery on behalf of Plaintiffs consistent with the requirements of the Minnesota Rules of Civil Procedure, including the preparation of interrogatories and requests for production of documents, the organization and review of documents produced by Defendants and non-parties, and the examination of witnesses via deposition;

h. consult with and employ experts, as necessary, for Plaintiffs;

i. receive and initiate communication with the Court, including receiving orders, notices, correspondence and telephone calls;

j. be the primary contact for all communications between Plaintiffs and Defendant;

k. perform such other duties as are necessary in connection with the prosecution of this litigation;

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l. coordinate the preparation and presentation of all the Plaintiffs' claims and coordinate all proceedings;

m. encourage full cooperation and efficiency among all Plaintiffs' counsel;

n. assess Plaintiffs' counsel for the costs of the litigation; and

o. consult with the Plaintiffs' Executive Committee as necessary to fulfill their obligations as Co-Lead Counsel.

2. William R. Sieben and Daniel E. Gustafson shall serve as Co-Lead Interim Class Counsel. The Co-Lead Interim Class Counsel shall have the same duties as Co-Lead Counsel on behalf of the putative class members.

3. Robert K. Shelquist, Esq., is appointed Liaison Counsel for Plaintiffs. Plaintiffs' Liaison Counsel is authorized to: (a) receive and distribute notices, orders, motions, and briefs on behalf of the Plaintiffs; (b) convene meetings of counsel as necessary; (c) advise parties and attorneys of developments in the litigation; (d) receive telephone calls from the Court; and shall (e) maintain complete files with copies of all documents served upon them and make such files available to all Plaintiffs' counsel; (f) maintain and make available to all counsel and the Court an up-to-date service list; and (g) resolve scheduling conflicts.

4. The following attorneys are appointed as members of the Plaintiffs' Executive Committee: Lewis A. Remele, Jr., Francisco Guerra, IV, William R. Sieben, Daniel E. Gustafson, Robert K. Shelquist, Richard M. Paul III, Will Kemp, Tyler Hudson, Clayton A. Clark, and Paul Byrd.

5. All Plaintiffs' counsel shall keep contemporaneous records of their time and expenses devoted to this matter. Those records shall reflect the date the legal service was rendered or expenses incurred, the nature of the service or expense, and number of hours consumed by the

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service or the amount of the expense. These records for the preceding month shall be submitted in summary form by the end of each month to Lewis A. Remele, Jr. No Plaintiffs' counsel shall incur an expense to be reimbursed from the Plaintiffs' assessment fund in excess of $500 without first obtaining the consent of one of Plaintiffs' Co-Lead Counsel. Failure to comply with this rule may render the expenses non-reimbursable, at the discretion of Co-Lead Counsel.

6. Any discussions of a settlement that would affect any claims brought in this litigation, other than claims of an individual Plaintiff or putative class member, must be conducted by Plaintiffs' Co-Lead Counsel. Any proposed settlement that resolves, in whole or in part, the claims brought in this action shall first be subject to review and approval by the Court in this litigation.

7. Plaintiffs' Liaison Counsel shall promptly serve a copy of this order and all future orders by overnight delivery service, facsimile, or other electronic means on counsel for plaintiffs in each related action that has not been consolidated in this proceeding to the extent that Plaintiffs' Liaison Counsel is aware of any such action(s) and on all counsel for Plaintiffs whose cases have been so consolidated but who have not yet registered for EFS.

8. Absent any contrary proposals and without objection, the Court assumes that Lead Counsel for Defendants will be Michael D. Jones of Kirkland & Ellis LLP, with the assistance of Edwin J. U.

9. Absent any contrary proposals and without objection, Liaison Counsel for Defendants will be David T. Schultz of Maslon LLP, with the assistance of D. Scott Aberson. Defendants' Liaison Counsel is designated as the counsel for all Defendants in all cases upon whom all notices, orders, pleadings, motions, discovery, and memoranda shall be served. Defendants' Liaison Counsel is authorized to: (a) receive and distribute notices, orders, motions, and briefs on

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behalf of the Defendants; (b) prepare and transmit copies of such orders and notices on Defendants' behalf; (c) receive orders and notices form this Court; (d) receive telephone calls from the Court; and shall (e) maintain complete files with copies of all documents served upon them and make such files available to all Defendants' counsel; and (f) resolve scheduling conflicts.

10. Within 30 days from the date of this Order, the designated counsel for Plaintiffs shall meet and confer with Defendants and submit to the Court proposals for: (a) a case management order, including deadlines for master consolidated complaints for producers, non-producers, and for classes of plaintiffs, and motions to dismiss or other pleadings responsive to complaints served; (b) a protective order; and (c) an ESI Order.

11. The attached Memorandum is incorporated herein.

BY THE COURT:

Dated: 8-5-2015

Thomas M. Sipkins
Judge of District Court

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MEMORANDUM

The Court received proposals from two competing slates to serve as lead counsel for the Plaintiffs in this litigation. The "Remele/Sieben Group" consists of Lewis A. Remele, Jr., William R. Sieben, Robert K. Shelquist, Richard M. Paul III, and Francisco Guerra IV. The "Johnson/Gustafson Group" consists of Michael K. Johnson, Daniel E. Gustafson, Martin J. Phipps, Charles S. Zimmerman, Tyler W. Hudson, Garrett D. Blachfield, Paul Byrd, Clayton A. Clark, Will Kemp, Adam J. Levitt, W. Daniel Miles III, Ronald E. Osman, James J. Pizzirusso, Adam Pulaski, Richard W. Schulte, Jason J. Thompson, and Aimee Wagstaff.

The Court reviewed all of the submitted materials and heard oral presentations by the interested parties at the July 31, 2015 hearing. *See Manual for Complex Litigation, Fourth*, §10.22. The Court must appoint counsel to leading roles that are qualified and responsible, that will fairly and adequately represent all of the parties on their side, and that will keep their charges reasonable. *Id.* In turn, the designated attorneys assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties' counsel. *Id.* The Court's appointment of leadership counsel reflects a consideration of the factors set forth in section 10.224 of the *Manual*. Several attorneys made impassioned presentations at the hearing that they represent and owe a duty to their individual farmer clients. The Court will make decisions on the issue at hand and throughout this litigation in the best interests of the Plaintiffs and Defendants; not those of their attorneys.

As the Court has noted before, it intends to coordinate and cooperate with the Honorable John W. Lungstrum in the United States District Court for the District of Kansas and the companion federal court MDL No. 2591 pending before him. The Court, however, recognizes the differences in size, types of parties, nature of the claims, and forum procedures between the two matters. The

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Court gives deference to Judge Lungstrum, but will exercise its independent judgment on all matters arising in this litigation. In the January 22, 2015 Order Concerning Appointment of Counsel, Judge Lungstrum rejected a dual leadership team and the creation of an "All-Star team" based on the opinion that both options would result in a team that would not function cohesively. In this instance, the Court will respectively diverge from Judge Lungstrum and appoint attorneys for leadership positions from competing slates.

The Court found the written proposals and oral presentations by both groups persuasive. The qualifications of both slates and the individual attorneys are impressive. The Court has no doubt that all of the proposed attorneys would perform well in a leadership role. The Court finds all of the proposed counsel competent for assignments. In addition, the attorneys' resources, commitment, and qualifications to accomplish any assigned tasks are more than adequate. There are only a few differences between the slates that had a bearing on the Court's decision.

The Court cannot ignore the fact that the Remele/Sieben Group represents approximately 92% of the cases currently involved in this litigation. Attorneys appointed to leadership roles have an obligation to act on behalf of and in the interests of all parties and parties' counsel. *Id.*, § 10.22. As several attorneys noted at the hearing, individual clients will be represented by attorneys that they did not initially choose. While not determinative, this factor weighs in favor of attorneys on the Remele/Sieben Group that represent a significant majority of the Plaintiffs involved in this litigation to date.

The Remele/Sieben Group has entered into a Joint Prosecution Agreement ("JPA") with the MDL leadership team. The MDL Co-Lead Counsel also submitted a statement in support of the Remele/Sieben Group. The Court considers an attorney's ability to work cooperatively and recognizes that some individuals may "have generated personal antagonisms during prior

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proceedings that will undermine his or her effectiveness in the present case." *Id.*, at § 10.224. It appears from the submissions that based on prior interactions in the MDL, there may be some individual attorneys in the Johnson/Gustafson Group that may have difficulty cooperating and coordinating with other attorneys.

The parties' characterizations of the JPA are quite divergent. The Remele/Sieben Group views the JPA as evidence of their commitment and ability to work well with the MDL team, which will reduce duplication and promote efficiency. The Johnson/Gustafson Group argues that the JPA causes the attorneys to lose their independence and compromises their ability to represent Minnesota interests. The Court agrees that the leadership team in this matter will need to find a balance between coordinating with the MDL and prosecuting the claims based on the individual circumstances of this litigation. The JPA, however, does not compromise the lawyers' ability to maintain this balance. In the final analysis, while members of the Remele/Sieben Group have executed the JPA, the Court is not subject to or bound by the terms of the JPA.[1]

The issue of trial dates was a consideration discussed by the competing slates in the presentation for leadership roles. Pursuant to the JPA, the Remele/Sieben Group has agreed that it will not seek a trial setting before March 31, 2017, and that the initial MDL bellwether trial will occur before the trial of any claim in this matter. The Johnson/Gustafson Group argues that holding fast to a speedy trial date in this matter is critical to settlement. The Court will control its own schedule. The Court is not obligated to follow the scheduling mandates of the JPA or the MDL. The Court will schedule bellwether cases for trial as appropriate.

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[1] At the hearing, Mr. Remele indicated that any attorney that wanted to be a part of their slate would need to execute the JPA. While that may have been a condition precedent to be a member of the Remele/Sieben Group and their proposal for leadership roles; it is not a requirement imposed by this Court in appointing counsel to the leadership team.

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Finally, the Johnson/Gustafson Group is offering a lower common benefit assessment. The Remele/Sieben Group proposes a common benefit assessment of 8% (fees) and 3% (expenses), which is consistent with the assessments approved by Judge Lungstrum in the MDL. The Johnson/Gustafson Group proposes a common benefit assessment of 3% (fees) and 1% (expenses). The Court considers whether the arrangements for compensation are clear, satisfactory, fair and reasonable. *Id.* at § 10.224. The lower assessment means the Plaintiffs would see a greater percentage of a settlement or verdict award. However, the overall savings may not be significant if the Johnson/Gustafson Group is unable to cooperate and coordinate with the MDL resulting in duplicative work. Furthermore, the risks undertaken by counsel for producer and non-producer plaintiffs and for plaintiff classes are quite substantial, especially given the possible obstacles to their success.

Based on all of these factors and considerations, the Court selects the Remele/Sieben Group with some modifications and additions. The proposal for leadership submitted by the Remele/Sieben Group is too narrowly drawn. The Court believes that the Plaintiffs will benefit by spreading the duties, responsibilities, and wisdom among more attorneys. The Court has thus made some adjustments to the Remele/Sieben Group proposal. Daniel Gustafson will be added as Co-Lead Interim Class Counsel. Mr. Sieben is an excellent trial lawyer but his class action experience is limited. On the other hand, Mr. Gustafson has extensive class action experience that will be an asset to the class action plaintiffs. The Court was impressed by Mr. Gustafson's presentation, despite the Court's selection of, primarily, the opposing slate. Mr. Sieben and Mr. Gustafson will make a perfect team representing plaintiff classes. The Court believes that coordination between this matter and the MDL will be furthered by appointing Robert Shelquist as Liaison Counsel. Finally, the Court is also adding Daniel Gustafson, Will Kemp, Clayton Clark, Tyler Hudson, and

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Paul Byrd to the Plaintiffs' Executive Committee for the reasons stated above. The Court expects all counsel to work together cooperatively for the ultimate benefit of their clients in accordance with the Minnesota Rules of Professional Conduct.

T.M.S.

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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT
Case Type: Other Civil

FILE NO. 27-CV-153785
Judge Thomas M. Sipkins

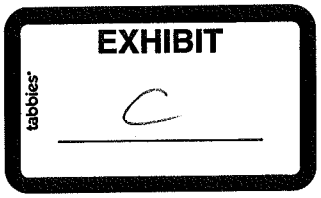
In re: Syngenta Litigation

This Document Relates to: ALL ACTIONS

COMMON BENEFIT ORDER

On August 5, 2015, this Court entered its Order Appointing Lead Counsel and appointed Lewis A. Remele Jr. and Francisco Guerra IV as Co-Lead Counsel for the named plaintiffs in this proceeding and delegated to counsel 15 itemized duties in connection with the conduct of this proceeding, all for the common benefit of such plaintiffs. (¶ 1) Further, this Court appointed William R. Sieben and Daniel E. Gustafson as Co-Lead Interim Class Counsel for the putative class members in this proceeding. (¶ 2) Further, this Court appointed Robert K. Shelquist as Liaison Counsel for the named plaintiffs in this proceeding (¶ 3) and an Executive Committee consisting of Messrs. Remele, Guerra, Sieben, Gustafson, and Shelquist and five additional counsel, including Richard M. Paul III, Will Kemp, Tyler W. Hudson, Clayton A. Clark, and Paul Byrd. (¶ 4)

This Court appointed Co-Lead Counsel and the Executive Committee to lead this proceeding on behalf of the named plaintiffs and the putative class members, and, in connection with their appointments, each shall be compelled to invest material time and



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money in the discharge of their duties for the common benefit of such plaintiffs, as well as all Producers and Non-Producers. The purpose of this Order is to establish a framework to ensure the potential for fair and reasonable compensation to those counsel who perform Common Benefit Work and incur Common Benefit Expenses.

I. DEFINITIONS.

For purposes of this Order –

"Administrator" means an independent professional, e.g., a CPA, appointed by subsequent Order of this Court to serve as Escrow Agent over the Common Benefit Funds. The Administrator's duties shall include, among other things, to (1) oversee and approve activity in the Funds, (2) provide Co-Lead Counsel periodic reporting in connection with such activity, and (3) timely make all applicable tax filings.

"Common Benefit Assessment" means this Court's assessment against the Gross Recoveries of Producers and/or Non-Producers for the payment of Common Benefit Awards.

"Common Benefit Awards" means common benefit awards made by this Court to counsel who performed Common Benefit Work and incurred Common Benefit Expenses.

"Common Benefit Expenses" means expenses incurred by counsel who performed Common Benefit Work, which work compelled such expenses.

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"Common Benefit Expense Fund" means a fund created to hold Common Benefit Assessments for the purpose of reimbursing Common Benefit Expenses.

"Common Benefit Fees" means fees awarded by this Court to counsel who perform Common Benefit Work.

"Common Benefit Fee Fund" means a fund created to hold Common Benefit Assessments for the purpose of paying Common Benefit Fees.

"Common Benefit Funds" means the Common Benefit Expense Fund and the Common Benefit Fee Fund.

"Common Benefit Rules" means the rules adopted, and amended from time to time, by Co-Lead Counsel, which rules govern how and when counsel may perform Common Benefit Work and incur Common Benefit Expenses and submit their related time and expenses to Co-Lead Counsel.

"Common Benefit Work" means work performed by or for Co-Lead Counsel in furtherance of their duties in this proceeding, which work is performed for the common benefit of all Producers and Non-Producers.

"MN Participation Agreement" means attached Exhibit A.

"Participating Counsel" means counsel who signed the MN Participation Agreement.

"Federal Coordination Order" means the Coordination Order entered in MDL No. 2591. (ECF Doc. 1099)

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"Federal MDL" means MDL No. 2591.

"Federal MDL Common Benefit Order" means the Order entered on July 27, 2015 (Doc. 936) by the Federal MDL Court entitled "Order Establishing Protocols for Common Benefit Work and Expenses and Establishing the Common Benefit Fee and Expense Funds," and any amendments thereto.

"Federal MDL Court" means U.S. District Judge John W. Lungstrum and U.S. Magistrate Judge James P. O'Hara in the United States District Court for the District of Kansas.

"Federal MDL Leadership" means those counsel appointed in MDL No. 2591 to lead such coordinated proceeding on behalf of the plaintiffs. (ECF Doc. 67)

"Gross Recovery" means all payments, which may be subject to a Common Benefit Assessment, made by one or more Defendants to a Producer and/or Non-Producer in partial or total satisfaction of a (1) settlement agreement between such producer and/or non-producer and one or more Defendants or (2), judgment taken by such producer and/or non-producer against one or more Defendants, to the extent covered by this Order as set forth herein.

"JPA" means the Amended and Restated Joint Prosecution Agreement entered into between the Remele/Sieben group and MDL Leadership on or about June 18, 2015, and any amendments thereto.

"MN MDL" means this proceeding.

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"MN MDL Leadership" means the Executive Committee in this proceeding.

"Producers and Non-Producers" means producers and non-producers who possess claims against one or more Defendants in connection with Defendants' launch of its Agrisure Viptera® and Agrisure Duracade™ corn seed.

"Recovery" means a payment, which may be subject to a Common Benefit Assessment, made by one or more Defendants to a Producer and/or Non-Producer in partial or total satisfaction of a (1) settlement agreement between such producer and/or non-producer and one or more Defendants or (2) judgment taken by such producer and/or non-producer against one or more Defendants, to the extent covered by this Order as set forth herein.

II. TO WHOM COMMON BENEFIT ASSESSMENT APPLIES.

This Court's Common Benefit Assessment shall apply to counsel for all Producers and Non-Producers, along with their referring counsel: (1) who file a case that is included in this proceeding, regardless of the ultimate disposition of such case; (2) who make a Recovery in connection with this proceeding, e.g., participate in a settlement administered by this Court; and/or, (3) whose counsel signed the MN Participation Agreement, regardless of whether or where such producer and/or non-producer file his/her/its case or the ultimate disposition of such case. Absent a signed Participation Agreement, the Court's Common Benefit Assessment shall not apply to cases outside the Minnesota MDL.

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In the event that there is a class settlement, recovery or judgment in favor of a class covered by this Order, no assessment pursuant to this Section will be made, either for attorneys' fees or for expenses, individually from any class member or his/her/its individual attorney as to the portion of any class recovery distributed to that individual class member if the class member remains in the class (i.e., does not opt-out of the class). Instead, all fees and expenses for that class member will come out of the overall class recovery funds provided by defendants, as approved by the Court, or as otherwise Ordered by the Court. The relationship between class counsel fees and costs obtained through any class settlement or judgment and the Common Benefit Fund will be addressed, if necessary, by later order of the Court. Nothing in this section is intended to be inconsistent with the JPA or the Federal MDL Common Benefit Order—but nothing in the JPA shall be deemed to bind or otherwise impose obligations on the Defendants.

III. WITH WHOM COMMON BENEFIT WORK MAY BE SHARED.

Counsel may share Common Benefit Work with Producers and/or Non-Producers, along with their counsel, to whom this Court's Common Benefit Assessment applies. Counsel may not share Common Benefit Work with any other persons or entities. Nothing in this section is intended to be inconsistent with the JPA or the Federal MDL Common Benefit Order or the Federal MDL Common Benefit Order—but nothing in the JPA shall be deemed to bind or otherwise impose obligations on the

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Defendants.

IV. MINNESOTA PARTICIPATION AGREEMENT.

The purpose of the MN Participation Agreement is to create a joint prosecution agreement to control the plaintiffs' work together in connection with their prosecution of claims possessed by Producers and Non-Producers in this proceeding. Participating Counsel, on behalf of themselves, their clients, and their co-counsel, desire to use and/or benefit from Common Benefit Work and Common Benefit Expenses, as well as other benefits detailed in such agreement. Similarly, Co-Lead Counsel and the Executive Committee desire for Participating Counsel, on behalf of itself, its clients, and its co-counsel, to use and/or benefit from such work, expenses, and other benefits; and, in exchange for same, for Participating Counsel, its clients, and its co-counsel, to submit to the jurisdiction of this Court and abide by this Court's orders applicable to such use and/or benefits.

V. COMMON BENEFIT WORK AND EXPENSES.

A. Authority to Perform Work and Incur Expenses.

Only counsel authorized in writing by one of Co-Lead Counsel may perform Common Benefit Work or incur Common Benefit Expenses and be eligible for a Common Benefit Award at the conclusion of this proceeding. All other counsel shall be ineligible for a Common Benefit Award at the conclusion of this proceeding.

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B. **Rules in Connection with Performing Work, Incurring Expenses, and Submitting Counsel's Related Time and Expenses.**

Co-Lead Counsel shall adopt, and may from time to time amend, the Common Benefit Rules; and, Co-Lead Counsel shall distribute such rules to those counsel performing Common Benefit Work and incurring Common Benefit Expenses; provided, such rules shall include, among other things:

1. All counsel performing Common Benefit Work and incurring Common Benefit Expenses shall submit proof of their related time and expenses to Bassford Remele on a monthly basis; the first such submission shall cover the period from August 5, 2015 through November 30, 2015;

2. Bassford Remele shall designate a person from Mr. Remele's office to receive and review each such submission; and, such person shall have the duty to compare each such submission with the Rules, identify non-conforming time and expenses, if any, work such issues with counsel who made such submission, attempt to resolve such issues, and then make a preliminary determination as to the portions of the submission that are approved and the portions, if any, of the submission that are rejected;[1]

[1] The purpose of this process is to ensure that Co-Lead Counsel, and others performing Common Benefit Work and incurring Common Benefit Expenses on behalf of Co-Lead Counsel, receive timely feedback as to whether (1) counsel's submissions are conforming submissions and (2) the amount of reported time and expense is consistent with Co-Lead Counsel's expectations; this to enable Co-Lead Counsel to more

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3. All time in connection with Common Benefit Work shall be reasonable in amount and supported by a contemporaneous record reflecting such time; similarly, all Common Benefit Expenses shall be reasonable in amount and supported by receipts reflecting such expenses; provided, counsel need not produce a receipt for such expenses in an amount less than $50.00; and only counsel authorized in writing by one of Co-Lead Counsel may incur a Common Benefit Expense in an amount more than $1,000.00;

4. At the conclusion of this proceeding, this Court shall make the ultimate determination regarding whether to accept or reject each submission.

C. **CAPITAL ASSESSMENTS.**

1. Co-Lead Counsel may from time to time make capital assessments from the Executive Committee for the purpose of reimbursing the Executive Committee for certain Common Benefit Expenses. Co-Lead Counsel shall distinguish those expenses that shall be reimbursed to the members of the Executive Committee periodically throughout this proceeding and, conversely, those expenses that shall be held by the members of the Executive Committee until the conclusion of this proceeding.

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efficiently manage the conduct of Common Benefit Work and the incurrence of Common Benefit Expenses from the outset of this proceeding and provide those performing such work and incurring such expenses some comfort that if their submissions are non-conforming, they will receive notice of same from the outset of this proceeding (rather than at the conclusion of this proceeding).

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2. Capital assessments shall be reasonable in amount; and, each member of the Executive Committee shall promptly contribute his/her pro rata share of such assessments.

VI. COMMON BENEFIT ASSESSMENTS.

A Producer shall pay a Common Benefit Assessment in the amount of 11% of such producer's Gross Recovery, which will consist of an 8% fee assessment and a 3% expense assessment. A Non-Producer shall pay a Common Benefit Assessment in the amount of 9% of such non-producer's Gross Recovery, which will consist of a 7% fee assessment and a 2% expense assessment.

Each Producer and Non-Producer shall be entitled to a dollar-for-dollar set off—in the amount of the common benefit assessment, if any, required to be paid by such producer and/or non-producer in the Federal MDL—against such producer's and/or non-producer's obligation to pay a Common Benefit Assessment under this Order. Such set-offs shall be made prior to the depositing of any holdback amount into the Common Benefit Funds.

VII. COMMON BENEFIT FUNDS.

Co-Lead Counsel shall open and maintain two bank accounts: one to serve as the Common Benefit Expense Fund; and, one to serve as the Common Benefit Fee Fund. Further, Co-Lead Counsel shall engage an Administrator; and, such person's fees and expenses shall be Common Benefit Expenses.

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VIII. COMMON BENEFIT HOLDBACKS.

Defendants shall hold back[2] and set aside for placement into the Common Benefit Funds the amounts prescribed by this Section. Defendants shall not distribute any proceeds, whether by settlement or in satisfaction of a judgment, to any plaintiff's counsel (or directly to a plaintiff) in cases covered by this Order until after: (1) Defendants' counsel notifies Co-Lead Counsel in writing of the existence (but not the amount) of a pending Recovery, and (2) Co-Lead Counsel has advised Defendants' counsel and the Administrator in writing of the percentage of such Recovery to be held back from the plaintiff's Gross Recovery, and provided a certification as to whether the Gross Recovery is subject to an assessment in the Federal MDL along with what the applicable assessment percentage is with respect to the Federal MDL. Co-Lead Counsel shall provide such certification within 5 business days after receiving Defense Counsel's notification, with a copy to the Federal MDL Leadership. For cases subject to an assessment under this Order, Defendants are directed to withhold the applicable assessment from any and all amounts paid to plaintiffs and their counsel (after deducting the percentage due pursuant to the Common Benefit Order in the Federal MDL, as specified in the certification provided by Co-Lead Counsel) and to pay the

[2] In the event any defendant fails to hold back the assessments required by this Section, plaintiff's counsel has an equal duty to pay the appropriate holdback amounts to the Common Benefit Funds. Under all scenarios (except to the extent the attorney is being paid an hourly rate), the fee assessment shall be paid from the attorney's portion of the recovery and shall not be borne by the client.

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resulting amount directly into the Common Benefit Funds as a credit against the settlement or judgment. No notice or order of dismissal of any plaintiff's case that is subject to this Order shall be entered unless accompanied by a certificate of plaintiffs' and defendant's counsel that the assessment, if applicable, will be withheld and will be deposited into the Common Benefit Funds at the same time the settlement proceeds are paid to settling counsel. Any assessments paid, or withheld, shall be made consistent with the JPA and the Federal MDL Common Benefit Order—but nothing in the JPA shall be deemed to bind or otherwise impose obligations on the Defendants.

Upon receipt of a hold back by the Administrator, he/she shall determine whether such holdback is in the correct amount. The Administrator shall provide written notice to the applicable Producer's and/or Non-Producer's counsel, Defendants, and Co-Lead Counsel that the holdback is in the correct amount. If any dispute arises between Co-Lead Counsel and Federal MDL Leadership as to the amount of any funds allegedly due pursuant to the Common Benefit Order in the Federal MDL, the disputed amount shall be held in escrow pursuant to procedures specified by this Court and the Federal MDL Court until the resolution of such dispute, unless otherwise agreed by Co-Lead Counsel and Federal MDL Leadership or otherwise specified by Court Order. Defendants' full and complete payment of the holdback amount and the required verification from the Administrator shall discharge Defendants' and Defendants' counsel's obligations and responsibilities with respect to the deposited funds, including

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any disputes between or among plaintiffs and plaintiffs' counsel as to the allocation of such funds.

To preserve the confidentiality of settlement amounts, if such confidentiality is agreed to by the settling parties in their settlement agreement(s), details of any individual settlement agreement, individual settlement amount, and/or amounts deposited into escrow by any particular defendant shall be confidential and shall not be disclosed by the Administrator to anyone other than the Court, upon request or by Order of the Court. Monthly statements from the Administrator shall be provided to Co-Lead Counsel (and, if the Court so requests, to the Court) showing only the total quarterly deposits from all Defendants, any disbursements, interest earned, and financial institution charges, if any, and the current balance.

IX. Reporting Obligations

Co-Lead Counsel shall provide Defendants, the Administrator, and the Court, if requested, with a list of cases, if filed, and counsel who are subject to signed MN Participation Agreements. This same list shall be made available to all plaintiffs' counsel with cases in the MN MDL, as well as any other plaintiffs' counsel who signs the Participation Agreement, upon request. In the event there is a dispute as to whether a case should be on the list, Co-Lead Counsel shall seek to resolve the matter with the particular plaintiff's counsel informally, and if that is unsuccessful, upon motion to the Court. The parties' reporting obligations shall continue quarterly until the conclusion

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of the MN MDL.

X. PAYMENTS FROM THE FUNDS.

When ripe, this Court shall determine the appropriate procedures to make Common Benefit Awards to counsel and otherwise authorize payments from the Funds.

The Federal Coordination Order contemplates that the Federal MDL Leadership, the MN MDL Leadership, and other counsel will combine to produce a comingled body of common benefit work available for the use and/or benefit of parties and their counsel with cases pending in the Federal MDL, the MN MDL, and other Coordinated Actions. (MDL No. 2591, ECF Doc. 1099 at p 3); and, as a result of same, the Federal MDL Leadership will perform Common Benefit Work for the use and/or benefit of the plaintiffs in this proceeding, and the MN MDL Leadership will perform Common Benefit Work for the use and/or benefit of the plaintiffs in the Federal MDL. Therefore, when this Court takes up the issue of making Common Benefit Awards, it will coordinate with the Federal MDL Court to establish a reasonable framework for the Federal MDL Leadership and the MN MDL leadership to share Common Benefit Awards made in the Federal MDL and this proceeding and, further, in making such determinations shall do so consistent with the JPA and the Federal MDL Common Benefit Order.

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IT IS SO ORDERED.

Dated 12-5, 2015.

Thomas M. Sipkins
District Court Judge

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EXHIBIT A

27-CV-15-3785

MINNESOTA PARTICIPATION IN RE: SYNGENTA LITIGATION
COURT FILE NO.: 27-CV-15-3785 (THE "MN MDL")

This MN Participation Agreement (this "Agreement") is by and between __ ("Participating Counsel") and the MN MDL Co-Leads (together with Participating Counsel, the "Parties"). The purpose of this Agreement is to control the Parties' work together in connection with their coordinated prosecution of the Claims.

RECITALS:

WHEREAS, Participating Counsel is a law firm with its principal office in __, __;

WHEREAS, Bassford Remele PA is a law firm with its principal office in Minneapolis, Minnesota;

WHEREAS, Gustafson Gluek PLLC is a law firm with its principal office in Minneapolis, Minnesota;

WHEREAS, Schwebel, Goetz & Sieben PA is a law firm with its principal office in Minneapolis, Minnesota;

WHEREAS, Watts Guerra LLP is a law firm with its principal office in San Antonio, Texas;

WHEREAS, Participating Counsel, on behalf of itself, its Clients, and its Co-Counsel, desire to use and/or benefit from MN MDL Common Benefit Work and other rights detailed in this Agreement;

WHEREAS, the MN MDL Co-Leads desire for Participating Counsel, on behalf of itself, its Clients, and its Co-Counsel, to use and/or benefit from MN MDL Common Benefit Work and other rights detailed in this Agreement, and, in exchange for same, for Participating Counsel, its Clients, and its Co-Counsel, to submit to the jurisdiction of the MN Court and abide by the MN MDL Court's orders applicable to such use and/or benefit and rights;

WHEREAS, the Parties desire to foster from the outset a spirit of coordination between Participating Counsel and the MN MDL Co-Leads and resolve all potential, future disputes in connection with Common Benefit Assessments; and

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NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Definitions.

a. "Claims" means claims possessed by Producers and Non-Producers against Syngenta as a result of Syngenta's premature launch of its Agrisure Viptera® and Agrisure Duracade™ corn seed.

b. "Client" means a Producer or Non-Producer represented or jointly represented, as the case may be, by Participating Counsel, alone or with Co-Counsel, as the case may be, in the prosecution of such producer's or non-producer's Syngenta Claims.

c. "Co-Counsel" means a law firm engaged in a joint representation of a Client.

d. "Common Benefit Assessment" means the common benefit fee and expense assessment ordered by the MN MDL Court in connection with the MN MDL.

e. "Common Benefit Assessment Dispute" means any dispute, large or small, at law or in equity, between two or more of the Parties in connection with the amount of money owed by Participating Counsel, its Client, or its Co-Counsel to the MN MDL Funds, whether in the form of a direct payment by such counsel, client, or co-counsel, or, in the alternative, a holdback by Syngenta on behalf of such counsel, client, and/or co-counsel, in satisfaction of a Common Benefit Assessment Order and this Agreement.

f. "Common Benefit Assessment Order" means the MN MDL Court's then-applicable order ordering a Common Benefit Assessment in the MN MDL.

g. "Common Benefit Work Product" means work performed by or for the MN MDL Co-Leads in furtherance of their duties in the MN MDL, which work is performed for the common benefit of all or substantially all of Producers and/or Non-Producers with Syngenta Claims.

h. "Federal MDL" means MDL No. 2591.

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i. "Federal MDL Funds" means the common benefit fee fund and expense fund formed in connection with the Federal MDL in which Syngenta will deposit money in satisfaction of the Common Benefit Assessment Order.

j. "MN MDL" means MDL No. 3785.

k. "MN MDL Co-Leads" means co-lead counsel in the MN MDL, which today consists of Bassford Remele PA, Gustafson Gluek PLLC, Schwebel, Goetz & Sieben PA, and Watts Guerra LLP.

l. "MN MDL Court" means the Fourth Judicial District Court, County of Hennepin, State of Minnesota, Judge Thomas M. Sipkins, presiding.

m. "MN MDL Funds" means the common benefit fee fund and expense fund to be formed in connection with the MN MDL in which Syngenta will deposit money in satisfaction of the Common Benefit Assessment ordered by MN MDL Court.

n. "MN MDL Leadership" means the plaintiff leadership appointed to lead the MN MDL by the MN MDL Court.

o. "Producer" and "Non-Producer" mean Producer and Non-Producer, as defined in MDL No. 2591, ECF No. 287 (¶ 1).

p. "Syngenta" means Syngenta Seeds, Inc. and other Syngenta entities or their successors, including, without limitation, successors as a result of merger, acquisition, or asset sale.

q. "Syngenta Case" means a case filed on behalf of a Producer or Non-Producer to prosecute such producer's or non-producer's Syngenta Claims.

2. Rights and Obligations.

a. Common Benefit Assessments.

i. For Participating Counsel, each of its Clients[3], and each of its Co-Counsel, if any, the Parties agree that if and as such clients are entitled to any

[3] Regardless of whether or where such clients' Syngenta Claims are filed.

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payment from Syngenta in connection with settlement of or judgment on such clients' Syngenta Claims, such clients will be subject to a Common Benefit Assessment payable to the MN MDL Funds in the amount of 11% (8% in fees and 3% in expenses) for Producers and 9% (7% in fees and 2% in expenses) for Non-Producers; and, consistent with same, Participating Counsel will instruct Syngenta to hold back and pay to the MN MDL Funds the appropriate amount of such assessment, as detailed below.[4]

ii. Further, the collective exposure of Participating Counsel, its Client, and its Co-Counsel, if any, for payment of a Common Benefit Assessment to the MN MDL Funds in connection with such client will be capped at 11% (8% in fees and 3% in expenses) for Producers and 9% (7% in fees and 2% in expenses) for Non-Producers.

iii. Further, to the extent Participating Counsel, its Client, or its Co-Counsel, if any, are subject to a common benefit assessment in MDL No. 2591, such assessment shall be set off—dollar for dollar—against such counsel's, client's, and co-counsel's obligation to pay a Common Benefit Assessment.

b. Client List and Clients' FSA 578 Forms.

i. Participating Counsel will provide to the MN MDL Co-Leads (1) a list in Excel format of such counsel's Clients, including their names and the style of their cases, for those Clients who have filed cases, (its "Client List") and (2) copies in PDF format of their FSA 578 forms for calendar years 2011-15 and each future calendar year after 2015 through the year of the first MN MDL bellwether trial, as they become available (its "Clients' FSA 578 Forms"). To the extent that Participating Counsel has filed a case seeking class treatment, only such counsel's Clients serving as individual named class representatives in such case, and not the proposed putative class members, should be included on such counsel's Client List.

ii. Participating Counsel will provide to the MN MDL Co-Leads its first Client List on March 31, 2016; and, such counsel will provide its first Clients' FSA 578 Forms on June 30, 2016.

---

[4] In the event any defendant fails to hold back the assessments required by this Section, plaintiff's counsel has an equal duty to pay the appropriate holdback amounts to the Common Benefit Funds. Under all scenarios (except to the extent the attorney is being paid an hourly rate), the fee assessment shall be paid from the attorney's portion of the recovery and shall not be borne by the client.

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iii. Participating Counsel will supplement its Client List and Clients' FSA 578 Forms every 180 days throughout the pendency of the MN MDL. Participating Counsel will timely supplement previously produced Clients' FSA 578 Forms with FSA 578 Forms for future calendar years through the year of the first federal court trial as they become available.

iv. The MN MDL Co-Leads acknowledge that each Client List and each Client's FSA 578 Forms are proprietary and confidential, and the MN MDL Co-Leads will, at all times, in all ways, and for all purposes, treat the content of same as proprietary and confidential; and, absent Participating Counsel's consent, the MN MDL Co-Leads will not (1) disclose any portion of same to any person or entity other than (a) under seal to the MN MDL Court and/or (b) pursuant to a protective order in a form to which Participating Counsel consent or (2) knowingly attempt at any time, in any way, or for any purpose to communicate with a Client included on any Client List submitted to the MN MDL Co-Leads, unless Coordinating Counsel consents to such communication. The Parties agree that publication notice of a proposed litigation or settlement class certification will not be deemed a knowing communication with a Client.

v. By including a client on its Client List, Participating Counsel represents and warrants that (1) it believes that it is in such client's best interest to be excluded from any and all proposed class actions in the Federal MDL or the MN MDL and (2) would recommend to such client that he/she/it opt out of the proposed class, if such client was included in the applicable class definition.

c. Common Benefit Work Product. Upon a written request and with reasonable notice from Participating Counsel, the MN MDL Co-Leads will provide Participating Counsel reasonable and continuing access to the MN MDL Co-Leads' Common Benefit Work Product, subject to the applicable MN MDL Court's and Federal MDL Court's orders. Participating Counsel will not disclose such work product to other counsel, unless such other counsel has signed a Joint Representation Agreement with the MN MDL Co-Leads; provided, Participating Counsel may use such work product when taking oral depositions or during hearings or trials, but may not provide or authorize others to provide any deposition or trial transcript to any other counsel, unless such other counsel has signed a Joint Prosecution Agreement with the MN MDL Co-Leads.

d. Class Certification.

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i. None of the MN MDL Co-Leads will propose to certify any litigation or settlement class that includes any Minnesota Client whose Syngenta Case was filed in Minnesota state court and is pending as of the date of any order granting class certification and whose name is included on the Client List as of the date of such order granting class certification (the "Excluded Clients"); if the MN MDL Co-Leads seek to certify any litigation or settlement class, they will not include in their proposed class definition(s) any Excluded Clients, unless Participating Counsel consents to same.

ii. Participating Counsel will not oppose class certification in the MN MDL if the MN MDL Co-Leads exclude from their proposed class definition(s) all Excluded Clients.

iii. The MN MDL Co-Leads will not seek to interfere with or alter the terms and conditions of any fee agreement with any Client (e.g., reduce or cap the fee of Participating Counsel or its Co-Counsel, if any).

3. Miscellaneous.

a. Any dispute between one or more of the MN MDL Co-Leads, on the one hand, and one or more of Participating Counsel, its Clients, and/or its Co-Counsel, if any, on the other, arising out of the construction or enforcement of this Agreement will be resolved by the MN MDL Court (to the exclusion of all other state and federal forums); and, each of Participating Counsel, its Clients, and its Co-Counsel, if any, submits to the personal jurisdiction of this Court for all purposes in connection with the construction or enforcement of this Agreement.

b. All notice or consent required by this Agreement must be in writing, signed by the Party giving such notice or consent, and served upon the other Parties.

c. The Parties may by mutual agreement amend or supplement this Agreement at any time and from time to time; provided, they must do so in writing, and such writing must be signed by the Parties and filed in the MN MDL. Defendants shall be afforded the opportunity to object to any subsequent amendment or supplement to this Agreement to the extent Defendants' rights and/or obligations are affected.

d. If any provision of this Agreement is held to be illegal, invalid, or unenforceable under present or future laws, the legality, validity, and enforceability of

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the remaining provisions of this Agreement will not be affected.

e. If any Party alleges that any other Party is in breach of this Agreement, then the former will give prompt notice of same to the latter, and the latter will have 90 days to cure before the former may take any action against the latter in connection with the alleged breach; and, if the latter timely cures, the former may not take any action against the latter in connection with the believed breach.

f. Each member of the MN MDL Executive Committee is a third-party beneficiary of this Agreement and may enforce this Agreement.

g. Each Client and Co-Counsel, if any, is third-party beneficiary of this Agreement and may enforce this Agreement.

h. The Parties agree that this Agreement will be construed without regard to any presumption or rule requiring construction or interpretation against the Party drafting same.

i. This Agreement embodies the entire agreement between the Parties in connection with the subject matter of this Agreement, and it supersedes and cancels all prior conflicting or inconsistent oral or written communications between the Parties in connection with such subject matter.

j. The Agreement will be effective when signed by the Parties. This Agreement may be executed in one or more counterparts, each of which will be deemed an original and all of which will constitute one and the same document. The electronic exchange of executed copies of the signature pages of this Agreement will constitute effective execution of this Agreement. Signatures of the Parties transmitted by electronic mail in .pdf form will be deemed to be their original signatures for all purposes.

k. The MN MDL Co-Leads whose signatures appear below agree that the rights, obligations, terms, and conditions of this Agreement shall apply both to them individually and to their present law firms regardless of any future disassociation from their present law firms and/or future association with a different law firm. The MN MDL Co-Leads whose signatures appear below represent and warrant to Participating Counsel, the Clients, and the Co-Counsel, if any, that such co-leads have the authority to execute, and do in fact execute, this Agreement ON BEHALF OF THEMSELVES, THEIR LAW FIRMS, AND THE MN LEADERSHIP.

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l. Participating Counsel and Co-Counsel, if any, agree that the rights, obligations, terms, and conditions of this Agreement shall apply both to them individually and to their present law firms and regardless of any future disassociation from their present law firms and/or future association with a different law firm. Participating Counsel whose signature appears below represents and warrants to the MN MDL Co-Leads that he/she have the authority to, and does in fact, execute this Agreement as Participating Counsel ON BEHALF OF HIMSELF/HERSELF, HIS/HER LAW FIRM, THE CLIENTS, AND THE CO-COUNSEL, IF ANY.

[Signatures appear on the following pages.]

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SIGNED on this the __ day of __, 20__.

[Participating Counsel's LAW FIRM]

_____

By: [name]
Title: [title]

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BASSFORD REMELE PA

By: Lewis A. Remele Jr.
Title: Partner

GUSTAFSON GLUEK PLLC

By: Daniel E. Gustafson
Title: Partner

SCHWEBEL, GOETZ & SIEBEN PA

By: William R. Sieben
Title: Partner

WATTS GUERRA LLP

By: Francisco Guerra IV
Title: Partner

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** CONFIDENTIAL **

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

In re: Syngenta Litigation

Case Type: Civil Other
Hon. Thomas M. Sipkins

This Document Relates to:
Daniel Mensik (Orig. Case No. 27-CV-15-16826)
Van Tilburg Farms (Orig. Case No. 27-CV-15-13191)
Kirk Kuechenmeister (Orig. Case No. 27-CV-15-12012)
Charles W. Ledeboer (Orig. Case No. 34-CV-15-117)
Douglas Maher (Orig. Case No. 27-CV-15-17386)

FILE NO. 27-CV-15-3785

ORDER

The above-entitled matter came on for hearing before the Honorable Thomas M. Sipkins, Judge of District Court, on December 5, 2016, pursuant to Plaintiffs' motion for leave to amend their complaint to add a claim for punitive damages.

Attorneys Lewis A. Remele, Jr., and Daniel E. Gustafson appeared on behalf of Plaintiffs.

Attorneys Patrick F. Philbin, Patrick Haney, and D. Scott Aberson appeared on behalf of Syngenta.

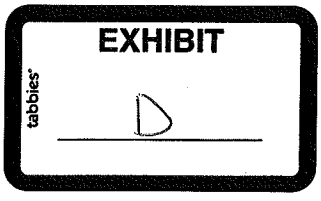
Based on all the files, records and proceedings herein, together with the arguments of counsel, the Court makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Plaintiffs Kuechenmeister and Ledeboer's motion for leave to amend their complaint to add a claim for punitive damages is granted.

2. The parties shall simultaneously submit briefs on the choice of law analysis as discussed and directed herein for Plaintiffs Mensik, Van Tilburg Farms, and Maher on January 25, 2017.



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3. The attached Memorandum of Law is incorporated herein.

BY THE COURT:

Dated: 1-9-2017

Thomas M. Sipkins
Judge of District Court

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Hennepin County, MN

** CONFIDENTIAL **

MEMORANDUM OF LAW

I. Factual History

The following facts surround Defendant Syngenta's commercialization of corn seed with genetically modified ("GM") traits. The primary individuals involved in making decisions on behalf of Syngenta with respect to these issues at the times relevant hereto include: CEO Mike Mack ("Mack"), COO Davor Pisk ("Pisk"), Global Head of External Affairs Sarah Hull ("Hull"), Head of Technology Acceptance Jack Bernens ("Bernens"), Head of Strategic Marketing for Corn for North America Chuck Lee ("Lee"), Region Director – North America and President of Syngenta Seeds, Inc. David Morgan ("Morgan"), then Head of Regulatory Affairs for China Shiping Zhang ("Zhang"), and current Global Head of Regulatory Affairs Lisa Zannoni ("Zannoni").

A. Bt10

Syngenta developed two genetically modified ("GM") corn seed traits known as Bt10 and Bt11. In 2005, Bt11 was authorized but Bt10 was not approved in the United States, European Union, or Japan. In 2005, it was discovered that some Bt10 seed was inadvertently exported as Bt11 for research purposes to Spain and France. Authorities estimated 1000 metric tons of Bt10 food and feed products may have entered the E.U. through export channels from 2001 to 2005. The U.S. assured the E.U. that no food, feed, or environmental concerns were associated with Bt10 because the Bt protein in Bt10 was similar to the one in Bt11. Syngenta, however, later informed the E.U. that Bt10 contains a gene conferring resistance against the antibiotic ampicillin. The E.U. and Japan demanded the U.S. take action and guarantee that all present and future exports of corn did not contain non-authorized GMOs. Hull testified that, "The EU asked that we clean out the Bt10 that was in the system, as did Japan, before they would take corn."

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B. Agrisure RW

Syngenta also developed a GM trait MIR604, designed to control rootworms in corn. In the spring of 2007, Syngenta commercialized the corn trait under the brand name Agrisure RW. Syngenta knew that Japan was a very important export market for U.S. corn but commercialized Agrisure RW prior to obtaining import approval in Japan. Several industry stakeholders voiced objections to Syngenta's decision to commercial Agrisure RW without obtaining this key import approval first.

The Japan Feed Trade Association ("JFTA") sent a letter to Syngenta dated March 1, 2007, asking it to review prior instances and the consequences that ensued when GM traits were launched prior to import approval. JFTA informed Syngenta that such action will cause a significant problem and trade issue between the U.S. and Japan and strongly asked Syngenta to release new biotech varieties in the U.S. only after obtaining full approval by the Japanese government.

The North American Export Grain Association ("NAEGA") is a trade association whose membership consists of private and publicly owned companies and farmer-owned cooperatives that are involved in and provide services to the bulk grain and oilseed exporting industry. By letter dated March 12, 2007, NAEGA submitted a comment to Syngenta's petition for deregulation of MIR604, requesting the imposition of conditions on the deregulation and stating:

> As background, US farmers and the grain export industry have relied on the commercial responsibility of technology providers to maintain access to major export markets as new biotechnology derived events become commercialized. One of the principle measures of maintaining access has included the voluntary restriction of commercialization until such time as the technology provider has obtained export market authorizations that are adequate to avoid significant disruption of markets. Over the last several years, we believe this process has eroded and subsequently failed US agriculture several times. This erosion of corporate responsibility to maintain major export markets has reached a point where now the provider of the MIR604 technology has indicated it will disregard

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> the single largest market for US corn, Japan. The unknown status of authorization in Japan is already adding risk mitigation costs, reducing competitiveness and posing a threat to sales of corn to a reliable, stable, and highest of value export market. This is a development that can and should be addressed promptly.
>
> In this case before you, Syngenta has indicated to several stakeholders it intends to distribute to US farmers for planting products containing MIR604 ("Agrisure RW" brand) despite the fact that MIR604 has not received approval in major export markets for US corn and corn products. We further understand the products will be distributed in widespread and 'significant' amount as soon as MIR604 is deregulated by USDA. Syngenta has also indicated it is certain US deregulation will occur before this coming planting season, allowing it to release this event for planting with full knowledge that requisite approvals or authorizations in most corn and corn product importing countries (including Japan) are not assured prior to the upcoming harvest.

Syngenta submitted a response that it had had discussions with NAEGA, the National Grain and Feed Association ("NGFA"), and others to "address the potential for commercial risks and market disruption that might occur in the event that Japanese approval is not secured prior to harvest this year. This is a hypothetical risk, and one that is and can continue to be successfully managed." Syngenta then discussed steps it had taken for Japanese approval and to inform growers to divert MIR604 corn from export markets. Syngenta asked that the event be deregulated without conditions.

On May 17, 2007, the Canadian Grains Council sent a letter to Syngenta indicating it strongly disagrees with Syngenta's decision to commercialize Agrisure RW in the U.S. before obtaining approval in Canada and "our grain industry will be holding Syngenta accountable for losses that this decision may cause." The letter further states, "Syngenta's actions in the United States, with full consultation and knowledge of the potential costs to the rest of the global grain industry, causes the Canadian industry to question its good faith in current and future discussion."

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Japan approved Agrisure RW at the last minute and a disruption in the corn trade with Japan did not occur in the fall of 2007. Syngenta subsequently met with members of JJZ and the Japanese Ministry of Forestry and Fisheries ("MAFF") in October 2007. A document of potential Q & As drafted in preparation for the meeting indicated Syngenta sincerely apologized for putting Japanese stakeholders in a difficult situation. Hull edited the message stating, "I believe we should express sincere regret and be immensely grateful for the work that was done by JJZ and MAFF but not 'apologize' for our actions. I think apologizing implies we did something wrong and that is not what the company believes." In a follow-up letter to MAFF dated November 15, 2007, Mack stated, "I fully realize that the launch of MIR604 in the United States prior to receipt of approval in Japan created concerns among the grain industry earlier this year and I sincerely regret the additional work and emotional stress this caused you and the industry."

Due to cross crop contamination, MIR604 was later detected in soybeans. In 2009 the E.U. stopped the import of soybean from the U.S. because of the detection of trace levels of MIR604 and MON89034, which were unapproved at that time.

C. BIO Policy

Syngenta's commercialization of Agrisure RW was the catalyst for development of the Biotechnology Industry Organization's ("BIO") "Product Launch Stewardship Policy" ("BIO Policy") and led to Syngenta's pledge to "not move forward with launching another corn and soy biotech product in the same manner as we did with Agrisure RW." The BIO Policy establishes guidelines for launching GM products. The BIO Policy provides that before launching a new GM trait, manufacturers "should meet applicable regulatory requirements in key countries, identified in a market and trade assessment, that have functioning regulatory systems and are

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likely to import commodities" including the new product. The BIO Policy defines a "functioning regulatory system" as one that is "science-based, with clearly defined timelines and processes for regulatory review and decision-making" and where the "decision-making processes [are] predictable, completed in a timely manner, and not subject to undue political pressure." For commodity corn, soybean, and canola, the key markets include "at a minimum" the U.S., Canada, and Japan.

In an email dated December 12, 2009, Mack made the following comments regarding the BIO Policy:

> Over the past two weeks I have stumbled across the phrase "BIO policy" as it relates to Syngenta activities now 3 times … In all cases, I gather that people are incorporating this policy into their thinking as if it constituted internal policy in a widespread way and I think we need to be all aligned on this. …
>
> To be sure you know my orientation (and here I presume everyone recalls the history and context when this wretched policy was crafted in the first place where BIO essentially acted against Syngenta when we were dealing with MIR604). From my vantage point, it served no legitimate purpose then and has served no legitimate purpose since. …
>
> Nevertheless, we are signatories to the BIO policy and so long as we are in the association, we will abide by it. From a practical point of view this means that it applies ONLY to US corn and nothing else (since we are not actively working on any traits in soybeans). BIO has no remit outside the USA and we should actively oppose (or stronger still, we just won't consider) a larger scope for them, or at least our participation in it. …

D. Viptera

Syngenta spent 15 years developing the GM trait MIR162, an in-seed control technology that protects corn from above-ground pests such as earworm, cutworm, armyworm, and corn borer. It is part of seeds sold under the brand name Viptera. Viptera corn produces a protein that has a different mode of action compared to other proteins.

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In 2007, Syngenta petitioned the USDA to deregulate MIR162. The USDA, EPA, and FDA deregulated MIR162 and Viptera was approved for unrestricted sale in the United States by April 20, 2010. Syngenta began selling Viptera seeds in the U.S. for the 2011 growing season.

Syngenta filed its application for approval of MIR162 in China. China requires cultivation approval from a separate country to accompany the application and has three windows for submissions per year. Brazil approved MIR162 in November 2009 but the first available opening for submission of the application was March 1, 2010. Under the Chinese process, the initial application must be followed by a final application after in-country studies in China. Syngenta's final submission was made on approximately November 9, 2011. Under Chinese regulations, Chinese authorities had up to 270 days to respond the submission. In general, the normal timeline for Chinese approval of a GM trait was two years from the initial application. In 2009, Syngenta's estimates of approval in China ranged from the third quarter of 2012 to 2014.

Syngenta represented to Cargill and other stakeholders that it planned a controlled release of Viptera for planting on only 50,000 acres. Internal communications indicate Syngenta did not agree that a controlled release was necessary. On October 19, 2009, Morgan provided the registration status of GAT corn to Mack, which had similar timelines for approval in the U.S. and Japan as MIR162. Mack responded:

> All the more reason why we should press for asking why a 'controlled' release needs to be made clearer to us under the BIO policy. Else-wise I presume that we are absolutely committed to launching 162 under a controlled release scenario (read: we sell as many as we can).
>
> I suspect you know full well that I think the whole thing is huge farce and typical 'association' crap.

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In the December 12, 2009 email from Mack wherein he stated his attitude toward the BIO Policy, he made the following comments regarding MIR162:

> That said, I think there is still some scope for ensuring that we are aligned on the risk assessment for 162 but it has nothing to do with BIO policy. To my mind, there are only 2 risks with an otherwise aggressive commercial launch of 162. The first is whether or not the grain traders can pull a '604' on us (you will recall well that they convinced the US railroad industry to block the transport of grain containing 604 and this caused growers to not plant the seed). Thus, if there is a material risk that the grain traders will actively NOT accept 162 grain, and IF this could impact the minds of the growers to not plant in the first place, then it is a commercial/financial risk....not a legal/financial one. The second risk is whether the grain traders could make an urgent appeal to Brasilia to place a temporary halt on 162 in an effort to ensure that the Brazil-Europe market stays open and whether this could possibly be successful. If so, then we would face a regulatory/commercial/financial risk and not a regulatory/legal/financial risk.
>
> In the end, I believe it is in our best interests to commercial this as wide and as aggressively as possible. ...

In an April 20, 2010 email from Gary Martin ("Martin"), the president and CEO of NAEGA, to several grain exporters, including Randall Giroux ("Giroux") of Cargill, Martin noted MIR162 was deregulated in the US and Canada but lacked "some key international approvals." He stated Syngenta said they would not commercialize MIR162 until 2011 but Martin expressed concern over what Syngenta considered commercialization based on its actions with Agrisure RW. Martin indicated that planting MIR162 in several test plots would be considered commercialization because of exposure to the commercial supply of commodity corn.

On June 9, 2010, Thomas Dorr ("Dorr"), CEO of the United States Grains Council ("USGC"), informed members that China had purchased 60,000 MT or 2.4 million bushels of corn and under circumstances "which leads us to believe that more private quota holders are preparing to purchase U.S. corn following this most recent purchase." Bernens forwarded the message from Dorr with the comment:

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> I have mention[ed] this to most of you before, but I continue to see signs that China may become and (sic) issue for unapproved biotech traits and international trade. As you know our approvals for China will likely lag some 2 years behind the first country with cultivation approval ... I had a call from Bunge on this yesterday so I know the trade is picking up and this could become a problem for us and the industry down the road.

On June 28, 2010, Giroux asked Bernens, "can Cargill assume that since MIR162 does not have major market approvals in several destinations and because there has not been a stakeholder consultation to determine what are 'major markets' for US origin corn in 2010, that you will continue to manage MIR162 as previously defined by Syngenta?" Bernens replied:

> But yes the bottom line is for 2010, we planted everything using regulated protocols (most important protocol being isolation distances) and we will ensure all grain harvested from the very limited number of Syngenta controlled plots or seed discard from any Syngenta production (which both will be extremely small acreages) will be delivered to verified domestic use only facilities under Syngenta supervision. We feel this is going well beyond what is required in the BIO launch policy for input traits....

In August 2010, NAEGA warned Syngenta of "the importance of obtaining Chinese regulatory approval prior to product launch." Mack testified that in 2010 he was aware that NAEGA was averring the importance of China even though China was not in the BIO. Randall Gordon of the NGFA testified that NGFA and NAEGA had discussions with Syngenta within its biotechnology committee that China was an important market as early as the summer and fall of 2010. On August 11, 2010, Bernens gave an update on the approval status of MIR162 to the MGFA Biotechnology committee, indicating approval in China was under review and expected in 2012.

On August 24, 2010, Bernens emailed Zannoni:

> as you may know corn exports continue to grow in China. Some estimate over 1 million MT in 2010 and maybe as much as 5 million MT in 2011. This would make China the 4th largest import market for corn from the U.S. behind Korea but ahead of Taiwan. So, what is our best estimate for MIR162 approval? I have Q1, 2012 is that still correct?

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Zhang advised there was a legal issue regarding the legal entity to import seeds and "if everything goes well, we may get import approval by Q1 2012. Recently I talked to the senior Chinese governmental officials they said the import amount of corn will be like soybean import soon. China imported more than 40 million MT soybean last year. So we should be ready for corn." Bernens replied:

> this is really alarming that our legal team has delayed the submission. I believe China is going to become a major issue for us, if Shiping is correct on 40 million MT for corn, China will be #1 importer ahead of Japan by a factor of three X. I can tell you right now no soybeans are going to market in the U.S. without Chinas approval. So I think the magnitude of the issue for the business is self evident.

In drafting answers to questions for an edition of Thrive magazine in January 2011, Syngenta stated, "Recently we have seen a faster economic recovery in China which has fueled the demand for US corn. This has been a key driver in the commodity price increases which is increasing the income of US farmers we discussed earlier. In fact China has moved from an insignificant importer of U.S. corn to the second most important market for U.S. corn."

In early 2011, Syngenta told stakeholders that China would approve MIR162 by "harvest 2011." On February 25, 2011, Giroux emailed Bernens, "Jack, are we going to have a safety cert for 162 this fall? What's the timeline for MOA to be finished on this cert? China is likely to be an importer in 2011 and an export opportunity US corn." Bernens forwarded the email to Morgan, Hull, Lee, and Steve Berreth and said, "As you know the answer is no and if we don't get the seed in from Argentina this month it might not be until sometime in 2013. I think I mentioned to some of you China became #1 importer of DDG's in 2010!" He later stated, "I believe China is a bigger issue than EU for MIR162, but I think you all know that we will be the only company that does not have approval of a single trait in both EU and China." Later in the discussion, Bernens stated:

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> I don't think China is a big issue for Brazil? However, in the U.S. it could be a significant one, bigger than the EU, because of the move toward substantial import of U.S. DDG's (now #1) and the anticipation of the same on whole corn. Also, let's not forget that China is a major importer of soybeans,.#1 for U.S. soybeans (it is a very big number). You know the whole cross crop contamination issue we had in the EU.

Finally, Bernens offered this information:

> 09/10 marketing year Sept to August China stats: 1.157 million metric tons of whole corn which makes them the #6 importer from U.S. and 2.173 million metric tons of DDG's of #1 importer of U.S. DDG's. This is quite a change from last year when they only imported 98 thousand metric tons of DDG's.
>
> I am not proposing anything, I think [Lee] just want to make sure you understand the risk to our business should the grain trade all of a sudden put up signs saying they will not take Agrisure Viptera because it is not approved in China. I am not sure I can put a probability on that happening?
>
> As for approval timing, if the seed from Argentina gets into China on time this spring and we can get planted then we are looking at approval sometime in 2012, if not they (sic) it could be delayed a year.

Bernens internally circulated his proposed response to Giroux that "based on the normal 2 year timeframe it would be this fall." Zannoni pointed out that under the normal timeframe, approval would be in spring 2012 because the submission was March 2010. Bernens responded that:

> If I [say] 2 years from March 2010 then clearly they know we have no chance of fall 2011. I was trying to buy sometime until we get things planted this spring, but if I am fudging the truth to (sic) much then I can go with March 2012. ... I am trying to find a response that does not prompt them to put up signs right away.

After reviewing Giroux's questions, Zannoni wrote, "Simple answers are no and spring 2012, but we should work on a broader message to deliver. We will be cutting it close with getting seed into China for the field test requirements this year." Bernens replied, "Problem is if I answer no then they might put up signs NOW and that impacts our sales this spring negatively."

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On March 2, 2011, Bernens answered Giroux, "We will have a better sense in few months following an update from Chinese government and can give you a better update then. But we used our Brazilian approval which was granted in Nov2009, instead of waiting for USDA approval which was in April 2010." After Giroux thanked Bernens for the update, Bernens emailed Zannoni and Hull, "It worked, I think." On April 20, 2011, Syngenta represented to another grain handler, Consolidated Grain and Barge Co. ("CGB"), that MIR162 was scheduled for Chinese approval in March 2012.

On or about May 18, 2011, Bernens prepared a slide labeled "Threats/opportunities identified" for a presentation that states:

- Potential for trade disruption could occur for the Agrisure Viptera 3220 stack if China and EU approvals for MIR162 are not obtained by 2012 launch.
  - Latest guidance for EU approval of MIR162, later half of 2013
  - Latest guidance for China approval of MIR162, Q2 2013
- As of May 17th, 2011 China trial for MIR162 had not been planted, could result in 1 year delay

Syngenta noted that the "[l]atest guidance for China approval of MIR162 [would be] Q2 2013."

On July 1, 2011, Syngenta received notice that CGB would not accept Agrisure Viptera corn. On July 2, 2011, Bernens wrote:

> as you know I have been warning of this pending potential development for sometime. I wish I had a way to fix it but China approval is not likely until next spring and even though we have done nothing wrong per BIO or any other policy, CGB has a right to refuse the corn. China has become a substantial market and we could see this was going to happen. I have not heard that anyone is planning to test for MIR162, but I suspect some might.

Syngenta also learned that Bunge began posting signs and instituting policies that they would not accept Viptera corn. On July 10, 2011, CEO Mack sent an internal email discussing how he wanted to deal with companies that refused to accept Viptera corn and stated, "[i]t's a no holds barred tone designed to make news and give them something to think about alongside our legal

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offering. ... We need to give the other grain traders pause before getting on this bandwagon." CEO Mack notes that the strategy would paint Bunge as "completely against any new technology" and that "they could care less about the incomes of growers." Mack indicated such a plan would work because "we have more corporate resources than they do."

On July 8, 2011, Mack wrote, "we need to make sure China knows that Viptera will be in every shipment of corn they receive by the fall of 2011." Hull then emailed Lee stating:

> [Mack] wants the Chinese to know that every ship carrying corn into China this fall will have 162 in it at some level. I need to pull some numbers together to make this a fact-based argument and wondered who could help me.
>
> ***
>
> Can we compare 162 to the first year of 604 and the dispersion models we have done to show what this means, or even compare it to the Bt10 experience which showed that under 0 tolerance even very little in the system had extensive hits. I know we need to be careful not to undermine our position that we can successfully grow products in closed looped systems such as Enogen, but I think we have to do what we can to get China to speed up this review and send signals to the grain trade. We would take this story to the US Government which should compel them [to] take it forward to China or put US corn trade at serious risk. Still, we will vet this further to make sure we understand the risk of sharing these facts but in the meantime we need to get the story pulled together.

Lee responded that enough Viptera had been planted to grow 229,824,000 bushels of corn and "I don't think the position you mentioned will hurt our strategy as it will need to be enable by some level of tolerance granted by the Chinese government. Obviously they won't grant a tolerance without some level of motivation."

The NGFA July 14, 2011 newsletter included an article on Viptera after Syngenta met with NGFA and NAEGA. The article includes the following statements:

> The timing of China's regulatory review of the commercialized Agrisure Viptera trait has taken on new importance given the growing volume of Chinese purchases of U.S. corn. China is one of the countries that has a functioning, predictable and science-based regulatory system for approving biotech-enhanced events. ...

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> The company said it has secured approvals for the Agrisure Viptera trait and stacks in key import markets recommended by the Biotechnology Organization (BIO) and National Corn Growers Association, which did not include China.
>
> But NAEGA said it alerted Syngenta in August 2010 of the importance of obtaining Chinese regulatory approval prior to product launch during a joint meeting with the NGFA's Biotechnology Committee. The issue has also been discussed at two subsequent NGFA Biotechnology Committee meetings, once during the March 2011 convention and another conducted on June 29 in Washington.
>
> China currently has a zero tolerance for the presence of unauthorized traits in import shipments, which has caused some U.S. domestic buyers who supply grains to exporters to notify producers that they will not be accepting corn with the Agrisure Viptera trait until the situation is resolved.
>
> Company officials currently project receiving approval of the trait in China by the end of the first quarter of 2012. ...

In a presentation on July 22, 2011, Mack noted that China "continues to have the greatest impact on world markets, with increasing imports not just of soybeans but also now of corn." In an August 2, 2011 memo to Seed Technology Members, including Syngenta, Dorr of the USGC stated that, "the current situation regarding the commercialization of unapproved events in China has raised industry-wide concern about potential near and longer-term disruption to U.S. corn exports to China."

Syngenta sent a letter dated August 17, 2011 to growers of Viptera stating they expect import approval from China in March 2012. Syngenta indicated that China had not previously been a substantial portion of U.S. exports and the National Corn Growers Association ("NCGA") stated Syngenta was in compliance with all commercialization policies. Syngenta informed growers that Bunge and CGB would not accept Viptera and offered options on where to deliver Viptera corn.

Miloud Araba, Product Lead, Technical Traits for Syngenta, sent a memo to Showalter Quinn on August 18, 2011, indicating MIR162 approval in China was expected in the first

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quarter of 2012 and in the first or second quarter of 2013 in the E.U. and that Syngenta was the "only company that has a single event (MIR162) in commercial corn products that is not approved in the EU (or China)." Araba further stated:

> All component events in 3110, 3220, 3122, 3111, and 3000GT are approved in all key import markets with the exception of event MIR162 not having approval in the EU and China. While neither country would be considered having a functioning regulatory system both countries have been growing in importance to the U.S. corn trade recently. This lack of approval in these importing countries has the potential to disrupt trade of U.S. corn products, soybean products and even other crops (e.g. wheat) that could have trace levels of unapproved corn events comingled. It is noteworthy that in the 2010 limited exports of whole corn and corn products from the US to the EU have resumed due to the approvals of MON88017 and MIR604 in late 2009. Therefore, like with Agrisure Viptera 3110 and 3111, a risk that commercialization of Agrisure Viptera 3220 in the US and Canada, could result in some disruption of trade with the EU is likely since the target date for EU approval of MIR162 is likely not until sometime in 2013. The risk is compounded by the fact that it is not necessarily limited to the corn trade. In 2009 soybean imports from the US to the EU were stopped, because of the detection of trace levels of unapproved corn events (MON89034 & MIR604). Detection of these corn events within soybean shipments is not completely surprising given the proportion of growers that produce both crops and the use of the same equipment, elevators and barges in the vast U.S commodity system. We thus have to also consider the risk commercialization in the U.S. and Canada might pose to the soybean trade or for that matter other commodities like wheat. Canada is one of the largest exporters of wheat with nearly 90% being exported. Fortunately, the wheat is grown in western Canada and does not overlap with the major corn growing areas in eastern Canada so cross contamination into wheat is very low.
>
> The risk of cross crop contamination in soybean and other crops has largely being abated for the EU after a technical solution was adopted in February of 2011. The technical solution allows .1% threshold of a trait approved in the country of cultivation but not yet approved in the EU. However, this cross crop contamination is still a significant risk for China which is currently the U.S. #1 importer of U.S. soybeans.

On August 22, 2011, Syngenta sued Bunge for refusing to purchase Viptera corn and sent communications to other grain traders as a warning. In a series of August 20, 2011 emails, Mack states, "I am attempting to give them lots of things to think about ... all of them designed to help isolate Bunge and to have the CEOS step back from it instead of step into it." Mack then adds "a

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reminder to them that they need to be careful about the risks that will befall their companies if they get into collusive behavior." In an email on the day the Bunge lawsuit was filed, Mack stated that he did not want to communicate with Monsanto and DuPont because, "I want them to worry about us when we go it alone...."

Cargill internally discussed an email that Mack sent them about the Bunge suit. Devry Boughner indicated that Syngenta's claim that it did not know China would be a commercial market was disingenuous. He also stated that China could reject corn but may let it slip in under their nose with the demand for corn the way it is but will reject corn when the price is right to reject it. Giroux noted that NAEGA told Syngenta in August 2010 that China would be a major market in 2011 but China approval would not be before April 2012 and Syngenta "chose to disregard that advice and take the risk."

On August 26, 2011, NAEGA and NGFA issued a joint statement in response to Syngenta's lawsuit against Bunge with the following comments:

> The grain handling and export industry have communicated consistently, clearly and in good faith with biotechnology providers and seed companies about the importance of biotech-enhanced events in commodity crops receiving regulatory approvals or authorizations – prior to commercialization – in key export markets where foreign governments have functioning regulatory systems that approve biotech-enhanced traits. These communications regarding key export markets, identified through market and trade assessments, have been conveyed through industry trade associations and in direct communications by individual companies.
>
> ***
>
> U.S. farmers, as well as the commercial grain handling and export industry, depend heavily upon biotechnology providers voluntarily exercising corporate responsibility in the timing of product launch as part of their product stewardship obligation. Technology providers must provide for two critical elements: First maintaining access to key export markets like China, or for that matter any market like China that has a functional, predictable biotech-approval process in place; and second, proactive transparency to all stakeholders when there is a potential for restricted marketability of their products based upon approval status in major markets. The negative consequences of overly aggressive commercialization of biotech-enhanced events by technology providers are numerous, and include

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> exposing exporting companies to financial losses because of cargo rejection, reducing access to some export markets, and diminishing the United States' reputation as a reliable, often-preferred supplier of grains, oilseeds and grain products. Premature commercialization can reduce significantly U.S. agriculture's contribution to global food security and economic growth.
>
> Putting the Chinese and other markets at risk with such aggressive commercialization of biotech-enhanced events is not in the best interest of U.S. agriculture or the U.S. economy.

In an internal email that same day Mack said:

> With this press release, the BIO policy is effectively dead. If the position of the grain trade is that we are guilty of overly-aggressive commercialization when we followed the existing protocol and otherwise launched last year in the virtual absence of the sort of allegations that are being made [], then the business model and basis for developing commercial assumptions is unacceptably imperiled.

In an October 21, 2011 email, Mack responds to concerns from Lee that two boats of U.S. corn had been rejected in China due to the presence of an unapproved Monsanto GM trait with:

> I think Chuck worries about this wrongly. Having boats get turned around and quarantined is precisely what we need to help pressurize this. Moreover, having more press about it is better than less press since this will put pressure on everyone else who has a vested interest in the broader issue to force an industry solution.

On November 9, 2011, Syngenta's John Fischer asked Bernens for data on the amount of Agrisure RW seed returned by growers indicating, "We're working on an analysis for the potential business risk to Agrisure Viptera sales this coming year if growers return seed this spring based on the trait still pending approval in China and in light of the fact that it will be 2013 before approved in the EU." Jill Wenzel added to the communication:

> One heads-up from today's Agrisure Viptera core team call – approx. 750,000 of our approx. 1MM units are already ordered and we anticipate the remainder will be ordered by year's end. The industry-wide short supply of seed will work in our favor. Latest guess from regulatory is we may have approval in China as early as January 2012. EU then becomes primary stumbling block.

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> Hence key business issue is more the black-eye we now have, vs. actual impact on sales. I still believe we need to do some give and take with the grain trade and, as we have determined, rebuild trust. But for immediate short-term business impact, it may not be as bad as we thought.

Fischer replied to Wenzel, "Thanks for the update. This is a look at orders. But what about returns on those orders? Once people realize that not same as SmartStax and can be detected, that will be a problem for grain and DDGS going to Europe. So still feels like there is a potential business impact." Wenzel replied, "This issue will be if they return it, they likely won't be able to replace it. Poor things will have to roll the dice." Jim Gresham then wrote:

> From the beginning, one could guess Viptera might sell out of the allocation Or close. From a sales standpoint we can count ourselves lucky. The black eye is not as much on Viptera as it is on Syngenta as good stewards and good business partners in the marketplace.
>
> We could try to ignore a black eye and there will likely be little impact overall, or perhaps a 3% to 5% downward impact as the KAMs suspect. If that is only 3% to 5% on Viptera, great. 5% of the sales of Syngenta overall? Oh man, that's a lot. This is what a black eye can do…it's not limited to one product. Everyone can see it.

In November 2011, Syngenta sent a letter to farmers that had grown Viptera that year to encourage them to purchase more Viptera seed for the next season. The letter says that even though some major grain handlers refused to accept Viptera, "That did not stop you, or us, from finding markets for this quality grain... It is anticipated that China will approve the trait in late March 2012 in time for planting, based on its customary regulatory processes and time frame for new biotechnology traits."

On November 30, 2011, Syngenta received communications that growers were cancelling orders of Viptera seed because of uncertainty of China clearance. Dan Kestel of Syngenta said communication from Syngenta to farmers was needed."But even more important is creating pull through interest in seed stock orders for planting the 2013 crop. If we say March enough, there

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should be no issue in ordering seed stock and seed companies will have confidence in the March date." On December 1, 2011, Syngenta also received notice that ADM was not accepting Viptera corn.

When the first quarter of 2012 passed and China had not approved Viptera, Syngenta drafted "talking points" that were to be "verbalized" to external audiences. The talking points include that Chinese "approval will be received shortly;" "Syngenta has had several indications that a successful review of its application has been completed;" "We continue to anticipate this approval will be received shortly;" "The authorities have not requested any additional data nor indicated any intention on their part to further evaluate or deny the approval, thus we anticipate this approval will be received shortly;" and "Syngenta has had several indications that a successful review of its application has been completed, however the notification of the approval has yet to be received."

On April 18, 2012, Mack participated in the company's regular earnings call with analysts. In reply to one analyst that asked for an update on key import approvals for Viptera, Mack told participants that Viptera:

> has import approval in all of the major markets. There isn't outstanding approval for China, which we expect to have quite frankly within the matter of a couple of days. That remains on track for approval to the very best of our ability. Of course, the regulatory authorities are not something that we can handicap definitely, but we know of no issue with that whatsoever...

Giroux and Lee communicated by email on May 9 and 10, 2012. Giroux asked for an update on Chinese approval because the first quarter had passed and Cargill had vessels lined up. Lee indicated China had not approved any traits due to an issue not associated with MIR162 but "Update I just received indicates we are still on track for Viptera approval by [China.]"

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On June 11, 2012, Syngenta received a letter dated May 15, 2012 from China's Ministry of Agriculture ("MoA") stating, "As the application with following problems, MoA doesn't grant approval temporarily." The letter then notes two deficiencies with the MIR162 application; it did not analyze the acute toxicity effect and did not provide certain comparison data. Zannoni indicated that they would prepare a response promptly and that China approved a soybean trait by Pioneer. Mack said, "I suspect that the folks in the USA are going to have some difficulty with this. Am wondering actually if we even need to make this public ... is it visible to the outside world?"

Syngenta issued a statement about the request for further information because the approval delay was already known by the grain trade, the sales team and customers wanted information, and to be in a stronger position with critical stakeholders. In discussing the language for the statement, Hull commented, "I think we need to still position the request for new information as politicizing the situation so it does not look like we had a bad file. We need to make China the problem and be the focus of the growing anger, not Syngenta."

In November 2013, China rejected shipments of U.S. corn that tested positive for the presence of MIR162. On November 30, 2013, Mack forwarded an article reporting that China rejected 60,000 tons of GM corn from the US to Syngenta's Chairman of the Board Michael Demare. Mack wrote:

> Btw, the delivered value of this corn is of the order of $20m…and if they unloaded it on an open air dock, it will begin to degrade immediately in value terms. If Cargill [has] another 9 boats on the way and reasons to believe it will be inspected (since if inspected it will test positive), then u can see why they r nervous and wishing we would accept liability…and why the phone call is rather polite, but clear, from our side.

Demare replied, "Indeed, this can turn into a legal, financial and PR nightmare if we don't handle this well. Quite a concern for Cargill though? How can they protect themselves from

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such exposures?" Mack replies that, "[t]he biological fact of the matter is that they can't protect themselves." Mack also explains that "it is financial exposure for Cargill, not a legal one, since they've no recourse on us ..."

By December 2013, China had rejected 545,000 metric tons of U.S. corn shipments and began rejecting U.S. DDGS because of contamination with MIR162. Giroux testified that Cargill learned directly from China in December 2013 that China had issues with Syngenta's application. Viptera was eventually approved for import into China in December 2014.

E. Duracade

In 2014, Syngenta proceeded to commercialize another MIR162 corn product with trait Event 5307 called Duracade. Duracade was approved for unrestricted sale in the United States by January 29, 2013. To date, Duracade has not been approved for import to China.

"Advancement to Commercialization" documents dated May 14, 2013 for Duracade state that most major functioning regulatory countries will have approved of Duracade before the 2014 launch and:

> It is noteworthy that we do not anticipate that the [EU] and China (both now considered non-functioning regulatory countries) will have approved Agrisure Duracade prior to the harvesting of the commercial grain in the fall of 2014. This creates a significant controversy in the grain trade, since China is anticipated to be a major importer of corn products in the next several years. Comparatively, the amount of US corn imported to China vs. the amount grown in the US is still fairly small. However, it is today and it will likely be a large percentage of US exported corn over the next five years.

On December 18, 2013, Greg Page of Cargill sent an email to Mack asking to talk about the launch of Duracade. Before responding to Page, Mack emailed Pisk:

> Not sure what more I can tell him other than that this is no different than 162 or 604 for that matter which is that we have always commercialized in the country when we receive deregulated status for the major crops and have agreed the 'functioning' regulatory agencies (I know the drill). As it is, this could turn testy since I suppose he will say that it's madness for us to commercialize a new trait

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> with what we know is going on ... and my reflex will be to say that the grain traders need to perhaps pay us for missed royalties and that while the system isn't perfect, for us to do otherwise is to say that China gets to decide all trait introductions on their own time and in their own way.

Pisk replied that the grain trade had four alternatives: 1) stop trading with China; 2) continue trading and hope the Chinese don't look for reasons to reject shipments; 3) push for a solution to asynchronous approvals (or at least get the Chinese to take the risk on this); and 4) bully Syngenta (any anybody else) into making the problem go away.

On January 22, 2014, NAEGA and NGFA wrote a joint letter urging Syngenta to halt commercialization of Viptera and Duracade, because the lack of Chinese import approval "resulted in serious economic harm to agricultural producers, exporters and grain handlers." Syngenta discussed internally how to respond. In a January 26, 2014 email, Mack informed the staff that "we should counter with an aggressive response" because "A mild response will imply that we are giving their demand consideration, when we aren't." He explains his reasoning for moving forward with Duracade and crafting a strong response to NAEGA and NGFA, "it tells the other side that we're now willing to go there to defend our company and that they need to take this into account when playing the next card in their hand. In short, it makes us more unpredictable, less corporate and potentially more dangerous (think wounded animal)." Upon review of a draft letter, Mack commented, "The one thing that I think is missing, critically so, is a clear rejection of their demand and clear assertion that we are pressing on, vigorously so, with our sales plan of both products." He also stated, "One of the things that I'm keen to avoid is any mistake of our intent on the next steps (i.e. we're going full speed ahead with Duracade....PERIOD)."

Mack drafted a letter to NAEGA and NGFA with the intent of painting NAEGA as a "trade association of Washington hacks and not a constituent with which we are even compelled

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to discuss matters" and anti-technology. He analyzed the business risks of his response to shareholders, Syngenta's sales force, the grain trade, and farmer customers and hoped it had the effect of giving the sales force incentive to more aggressively sell Viptera and Duracade. In the letter, he states:

> If we took seriously your demand, it is entirely possible that more than half of the patent life of a trait could languish awaiting registration from a regulatory regime which just isn't working. Taken literally, your letter seems to suggest that, in the end, it is only the Chinese government which will decide which tools are going to be used by US corn growers in the future, and Syngenta intends to vigorously oppose legislation which your association might introduce to prevent this from happening.

Pisk traveled to the U.S. in February 2014 and in determining who to meet with, stated, "[w]e have long said that we needed a crisis to address/resolve the asynchronous approvals issue - now we have one lets please make sure we make full use of it." On February 13, 2014, Pisk went to Cargill to discuss Viptera and Duracade. Giroux summarized the meeting in an email report as follows:

> ***Do not anticipate approvals in China before July 2014.*** Their next opening for approval is at the March meeting and have to solve their scientific issues before then. Visible lynch pin to approvals is china-declared safety concerns (allerginicity and environmental). They discount MOA scientists negative safety assessments and to address that have created technical group (SYN and china scientists). Goal to identify the difference in interpretations working towards an approval from MOA. MOA finally talking to them about it officially and group will meet in next couple weeks. SYN did not feel scientific issue around allergens was a big deal and could be dealt with quickly; we are not convinced that they have good judgment here.
>
> ***Syngenta (finally) shared they had applied for cultivation in China and this could be the approval problem.*** We had asked this question before (Nov and Dec mtgs) and Morgan had denied applying for cultivation. This fact first came out on NAEGA meeting (Steve Smalley)) with MOA in China where they told industry of their environmental concerns. Syngenta continues to discount influence of the cultivation approval and environmental questions raised. When questioned about whether the cultivation request was holding up the import approval they naturally said no. Could be the issue as most tech co don't apply for cultivation, new group of scientists got involved asking difficult questions. Environmental questions

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could explain why processed products like DDGS continue to flow into the country.

Farmer is their customer and demanding innovation; this will remain their focus. Lights are bright green for them to continue to innovate and bring products to the market and while they do recognize that there are negative impacts on the others, they will continue to move. Good discussion and debate about risk/reward, market access and impacts on farmers. Did not change their minds nor expected to do so. Did signal to them that we may not be willing to take Duracade in our elevators and that corn sales to China were going to be significantly impacted. Cost to the industry will work themselves back to the farmer and we will continue to build communications to farmers about importance of export approvals to their bottom line.

They are pulling back on aggressiveness of Duracade commercialization. They do recognize that Viptera problem is significant and have decided to conduct a 'limited launch' plan vs. a broad commercialization. Indicated that this will include a management plan for distributing and delivering the trait into the grain supply. When asked if they will take responsibility for the event showing up in China the answer was NO. Plan should be available in a couple week, we do not put much value behind it on managing zero tolerance in China.

We all agree that we need to work towards synchronized approvals for GM traits but don't share the same strategy to get there. We did recognize improving the external environment is a shared responsibility. Both sides recognize that this work is already underway through both broad coalitions and national and international trade organizations. Reality is this is a 10-15 year plan and how we approach commercialization between now and then is where we struggle with each other. Difficult to collaborate when we don't treat each other fairly. SYN was clear they will focus on the farmer and while we share the same goals, we don't share the same near term strategy to get there.

II. Procedural History

Thousands of lawsuits based on these allegations surrounding Syngenta's commercialization of Viptera and Duracade have been filed in various federal and state courts. In this case, Plaintiffs claim, *inter alia*, that Syngenta's commercialization of Viptera and Duracade was negligent. In an Order dated April 7, 2016, the Court denied Syngenta's motion to dismiss finding Plaintiffs stated a legally cognizable claim for relief. The Court determined that Syngenta had a duty to control the timing, manner, and scope of the commercialization of

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Viptera and Duracade. This duty arises out of an inter-connected industry and market.[1]

On October 2, 2015, Plaintiffs filed a Master Complaint for Producers and Non-Producers and a Minnesota Class Action Master Complaint for Producers and Non-Producers (collectively "Master Complaints"). At a status conference on October 30, 2015, the Court informed the Plaintiffs that it was improper to include a claim for punitive damages in a complaint. *See* Minn. Stat. § 549.191. Plaintiffs then amended the Master Complaints to remove the request for punitive damages on November 5, 2015. Pursuant to the Court's April 7, 2016 Order on Syngenta's motion to dismiss, Plaintiffs filed Second Amended Master Complaints on May 6, 2016. Syngenta then filed Answers to the Second Amended Master Complaints on June 20, 2016.

The Court has issued several scheduling and procedural orders in this matter to manage progression of the litigation. In Paragraph II of Scheduling Order No. 2 issued on November 4, 2015, the Court directed "[a]ny motion for leave to join additional parties or to otherwise amend the pleadings must be filed by no later than 21 days following the filing of the Answer[s], subject to such joinders or amendments that a party may seek to make upon good cause shown based on facts learned during discovery." The second line of Scheduling Order No. 5 issued on November 16, 2016, provides that Plaintiffs' motion to amend the complaint to add punitive damages would be heard on October 26, 2016. Plaintiffs first gave notice to Syngenta of this motion in October 2016. Due to scheduling issues and upon agreement of the parties, the hearing on the present motion was rescheduled to December 5, 2016.

III. Legal Analysis

Plaintiffs move the Court for leave to amend the Second Amended Complaint for Producers

[1] Whether these claims are subject to preemption by the federal Grain Standards Act is a question pending by separate briefing and argument of the parties. The Court is aware of the decisions issued by the United States District Courts in related matters and will consider them in subsequent orders.

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and Non-Producers (non-Class) to add a claim for punitive damages as it relates to bellwether trial Plaintiffs Daniel Mensik ("Mensik"), Van Tilburg Farms, Kirk Kuechenmeister ("Kuechenmeister"), Charles W. Ledeboer ("Ledeboer"), and Douglas Maher ("Maher"). Plaintiffs seek punitive damages on their negligence claim; not on their statutory claims. After filing an action, a party may make a motion to amend the complaint to seek punitive damages. Minn. Stat. § 549.191. The motion must allege the statutory basis for a punitive damages claim and be supported by *prima facie* evidence. *Id.* If the court finds *prima facie* evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages. *Id.* "A plaintiff need not demonstrate an entitlement to punitive damages *per se,* but only an entitlement to allege such damages." *Berczyk v. Emerson Tool Co.,* 291 F.Supp.2d 1004, 1008 (D. Minn. 2003).

"'Prima facie' does not refer to a quantum of evidence but, rather, to a procedure for the winnowing of nonmeritorious punitive damage claims." *Swanlund v. Shimano Indus. Corp., Ltd.*, 459 N.W.2d 151, 154 (Minn. Ct. App. 1990), *rev. denied* (Minn. Oct. 5, 1990). A party seeking to add a claim for punitive damages must present evidence which, if unrebutted, would support a finding of punitive damages. *Id.* The Court may not make credibility determinations and may not consider any challenge, by cross-examination or otherwise, to the moving party's proof. *Id.*; *Berczyk*, 291 F. Supp. 2d at 1008 n. 3; *Olson v. Snap Prods., Inc.*, 29 F. Supp. 2d 1027, 1034 (D. Minn. 1998). But the Court must carefully scrutinize the evidence presented by the moving party to independently ascertain that it amounts to a *prima facie* showing that the substantive requirements for punitive damages have been met. *See Ulrich v. City of Crosby*, 848 F. Supp. 861, 868-69 (D. Minn. 1994); *Healey v. I-Flow, LLC*, 853 F. Supp. 2d 868, 873 (D. Minn. 2012). Section 549.19 thus requires the Court to perform a gatekeeping function at this stage. *See Healey*, 853 F. Supp. 2d at 873 (citing *Swanlund*, 459 N.W.2d at 154)).

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The Court shall allow punitive damages only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others. Minn. Stat. § 549.20, subd. 1(a). The statute defines deliberate disregard as follows:

> (b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:
>
> (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
>
> (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn. Stat. § 549.20, subd. 1(b). The purposes of punitive damages are to punish the perpetrator, deter repeat behavior, and deter others from engaging in similar behavior. *Jensen v. Walsh*, 623 N.W.2d 247, 251 (Minn. 2001). In light of these purposes, the focus of the analysis is on the wrongdoer's conduct. *Id.* The "clear and convincing" requirement is met where the "evidence is sufficient to permit the jury to conclude that it is 'highly probable' that the defendant acted with deliberate disregard to the rights or safety of others." *Ulrich*, 848 F.Supp. at 868 (citing *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 659 (Minn. 1987)).

Punitive damages are generally disfavored and are an extraordinary remedy allowed only with caution and within narrow limits. *Lewis v. Equitable Life Ass. Soc. of the U.S.*, 389 N.W.2d 876, 892 (Minn. 1986). The availability of punitive damages depends upon the evaluation of a variety of considerations including:

> those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct,

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> including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Minn. Stat. § 549.20, subd. 3. Evidence of negligence, even gross negligence is not enough. *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 381 (Minn. 1990). Intent to harm, however, need not be shown. *See Bucko v. First Minn. Savings Bank, F.B.S.*, 471 N.W.2d 95, 98 (Minn. 1991).

The facts recited above in Section I reflect the Court's careful scrutiny of Plaintiffs' unrebutted proof. The arguments made and brilliantly presented by Syngenta's counsel ultimately cannot overcome the gatekeeping standard at this stage in the litigation on this issue. The Court finds Plaintiffs have presented a *prima facie* case that there is clear and convincing evidence from which a reasonable jury might conclude that Syngenta acted with deliberate disregard for the rights of Plaintiffs under Minn. Stat. § 549.20.

A. Timeliness

Syngenta argues that Plaintiffs' motion should be denied as untimely. Syngenta relies on Paragraph II of Scheduling Order No. 2, stating a motion to amend the pleadings must be filed 21 days after filing of the Answer, or July 11, 2016. Plaintiffs' motion, however, is timely under Scheduling Order No. 5. In addition, Scheduling Order No. 2 further states that the deadline is, "subject to such joinders or amendments that a party may seek to make upon good cause shown based on facts learned during discovery." As the Court has previously noted, the extreme number of cases and complex procedural history of this litigation has complicated scheduling. The parties have conferred and agreed to most scheduling dates in this matter, including those in Scheduling Orders Nos. 2 and 5. A motion for leave to amend the complaint to add a claim for punitive damages is a fact-based motion that required discovery. The motion should not be a surprise to Syngenta since the complaint originally included a claim for punitive damages but was removed

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when the Court noted that including such a claim was procedurally incorrect in Minnesota. Plaintiffs have thus shown good cause to bring the motion at this time. Under these circumstances, Plaintiffs' motion complies with the Scheduling Orders and will not be denied as untimely.

B. Choice of Law

Syngenta argues that the non-Minnesota Plaintiffs cannot seek punitive damages. In the Court's April 4, 2016 Order on Syngenta's motion to dismiss, the Court held that the law of each Plaintiff's state of residence would apply to their common law claims. The Court also conducted a choice of law analysis and permitted the extraterritorial application of Plaintiffs' statutory claims under the Minnesota Unfair Trade Practices Act and Minnesota Consumer Fraud Act to those Plaintiffs residing in a state without consumer protection statutes. Based on that Order, Syngenta argues the Court should automatically apply the punitive damages law of each Plaintiff's home state and Plaintiffs argue the Court should automatically apply Minnesota's punitive damage statute to all five Plaintiffs.

When a conflict-of-law issue arises, the preliminary step is to decide whether the question is substantive or procedural. If the matter is one of substantive law, the Court must perform a choice of law analysis to determine which state's law applies. *Jepson v. Gen. Cas. Co. of Wis.*, 513 N.W.2d 467, 469 (Minn. 1994). This analysis was initially adopted in *Milkovich v. Saari,* 295 Minn. 155, 203 N.W.2d 408 (1973). If the matter is one of procedural law, Minnesota follows the "almost universal rule that matters of procedure and remedies [are] governed by the law of the forum state." *Davis v. Furlong,* 328 N.W.2d 150, 153 (Minn. 1983) (citation omitted). In diversity cases, the U.S. District Court, District of Minnesota applies the procedural requirements of Minn. Stat. § 549.191 before a plaintiff may plead a claim for punitive damages. *Healey*, 853 F. Supp. 2d at 873-74. But the substantive standard of the claim is subject to a choice of law analysis. *Id.* at 874. In *Healey,*

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the Court found there was no conflict between Minnesota and Virginia's punitive damages laws and thus applied Minnesota's substantive standard found in Minn. Stat. § 549.20. *Id.* at 875.

The Court agrees and finds that the procedural requirements of Minn. Stat. § 549.191 applies to all claims for punitive damages. However, the applicable substantive standard for the claim is subject to a choice of law analysis. Contrary to Syngenta's argument though, it is not automatic based on the Court's April 4, 2016 Order that non-Minnesota Plaintiffs are barred from seeking punitive damages. As Plaintiffs' motion seeks to add a new claim, a choice of law analysis for the new claim should be performed. There may be no outcome-determinative conflict of law or some of the choice of law factors may be different or hold greater weight when analyzing tort claims versus a claim for punitive damages. The Court finds that neither party fully briefed this issue and requests the parties to submit additional briefs on the choice of law analysis for Plaintiffs Mensik, Van Tilburg Farms, and Maher. Since Plaintiffs Kuechenmeister and Ledeboer are Minnesota residents, Minnesota's law on punitive damages applies and the Court will continue with its examination of their claims.

C. Clear and Convincing Evidence of Deliberate Disregard

Syngenta knew that launching Viptera without Chinese import approval created a significant risk of harm to U.S. corn farmers. First, Syngenta had knowledge that China was a growing and important market for U.S. corn. The Court notes that the evidence shows China had not been a major importer of U.S corn prior to 2009 and the BIO Policy did not specifically identify China as a key export market with a functioning regulatory system. However, industry stakeholders and Syngenta itself forecasted the shift in China's import of U.S. corn. The USGC informed Syngenta of significant Chinese imports as early as June 2010 and NAEGA and NGFA as early as August 2010. Bernens shared this information and advised Syngenta of the importance of the Chinese

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market for U.S. corn at this time. In addition, there is evidence that most stakeholders considered China to be a key import approval to obtain.

Syngenta also knew the potential risk and consequences of commercializing MIR162 without import approval. Evidence of Syngenta's knowledge includes Syngenta's history with Bt10 and MIR604, the numerous communications from NAEGA, NGFA, JZZ, MAFF, and the Canada Grains Council. Again, Syngenta knew the risk of trade disruption from prior experience with Bt10 and MIR604 as well as direct admonishments from industry stakeholders that Syngenta's actions would hurt all of the other players in the interconnected industry and market.

Considerations that bear on the availability of punitive damages weigh in favor of granting the motion. Factors include the profitability, duration, and concealment of the misconduct, degree of awareness of the hazard, and attitude. There is evidence that Syngenta was at least disingenuous, perhaps mendacious at worst, about the timing of Chinese approval to induce farmers to buy and plant Viptera. Bernens' reply to Cargill's February 2010 request for information shows Syngenta was being less than forthright about the anticipated date of China's approval in an effort to prevent elevators from putting up signs refusing to take Viptera and in turn deterring farmers from buying and planting Viptera. In addition, when stakeholders in the industry questioned Syngenta regarding its conduct, Mack directed that any criticism be met with shifting blame and increased aggressiveness in commercialization. Mack and Pisk's comments show Syngenta was willing risk a trade disruption in order to advance their own interests and agenda with respect to changing the issue of asynchronous approvals with disregard for the effect this would have on U.S. farmers.

In sum, taking Plaintiffs' proof as unrebutted, they have presented a *prima facie* case that Syngenta had knowledge of facts that created a high probability of injury to the rights of U.S. corn farmers and deliberately proceeded to act in intentional disregard of the high degree of probability of

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injury to their rights. Syngenta knew that releasing Viptera prior to securing import approval in China created a high probability of trade disruption and loss of the Chinese corn market to U.S. farmers. Despite that knowledge, Syngenta proceeded with commercialization. Syngenta acted to conceal its actions and shift blame to the grain trade, or China, or to the farmers themselves for the consequences. Syngenta was willing to risk the loss of the Chinese market for U.S. corn, despite knowledge of the financial consequences that a trade disruption would have on American corn farmers.

1. Regulatory Compliance

Syngenta's argument that Viptera's approval by the USDA, EPA, and FDA bars punitive damages is unpersuasive. Syngenta argues that because Viptera was approved for sale in the U.S. and eventually approved for import in China, it sold a legal product and cannot be found reckless. None of the cases cited by Syngenta from other states for the proposition that punitive damages are improper where a defendant has adhered to environmental and safety regulations are persuasive or controlling on this Court. *See e.g., Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993); *Nissan Motor Co., Ltd. v. Maddox*, 486 S.W.3d 838, 843 (Ky. 2015), as modified on denial of reh'g (May 5, 2016); *In re Miamisburg Train Derailment Litig.*, 725 N.E.2d 738, 752 (Ohio Ct. App. 1999); *Nader v. Allegheny Airlines, Inc.*, 626 F.2d 1031, 1035 (D.C. Cir. 1980). Minnesota, however, has permitted punitive damages in spite of a defendant's compliance with government regulations. *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 738 (Minn. 1980). "While compliance with this test may be relevant to the issue of punitive damages, it does not preclude such an award as a matter of law." *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 734–35 (Minn. 1980). First, Syngenta's argument fails to acknowledge that it is not the sale of Viptera in and of itself that Plaintiffs' claim was reckless but the launch and commercialization of a product in a manner that gave rise to a risk of trade disruption. Second, in accordance with *Gryc*, Syngenta's

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compliance with regulations is relevant to determining if Plaintiffs' prove entitlement to punitive damages, but it does not preclude such an award as a matter of law.

2. Chinese Market Importance and Conduct

Syngenta claims that its failure to foresee that China would become a major importer of corn, China's delay in approving MIR162, and China's embargo on all U.S. corn does not evidence deliberate disregard of Plaintiffs' rights. Viewing the evidence as unrebutted, Syngenta was aware of the importance of the Chinese market to U.S. corn growers prior to the time of commercialization. There is evidence that as early as June 2010, the USGC, NAEGA, and NGFA informed Syngenta that China was a major import market for corn. Syngenta's employees, including Bernens and Zhang, recognized China's growing import market and predicted a large increase in the import of corn.

Syngenta's argument that it could not foresee China's delay in approving MIR162 misses the mark. Plaintiffs' claim is that it was negligent to go forward with the launch without obtaining approval first. Syngenta's argument is based on the presumption that China would undoubtedly approve MIR162 but unreasonably delayed approval. There is evidence that China had issues with Syngenta's application such as questions regarding allergies and applying for cultivation. In any event, it is Syngenta's action of commercializing with the knowledge that China had not approved MIR162 and not the actions of China that are at issue.

In addition, the unrebutted evidence indicates Syngenta was aware of the consequences of its actions. Syngenta knew China had a zero tolerance policy and that all shipments of U.S. corn would contain trace amounts of MIR162. A reasonable juror could find from Mack and Pisk's comments that Syngenta wanted a crisis to advance its agenda of changing the asynchronous approval system with total disregard of the effect on U.S. corn growers.

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3. Other Arguments

None of Syngenta's arguments against Plaintiffs' proffered evidence provide a basis to deny the motion to amend. Syngenta interposes the following arguments: 1) Monsanto also launched GM traits without Chinese approval; 2) the grain elevators and exporters caused Plaintiffs' injuries by shipping Viptera to China without Chinese approval; 3) Syngenta did not delay its application for approval from China; 4) Syngenta did not make misrepresentations about the date of approval; 5) NAEGA and NGFA are trade associations and not disinterested parties; and 6) the launch of Duracade was not negligent. All of these arguments are either interpretations of the evidence or a defense to Plaintiffs' claim. The Court conducted a careful review of the evidence. While some of Syngenta's arguments may be used to defend against the claim, they do not prevent a bar to pleading the claim as a matter of law.

D. Due Process Clause

1. Novel Legal Theories

Syngenta claims Plaintiffs' motion is barred by the Due Process Clause. "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–17, 123 S. Ct. 1513, 1519–20, 155 L. Ed. 2d 585 (2003). This is based upon "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 574 (1996). The Minnesota Supreme Court has held that Section 549.20 should not be read to extend the availability of punitive damages to newly recognized causes of actions. *Lewis v. Equitable Life Assur. Soc. of the U.S.*, 389 N.W.2d 876, 892 (Minn. 1986).

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Syngenta argues that Plaintiffs' claims are new and novel theories of liability. Syngenta misconstrues the cases of *Lewis* and *Phipps*. In *Lewis*, the Court denied the imposition of punitive damages in defamation actions involving compelled self-publication based on the legislative intent in enacting Minn. Stat. § 549.20, the potential effect of increasing self-publication by plaintiffs, and the lack of a deterrent effect. *Id.* In *Phipps*, the Minnesota Supreme Court held that even though punitive damages are appropriate in public policy exception cases, they declined to impose them in the initial case in which they recognized the public policy exception because "the employer [in this case] could not have anticipated beforehand that the claim would even be actionable." *Phipps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569, 573 (Minn. 1987) (citing *Vigil v. Arzola,* 102 N.M. 682, 690, 699 P.2d 613, 621 (App. 1983), *rev'd in part on other grounds,* 101 N.M. 687, 687 P.2d 1038 (1984); *see Nees v. Hocks,* 272 Or. 210, 220-21, 536 P.2d 512, 517 (1975)). Unlike *Phipps* and *Lewis*, negligence is not a newly articulated cause of action. Plaintiffs' claims are not based on a new cause of action or new theory of liability; they allege Syngenta failed to exercise reasonable care in the timing, scope, and manner of the commercialization of Viptera. If anything, it is the factual circumstances that are novel because they are based on the recent rise in the development of GM products.

Syngenta's reliance on two cases that considered similar claims belies their position. Farmers sued Monsanto for lost revenue because the E.U. rejected Monsanto's GM products and boycotted all American corn and soy as a result. *Sample v. Monsanto Co.*, 283 F. Supp. 2d 1088, 1091 (E.D. Mo. 2003). The Court dismissed the claims under the economic loss doctrine. *Id.* at 1093. The fact that the plaintiffs did not prevail may indicate a GM manufacturer has defenses to such a claim but does not mean that it could assume it could not be sued for such conduct. In another case, the Court permitted claims to go forward alleging liability for a foreign boycott of

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U.S. following the release of an unapproved GM trait. *In re Genetically Modified Rice Litig.*, 666 F. Supp. 2d 1004, 1016 (E.D. Mo. 2009). The fact that other cases have been litigated against GM seed manufacturers for trade disruptions shows it is not a novel or arbitrary claim. While these cases may involve successful defenses or distinguishable facts, it shows that GM manufacturers can and should be aware of potential liability.

2. Public Policy

Syngenta argues punitive damages are inappropriate in this instance because they might deter socially useful conduct. Syngenta claims their product complied with all regulations and provided the benefits of increasing crop yields and making food safer by reducing reliance on chemical pesticides. Syngenta argues that punishing companies for introducing advances in biotechnology simply because they misjudge how a foreign sovereign would react to their products will stifle innovation and stall advances in biotechnology that are beneficial to the agriculture industry and society as a whole. Again, it is not the conduct of developing and producing a GM corn seed that punitive damages would seek to deter in this case. The targeted conduct is deliberately commercializing the product prior to ascertaining that all of the necessary channels of international trade are in place.

Syngenta claims that it should not be punished because there was no societal harm but rather a benefit in the form of lower corn prices for consumers. Punitive damages are not only meant to protect consumers. The alleged harm was to the group of corn farmers. Syngenta cites to *BMW* for the proposition that harm that is purely economic in nature is less worthy of punitive damages. The Court in *BMW*, however, stated, "To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576, 116 S. Ct. 1589,

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1599, 134 L. Ed. 2d 809 (1996) (internal citation omitted). The three guideposts established in *BMW* are to determine if the award of punitive damages is grossly excessive; not to determine if they may be sought.

Similarly, Syngenta's argument that punitive damages should not be allowed because it would interfere with diplomatic efforts regarding China's trade policies focuses on the wrong behavior. It is Syngenta's conduct of launching Viptera prior to having all hurdles to commodity trading resolved that is at issue; not China's act of rejecting all American corn.

E. Waiver

Syngenta argues that four of the five Plaintiffs at issue waived any claim for punitive damages by contract. Syngenta claims Plaintiffs Mensik, Keuchenmeister, Ledeboer, and Van Tilburg Farms entered into a "Stewardship Agreement" with Syngenta that included a provision waiving any claim for punitive damages. Syngenta argues that the bags in which Viptera and Duracade were distributed had packaging that stated "[b]y opening this package of seed, you affirm that you have signed and are obligated to follow the terms and conditions of the Syngenta Stewardship Agreement." Some Plaintiffs deny they signed any agreement.

Syngenta's waiver argument is procedurally premature. Waiver is an affirmative defense that requires Syngenta to prove all necessary factual elements. *See* Minn. R. Civ. P. 8.03; *see also MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008). Questions of fact and law exist regarding whether the parties are bound by the provisions of the Stewardship Agreement. In the end, such an argument is a defense to a claim for punitive damages. It does not prevent Plaintiffs from amending the Complaint to assert a claim for punitive damages.

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F. Unclean Hands

Finally, Syngenta argues that punitive damages are barred because Plaintiffs have unclean hands. Syngenta cites to evidence that some Plaintiffs grew, distributed, or accepted Viptera before it was approved by China. None of the five cases cited by Syngenta for the proposition that the doctrine of unclean hands bars punitive damages are from Minnesota or controlling on this Court. The unclean hands doctrine will be invoked only against a party whose conduct "has been unconscionable by reason of a bad motive, or where the result induced by his conduct will be unconscionable." *Creative Commc'ns Consultants, Inc. v. Gaylord*, 403 N.W.2d 654, 657–58 (Minn. Ct. App. 1987) (quoting *Johnson v. Freberg,* 178 Minn. 594, 597–98, 228 N.W. 159, 160 (1929)). Even if the Court were to recognize the doctrine in this situation, it would be in defense to the claim but would not prevent Plaintiffs from pleading the claim at this stage in the litigation. Based on the procedural posture of this motion, the Court would need to find that Plaintiffs had unclean hands as a matter of law.

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STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

In re: Syngenta Litigation

Case Type: Civil Other
Hon. Thomas M. Sipkins

This Document Relates to:
Daniel Mensik (Orig. Case No. 27-CV-15-16826)
Van Tilburg Farms (Orig. Case No. 27-CV-15-13191)
Douglas Maher (Orig. Case No. 27-CV-15-17386)

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ORDER

The above-entitled matter came on for hearing before the Honorable Thomas M. Sipkins, Judge of District Court, on December 5, 2016, pursuant to Plaintiffs' motion for leave to amend their complaint to add a claim for punitive damages. Pursuant to the Court's January 9, 2017 Order, the parties submitted supplemental briefs on the issue of choice of law with respect to Plaintiffs Mensik, Van Tilburg Farms, and Maher on January 25, 2017.

Attorneys Lewis A. Remele, Jr., and Daniel E. Gustafson appeared on behalf of Plaintiffs.

Attorneys Patrick F. Philbin, Patrick Haney, and D. Scott Aberson appeared on behalf of Syngenta.

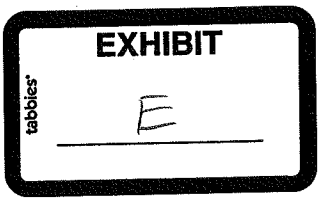
Based on all the files, records and proceedings herein, together with the arguments of counsel, the Court makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Plaintiffs Mensik, Van Tilburg Farms, and Douglas Maher's motion for leave to amend their complaint to add a claim for punitive damages is granted.

2. The attached Memorandum of Law is incorporated herein.



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BY THE COURT:

Dated: 4-16-2017

Thomas M. Sipkins
Judge of District Court

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MEMORANDUM OF LAW

I. Procedural History

The five bellwether trial Plaintiffs Daniel Mensik ("Mensik"), Van Tilburg Farms, Kirk Kuechenmeister ("Kuechenmeister"), Charles W. Ledeboer ("Ledeboer"), and Douglas Maher ("Maher") moved the Court for leave to amend the Second Amended Complaint for Producers and Non-Producers (Non-Class) to add a claim for punitive damages. On January 9, 2017, the Court granted the motion with respect to Minnesota Plaintiffs Kuechenmeister and Ledeboer. The Court determined that under Minnesota law, Plaintiffs presented a *prima facie* case that there is clear and convincing evidence from which a jury might conclude that Syngenta acted with deliberate disregard for the rights of Plaintiffs under Minn. Stat. § 549.20.[1] The Court incorporates the January 9, 2017 Order herein.

In the Court's April 4, 2016 Order on Syngenta's motion to dismiss, the Court conducted a choice of law analysis and held that the law of each Plaintiff's state of residence would apply to their common law claims. In the January 9, 2017 Order, the Court found the applicable substantive standard for a claim for punitive damages is subject to a choice of law analysis. Choice of law determinations are made on an issue-by-issue, and not a case-by-case, basis. *Zaretsky v. Molecular Biosystems, Inc.*, 464 N.W.2d 546, 548 (Minn. Ct. App. 1990) (citing Restatement (Second) of Conflict of Laws § 2 comment a(3) (1971)). The Court recognized that the choice of law analysis for torts may differ from the choice of law analysis for punitive damages. "Situations may arise where one state has the dominant interest with respect to the issue of compensatory damages and another state has the dominant interest with respect to the issue of exemplary damages."

[1] The parties subsequently agreed that the Court's analysis would apply to the Class Action, which consists only of Minnesota Producers, and stipulated to amending the Class Action Complaint to include a claim for punitive damages.

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Restatement (Second) of Conflict of Laws, § 171, cmt. d. The Court thus directed the parties to submit supplemental briefs on the choice of law analysis for non-Minnesota Plaintiffs.

II. Legal Analysis

A. Conflict of Laws

In analyzing the choice of law issue, the Court must first consider whether the choice of one state's law over another's creates an actual conflict. *Jepson v. General Cas. of Wis.*, 513 N.W.2d 467, 469 (Minn. 1994). A choice between laws is required where "the choice of one forum's law over the other will determine the outcome of the case." *Nodak Mut. Ins. Co. v. American Family Mut. Ins. Co.*, 604 N.W.2d 91, 93-94 (Minn. 2000). If there is no outcome determinative conflict between the laws of the two states, then it is not necessary to complete the choice of law analysis. *See State Farm Mut. Auto. Ins. Co. v. Great W. Cas. Co.*, 623 N.W.2d 894, 899 (Minn. 2001).

The Court has already held that Plaintiffs have met Minnesota's standard to amend the complaint to add a claim for punitive damages, which requires clear and convincing evidence that the acts of the defendant showed deliberate disregard for the rights or safety of others. There is no dispute that Nebraska law does not permit punitive damages, and thus a choice of law analysis is required. *See Golnick v. Callender*, 860 N.W.2d 180, 190 (Neb. 2015). The parties disagree on whether the law governing punitive damages in Ohio and Iowa result in a different outcome than the Court's analysis under Minnesota law.

In Minnesota, the Court shall allow punitive damages only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others. Minn. Stat. § 549.20, subd. 1(a). The statute defines deliberate disregard as follows:

> (b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

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> (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
>
> (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn. Stat. § 549.20, subd. 1(b). An award of punitive damages shall be measured by:

> those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Minn. Stat. § 549.20, subd. 3.

Plaintiff VanTilburg Farms is a resident of Ohio. In Ohio, punitive damages are recoverable in a "tort action" upon a showing that the defendant's "actions or omissions … demonstrate malice or aggravated or egregious fraud …." Ohio Rev. Code Ann. § 2315.21(A)(1); *id.* at (c)(1). A "tort action" is defined as "a civil action for damages for injury or loss to person or property." *Id.* at (A)(1). Tort actions include claims for "economic loss," including any "compensation lost as a result of an injury" or "[a]ny expenditures incurred" as a result of tortious conduct. Ohio Rev. Code Ann. § 2315.18(A)(2)(a), (c). Ohio courts have interpreted the term "malice" to include two different types of intent: (1) a "state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston v. Murty*, 512 N.E.2d 1174, 1176 (Ohio 1987). The standard of governing elements of a claim for punitive damages is thus substantially similar between Minnesota and Ohio.

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Syngenta identifies two differences between Minnesota and Ohio law on punitive damages that they argue results in a different outcome. First, Ohio imposes a cap on punitive damages at two times the amount of compensatory damages. Ohio Rev. Code Ann. § 2315.21 (D)(2)(a). The statutory cap is an attempt by the Ohio General Assembly to limit the subjective process of calculating punitive damages, which it believed was contributing to the uncertainty associated with the civil justice system and harming the state's economy. *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 442 (Ohio 2007). In Minnesota, the court must apply a multi-factor analysis to review the amount of a punitive damages award. Minn. Stat. § 549.20, subd. 3. This difference, however, is not "outcome determinative." It does not affect a finding that punitive damages are warranted. It is the court's review on the amount recoverable that may differ. The result is a potential difference in the amount of the award but not the imposition of punitive damages.

Syngenta also argues that the role of compliance with regulations plays in determining punitive damages differs between Ohio and Minnesota. In Minnesota, compliance with regulations is relevant to determining if Plaintiffs' prove entitlement to punitive damages, but it does not preclude such an award as a matter of law. *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 734–35 (Minn. 1980). Syngenta argues compliance with regulations bars punitive damages in Ohio based on the case of *In re Miamisburg Train Derailment Litig.*, 725 N.E.2d 738, 752 (Ohio Ct. App. 1999). The Ohio Court of Appeals found in that case that the defendant's compliance with a non-specific federal regulation acted to "overwhelm any suggestion that appellees acted with conscious disregard for safety" and thus "No reasonable person could reconcile the appellees' compliance with the regulation in question with the notion that their behavior was somehow 'outrageous,' 'flagrant,' or 'criminal.'" *Id.* The court also found that the testimony presented at trial also failed to show that any negligence of the appellees presented a "great probability of causing substantial harm." *Id.* The

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court did not explicitly hold that compliance with regulations will bar an award of punitive damages in all circumstances. In addition, this issue is a matter of weight given to evidence and is not an outcome determinative difference.

Plaintiff Maher is a resident of Iowa. Under Iowa law, punitive damages may be awarded upon a showing that the conduct of the defendant constituted "willful and wanton disregard for the rights and safety of another." Iowa Code § 668A.1(1)(a). Iowa courts define "willful and wanton disregard" to mean that "the actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *McClure v. Walgreen Co.*, 613 NW.2d 225, 230 (Iowa 2000). In addition to "willful and wanton disregard," Iowa courts further provide that "[p]unitive damages are only recoverable when the defendant acted with actual or legal malice." *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 743 N.W.2d 525, 529 (Iowa 2007). Legal malice exists where the conduct showed a "willful or reckless disregard for the rights of another." *Id.* The legal standard to prove the right to punitive damages in Iowa and Minnesota is substantially similar.

The only difference between the laws of Iowa and Minnesota relates to the payment of punitive damages. Under Iowa Code § 668A.1, if the punitive conduct is "directed specifically" at the plaintiff, the plaintiff shall receive 100% of the punitive damages award. *In re Estate of Vajgrt*, 801 N.W.2d 570, 574 (Iowa 2011). However, if the punitive conduct is not "directed specifically" at the plaintiff, the plaintiff shall receive 25% of the punitive damages award, with the remaining 75% paid into a civil reparations trust fund. *Id.* The purpose of this requirement is to divert a portion of any punitive damages awarded under Iowa law to a public purpose. *See Fernandez v. Curley*, 463 N.W.2d 5, 7-8 (Iowa 1999). This provision does not affect whether punitive damages

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are warranted or the amount of such an award; rather it affects to whom the funds are paid. The difference is thus not outcome-determinative.

Based on the determination that there is no outcome determinative conflict in the laws on punitive damages between Minnesota and Ohio and Minnesota and Iowa, the Court need not complete a choice of law analysis and Minnesota law may be applied. The Court, however, notes that the remaining choice of law analysis is the same for Mensik, Van Tilburg Farms, and Maher.

B. Constitutionality

Application of the forum state's law to a nonresident's claim must be constitutional. "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981). "When considering fairness in this context, an important element is the expectation of the parties." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985). The Court previously determined that Minnesota law may be constitutionally applied to Defendants in this matter in the April 4, 2016 Order.

C. Choice of Law

If there is an outcome-determinative conflict and the law of either forum may be constitutionally applied, Minnesota looks to five factors to determine which State's law applies: (1) predictability of result; (2) maintenance of interstate order; (3) simplification of judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law. *Jepson*, 513 N.W.2d at 470; *see also Schumacher v. Schumacher*, 676 N.W.2d 685, 690 (Minn. Ct. App. 2004). "The factors are not to be mechanically applied, but are meant 'to prompt the courts to carefully and critically consider each new fact situation and explain in a straightforward manner

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their choice of law.'" *Schmelzle v. ALZA Corp.*, 561 F. Supp. 2d 1046, 1048 (D. Minn. 2008) (quoting Jepson, 513 N.W.2d at 470). As noted above, the choice of law analysis is substantially the same as to all three states in relation to Minnesota on the issue of punitive damages.

1. Predictability of Results

The first factor "addresses whether the choice of law was predictable before the time of the transaction or event giving rise to the cause of action." *Danielson v. National Supply Co.*, 670 N.W.2d 1, 7 (Minn. Ct. App. 2003). This factor applies "primarily to consensual transactions where the parties desire advance notice of which state law will govern in future disputes." *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 454 (Minn. Ct. App. 2001). Predictability of results has little bearing on a tort case. *See Reed v. University of N. Dakota*, 543 N.W.2d 106, 108 (Minn. Ct. App. 1996). Because Plaintiffs seek punitive damages on their negligence claims, this factor is not particularly relevant to the Court's analysis. It is equally reasonable for the parties to expect the law of Minnesota, where Syngenta's seed business is headquartered, to apply and the law of the Plaintiff's home state, where they farmed corn and were injured, to apply. This factor does not weigh in favor of Minnesota law or the home state law.

2. Maintenance of Interstate Order

For this factor, the Court is "primarily concerned with whether the application of Minnesota law would manifest disrespect for [other states'] sovereignty or impede the interstate movement of people or goods." *Jepson*, 513 N.W.2d at 471. This factor "is generally satisfied as long as the state whose laws are purportedly in conflict has sufficient contacts with and interest in the facts and issues being litigated." *Myers v. Government Employees Ins. Co.*, 302 Minn. 359, 225 N.W.2d 238, 242 (1974). Plaintiffs have sufficiently pleaded significant contacts with Minnesota. Defendant Syngenta Seeds, Inc. had its principal place of business in Minnesota. It is the entity responsible for

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developing, producing, and selling seeds. Many of the employees involved in the commercialization of Viptera were located in Minnesota and communications came from Minnesota. Application of Minnesota law would not manifest disrespect for the sovereignty of any other state.

Syngenta argues that applying Minnesota would encourage forum shopping. Evidence of forum shopping or evidence that application of one state's law would promote forum shopping, would indicate disrespect for the law of the other state. *See Schumacher*, 676 N.W.2d 685, 690-91 (Minn. Ct. App. 2004). Here, Minnesota has sufficient contacts with the facts and issues being litigated in this case given that Minnesota is the home of Syngenta Seeds, Inc.[2] The issue before the Court is Syngenta's conduct in commercializing Viptera and Duracade. The facts relating to the individual Plaintiffs' home state primarily relate to the issue of damages incurred by the individual Producers. Thus, the facts relevant to those states are pertinent to the issue of compensatory damages, and not punitive damages, which are intended to punish and deter the conduct of the defendant. Application of Minnesota law would not demonstrate disrespect for the laws of the other states.

3. Simplification of the Judicial Task

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

4. Governmental Interest

Under this factor, the Court must weigh each state's governmental interest. *Nodak Mut. Ins. Co. v. American Family Mut. Ins. Co.*, 604 N.W.2d 91, 95 (Minn. 2000). The assessment of this factor differs in the context of punitive damages and compensatory damages. *Keene Corp. v.*

[2] At the time of the conduct at issue, Syngenta Seeds, Inc. was a Delaware corporation with its principal place of business in Minnesota. On December 31, 2015, Syngenta Seeds, Inc. converted to a limited liability company organized under the laws of Delaware and whose sole member is Syngenta Corporation.

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Insurance Co. of N. America, 597 F. Supp. 934, 938 (citing *James v. Powell*, 19 N.Y.2d 249, 279 N.Y.S.2d 10, 16-17, 225 N.E.2d 741, 746-7 (1967). The interest a state has in punishing and deterring conduct is different than the interest a state has in ensuring their citizens are compensated for injuries.

Usually in torts, each state has an interest in providing a forum for their injured residents. When the primary purpose of a rule of law is to deter or punish conduct, the states with the most significant interests are those in which the conduct occurred and in which the principal place of business and place of incorporation are located. *See* Restatement (Second) of Conflict of Laws § 145 comments c-e; *In re Air Crash Disaster*, 644 F.2d 594, 613 (7th Cir. 1981). Punitive damages are awarded to punish and deter the defendant and other from repeating the conduct, not to compensate the plaintiff. *See Distinctive Printing and Packaging Co. v. Cox,* 443 N.W.2d 556, 574 (Neb. 1989) (citation omitted); *Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994); *Moskovitz v. Mount Sinai Med. Ctr.*, 635 N.E.2d 331, 343 (Ohio 1994); *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 837 (Minn. 1988). The purpose of precluding or limiting punitive damages is to protect resident defendants from excessive financial liability which encourages companies to locate and do business within those states due to their economic advantages. *Fanselow v. Rice*, 213 F. Supp. 2d 1077, 1085 (D. Neb. 2002) (citations omitted). Therefore, the state that has the greatest interest in punishing and deterring the conduct has the strongest government interest in the context of punitive damages. In this case, Minnesota has the strongest interest in policing a corporation with its principal place of business in Minnesota. Nebraska, Ohio, and Iowa's interests in protecting resident defendants by protecting them from financial liability and encouraging business is not significant since the corporate defendants are not located in those states. This factor weighs in favor of Minnesota law.

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5. Better Rule of Law

Courts generally have not emphasized the fifth factor. *Nodak*, 604 N.W.2d at 96. The rule of law on punitive damages in Minnesota compared to Nebraska, Ohio, or Iowa cannot be said to be the better law. As discussed above, the laws serve different purposes.

For all of these reasons, the Court concludes that as a whole, the five factors weigh in favor of applying Minnesota law to the issue of punitive damages for Plaintiffs Mensik, Van Tilburg Farms, and Maher. In accordance with the Court's holding in the January 9, 2017 Order, the motion to amend the complaints to add a claim for punitive damages is granted.

T.M.S.

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** CONFIDENTIAL **

STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

In re: Syngenta Litigation

Case Type: Civil Other
Hon. Thomas M. Sipkins

This Document Relates to:

Daniel Mensik (Orig. Case No. 27-CV-15-16826)

FILE NO. 27-CV-15-3785

ORDER REGARDING SUMMARY JUDGMENT MOTIONS

The above-entitled matter came on for hearing before the Honorable Thomas M. Sipkins, Judge of District Court, on March 17, 2017, pursuant to Defendants' motion for summary judgment and Plaintiff's motion for partial summary judgment.

Lewis A. Remele, Jr., Esq., appeared on behalf of Plaintiff Daniel Mensik.

Patrick F. Philbin, Esq., appeared on behalf of Defendants.

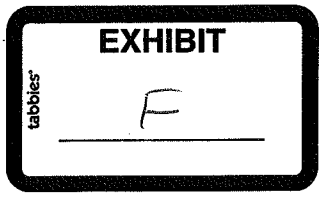
Based on all the files, records and proceedings herein, together with the arguments of counsel, the Court makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Defendants' motion for summary judgment is granted in part and denied in part. Defendants' motion is granted with respect to strict liability for failure to warn and any claims for damages other than a lower market price for corn and any such claims are dismissed with prejudice. The motion is otherwise denied.

2. Plaintiff's motion for partial summary judgment is granted in part and denied in part. Plaintiff's motion is granted with respect to the defenses of the disclaimer and limitation of warranties in the Stewardship Agreement, contractual economic loss doctrine, contributory



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negligence, allocation of fault, superseding cause, assumption of the risk, and unjust enrichment.

The motion is otherwise denied.

3. The attached Memorandum of Law is incorporated herein.

BY THE COURT:

Dated: 4-11-2017

Thomas M. Sipkins
Judge of District Court

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** CONFIDENTIAL **

MEMORANDUM OF LAW

I. Introduction

Plaintiffs in this consolidated action assert claims relating to Defendants' (collectively "Syngenta") commercialization of genetically modified ("GM") corn seed products known as Agrisure Viptera ("Viptera") and Agrisure Duracade ("Duracade"). Viptera contains the GM trait called MIR162 and Duracade includes Event 5307. After receiving approval from U.S. regulatory agencies, Syngenta broadly commercialized Viptera prior to receiving regulatory approval of MIR162 for import from China. In November 2013, China began to enforce its zero tolerance policy regarding corn containing the non-approved GM trait in Viptera and rejected all shipments of U.S. corn. Plaintiffs are Producers and Non-Producers alleging that Syngenta's widespread release of Viptera was premature; that Syngenta knew that its decision could cause a trade disruption; that such rejection caused corn prices to drop in the United States; and that Plaintiffs were harmed by that market effect.

In an Order dated April 7, 2016, the Court granted in part and denied in part Syngenta's motion to dismiss finding Plaintiffs stated a legally cognizable claim for relief. The Court determined that Syngenta had a duty to use reasonable care in the timing, scope, and manner in the commercialization of Viptera and Duracade. This duty arises out of an inter-connected industry and market. In the Second Amended Master Complaint for Producers and Non-Producers (Non-Class) ("Master Complaint"), Plaintiffs assert claims for negligence, violations of consumer protections statutes, and strict liability duty to warn.

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This matter consists of the consolidated individual claims of approximately 50,000 Producers and Non-Producers and a class of Minnesota farmers as certified by Order dated November 3, 2016. Of the group of individual claims, Plaintiff Daniel Mensik ("Plaintiff" or "Mensik") is the first bellwether case set for trial and this Order applies only to his case. Mensik is a corn producer who lives in Morse Bluff, Nebraska. His farm is located in Saunders County, Nebraska. He began farming full-time in the mid-1980's as an employee of Otte Enterprises. In 2013, Mensik began his own farming operation. In 2013, 2014, and 2015, Mensik purchased Viptera seed and planted, grew, harvested, and sold corn grown from Viptera seed. Each year he increased the number of bags of Viptera seed he purchased and grew from 16 bags in 2013 to 26 bags in 2015. In 2014, Mensik purchased Duracade seed and planted, grew, and harvested corn grown from Duracade seed. Mensik also purchased, planted, grew, harvested, and sold corn grown from seed from other manufacturers from 2013 to the present.

Mensik testified that he was unaware which foreign markets had approved corn grown from Viptera or Duracade for import. According to Mensik, he did not discuss with his Syngenta seed representatives which foreign markets had approved corn grown from Viptera for import and did not discuss any restrictions on the planting or grain-channeling procedures for his Viptera corn. From 2013 to the present, Mensik has not harvested his corn grown from Viptera separately from the non-Viptera corn that he grew. None of the parties that bought Mensik's corn asked him if he was delivering Viptera or any other types of corn. After Mensik delivered his harvested corn, he was unaware of what the buyer did with the corn. Mensik did not take any affirmative steps from 2013 to 2015 to sell any of his corn to the Chinese export market.

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II. Legal Analysis

Mensik moves the Court for partial summary judgment on several of Syngenta's defenses and Syngenta moves the Court for summary judgment on all of Mensik's claims.[1] A party is entitled to summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. An issue of fact is genuine if it can only be resolved by a finder of fact because it may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact "is one of such a nature as will affect the result or outcome of the case depending on its resolution." *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976). The Court must view all evidence in a light most favorable to the nonmoving party, and must resolve all factual inferences against the moving party. *Nord v. Herreid*, 305 N.W.2d 337, 339 (1981).

The moving party has the burden to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 897 (Minn. 1996). No genuine issue of material fact exists if the record as a whole "could not lead a rational trier of fact to find for the non-moving party." *DLH, Inc. v. Russ,* 566 N.W.2d 60, 69 (Minn. 1997) (quoting *Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim. *See Nicollet Restoration, Inc. v. City of St. Paul,* 533 N.W.2d 845, 847-48 (Minn. 1995) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986)).

[1] The parties submitted comprehensive and voluminous undisputed and disputed fact sections for both motions. The Court reviewed all of the materials submitted. Although judgment will not be rendered upon the whole case, the Court finds that specifying the undisputed facts is not practicable. *See* Minn. R. Civ. P. 56.04.

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The non-moving party must "present specific admissible facts showing a material fact issue." *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012). There is no genuine issue of material fact for trial when the evidence is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ,* 566 N.W.2d 60, 71 (Minn. 1997). The non-movant "may not establish genuine issues of material fact by relying upon unverified and conclusory allegations, or postulated evidence that might be developed at trial, or metaphysical doubt about the facts." *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004). "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995).

A. Contractual Economic Loss Doctrine

Syngenta argues Mensik's claims are barred by the contractual economic loss doctrine ("ELD").[2] Mensik cross moves the Court for an order holding that Syngenta's Fifteenth Defense fails as a matter of law. The ELD is a "judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses." *Lesiak v. Cent. Valley Ag Co-op, Inc.*, 808 N.W.2d 67, 80 (Neb. 2012) (quotation marks omitted). The doctrine is designed to "maintain the line of demarcation between tort law and contract law" and reflects the view that "if a party could simply avoid its contractual bargain by suing in tort, which often offers more generous terms of recovery, then the effectiveness of contract law would be reduced." *Id.* at 81. The doctrine "should not be interpreted so broadly as to undermine tort law and preclude tort remedies in situations which, historically, have presented viable tort cases." *Id.* at 81-82. The *Lesiak* court stated:

[2] The Court did not analyze contractual ELD with respect to individual producers in the April 7, 2016 Order on Syngenta's motion to dismiss.

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> After reviewing our own case law, the case law from other jurisdictions, and the scholarly work done on the subject, we hold that the economic loss doctrine precludes tort remedies only where the damages caused were limited to economic losses and where either (1) a defective product caused the damage or (2) the duty which was allegedly breached arose solely from the contractual relationship between the parties. And economic losses are defined as commercial losses, unaccompanied by personal injury or other property damage.

Id. at 81. The Nebraska Court of Appeals subsequently explained the *Lesiak* court "clarified the [ELD] in Nebraska, however, limiting its application to the products liability context and to situations where the alleged breach is only of a contractual duty, and no independent tort duty exists." *Thurston v. Nelson*, 21 Neb. App. 740, 753 (Neb. Ct. App. 2014).

Plaintiff does not claim that Viptera or Duracade were defective. Although Mensik purchased Viptera and Duracade seed from Syngenta, none of claims are based on contractual duties arising from the sale of the seed products. Plaintiff's negligence claim is based on an independent tort duty; the duty to exercise reasonable care in the timing, manner, and scope of the commercialization of Viptera and Duracade. This case is not a products liability action and does not allege a breach of only a contractual duty. Syngenta's motion for summary judgment of all claims based on application of the contractual ELD is denied and Plaintiff's motion to dismiss Syngenta's Fifteenth Defense is granted.

B. Physical Injury

Syngenta moves the Court for summary judgment on any theory of liability or claim for damages based on physical injury. Beginning in 2013, Mensik planted and grew a mix of corn seeds, including Viptera and non-Syngenta seeds. Mensik testified that he planted, harvested, and stored his non-Viptera/Duracade corn with his Vipetra/Duracade corn. Plaintiff has affirmed that he does not claim that Viptera or Duracade were defective. Syngenta argues that: 1) Mensik has no evidence of damages from the alleged harm; 2) no evidence of the alleged harm; 3) Mensik's theory

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of injury does not depend on physical harm; and 4) even if there is proof of cross-pollination or commingling, there is no evidence that Viptera and Duracade cause physical damage.

Syngenta argues Plaintiff cannot prove commingling or contamination because none of the non-Viptera/Duracade corn grown by Mensik was ever tested for the presence of Viptera or Duracade. Mensik testified that it nearly impossible to prevent cross-pollination. Dirk Maier ("Maier") opined that there will be commingling of corn seeds planted in a given row if seed tanks used while planting are not completely emptied or there is corn seed left in the hoppers between planting different corn brands varieties. He stated that combines are not typically cleaned between the harvests of different corn varieties, which leads to commingling. A reasonable juror could find physical harm to the non-Viptera/Duracade corn based on the testimony of Mensik and Maier. Viewing the evidence in the light most favorable to Mensik, and giving him the benefit of all reasonable inferences from the evidence, there is a genuine issue of material fact whether non-Viptera/Duracade corn mixed with or came into contact with Viptera or Duracade corn on Mensik's property and caused physical damage.

Plaintiff alleges his crops were damaged by Viptera and Duracade through cross-pollination and commingling, rendering it unfit for sale in China. Contamination of a farmer's corn supply, through cross-pollination or by commingling in storage and shipping, can constitute a physical injury. *In re StarLink Corn Prod. Liab. Litig.*, 212 F. Supp. 2d 828, 842-43 (N.D. Ill. 2002). A GM crop can damage a non-GM crop when pollen causes the non-GM crop to develop the GM trait and renders the crop unfit for its intended use. *Id.* at 841. Non-GM corn can also be damaged when it is commingled with GM corn. *Id.* Syngenta's attempt to limit *StarLink* to crops where contamination renders the crops unfit for human consumption is rejected. A broader reading finding that the contamination renders the crop unfit for its intended use addresses other types of crops and uses. In

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this case, the intended use was unrestricted sale as a commodity corn crop. Plaintiff has presented sufficient evidence that contact with Viptera and Duracade corn rendered all of his corn unfit for sale to all markets.

Furthermore, Plaintiff's claims for damages for physical harm does not fail for lack of damages. The Court is not persuaded by Syngenta's argument that because Mensik's theory of injury is not dependent on harm to his property that the Court should declare no physical harm occurred. Syngenta cites to no case law that requires such action.

> Where a growing crop is injured but not rendered entirely worthless, the damage to it may be measured by the difference between the value at maturity of the probable crop, if there had been no injury, and the value of the actual crop, less the expense of fitting for market that portion of the probable crop which was prevented from maturing by the injury.

Lesiak, 808 N.W.2d at 76. Plaintiff is not under a duty to calculate a separate figure for the actual physical damage. The Rao King Report opines that contamination of corn with Viptera/Duracade caused Mensik to suffer damages in the amount of $140,925. This amount reflects the difference between the price at which Plaintiff would have sold his corn without the contamination and the price at which he was, is, and will be able to sell his corn after the contamination. Syngenta is not entitled to summary judgment on any theory of liability or claim for damages based on physical injury.

C. Duty to Conduct a Limited Launch

Syngenta moves to dismiss any portion of any of Mensik's claims that rely on the imposition of a duty to limit the sale of Viptera for lack of causation. Specifically, Syngenta argues that a reasonable jury could not conclude that limiting the sale of Viptera to farmers that agreed to use certain planting methods;[3] promised not to sell their crop in interstate commerce; or

[3] In an Order dated March 21, 2017, the Court held that claims regarding channeling or containment of grown corn is preempted by the Grain Standards Act ("GSA").

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withdrawing Viptera would have avoided the alleged injuries because the GM trait still would have dispersed into the corn supply through cross-pollination and commingling during harvesting, storage, and shipping. In light of China's policy of zero tolerance, the presence of MIR162 would have resulted in the same trade disruption.[4]

Plaintiff has presented admissible evidence showing a material fact issue on the claim for negligence based on a limited launch. "In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages." *Hall v. County. of Lancaster*, 846 N.W.2d 107, 118 (Neb. 2014) (footnote omitted). A proximate cause is a cause (1) that produces a result in a natural and continuous sequence, and (2) without which the result would not have occurred. *Id.* at 983-84 (citing *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (Neb. 2008)). "To establish proximate cause, the plaintiff must meet three basic requirements: (1) Without the negligent action, the injury would not have occurred, commonly known as the 'but for' rule or 'cause in fact'; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause." *Roskop Dairy, L.L.C. v. GEA Farm Techs., Inc.*, 871 N.W.2d 776, 794 (Neb. 2015) (footnote omitted). "Proximate causation is generally a question for the jury, and only where but one inference can be drawn is it proper for the court to decide the issue." *McKinney v. Okoye*, 842 N.W.2d 581, 594 (Neb. 2014).

1. Inevitable Cross-Pollination and Commingling

First, Syngenta argues Mensik failed to carry his burden by not submitting expert opinion on the issue of causation from cross-pollination and commingling. Expert testimony is necessary to show proximate cause where the issue of causation is "not within the common knowledge and usual

[4] The Court considered and rejected this argument based solely on the allegations in the pleadings in the March 21, 2017 Order.

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experience of a factfinding jury." *McVaney v. Baird, Holm, McEachen, Pedersen, Hammann & Strasheim*, 466 N.W.2d 499, 508 (Neb. 1991). The issue of causation with respect to Plaintiff's claim regarding a limited launch duty is not a technical matter beyond the scope of ordinary knowledge. While jurors may not have actual experience growing corn, the concept of cross-pollination and trait dispersion does not require expertise under these circumstances. The issue can be determined from the evidence presented and the common knowledge of fact finders. *See, e.g., Canas v. Maryland Cas. Co.*, 459 N.W.2d 533, 539 (Neb. 1990).

Syngenta's expert, Dr. Alan McHughen, a geneticist and biotechnology specialist, opines that ensuring 100% genetic purity is scientifically impossible because corn naturally cross-pollinates and pollen can travel substantial distances. Plaintiff's experts Dirk Maier and Joseph Keaschall provide opinion regarding the distance that pollen can travel and that the launch of Viptera that occurred resulted in inevitable cross-pollination. Cargill employee, Randall Giroux ("Giroux") testified that he did not think that one could find anyone in the grain or seed industry who says they can contain pollen to 100 percent. In addition, the testimony of the deposed producers, including Mensik, is that most measures cannot completely eliminate cross-pollination.

There is also evidence that a zero tolerance standard for GM traits in commodity crops is difficulty to satisfy. The U.S. National Academy of Science has stated that a zero tolerance is not technically or economically feasible. The North American Export Grain Association ("NAEGA") stated in a 2014 letter to the United States Drug Administration ("USDA") that with respect to zero tolerance requirements, a limited launch is no different than product commercialization because of an inherent risk that the GM trait will be detected. Giroux testified that zero tolerance is impossible as a standard to meet and it was unlikely that Syngenta could have managed to zero tolerance under a limited launch.

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However, the Court also notes that there is evidence that this interconnected corn market often operates under the belief that launches of GM traits can be limited so as to avoid trade disruptions. *See, e.g., In re StarLink Corn Prod. Liab. Litig.*, 212 F. Supp. 2d 828, 834 (N.D. Ill. 2002). For example, manufacturer signatories to the BIO Policy agree to manage launches of new products to avoid trade disruption in key export markets; Syngenta stated in its Deregulation Petition to the USDA for Viptera that it would require the diversion of MIR162 corn away from export markets where the trait was not yet approved and that such ability to channel corn was not merely hypothetical; Syngenta promoted that it could launch seed products such as Enogen in a "closed-loop system" to minimize dispersion; and Monsanto used a "managed" system to prevent corn contamination with the limited launch of Droughtguard. The Court notes, however, that these programs include some component of channeling, which is a duty preempted by the GSA.

In any event, the inevitability of cross-pollination is not fatal to a finding of causation. Even in light of China's zero tolerance policy, Plaintiff does not need to demonstrate that a more limited launch would have resulted in "100% genetic purity" or no kernel of corn with the MIR162 trait in shipments to China. Plaintiff can satisfy his burden by showing that it is more likely than not that no trade embargo would have occurred. *See, e.g., Doe v. Zedek*, 587 N.W.2d 885, 894 (Neb. 1999). Despite China's zero tolerance policy, there is evidence that a more limited launch would not have resulted in the rejection of all U.S. corn by China. When asked if Syngenta could have used a system similar to Monsanto's Droughtguard, Giroux responded, "If [Syngenta] had chosen to, they could have grown much fewer acres and in a much more controlled manner to help protect that export market, that's correct." He also stated that it is more likely than not that exporters could have serviced Chinese demand for U.S. corn if Syngenta had taken certain precautions in launching Viptera. In addition, Plaintiff provided evidence that China tested only a small percentage of

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kernels, China accepted shipments of U.S. corn that likely contained some amount of MIR162, and some Cargill testing showed 50% of the shipments to China contained MIR162. All of this evidence, taken in a light most favorable to the Plaintiff, demonstrates that a limited launch may not have resulted in 0% of exported corn containing MIR162 but could support a finding that it is more probable than not that it would have avoided the embargo. The evidence is sufficient to create a question of fact on the issue of causation under Plaintiff's limited launch theory.

2. Non-Interstate Sales

One of the measures Plaintiff indicates Syngenta could have taken to limit the launch of Viptera in order to avoid a trade disruption was to only sell Viptera seed to farmers in counties where the corn is not sold into interstate or foreign commerce. Syngenta's expert Charles Finch provided testimony that farmers sell to local or county elevators, sub-terminal and terminal elevators, river elevators and port elevators, all of which sell to the export market. He also states that even in areas with ethanol plants, which absorb a significant amount of corn production, the plants produce DDGS as an output that may be sold locally, interstate, and in the export market. Finch opines that based on the many uses and demand for corn along with the modern transportation infrastructure, "there are few counties, if any, in the Corn Belt that consume all of the corn and DDGS produced within that county."

Syngenta's argument that this theory should be dismissed for lack of evidence is rejected. Plaintiff has presented evidence that Syngenta uses a "closed-loop" production system designed to ensure that all Enogen corn is sold and delivered to ethanol plants. Giroux's description of part of Monsanto's Droughtguard program includes, "Farmer signs a contract to surround Droughtguard with other corn (pollen scrubber) and all material fed on farm in feed application or volumes contracted to a feed operation locally[.] Not allowed to deliver to an elevator in this program, even

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if its heading to feed ultimately[.]" The evidence of these programs demonstrates that it is possible to grow and manage corn not sold in interstate or foreign commerce. Questions of fact exist whether Syngenta could have used such measures in a limited launch of Viptera.

3. Duty to Recall

Syngenta also seeks summary judgment on any theory of liability based on a duty to recall seeds already sold. Plaintiff argues his theory of liability is that the exercise of reasonable care in launching Viptera required ceasing the sale of Viptera to prevent harm to the market. In a products liability case, the Eighth Circuit has determined that Nebraska would not impose either a post-sale duty to warn or a duty to retrofit. *Anderson v. Nissan Motor Co.*, 139 F.3d 599, 602 (8th Cir. 1998); *see also Vallejo v. Amgen, Inc.*, No. 8:14CV50, 2014 WL 4922901, at *4 (D. Neb. Sept. 29, 2014) ("In light of *Anderson,* Plaintiff's claims based on strict liability and negligent failure to warn are barred to the extent that they allege post-sale duties to warn). These cases relied upon by Syngenta are distinguishable and not persuasive. *Anderson* and *Vallejo* are applicable to products liability cases and bar claims alleging post-sale duties to warn or retrofit. This is not a products liability case and Plaintiff's claim is that the exercise of reasonable care include ceasing the sale of Viptera. Syngenta is not entitled to summary judgment on this theory of liability.

D. Negligence Based on Misrepresentations

In the March 21, 2017 Order on Syngenta's motion for judgment on the pleadings, the Court dismissed with prejudice Plaintiffs' claims in the Master Complaints for negligence based on misrepresentations.

E. Failure to Warn Claims

This Court previously dismissed any claim that Syngenta failed to include adequate warnings accompanying the Viptera and Duracade seeds it sold as preempted under the Federal

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Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). Syngenta now seeks summary judgment on any other failure to warn claims asserted by Mensik. Mensik does not oppose Syngenta's motion with respect to strict liability failure to warn and the motion is so granted.

Mensik argues that he may allege a failure to warn of the damages of MIR162 entering the corn supply as part of the totality of conduct by Syngenta that was negligent.[5] Plaintiff must show: (1) that Syngenta owed a duty to warn; (2) that Syngenta breached its duty to warn; and (3) that Syngenta's breach of its duty caused Mensik's injuries. *McRunnel v. Batco Mfg.*, 917 F. Supp. 2d 946, 957 (D. Minn. 2013) (citing *In re Levaquin Prods. Liab. Litig.*, 700 F.3d 1161, 1166 (8th Cir. 2012)). "[G]eneral negligence law imposes a general duty of reasonable care when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff." *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011). "In other words, when a person acts in some manner that creates a foreseeable risk of injury to another, the actor is charged with an affirmative duty to exercise reasonable care to prevent his conduct from harming others." *Id.* at 26. A duty to use reasonable care can include a duty to warn of known dangers. *See, e.g., Tite v. Omaha Coliseum Corp.*, 12 N.W.2d 90, 93 (Neb. 1943).

First, Syngenta argues that the claim fails because it did not owe a duty to warn because the risks were obvious and well known in the industry. There is no duty to warn of a known danger. *Waegli v. Caterpillar Tractor Co.*, 251 N.W.2d 370, 372 (Neb. 1977). "This is especially true when the user is a professional who should be aware of the characteristics of the product." *Harmon Contract Glazing, Inc. v. Libby-Owens-Ford Co.*, 493 N.W.2d 146, 151 (Minn. Ct. App. 1992) (citing *Strong v. E.I. DuPont de Nemours Co.*, 667 F.2d 682, 687 (8th Cir. 1981). Syngenta claims

[5] Syngenta did not object to Plaintiff's inclusion of this duty in its general negligence claim. The Court also finds it is distinguishable from the assertion of misrepresentations as the basis for a negligence claim. Unlike a separate claim for negligent misrepresentation, there is no element of proof that Plaintiff would be circumventing.

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that the Producers and grain handlers know about cross-pollination and contamination of the corn supply. The testimony of the Plaintiffs deposed, including Mensik, demonstrate that they are knowledgeable on these topics, characteristics regarding the seed, and their use of the seed. However, the depositions also show the farmers do not have specialized knowledge of seed manufacturers' commercialization programs, foreign processes for approval of GM traits, China's policies and process for approval of GM traits in particular, and international shipping and export of agricultural commodity crops. Mensik testified that he did not know what countries had approved MIR162. In addition, while other members of the interconnected market such as grain handlers have more knowledge regarding foreign approval processes, export procedures, and the possibility of trade disruptions, there is evidence that Syngenta failed to provide accurate information regarding its commercialization and foreign approval of MIR162. The commercialization of Viptera and process of obtaining approval of MIR162 in other foreign export markets was in the control and knowledge of Syngenta. The interconnected market was dependent on the information provided by Syngenta. The danger of a trade disruption was not a known danger that negated Syngenta's duty to warn.

Second, Syngenta claims it provided adequate warnings to Mensik and other industry participants regarding the risks of a trade disruption. Syngenta points to the Stewardship Agreement, Know Before You Grow website, and updates it provided to the grain trade associations. These warnings, however, did not discuss the potential for and the scope of a possible trade disruption. Questions of fact exist whether Syngenta satisfied its duty to warn.

Finally, Syngenta argues that Plaintiff cannot show that the failure to warn caused Plaintiff harm. Plaintiff has not asserted a separate failure to warn claim in a products liability action. As discussed in Section H *infra*, a proximate cause "is a cause (1) that produces a result in a natural and

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continuous sequence and (2) without which the result would not have occurred." *Brandon v. County of Richardson*, 624 N.W.2d 604, 627 (Neb. 2001). Where there is conflicting evidence, causation is a question of fact. *Zeller v. County of Howard*, 419 N.W.2d 654, 658 (Neb. 1988). Plaintiff presented evidence that an additional warning could have prevented the injury. *See, e.g., Kapps v. Biosense Webster, Inc.*, 813 F. Supp. 2d 1128, 1157 (D. Minn. 2011). Mensik testified that producers "wouldn't have been in this problem if Syngenta would have been honest with us." He went on to explain that Syngenta should have "had one large document in front of us" stating, "if you're going to purchase this, we have no outlet for it at this time. And we are going to need to channel this, just like they brought up Duracade after the fact, and we would have all obeyed the rules like we do." In addition, when Giroux asked Bernens if China would approve Viptera by fall, Bernens told other Syngenta employees that the answer is "no," but, "I am trying to find a response that does not prompt them to put up signs right away." A reasonable inference from this evidence is that Syngenta knew that producers and grain handlers would have taken a different course of conduct to prevent the harm had Syngenta given adequate warning. Taking the evidence in a light most favorable to Plaintiff, questions of fact exist whether Syngenta's failure to warn caused Plaintiff harm. Syngenta is not entitled to summary judgment on a failure to warn duty as part of Plaintiff's negligence claim.

F. Voluntary Duty / Broken Promises

Syngenta moves the Court to dismiss any negligence claim based on any theory that it owed a duty to Plaintiffs based on a "voluntary undertaking." Nebraska follows the Restatement, which states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

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(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts §323; *see also id.* at § 324.

Syngenta argues that any theory of liability under this provision fails for lack of physical harm. Liability for voluntary undertakings is applicable only where the product causes physical harm. *National Crane Corp. v. Ohio Steel Tube Co.*, 332 N.W.2d 39, 43 (Neb. 1983). As discussed in section B *supra*, Mensik has sufficiently presented evidence of physical harm.

Plaintiff argues that Syngenta voluntarily undertook compliance with the Biotechnology Industry Organization's ("BIO") "Product Launch Stewardship Policy" ("BIO Policy") in the commercialization of Viptera and Duracade.[6] The BIO Policy establishes guidelines for launching GM products for those manufacturers that agree to abide by the recommendations.[7] Syngenta relies on an Eighth Circuit case that declined to extend the holding of the Arkansas Supreme Court under this section of the Restatement to a plaintiff that contended the defendant assumed a duty by publicly representing that they would pursue public health research about the dangers of cigarette smoking, and breached that duty by withholding information on the health ramifications and addictiveness of cigarettes. *Boerner v. Brown & Williamson Tobacco Corp.*, 260 F.3d 837, 849 (8th Cir. 2001). The Court found that the plaintiff failed to show either that the public health community owed him or his wife a legally enforceable duty through "unilateral public statements." *Id.* The BIO Policy is more than a typical internal corporate policy or "unilateral public statement." It is an

[6] To the extent Plaintiff relies on "numerous statements regarding its plans, progress, and projections for obtaining import approval from China and about its plans for a limited release with proper stewardship," the duty of a voluntary undertaking is rejected. Plaintiff has not identified any of these statements or the duty they give rise to with specificity.

[7] Syngenta's commercialization of Agrisure RW was the catalyst for development of the BIO Policy.

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agreement among manufacturers in the industry to abide by certain conduct. It does not contain vague public statements but rather sets forth specific guidelines, standards, and requirements.

Seed manufacturers could decide whether they would execute the BIO Policy and agree to be bound by the standards and requirements in the agreement. An undertaking requires that the defendant "must have agreed to perform a certain act and have assumed the performance of that act." *Jordan v. NUCOR Corp.*, 295 F.3d 828, 838 (8th Cir. 2002). A fact finder could determine this was a voluntary undertaking necessary for the protection of others in the interconnected market. Questions of fact remain and Syngenta is not entitled to judgment as a matter of law on the duty based on a voluntary undertaking.

G. Petition Clause

Syngenta moves the Court to declare that statements made in Syngenta's Deregulation Petition to the USDA and Syngenta's litigation in *Syngenta Seeds, Inc. v. Bunge North America, Inc.*, 773 F.3d 58 (8th Cir. 2014) ("*Bunge* lawsuit") cannot be used as the basis for any liability because they enjoy immunity under the First Amendment's Petition Clause. *See, e.g., N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). The Court agrees with Plaintiff that Syngenta has not asserted a proper basis for summary judgment on this issue in this case. Mensik does not assert a claim against Syngenta based on the Deregulation Petition or *Bunge* lawsuit. Plaintiff has asserted they are pieces of evidence relevant to his claims for negligent commercialization. Syngenta's motion is denied at this time.

H. Proximate Cause

Syngenta moves the Court to dismiss all of Mensik's claims for lack of proximate cause. A proximate cause is a cause (1) that produces a result in a natural and continuous sequence, and (2) without which the result would not have occurred. *Hall,* 846 N.W.2d at 983-84 (citing *Stacy v.*

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Great Lakes Agri Mktg., 276 Neb. 236, 753 N.W.2d 785 (Neb. 2008)).

> To establish proximate cause, the plaintiff must meet three basic requirements: (1) Without the negligent action, the injury would not have occurred, commonly known as the 'but for' rule or 'cause in fact'; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause.

Roskop Dairy, L.L.C. v. GEA Farm Techs., Inc., 871 N.W.2d 776, 794 (Neb. 2015) (footnote omitted). "Proximate causation is generally a question for the jury, and only where but one inference can be drawn is it proper for the court to decide the issue." *McKinney v. Okoye*, 842 N.W.2d 581, 594 (Neb. 2014).

Plaintiff has presented sufficient evidence upon which a reasonable jury could find proximate cause. A proximate cause need not be the sole cause; it need only be a proximate cause. *See, e.g., Maclovi-Sierra v. City of Omaha*, 860 N.W.2d 763, 774 (Neb. 2015). It also does not need to be the immediate cause; it may be enough that the act complained of set in motion a series of events through which it produced the damage. *See Meyer v. State*, 650 N.W.2d 459, 463 (Neb. 2002). It is not necessary, however, that the specific injury sued upon have been foreseeable; it suffices if what occurred was one of the kind of consequences reasonably foreseeable. *Erickson v. Monarch Indus.*, 347 N.W.2d 99, 105 (Neb. 1984). Here, Plaintiff has presented evidence that without Syngenta's act of launching Viptera in the absence of approval from China, the injury of trade disruption would not have occurred. The injury of a trade embargo is a natural and probable result of releasing a GM trait without approval from for import by a foreign market. And as discussed in Section I *infra*, there was no efficient intervening cause.

Syngenta's argument that it created a "condition" by which Mensik's injury was made possible is unpersuasive. Syngenta claims that its actions of launching Viptera merely created a condition under which the presence of Viptera in the corn supply permitted the actions of Cargill and ADM to cause the harm. Syngenta relies heavily on the fact that Cargill and ADM chose not to

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ship corn to China in 2011 and thus no harm would have occurred if Cargill and ADM kept the status quo. Syngenta's argument, however, fails to account for the fact that its negligence altered Cargill and ADM's actions in the first place. If Syngenta's negligence had not occurred, the status quo would have been unrestricted shipments to China by Cargill and ADM. In addition, the distance in time between the negligence and the injury may be a factor in assessing proximate cause but it does not defeat causation. *See, e.g., Landmesser v. Ahlberg*, 166 N.W.2d 124, 128 (Neb. 1969). Simply because other participants in the interconnected market changed their behavior in response to Syngenta's alleged negligence which resulted in a delay before the harm occurred does not create an automatic break in the chain of causation.

I. Superseding Cause

Syngenta argues that summary judgment should be granted on the issue of causation because the grain exporters' act of shipping U.S. corn to China was an intervening cause that broke the chain of proximate causation. Conversely, Plaintiff moves to dismiss Syngenta's defense of intervening/superseding cause. Syngenta claims Cargill and ADM chose not to ship corn to China in 2011 because of Viptera. In 2012, Cargill and ADM chose to ship corn to China, knew shipments contained MIR162, and knew China had a zero tolerance for unapproved GM traits. Syngenta claims Cargill and ADM made these shipments in violation of Chinese law, contracts with Chinese buyers, and their own policies. Syngenta concludes that it was China's rejection of those shipments made by Cargill and ADM that caused Plaintiff's damages. Plaintiff argues that the grain exporters' acts do not constitute intervening causes because they were foreseeable, were not new and independent of Syngenta's conduct, were not sufficiently wrongful, and Cargill and ADM did not have full control of the situation.

"An efficient intervening cause is new and independent conduct of a third person, which

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itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury." *Willet v. County of Lancaster*, 713 N.W.2d 483, 488 (Neb. 2006).

> An efficient intervening cause is a new, independent force intervening between the defendant's negligent act and the plaintiff's injury by the negligence of a third person who had full control of the situation, whose negligence the defendant could not anticipate or contemplate, and whose negligence resulted directly in the plaintiff's injury. Thus, an intervening act that is reasonably foreseeable by the defendant does not preclude the defendant's liability.

Kozicki v. Dragon, 583 N.W.2d 336, 340 (Neb. 1998) (citations omitted); *see also Brandon v. County of Richardson*, 624 N.W.2d 604, 627 (Neb. 2001). "The causal connection is severed when (1) the negligent actions of a third party intervene, (2) the third party had full control of the situation, (3) the third party's negligence could not have been anticipated by the defendant, and (4) the third party's negligence directly resulted in injury to the plaintiff." *Malolepszy v. State*, 729 N.W.2d 669, 675 (Neb. 2007) (citing *Willet*). A superseding cause relieves the defendant of responsibility for the injury. *Id.* at 675-77. Ordinarily, the issue of whether an intervening force was a superseding cause is for the jury. *Kozicki*, 583 N.W.2d at 340. Where reasonable minds could not differ on the issue, however, the question is one for the court. *Egenberger v. National Alfalfa Dehydrating & Milling Co.*, 83 N.W.2d 523, 532 (Neb. 1957).

The act of Cargill and ADM in shipping corn to China does not constitute an efficient intervening cause. First, Cargill and ADM's shipments of corn to China were not new and independent acts unrelated to Syngenta's conduct. A "new and independent" act is one that is "not set in motion by him, and not connected with but independent of his acts and not flowing therefrom." *Hersh v. Miller*, 99 N.W.2d 878, 881 (Neb. 1959).

> If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence. A cause of an injury may be the proximate cause notwithstanding it acted through successive instruments or a series of events,

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> if the instruments or events were combined in one continuous chain or train through which the force of the cause operated to produce the disaster.

Kroeger v. Safranek, 72 N.W.2d 831, 838 (Neb. 1955) (quotation omitted). Plaintiff has presented evidence that Syngenta negligently commercialized Viptera, causing MIR162 to contaminate the U.S. corn supply despite lack of approval in China. Shipment of corn to foreign markets is a regular occurrence in the agricultural commodities industry. Shipments by Cargill and ADM would not have triggered the rejection by China if Viptera had not been present. Syngenta set in motion the rejection of shipments of corn. The act of shipping corn containing MIR162 flowed from Syngenta's commercialization of Viptera. The conduct of ADM is therefore not new or independent from Syngenta's alleged negligence.

Second, ADM and Cargill did not have full control of the situation. Third parties have control over a situation where they could have avoided the harm through the exercise of reasonable care. *Latzel v. Bartek*, 846 N.W.2d 153, 167 (Neb. 2014). Syngenta was the party responsible for obtaining import approval of MIR162 from China. Cargill and ADM did not have knowledge of the application for approval and its status. No reasonable jury could find that the shipments of corn to China by Cargill and ADM were unrelated and independent acts of parties that had full control of the situation.

Furthermore, Cargill and ADM's conduct was reasonably foreseeable. Third-party conduct that is reasonably foreseeable is not an intervening cause, as a matter of law. *Zeller v. County of Howard*, 419 N.W.2d 654, 658 (Neb. 1988); *Brandon v. County of Richardson*, 624 N.W.2d 604, 627 (Neb. 2001). "Any action that was foreseeably within the scope of the risk occasioned by the defendant's negligence cannot be said to supersede that negligence." *Fuhrman v. State*, 655 N.W.2d 866, 875 (2003) (citation and internal quotation marks omitted). In the January 9, 2017 Order granting Plaintiff's motion to amend to add a claim for punitive damages, the Court reviewed

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in length the evidence demonstrating Syngenta was aware that its conduct of commercializing Viptera without approval for import from a foreign market could result in a trade disruption. The evidence shows the knowledge came from prior releases of GM traits by Syngenta and other companies and foreseeability was shown in numerous discussions among Syngenta employees on how to react to the situation.

Syngenta argues that Cargill and ADM's conduct was not foreseeable because shipping corn with MIR162 to China was unlawful conduct. The Restatement provides:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded the opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Restatement (Second) of Torts § 448; *Shelton v. Board of Regents*, 320 N.W.2d 748, 752-53 (Neb. 1982). This is a situation where at the time of Syngenta's commercialization of Viptera without approval from China, it realized or should have realized that it created a situation where Cargill, ADM, and other grain exporters may ship corn with MIR162 in violation of China's rules. Since the unlawful conduct by others was foreseeable, it cannot be an intervening cause. Unlike the cases relied upon by Syngenta involving motorists who failed to obey traffic laws, the reason Cargill and ADM's action was unlawful was because of Syngenta's negligence.

For all of these reasons, Syngenta failed to offer evidence to create a question of fact concerning whether Cargill and ADM's shipments to China constitutes an efficient intervening cause. Plaintiff is entitled to summary judgment on Syngenta's defense of superseding cause.

J. Contributory Negligence

Plaintiff seeks summary judgment of Syngenta's defense of Mensik's contributory negligence. Syngenta argues that as a grower of Viptera, Mensik was subject to a duty to prevent

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contamination. "One is contributorily negligent if (1) he breaches the duty imposed upon him by the law to protect himself from injury; (2) his actions concur and cooperate with actionable negligence of the defendant; and (3) his actions contribute to the injuries as a proximate cause." *Steinauer v. Sarpy County*, 353 N.W.2d 715, 721 (Neb. 1984). A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred. *Meyer v. State*, 650 N.W.2d 459, 463 (Neb. 2002).

First, the Court notes that any duty imposed upon Mensik would be subject to the same GSA preemption analysis. Therefore, any requirement of inspection or description based on the presence of genetic traits in Viptera or Duracade as a condition of shipment or sale of grown corn in interstate or foreign commerce is preempted. In general, stewardship measures based on containment or channeling are preempted but isolation measures applying actions taken with regard to seed and not corn are not preempted.

Plaintiff argues that Syngenta's claim fails for lack of causation. China would have rejected shipments of corn containing MIR162 causing the trade disruption and drop in price even if Mensik had not grown Viptera. Plaintiff argues that when China began rejecting U.S. corn in November 2013, the corn supply was so contaminated with corn grown form Viptera that Mensik's very small amount of Viptera corn did not affect the presence of MIR162 in the corn supply. He claims that China would have rejected U.S. corn whether he planted Viptera or not and he was thus not a "but for" cause of the trade disruption. The Court agrees with Plaintiff. No reasonable jury could find that Mensik's conduct was a proximate cause of the injury.

K. Allocation of Fault

Plaintiff moves the Court to dismiss Syngenta's defense to allocate fault to grain handlers, China, and other non-producers. Nebraska law does not allow the allocation of fault to non-parties.

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Neb. Rev. Stat. Sec. 25-21, 185.10 provides:

> the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence, and a separate judgment shall be rendered against that defendant for that amount.

The Nebraska Supreme Court has made clear that this statute is only applicable to actions involving more than one defendant. *Tadros v. City of Omaha*, 735 N.W.2d 377, 380 (Neb. 2007).

> Because [the statute's] effect is on only the apportionment of damages between multiple defendants after liability has been established, the proper timeframe to consider in determining whether there are, in fact, multiple defendants in a case is when the case is submitted to the finder of fact. In other words, if there is only one defendant in a particular case at the point the case is submitted to a jury, the jury will not be allowed to allocate a percent of damages or negligence to 'phantom' defendants who have never been part or are no longer part of a proceeding. Again, only when there are multiple defendants in a case at the time the case is submitted to the finder of fact can there be the possibility of an allocation of damages between damages under [the statute.]

Maxwell v. Montey, 631 N.W.2d 455, 462 (Neb. 2001).

The law in Minnesota does not prohibit the allocation of fault to non-parties. "When apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tortfeasors either by operation of law or because of a prior release." *Lines v. Ryan*, 272 N.W.2d 896, 903 (Minn. 1978); *see also Staab v. Diocese of St. Cloud*, 813 N.W.2d 68, 77 (Minn. 2012). Syngenta argues the Court should apply Minnesota law to the allocation of fault.

In an Order dated April 7, 2016 on Syngenta's motion to dismiss, the Court conducted a choice of law analysis and concluded that the law of each Plaintiff's state of residence would apply to their common law claims. In a separate Order issued on April 11, 2017, the Court performed a

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choice of law analysis and held that Minnesota law applied to Mensik's claim for punitive damages. Syngenta's argument that allocation of fault is simply a rule applied to damages and not a substantive law is rejected. Allocation of fault is an issue of state substantive law. *See Ryan v. McDonough Power Equip., Inc.*, 734 F.2d 385, 389 (8th Cir. 1984). In order to allocate fault between parties, the fact finder must determine that each individual party is liable. Such a finding is thus a substantive law query and the Court's choice of law analysis regarding common law claims in the April 7, 2016 Order is applicable and is incorporated herein.

However, the Court will also conduct a choice of law analysis on the issue. Choice of law determinations are made on an issue-by-issue, and not a case-by-case, basis. *Zaretsky v. Molecular Biosystems, Inc.*, 464 N.W.2d 546, 548 (Minn. Ct. App. 1990) (citing Restatement (Second) of Conflict of Laws § 2 comment a(3) (1971)). The difference between Nebraska and Minnesota in allocating the potential fault of non-parties is outcome determinative because it affects who may be found liable. The Court also previously determined that Minnesota law may be constitutionally applied to Defendants in this matter in the April 4, 2016 Order. Consistent with the Court's two previous choice of law analyses, the distinguishing *Milkovich* factor is the advancement of each state's governmental interest. *See also H Enter. Int'l v. Gen. Elec. Capital Corp.*, 833 F. Supp. 1405, 1416 (D. Minn. 1993) (advancement of the forum's governmental interests and the application of the better rule of law are the only two factors relevant in torts). The competing interests involved in allocation of fault rules are ensuring victims are fully compensated and protecting defendants from paying for harm caused by others. In the context of compensatory damages, the Court finds ensuring full compensation to victims is the dominant interest. The Court finds that Nebraska's governmental interest is more significant on the issue of allocation of fault.[8]

[8] The Court does not find the better rule of law a relevant factor. The law on allocation of fault in Minnesota compared to Nebraska cannot be said to be the better law. As discussed above, the laws serve different purposes.

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Here, Cargill, ADM, and China are not parties to this action. In Orders dated September 2, 2016 and September 14, 2016, this Court specifically denied Syngenta's motion to assert claims against Cargill and ADM. Accordingly, Syngenta's defense that fault should be allocated to Cargill, ADM, and China is dismissed as a matter of law.

Syngenta also argues that fault can be allocated to non-Viptera growers. The other Producer Plaintiffs are not technically parties to Mensik's case. Therefore, no portion of damages can be allocated to them. In addition, Syngenta has not provided any evidence that Plaintiffs who did not grow Viptera could have taken action on their own farm to prevent cross-pollination from Viptera growers' farms.

L. Assumption of the Risk

Syngenta claims Plaintiff's claims are barred by the doctrine of assumption of the risk. Plaintiff claims this defense fails as a matter of law. An affirmative defense of assumption of the risk requires that, "(1) the person knew of and understood the specific danger, (2) the person voluntarily exposed himself or herself to the danger, and (3) the person's injury or death or the harm to property occurred as a result of his or her exposure to the danger." Neb. Rev. Stat. § 25-21, 185.12; *see also Burke v. McKay*, 679 N.W.2d 418, 424 (Neb. 2004). Assumption of the risk applies a subjective standard, geared to the individual plaintiff and his actual comprehension and appreciation of the nature of the danger. *Burke*, 679 N.W.2d at 424. The defendant has the burden to establish the elements of assumption of risk as an affirmative defense. *Mandery v. Chronicle Broad Co.*, 423 N.W.2d 115, 120 (Neb. 1988).

The evidence regarding Mensik's knowledge of the risk of trade disruption is that he knew China rejected corn imports in 2013. This demonstrates knowledge after-the-fact and not an appreciation of the risk before it occurred. The Court finds that no reasonable jury could find

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that Mensik knew the risk associated with purchasing Viptera seed, that he appreciated the risk of a trade disruption, or that he voluntarily chose to incur it. Syngenta's defense of assumption of the risk is dismissed as a matter of law.

M. Stewardship Agreement

Syngenta moves the Court for summary judgment enforcing the terms of the Stewardship Agreement by limiting Mensik's remedies to the purchase price of his seeds. Conversely, Mensik moves the Court for summary judgment on Syngenta's Eighteenth Defense, that Mensik's claims are barred by the disclaimer and limitation of warranties in the Stewardship Agreement. Each bag of Viptera and Duracade seed sold by Syngenta bore a tag stating, "By opening this package of seed, you affirm that you have signed and are obligated to follow the terms and conditions of the Syngenta Stewardship Agreement and will practice responsible Insect Resistance Management (IRM) on your farm."[9]

Syngenta's Stewardship Agreement states:

> This Stewardship Agreement ('Agreement') is entered into between You ('Grower') and Syngenta Seeds, Inc., 11055 Wayzata Blvd., Minnetonka, Minnesota 55305 ('Syngenta'). By signing and returning this Agreement the Grower received from Syngenta a limited license to use the following technologies as they are contained in any Syngenta seed product and/or in any seed product distributed by a third party Syngenta-licensee (such products collectively referred to as 'Seed Product'):
>
> (I) Agrisure® CB/LL corn, Agrisure GT corn, Agrisure RW corn, Agrisure Viptera™ corn (the 'Agrisure Technologies');
>
> (II) **** (the 'DAS Technologies'); and
>
> (III) **** (the 'Gennuity RR2Y Technology').
>
> The Agrisure Technologies, DAS Technologies and Gennuity RR2Y Technology shall collectively be referred to as the 'Licensed Technologies' throughout this Agreement.

The Stewardship Agreement includes the following provisions under the heading

[9] Plaintiff's argument that there is no affirmative evidence to prove that the bags of seed purchased by Mensik contained these tags creates nothing more than a "metaphysical doubt about the facts" and is rejected. *See, e.g., Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004).

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"LIMITATIONS OF WARRANTIES AND REMEDIES":

> Syngenta warrants that the Licensed Technologies licensed hereunder conform to the written description on the seed bag affixed to each unit of Seed Products containing the Licensed Technologies. This warranty applies only to the Licensed Technologies contained in the Seed Products that have been purchased from Syngenta seed companies licensed by Syngenta, or their authorized dealers or distributors and planted from the original sealed bag. THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE WHICH ARE HEREBY EXPRESSLY DISCLAIMED. THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE DESCRIPTION ON THE LABEL.
>
> No claim shall be asserted against Syngenta unless Grower reports to Syngenta promptly after discovery any condition that may lead to a complaint. All claims must be asserted within one year from the date of acceptance. GROWER'S EXCLUSIVE REMEDY FOR ANY CLAIM OR LOSS, INCLUDING WITHOUT LIMITATION, CLAIMS RESULTING FROM BREACH OF WARRANTY, BREACH OF CONTRACT, TORT, STRICT LIABILITY OR NEGLIGENCE, SHALL BE LIMITED TO REPAYMENT OF THE AMOUNT OF THE PURCHASE PRICE. IN NO EVENT SHALL SYNGENTA, ITS DISTRIBUTORS, OR DEALERS BE LIABLE FOR ANY INCIDENTAL, SPECIAL, PUNITIVE OR CONSEQUENTIAL DAMAGES.

Syngenta argues that by opening the bags and using the seeds, Mensik accepted the terms of the Stewardship Agreement.[10] To form a contract under Nebraska law,[11] "there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract." *Gibbons Ranches, L.L.C. v. Bailey*, 857 N.W.2d 808, 812 (Neb. 2015); *Houghton v. Big Red Keno,* 574 N.W.2d 494, 499 (Neb. 1998). A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties themselves as to all the details of the proposed

[10] There is a dispute whether Mensik ever signed the Stewardship Agreement. There is one copy of the Stewardship Agreement with a signature of Mensik but he denies it is his signature and the parties have retained handwriting experts to evaluate the signature. In addition, an electronic copy of the Stewardship Agreement was downloaded on a computer at the Mensik home. For purposes of this motion, Syngenta relies on a contract formed by opening the seed bags.

[11] The Stewardship Agreement states that Minnesota law shall govern. The Court finds no difference between the law of Minnesota and Nebraska on contract formation.

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agreement; it may be implied from the parties' conduct and the surrounding circumstances. *Nebraska Nutrients, Inc. v. Shepherd*, 261 Neb. 723, 751–52, 626 N.W.2d 472, 498–99 (2001) (citing *Hoeft v. Five Points Bank,* 248 Neb. 772, 539 N.W.2d 637 (1995)). An agreement to make a future contract is not binding upon either party unless all terms and conditions are agreed upon and nothing is left to future negotiation. *Cimino v. FirsTier Bank,* 530 N.W.2d 606, 614 (Neb. 1995). A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement. *Id.* To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract. An agreement to agree is not enforceable in Nebraska. *Id.*

Syngenta argues that Mensik manifested assent to the terms of the contract by opening the bags and using the seeds. Mutual assent is measured under an objective standard. *Sorenson v. Dager*, 601 N.W.2d 564, 569 (Neb. 1999). Syngenta argues that the situation is the same as cases wherein courts have held that offers to license that are included with product packaging can be accepted by software end users and are enforceable agreements. *See, e.g., Siebert v. Amateur Athletic Union of U.S., Inc.*, 422 F. Supp. 2d 1033, 1039-40 (D. Minn. 2006) ("Most courts which have considered the issue have upheld arbitration and forum selection clauses in so-called "clickwrap" or "shrinkwrap" form contracts. These occur when the terms are provided online, or only after plaintiffs have manifested assent"). Unlike these primarily software cases, there was no affirmative "click" by the purchaser in this case to affirmatively demonstrate acceptance. This transaction involved the purchase of a product that did not require any involvement with accessing a computer, where you are unable to download software or continue with an application unless you signal assent by clicking a box.

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In addition, all of the cited cases involved upholding arbitration and forum selection clauses in the contracts. *Id.* As the court noted in *Siebert*, "both state and federal governments have strong policies favoring arbitration." *Id.* at 1038. While parties to a commercial agreement may limit or alter the measure of damages, Minn. Stat. § 336.2-719(1)(a), there is no "strong policy" favoring such provisions. Here, the terms of the Stewardship Agreement were not known to Mensik until after he purchased the product and did not make an affirmative showing of assent to those post-sale terms. The parties did not enter into a binding contract.

Furthermore, the scope of the Stewardship Agreement terms is too narrow to govern the claims in this case. The scope of a contract is determined by the parties' intent. *See, e.g., Joe v. First Bank Sys., Inc.*, 202 F.3d 1067, 1070 (8th Cir. 2000). The Stewardship Agreement applies to the technology license, express and implied warranties. Mensik's claims do not relate to defective seed product, or a failure to perform, or Mensik's use of Syngenta technologies. Even if the parties entered into this contract, the evidence shows they did not intend the agreement to apply to claims for negligent commercialization. Mensik's tort claims are unrelated to his purchases and use of Viptera or Duracade corn seed, the Stewardship Agreement does not apply to his claims in this case.

The parties did not enter into binding contract with mutual assent to the terms in the Stewardship Agreement. In addition, the parties did not intend the agreement to govern Plaintiff's claim in this case. Therefore, the Stewardship Agreement will not be enforced as a matter of law. The Stewardship Agreement does not operate to limit the damages available for Mensik's claims in this case.

N. Restraint of Trade

Plaintiff moves the Court to dismiss Syngenta's affirmative antitrust defense. Syngenta argues that some of the duties Plaintiff seeks to impose on Syngenta would be a violation of

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antitrust laws. "Federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior." *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n. 8 (1987). For example, Syngenta argues it would be a violation of antitrust laws to agree with Cargill and ADM about which seed products could be sold in the U.S. or agree with other seed manufacturers on identifying key export markets. Similar to the discussion in Section G *supra* regarding Syngenta's motion on the Petition Clause, the Court finds this is not a proper basis for summary judgment. There does not appear to be a specific claim or affirmative defense at issue but rather concern over evidence. Plaintiff's motion is denied at this time.

O. Unjust Enrichment

Syngenta asserted an affirmative defense of unjust enrichment. Syngenta claims Mensik unjustly received an increased yield from planting Viptera. Plaintiff moves for summary judgment, arguing unjust enrichment cannot be used as an affirmative defense and there is no evidence to support a finding if unjust enrichment. The Court agrees.

Syngenta's argument that unjust enrichment may be used as an affirmative defense is not persuasive. Unjust enrichment is a quasi-contractual theory of recovery, having "its origin in the principle that a person shall not be allowed to enrich himself unjustly at the expense of another." *Bush v. Kramer*, 173 N.W.2d 367, 369 (Neb. 1969). "Generally, unjust enrichment is not argued as a defense to an action because a party cannot recover for unjust enrichment until the allegedly inequitable benefits have been received and retained." *Ag Servs. of Am., Inc. v. Empfield*, 587 N.W.2d 871, 874 (Neb. 1999) (citing *In re Estate of Krueger,* 235 Neb. 518, 455 N.W.2d 809 (1990); *Professional Recruiters v. Oliver,* 235 Neb. 508, 456 N.W.2d 103 (1990)). Syngenta's reliance on the case of *Bank of Beaver City v. Southwest Feeders, L.L.C.*, No. 4:10-CV-3209, 2011 WL 4632887, at *14 (D. Neb. Oct. 4, 2011) is misplaced. In the context of a Rule 12(f)

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motion to strike, the court in *Bank of Beaver City* held that it would "not strike the 'unjust enrichment' theory solely on the ground that it may have been mistakenly designated as an affirmative defense." *Id.* at *13. The court did not sanction the use of unjust enrichment as an affirmative defense. The Court agrees with Plaintiff that unjust enrichment is not a valid affirmative defense.

Even if the Court recognized unjust enrichment as an affirmative defense, Plaintiff would still be entitled to summary judgment. Syngenta argues Mensik unjustly received an increased yield from planting Viptera. A reasonable jury could not find this "benefit" to be "unjust." "Where benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay their reasonable value." *Hoffman v. Reinke Mfg. Co.,* 416 N.W.2d 216, 219 (Neb. 1987). Plaintiff paid for the Viptera and Duracade seed that he purchased. Presumably, the price reflected any additional increase in the value of the seed. A reasonable jury could not find the purchase of a GMO corn seed at the price set by the seller to be inequitable or unconscionable. In addition, there is no evidence to show what the yield of Mensik's crop would have been had he not planted Viptera seed. For all of these reasons, Plaintiff's motion is granted with respect to the affirmative defense of unjust enrichment.

P. Consumer Protection Act Claim

In the Master Complaint, Plaintiffs identify four alleged misrepresentations that violate the consumer protection act: 1) a statement made by Mack in the 2012 earnings call; 2) statements made in the Deregulation Petition; 3) statements made in the request for a biosafety certificate; and 4) the Plant with Confidence Sheet. The Nebraska Consumer Protection Act ("NCPA") requires

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Mensik to prove causation by showing that he was "injured in his … business or property by" the allegedly false and deceptive representations, Neb. Rev. Stat. § 59-1609, and that the allegedly false and deceptive representations affected the public interest. *See Bruno v. Sunglass Hut Trading Corp.*, 2008 WL 2277550, at *3 (Neb. Ct. App. June 3, 2008).

The Nebraska Consumer Protection Act ("NCPA") prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" that "affect the public interest." Neb. Rev. Stat. § 59-1602; *see also* Neb. Rev. Stat. § 59-1601; *Infogroup, Inc. v. DatabaseLLC*, 95 F. Supp. 3d 1170, 1184 n.11 (D. Neb. 2015) (citing *Eicher v. Mid America Fin. Inv. Corp.*, 748 N.W.2d 1, 12 (Neb. 2008); *Arthur v. Microsoft Corp.*, 676 N.W.2d 29, 36 (Neb. 2004)). "The terms 'unfair' and 'deceptive' are not defined in by the [NCPA]" leaving courts to "try to predict how the Nebraska Supreme Court would define and then apply those words ...." *Raad v. Wal-mart Stores, Inc.*, 13 F. Supp. 2d 1003, 1011 (D. Neb. 1998); *Reynolds v. Credit Mgmt. Servs., Inc.*, No. 8:14CV391, 2016 WL 756469, at *2 (D. Neb. Feb. 25, 2016).

> Any person who is injured in his or her business or property by a violation of sections 59-1602 to 59-1606, whether such injured person dealt directly or indirectly with the defendant, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of sections 59-1603 to 59-1606, may bring a civil action in the district court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an amount which bears a reasonable relation to the actual damages which have been sustained and which damages are not susceptible of measurement by ordinary pecuniary standards; except that such increased award for violation of section 59-1602 shall not exceed one thousand dollars. For the purpose of this section, person shall include the counties, the municipalities, and all political subdivisions of this state.

Neb. Rev. Stat. Ann. § 59-1609.

Syngenta moves for judgment of dismissal as a matter of law, arguing no one saw or acted

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upon the four representations listed in the Master Complaint: 1) Mack's comment in the earnings call; 2) statements in the Deregulation Petition; 3) statements in the request for biosafety certificate; and 4) the Plant with Confidence Sheet. Syngenta notes that out of the more than 100 farmers deposed, 106 testified they had not seen Mack's earnings call statement, 107 had never seen the biosafety certificate request form, and 105 had not seen the Deregulation Petition. The statute does not specifically require reliance on a misrepresentation. Rather, the Act prohibits unfair and deceptive trade practices and allows any person who is injured in his business by the conduct to bring an action.

The Act requires that the person be injured "by" the violation. Syngenta argues Mensik failed to prove causation. Causation is generally a question of fact. *Brandon v. County of Richardson*, 624 N.W.2d 604 (Neb. 2001). Mensik has alleged that Syngenta used unfair and deceptive acts in the commercialization of Viptera and Duracade, which is more expansive than just misrepresentations. Mensik has presented facts upon which a jury could find Syngenta's acts caused him damages.

Syngenta also claims Mensik cannot prove that any of the statements were unfair or deceptive. "Reinbrecht next assigns that the trial court erred by using the wrong definitions of "unfair" and "deceptive" in analyzing his CPA claim. After noting that the terms "unfair" and "deceptive" are not defined in the NCPA and that no Nebraska case law defines the terms as used in the NCPA, the *Raad* court stated that an unfair trade practice is one that is immoral, unethical, oppressive, or unscrupulous. *Raad v. Wal–Mart Stores, Inc.*, 13 F.Supp.2d 1003 (D. Neb. 1998). It defined a deceptive practice as one which possesses the tendency or capacity to mislead, or creates the likelihood of deception, and that fraud, misrepresentation, and similar conduct are examples of what is prohibited. *Id.* The Nebraska Court of Appeals subsequently found no error with these

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definitions. *Reinbrecht v. Walgreen Co.*, 742 N.W.2d 243, 249 (2007). Mensik has presented evidence of statements made by Syngenta to growers and grain handlers, members of the interconnected market, regarding the expected timing of approval from China that a jury could conclude were deceptive.

Finally, Syngenta argues the claim should be dismissed because a plaintiff cannot redress a private wrong where the public interest is unaffected. The NCPA only applies to unfair or deceptive practices which affect the "public interest." *Eicher v. Mid Am. Fin. Inv. Corp,* 748 N.W.2d 1, 12 (2008). "The purpose of the Act is to provide consumers with protection against unlawful practices in the conduct of any trade or commerce which directly or indirectly affects the people of Nebraska. *See Nelson v. Lusterstone Surfacing Co.,* 258 Neb. 678, 605 N.W.2d 136 (2000). Syngenta attempts to characterize the dispute as a private transaction between two merchants with a Stewardship Agreement limiting available remedies. There are five sets of related litigation surrounding Syngenta's commercialization of Viptera. This matter involves approximately 50,000 producers and Plaintiffs indicate there are over 7,000 farmers from Nebraska in the action. The federal MDL involves a nationwide class action and a Kansas class action and this matter includes a class action of Minnesota farmers. In *Arthur*, the court found that an alleged class of 4,000 consumers affected by the defendant's alleged violation of the Act was sufficient to show the public interest was affected. *Arthur v. Microsoft Corp.*, 676 N.W.2d 29, 38 (2004). Similarly, Mensik has made a sufficient showing that based on the large number of Nebraska farmers affected, the public interest was affected.

Q. Duracade

Syngenta seeks summary judgment to the extent Mensik's claims are based on the commercialization of Duracade. Mensik argues there is a question of fact whether Syngenta's

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commercialization of Duracade increased or extended Plaintiff's damages. Mensik states that because Duracade is not approved for import into China, it has delayed full resumption of Chinese purchases of U.S. Corn.

Syngenta argues that Plaintiff lacks evidence that Duracade had any impact on U.S. corn prices. Plaintiff submitted the Rao/King Report which opines that Duracade extended the duration of the economic damage from the trade embargo. Rao/King calculated static damages of $.50 per bushel of corn from November 18, 2013 to December 7, 2014 and $0.15 per bushel from December 8, 2014 to August 26, 2016. Given the bushels of corn sold by Mr. Mensik in this period, Rao/King calculated his damages at $104,460.00. Although only calculating damages to August 2016, Rao/King opined that, "the fact that China has yet to resume any meaningful imports of US corn suggests that this price suppressive effect continues to this day." Based on the assumption that the $0.15 per bushel price suppression continues through the 2017 marketing year, Rao/King calculated Mensik's damages at $36,465.00 from August 2016 through the 2017 marketing year.

Syngenta attacks this evidence as speculative and lacking support. The Court has found there is sufficient foundational reliability for the Rao/King report. Syngenta will have ample opportunity to cross-examine the opinions of Dr. Rao and Anna King; allowing the jury to determine the credibility and weight to be given to their testimony. Plaintiff has presented sufficient evidence to raise a question of fact and the Court cannot conclude that no reasonable jury could award damages based on Syngenta's actions in commercializing Duracade. Syngenta's motion for summary judgment with respect to Duracade is denied.

R. Damages

Syngenta moves the Court for summary judgment of any claims brought by Plaintiff other than claims for damages due to the alleged lower market price of corn. Mensik confirmed that the

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only damages he seeks are market-loss damages and does not oppose Syngenta's motion. The motion is therefore granted.

S. Collateral Source Offsets

Mensik moves for summary judgment on Syngenta's Thirty Ninth Defense, which states that Mensik's damages must be reduced by any payments and income received from other sources related to his corn farming operation. Under Nebraska law, "benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer." *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 443 N.W.2d 872, 874-75 (Neb. 1989); *Tetherow v. Wolfe*, 392 N.W.2d 374, 380 (Neb. 1986). The theory underlying the adoption of this rule by a majority of jurisdictions is to prevent a tort-feasor from escaping liability because of the act of a third party, even if a possibility exists that the plaintiff may be compensated twice. *Id.* Syngenta does not dispute that insurance payments and government subsidies are collateral sources precluded from offsetting damages under Nebraska law.

Syngenta argues that Mensik's use of options contracts should reduce any damages. Mensik testified that he generally tries to sell half of his corn in the futures market by December of the prior year. Syngenta argues this use of pricing advantage does not constitute a benefit received and is not wholly independent of wrongdoing.

While Nebraska law governs the substantive provision of collateral source law, the Court finds that Minnesota procedure should govern the request for collateral source offsets. If the matter is one of procedural law, Minnesota follows the "almost universal rule that matters of procedure and remedies [are] governed by the law of the forum state." *Davis v. Furlong,* 328 N.W.2d 150, 153 (Minn. 1983) (citation omitted). In tort actions where a jury determines liability and issues an award providing compensation for past losses, a party may move the Court to reduce the amount of

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the award by amounts received from collateral sources. Minn. Stat. § 548.251, subd. 2. Upon motion, the Court determines the "amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses except those for which a subrogation right has been asserted." Minn. Stat. § 548.251, subd. 2(1). The Court must then reduce the award by the collateral source amount less any sums paid by the plaintiff to secure the collateral sources. Minn. Stat. § 548.251, subd. 3(a). Therefore, any request for collateral source offsets can be made by motion following a verdict.

T.M.S.

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STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

In re: Syngenta Litigation

Case Type: Civil Other
Hon. Thomas M. Sipkins
Hon. Laurie J. Miller

This Document Relates to:

Class Action

FILE NO. 27-CV-15-12625

ORDER REGARDING SUMMARY JUDGMENT MOTIONS

The above-entitled matter came on for hearing before Thomas M. Sipkins and Laurie J. Miller, Judges of District Court,[1] on June 29, 2017, pursuant to Syngenta's and Class Plaintiffs' motions for partial summary judgment.

Attorneys Daniel E. Gustafson, Amanda M. Williams, Rebecca A. Peterson, Lewis A. Remele, Jr., Eric S. Taubel, Aram V. Desteian, and Casey D. Marshall appeared on behalf of Class Plaintiffs.

Attorneys Patrick F. Philbin, Leslie M. Smith, Edwin J. U, Patrick Haney, and D. Scott Aberson appeared on behalf of Syngenta.

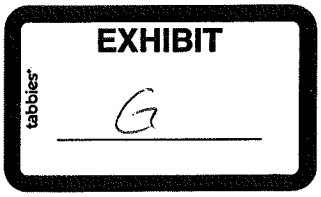
Based on all the files, records and proceedings herein, together with the arguments of counsel, the Court makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Syngenta's motion for partial summary judgment is granted in part and denied in part.

[1] The motions were submitted to and argued before Judge Sipkins. On July 7, 2017, the Minnesota Supreme Court appointed Judge Miller to hear and decide these consolidated matters. Judge Sipkins and Judge Miller are thus jointly issuing this Order.



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A. Summary Judgment is granted on Class Plaintiffs' claim for violation of the Minnesota Unfair Trade Practices Act. Count I of the Third Amended Minnesota Class Action Master Complaint for Producers is dismissed with prejudice.

B. Summary Judgment is denied with respect to negligence based on the failure to warn.

C. The motion is denied with respect to immunity under the Petition Clause.

D. Summary judgment is granted as to any claims based on liability or damages for physical injury.

E. Summary judgment is granted on any theories of duty based on a voluntary undertaking.

F. Summary judgment is granted on Class Plaintiffs' claim for strict liability failure to warn. Count III of the Third Amended Minnesota Class Action Master Complaint for Producers is dismissed with prejudice.

2. Class Plaintiffs' motion for partial summary judgment is granted in part and denied in part.

A. The motion to strike allocation of fault for the Minnesota Unfair Trade Practices Act is moot. *See* Section I.A. herein.

B. The motion is granted with respect to Syngenta's defense seeking to allocate fault to Cargill, ADM, or any other grain handlers.

C. The motion is granted with respect to Syngenta's defense seeking to allocate fault to China.

D. The motion is granted with respect to Syngenta's defense seeking comparative fault of the Plaintiffs.

E. The motion is granted in part and denied in part with respect to superseding cause. To the extent Syngenta can prove that China's rejection of U.S. corn was politically-motivated, then Syngenta's affirmative defense that China's rejection of U.S. corn was a superseding cause may be submitted to the jury.

F. The motion is granted with respect to Syngenta's antitrust defense.

G. The motion is granted with respect to mitigation of damages.

H. The motion is granted with respect to assumption of the risk.

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3. The attached Memorandum of Law is incorporated herein.

BY THE COURT:

Dated: 8-17-2017

Thomas M. Sipkins
Judge of District Court

Dated: Aug. 17, 2017

Laurie J. Miller
Judge of District Court

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MEMORANDUM OF LAW

Introduction

Defendant Syngenta Seeds Inc. (n/k/a Syngenta Seeds LLC) ("Syngenta") developed a GMO corn seed containing the genetic trait MIR162 and known as Viptera and Duracade, which also included the trait Event 5307. Syngenta commercialized Viptera prior to obtaining regulatory approval from China to import corn with MIR162. In general, corn producers and non-producer corn sellers allege that Syngenta's commercialization of Viptera caused corn containing MIR162 to be commingled throughout the United States corn supply; that China rejected imports of all United States corn because of the presence of MIR162; that such rejection caused corn prices to drop in the United States; and that Plaintiffs were harmed by that market effect. Plaintiffs make similar allegations with respect to Duracade.

In addition to individual non-class claims of approximately 50,000 Producers and Non-Producers from 47 states, this matter includes a class of Minnesota farmers as certified by Order dated November 3, 2016 ("Plaintiffs," "Class Plaintiffs," or "Class"). The class is defined as:

> All Minnesota producers that priced corn after September 2013. Excluded from the class are any corn producers that purchased or planted corn containing the MIR 162 trait (including Duracade); the Court, and its employees; Syngenta, and its parents, subsidiaries, affiliates, employees and directors during the relevant time period. A 'producer' is a person or entity listed as a producer on an FSA-578 form filed with the United States Department of Agriculture.

Pursuant to this definition, none of the Class Plaintiffs purchased or grew Viptera or Duracade. The Court appointed class counsel and four class representatives.[2] The Court subsequently approved a procedure for providing notice to potential class members. Trial on the class action is now scheduled to begin September 11, 2017.

[2] A motion to withdraw class representative Nathan Thompson due to personal hardship has been filed.

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Class representative Leroy Edlund ("Edlund") is a corn producer who lives in Pope County, Minnesota. Edlund grows soybeans and corn, and generally uses a 50-50 rotation between the two crops. Edlund was unaware of the regulatory approval status of the GMO crops he grew and what buyers did with the corn he sold. Edlund testified that he had little knowledge of Viptera prior to the time U.S. corn was rejected by China.

Plaintiff Roger Ward ("Ward") lives in Blue Earth County, Minnesota and grows soybeans and corn. In general, he alternated the two crops every other year. He testified that he rotated crops for the purposes of insect and erosion control. According to Ward, soybeans are detrimental to the organic matter level of soil because they don't produce as much volume of straw. From 2012 to 2014 Ward transitioned to growing only non-GMO corn primarily for economic reasons. When he grew GMO corn, Ward sold his corn to Cargill, a local farm elevator, and an ethanol plant. He primarily uses futures contracts.

Ward testified that he is not aware which countries have approved the corn and soybean he grows nor the ones he does not grow. Ward testified that he knew from the StarLink incident that lack of approval of GM traits in major markets could lead to economic harm and he believed Syngenta's commercialization of Viptera and Duracade represented the same principle and had a similar effect on the market.

Plaintiff Grant Annexstad ("Annexstad") grows corn and soybeans and lives in Nicollet County, Minnesota. He grows more corn than soybeans because some of the land that he operates is high pH, which is not ideal for soybeans. On the land that is conducive to soybeans, he rotates crops because he believes it is a mistake to grow soybeans on soybeans. Annexstad sells his corn to ethanol plants and local elevators using futures contracts, hedge-to-arrive contracts, and spot sales.

Annexstad was not aware of the regulatory approval status of the GMO crops he grew. After Annexstad delivered his harvested corn, he was unaware of what the buyer did with the corn. He recalled receiving a gift certificate approximately ten years earlier as damages from a class action lawsuit against another seed company related to the cross-pollination of a corn trait that was rejected by some other countries. Annexstad testified that he had not heard of Viptera until after the rejection of U.S. corn by China and had not heard of Duracade at the time of his deposition.

Plaintiff Nathan Thompson ("Thompson")[3] is a corn producer who lives in Swift County, Minnesota. Thompson grows both soybeans and corn. In 2012 he grew only corn due to high corn prices. He does not use a strict crop rotation strategy because some of his fields are not conducive to growing soybeans. Consequently, some plots of his land get more continuous corn rotation. Thompson marketed his corn through spot pricing.

Currently before the Court are the parties' cross-motions for partial summary judgment. The Third Amended Minnesota Class Action Master Complaint for Producers ("TAC") includes claims for negligence, violation of the Minnesota Unfair Trade Practices Act ("MUTPA"), and strict liability failure to warn.[4] By Order dated May 25, 2017, the Court adopted the parties' stipulation that certain rulings entered by the Court in the Order dated April 11, 2017 in the first individual bellwether case ("*Mensik*

[3] Thompson has submitted a motion to withdraw. The motion will be submitted to the Court and taken under advisement on August 18, 2017.

[4] Because the Class consists only of producers that reside in Minnesota, the remaining claims are governed by Minnesota law. The Court previously held in the April 7, 2016 Order that the substantive law of each Plaintiff's home state applies to Plaintiffs' common law claims and the consumer protection statutes of Minnesota would apply to Minnesota Plaintiffs.

Summary Judgment Order") would apply to the class action. The identified sections are treated as having been raised on summary judgment in this case and resolved by the Court's rulings. Those portions of the *Mensik* Summary Judgment Order are thus incorporated herein.

The Court reviewed all of the evidence submitted by the parties.[5] The Court incorporates its factual findings from prior orders, specifically the April 7, 2016 Order on Syngenta's motion to dismiss, November 3, 2016 Order for class certification, January 9, 2017 Order granting Plaintiffs' motion to amend the complaint to add a claim for punitive damages, March 21, 2017 Order on Syngenta's motion for judgment on the pleadings, and the Court's series of orders issued in April 2017 on the parties' motions to strike the opinion and testimony of various expert witnesses.

Legal Analysis

Syngenta moves the Court for partial summary judgment on some of the Plaintiffs' claims and Plaintiffs move the Court for partial summary judgment on several of Syngenta's defenses. A party is entitled to summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). An issue of fact is genuine if it can only be resolved by a finder of fact because it may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A material fact "is one of such a nature as will affect the result or outcome of the case depending on its resolution." *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976). The Court must view all evidence in a light most

[5] The parties submitted comprehensive and voluminous undisputed and disputed fact sections for both motions. The Court reviewed all of the materials submitted. Although judgment will not be rendered upon the whole case, the Court finds that specifying the undisputed facts is not practicable. *See* Minn. R. Civ. P. 56.04.

favorable to the nonmoving party, and must resolve all factual inferences against the moving party. *Nord v. Herreid*, 305 N.W.2d 337, 339 (1981).

The moving party has the burden to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 897 (Minn. 1996). No genuine issue of material fact exists if the record as a whole "could not lead a rational trier of fact to find for the non-moving party." *DLH, Inc. v. Russ,* 566 N.W.2d 60, 69 (Minn. 1997) (quoting *Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). A defendant is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the plaintiff's claim. *See Nicollet Restoration, Inc. v. City of St. Paul,* 533 N.W.2d 845, 847-48 (Minn. 1995) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986)).

The non-moving party must "present specific admissible facts showing a material fact issue." *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012). There is no genuine issue of material fact for trial when the evidence is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ,* 566 N.W.2d 60, 71 (Minn. 1997). The non-movant "may not establish genuine issues of material fact by relying upon unverified and conclusory allegations, or postulated evidence that might be developed at trial, or metaphysical doubt about the facts." *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004). "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995).

I. Syngenta's Motion for Partial Summary Judgment

A. Violation of the Minnesota Unfair Trade Practices Act

In the TAC, Plaintiffs assert Syngenta made misrepresentations in the following communications: (1) statements in the Deregulation Petition; (2) an August 17, 2011 letter from Syngenta to Viptera growers ("Grower Letter"); (3) a statement made by Syngenta's then-CEO Michael Mack in an April 2012 earnings call; (4) the "Plant with Confidence Fact Sheet," which Syngenta distributed to Viptera growers in March 2014; and (5) a request form for a Chinese biosafety certificate. Plaintiffs note that they rely on additional statements uncovered during discovery, largely to exporters Cargill, Archer Daniels Midland ("ADM"), and Consolidated Grain and Barge Co. ("CGB").[6] Plaintiffs allege Syngenta misrepresented the: (1) impact of MIR162 on the export market; (2) the size of the Chinese market; (3) Syngenta's stewardship program; (4) the nature, progress, and status of Syngenta's application; and (5) the timing of approval of MIR162 by China.

Plaintiffs claim these misrepresentations violate MUTPA and caused them damages. Syngenta moves the Court for summary judgment on the Plaintiffs' claim for violation of the MUTPA. Syngenta argues the claim fails as a matter of law because: (1) the alleged misrepresentations are not of the kind proscribed by the statute; (2) causation is lacking between the misrepresentations and the injuries; and (3) the statements were not knowingly false when made.

Since the claim is based on statute, the Court looks to the language of the statute to determine the viability of the claim. The statute provides, "No person shall, in connection with the sale of merchandise, knowingly misrepresent, directly or indirectly, the true quality, ingredients or origin of such merchandise." Minn. Stat. § 325D.13. MUTPA creates a private cause of action for

[6] The Court's January 9, 2017 Order granting Plaintiffs' motion to amend the complaint to add a claim for punitive damages outlines most of these statements.

"any person" that is "damaged … by" a violation of the statute. Minn. Stat. § 325D.15. When interpreting a statute, the Court's function is to effectuate the intention of the legislature. *Current Technology Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995). In enacting consumer protection statutes, the legislature "intended to make it easier to sue for consumer fraud than it had been to sue for fraud at common law." *State by Humphrey v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 790 (Minn. 1993). The Court must not extend nor narrow the reach of consumer protection beyond what was intended by the legislature. *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 11 (citations omitted).

Syngenta argues the alleged misrepresentations are not within the reach of MUTPA. The statute prohibits misrepresentations about "the true quality, ingredients or origin" of the product. Minn. Stat. § 325D.13. The statute does not define the terms "true quality, ingredients or origin." *See* Minn. Stat. § 325D.10. There is no dispute that the alleged misrepresentations do not relate to the "ingredients" or "origin" of Viptera. The issue is whether the statements relate to the "quality" of the seeds.

Plaintiffs propose the term "true quality" encompasses a product's fitness for a particular use or purpose. Plaintiffs argue Viptera was meant to be "commodity corn." Under Plaintiffs' theory, commodity yellow corn is a fungible product that can be commingled with other yellow corn while preserving its ability to be used for all purposes for which yellow corn is utilized, including export. Plaintiffs allege Syngenta's misrepresentations each involved false statements to the interconnected market that Viptera and Duracade could be used like any other commodity yellow corn, including export to key markets.

The case relied on by Plaintiffs, *Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp. 286 (D. Minn. 1990), is distinguishable. In *W.R. Grace & Co.*, the defendant sought

summary judgment on the plaintiff's claim for economic losses incurred in removing fireproofing that contained asbestos that had been installed in a public school building. *Id.* at 288. The court denied summary judgment of the plaintiff's MUTPA claim, holding that:

> plaintiff has alleged that defendant had available to it data which clearly indicated the hazards of asbestos prior to installation of defendant's product in plaintiff's building and that defendant represented that the asbestos products specified and installed in plaintiff's buildings were suitable for such use when, in fact, they knew or should have known they were not.

Id. at 304. The court in *W.R. Grace & Co.* did not expressly hold that the term "quality" includes the product's fitness for a particular purpose. Although the court did not use the statutory language, a component or "ingredient" of the fireproofing was asbestos. And a "quality" of asbestos is that it is a potential carcinogen and hazardous. *See id.* at 288. The quality of being carcinogenic is an innate feature of asbestos that remains with the product regardless of where it is installed or its intended use. Here, there is no "ingredient" or component of Viptera that makes it unsuitable to be imported regardless of the intended export market. In fact, Viptera was authorized for import in over a dozen countries.

The Court rejects Plaintiffs' argument. First, Plaintiffs' theory is based and relies upon technical industry terms, which are defined and regulated by government agencies. *See, e.g.*, 7 C.F.R. § 810.402(c)(1) (defining "yellow corn"). The USDA classifies corn based on qualities such as color, kernel, and size but does not refer to exportability to certain international markets. In addition, none of the representations are statements that Viptera was commodity corn that could be exported to all markets.[7] The statements, rather, acknowledged that Viptera was *not* approved for import to China but allegedly misrepresented *when* approval would occur.

[7] Plaintiffs cite to Syngenta's February 27, 2017 Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment to argue Syngenta has represented that Viptera is "commodity corn." Syngenta's statements in this litigation cannot form the basis for Plaintiffs' claim for violation of MUTPA.

Without a statutory definition or caselaw defining "true quality," the Court looks to the plain meaning of the language. The Court construes non-technical words according to their common and approved usage and the rules of grammar. *Id.* The Court thus looks to the common dictionary definition of undefined terms to discover their plain and ordinary meaning. *Jaeger v. Palladium Holdings, LLC*, 884 N.W.2d 601, 605 (Minn. 2016) (quoting *State v. Brown,* 792 N.W.2d 815, 822 (Minn. 2011)). The dictionary definition of "quality" includes an object's "peculiar and essential character: nature, kind," or "a distinctive inherent feature." *Webster's Third New International Dictionary* 1858 (2002). The statements identified by the Plaintiffs relate to: (1) China's demand for corn; (2) the nature, status, and timing of Syngenta's application for approval; and (3) Syngenta's stewardship program. Whether and when China would approve the import of a GM seed does not constitute the "true quality" of the seed. The statements do not relate to an inherent feature of the seed but rather a government's treatment of the corn. The corn seed exists without any relation to how it is exported or channeled. If a person purchased Viptera seed for his or her own private consumption, the ability and timing of its import to China would have no bearing on the essential nature of the seed. Plaintiffs' claim for a violation of the MUTPA fails as a matter of law because none of the statements constitute a misrepresentation of the "true quality, ingredients or origin" of Viptera and Duracade. Since the Court finds the claim fails as a matter of law on this basis, it need not address the issues of causation of knowing falsity.

B. Negligence Based on Failure to Disclose or Warn

Syngenta moves the Court for summary judgment of Plaintiffs' negligence claim based on failure to disclose or warn.[8] In general, Syngenta argues that Plaintiffs cannot base a general

[8] This Court previously dismissed any claim that Syngenta failed to include adequate warnings accompanying the Viptera and Duracade seeds it sold as preempted under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").

negligence claim on conduct that would give rise to a specific tort with certain required elements. This Court and the other courts in these coordinated actions have held that misrepresentations cannot be the basis for liability in a general negligence claim against Syngenta. *See 3/21/17 Order on Mot. for Jdgmt on the Pleadings at 13; In re Syngenta AG MIR 162 Corn Litig.*, 2016 WL 4382772, at *9 (D. Kan. Aug. 17, 2016) (footnote omitted); *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL, 2017 WL 1250791, at *3 (D. Kan. Apr. 5, 2017); *In re Syngenta Mass Tort Actions (Tweet)*, No. 3:16-cv-00255-DRH, 2017 WL 2117728, at *12-13 (S.D. Ill. May 15, 2017). In general, all of the courts have held that Plaintiffs cannot base an ordinary negligence claim on alleged misrepresentations because it would effectively circumvent having to plead facts supporting each element of the higher standard associated with the tort of negligent misrepresentation found in Restatement § 552. *Id.* Syngenta now asks the Court to make the same ruling for any negligence claim based on failure to warn or disclose.

Syngenta argues that when a plaintiff asserts negligent failure to warn that results in physical injury, Restatement (Second) of Torts § 338 applies. This section establishes liability "for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier" should have known that the chattel "is likely to be dangerous for the use for which it is supplied," "has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition," and "fails to exercise reasonable cate to inform them of its dangerous condition...." Restatement (Second) of Torts § 338. Syngenta indicates it did not make the current argument in the *Mensik* case because Mensik has alleged physical harm and thus the elements for negligent failure to warn as found in § 388 is applicable.[9]

[9] In the *Mensik* Summary Judgment Order, the Court addressed and denied Syngenta's arguments and motion related to the elements of a failure to warn claim. Both parties reasserted and incorporated by reference their arguments related to the elements of a failure to warn claim presented in the *Mensik* case. The Court incorporates its analysis and holding from the *Mensik* Summary Judgment Order at pages 14-17 herein.

Syngenta asserts that if a plaintiff has suffered only economic loss, Restatement (Second) of Torts § 551 establishes the requirements for negligent failure to warn. Section 551 provides:

> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
>
> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
>
> (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
>
> (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and
>
> (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and
>
> (d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and
>
> (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Restatement of the Law, Torts § 551. Section 551 thus requires that the parties be in a business transaction.

Syngenta argues that Plaintiffs' claim for negligence cannot be based on failure to warn or disclose because Plaintiffs cannot meet the higher standard of Section 551. Specifically, Syngenta argues that Plaintiffs cannot meet the elements of § 551 because they were not in a business transaction. *See, e.g., In re TMJ Implants Prods. Liab. Litig.*, 880 F. Supp. 1311, 1317 (D. Minn. 1995) (holding Section 551 did not apply because the parties were not engaged in a business transaction). It is undisputed that since Class Plaintiffs did not plant Viptera or Duracade, this case

does not involve a business transaction between Class Plaintiffs and Syngenta. The Court notes that while cases recognize the duty to warn in business transactions, no case has expressly stated that a duty to warn can exist *only* in the context of a business transaction for economic loss. The Court concludes that Section 551 does not establish the only pathway to liability for economic losses caused by failure to warn.

The Court's treatment of Plaintiff's claim for negligence based on misrepresentations is distinguishable from the claim for negligence based on failure to warn or disclose. Unlike Section 551, Section 552 is not limited to the parties to a business transaction. Rather, Section 552 applies to "[o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions." Restatement of the Law, Torts § 552. Since a claim for negligent misrepresentation does not require the parties to be in a business transaction with one another, it is applicable to Plaintiffs' theory of liability and Plaintiffs were required to meet the elements of the specific claim of negligent misrepresentation.

Syngenta argues that this Court should follow the final ruling of the MDL Court on this issue. The MDL Court granted Syngenta's summary judgment motion on any claim based solely on a failure to warn but denied summary judgment for plaintiffs' failure to warn as part of the totality of conduct by Syngenta that was negligent. *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL, 2017 WL 1250791, at *4 (D. Kan. Apr. 5, 2017). The Court distinguished the issue from the issue of negligent misrepresentation, "as Syngenta has not identified any element of proof that plaintiffs may be circumventing by their assertion of an ordinary negligence claim." *Id.* at *4 n. 5. The MDL Court subsequently denied Syngenta's motion *in limine* to exclude evidence on failure to warn finding, "I agree with plaintiffs that failure to warn is an area in which defendants'

statements or lack thereof are relevant." 5/12/17 Tr. 49: 7-9. Following the close of plaintiffs' case at trial, the MDL Court granted Syngenta's Rule 50 motion on plaintiffs' negligence claim based on a failure to warn or disclose. 6/15/17 Tr. 1389: 16-21. Judge Lungstrum stated:

> Syngenta seeks judgment on any theory by which the plaintiffs seek to base negligence liability on a failure to warn or a failure to disclose particular information.
>
> In response the plaintiffs state, as they did in their arguments on jury instructions, that they have not asserted a formal failure to warn claim but they argue that they should, nonetheless, be permitted to include a failure to warn among the entirety of the negligent conduct. But I agree with Syngenta that judgment is appropriate at this point on that issue.
>
> At summary judgment, I distinguished this use from the issue of misrepresentations based on the fact that Syngenta didn't show the plaintiffs would be circumventing any additional requirements of proof by including a failure to warn in its general negligence claim. But Syngenta has made that showing now and I agree with Syngenta that including a failure to warn or a failure to disclose specific information as part of the general negligence claim would be tantamount to allowing a claim for a negligent omission or negligent non-disclosure.
>
> As Syngenta points out and as I have ruled in the past, Kansas has not recognized such a cause of action. And even if Kansas had, the claim as set forth in the restatement as additional requirements which has not – have not been met here; no evidence to meet that.

Id., 1388: 14 - 138915. The MDL Court further noted that evidence of Syngenta's failure to disclose information may be relevant to other issues and had in fact been admitted. *Id.*, 1389: 22 – 1390:8. This Court respectfully does not reach the same conclusion. The Court finds that a claim for negligence may be based on the theory of failure to warn.

C. Petition Clause

Syngenta moves the Court to declare that statements made in the Deregulation Petition and litigation in *Syngenta Seeds, Inc. v. Bunge North America, Inc.*, 773 F.3d 58 (8th Cir. 2014) ("*Bunge* lawsuit") cannot be used as the basis for any liability. Syngenta first argues that the statements are subject to immunity under the First Amendment's Petition Clause. The First Amendment states: "Congress shall make no law respecting ... the right of the people ... to petition the Government for a

redress of grievances." U.S. Const. amend. I. There is no dispute that submitting an application to the USDA to obtain deregulation and initiating a lawsuit are included in the right to petition. *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S. Ct. 609, 612, 30 L. Ed. 2d 642 (1972) (holding the right to petition extends to all departments of the government including administrative agencies and the courts).

Plaintiffs argue the *Bunge* lawsuit cannot immunize Syngenta because it was baseless and motivated by Syngenta's desire to punish Bunge and prevent other grain handlers from rejecting Viptera corn. Baseless litigation is not immunized by the First Amendment right to petition. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983). To defeat immunity, Plaintiffs must show that the lawsuit was both "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and the litigant acted subjectively with an intent to use the process of the lawsuit to harm others. *Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, 508 U.S. 49, 60 (1993). Plaintiffs rely on the dismissal of Syngenta's U.S. Warehouse Act claim and third-party beneficiary claim and Michael Mack's statement that the Bunge lawsuit was "a 'no holds barred tone' which is perfectly designed to make news and give them something to think about alongside our legal offering .... We need to give the other grain traders pause before getting on this bandwagon." The dismissals were based on the lack of a private cause of action and lack of standing as a third-party beneficiary. The Eighth Circuit also remanded Syngenta's Lanham Act claim. Upon review, the Court cannot say the lawsuit was objectively baseless or that Mack's statement shows Syngenta initiated the lawsuit to harm others.

In the MDL, when Judge Lungstrum held that Plaintiffs' negligence claim could not be based on misrepresentation, he noted that it included "any misrepresentation made in the deregulation petition or the *Bunge* suit." *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-

2591-JWL, 2017 WL 1250791, at *3 (D. Kan. Apr. 5, 2017). Subsequently, in response to Syngenta's motion *in limine*, Judge Lungstrum prohibited any reference to the *Bunge* lawsuit finding plaintiffs intended to use it as evidence of recklessness to prove entitlement to punitive damages, which was equivalent to basing a claim on the lawsuit.

In the *Mensik* Summary Judgment Order, the Court concluded that Syngenta had not asserted a proper basis for summary judgment on this issue because Mensik had not asserted a claim against Syngenta based on the Deregulation Petition or *Bunge* lawsuit. *Mensik* Summary Judgment Order at 19. Rather, the Court found Plaintiff had asserted they were pieces of evidence relevant to his claims for negligent commercialization. *Id.* In the Class Action, the Court has dismissed Plaintiffs' claim for negligence based on misrepresentations and the claim for violation of the MUTPA based on misrepresentations. Any alleged misrepresentations cannot be used as a basis for liability. The Court thus need not declare that Syngenta is immune from claims that have been dismissed. However, whether evidence of the Deregulation Petition or *Bunge* lawsuit is relevant and admissible for some other purpose can be determined in an evidentiary motion.

Syngenta also argues that Plaintiffs' claim for negligence based on statements in the Deregulation Petition and *Bunge* lawsuit are prohibited by Minnesota's anti-SLAPP statute. *See* Minnesota Statutes §§ 554.01-.05. A SLAPP suit is a "Strategic Lawsuit [ ] Against Public Participation," initiated with the goal of stopping "citizens from exercising their political rights or to punish them for having done so." *Middle-Snake-Tamarac Rivers Watershed Dist. v. Stengrim*, 784 N.W.2d 834, 838 (Minn. 2010) (quotation omitted). The anti-SLAPP provisions were passed to "protect citizens and organizations from civil lawsuits for exercising their rights of public participation in government." *Id.* at 839 (citation omitted).

The Minnesota Supreme Court recently held that Minn. Stat. § 554.02 is unconstitutional as applied to claims at law alleging torts because it impermissibly infringes on a litigant's right to a jury trial. *Leindecker v. Asian Women United of Minnesota*, No. A16-0360, 2017 WL 2267289, at *10 (Minn. May 24, 2017). The anti-SLAPP procedural process begins with the filing of "any motion in a judicial proceeding to dispose of a judicial claim on the grounds that the claim materially relates to an act of the moving party that involves public participation." Minn. Stat. § 554.02, subd. 1. "Therefore, a district court must make a preliminary determination about whether the underlying 'claim materially relates to an act of the moving party that involves public participation,' Minn. Stat. § 554.02, subd. 1, that is, 'speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action.' Minn. Stat. § 554.01, subd. 6." *Middle-Snake-Tamarac Rivers Watershed Dist.*, 784 N.W.2d at 841. Plaintiffs' negligence claim is based on Syngenta's commercialization of Viptera and Duracade. The Deregulation Petition and *Bunge* lawsuit are only portions of Syngenta's overall conduct and Plaintiffs' claim is not based on the alleged misrepresentations. The anti-SLAPP statute thus does not apply because Plaintiffs' negligence claim does not materially relate to Syngenta's Deregulation Petition or *Bunge* lawsuit.

D. Physical Injury

Plaintiffs have reaffirmed that they are not seeking damages for any physical injury as a separate claim. However, Plaintiffs assert that evidence that contamination of class members' non-Viptera corn with Viptera corn has occurred demonstrates Syngenta's breach of its duty to reasonably commercialize Viptera corn and ask the Court not to exclude all theories of liability based on evidence of physical injury. Syngenta's motion to dismiss any claim seeking to impose liability or damages for physical injury is granted. However, whether evidence of contamination and commingling is relevant and admissible to Plaintiffs' claim will be determined as needed.

E. Voluntary Duty / Broken Promises

Syngenta moves the Court to dismiss any negligence claim based on any theory that it owed a duty to Plaintiffs based on a "voluntary undertaking." Plaintiffs did not oppose the motion, and it is so granted.

F. Strict Liability Failure to Warn

Syngenta moves the Court to dismiss the claim for strict liability failure to warn. Plaintiffs do not oppose Syngenta's motion, and the motion is so granted.

II. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs' first four motions seek to dismiss Syngenta's affirmative defense of allocation of fault with respect to certain entities and claims. At common law, a tortfeasor is "severally liable" when that person's liability is separate from another person's liability so that an injured person may bring an action against one defendant without joining the other liable person. *Staab v. Diocese of St. Cloud (Staab I),* 813 N.W.2d 68, 74 (Minn. 2012). Pursuant to the Minnesota Comparative Fault Act, several liability applies in all circumstances and joint and several liability is limited to four enumerated circumstances. *Id.* at 78. The statute provides:

> When two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:
>
> (1) a person whose fault is greater than 50 percent;
>
> (2) two or more persons who act in a common scheme or plan that results in injury;
>
> (3) a person who commits an intentional tort; or
>
> (4) a person whose liability arises under [certain environmental laws].

Minn. Stat. § 604.02, subd. 1. The statute defines the term "fault" as follows:

> 'Fault' includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent or primary assumption of risk, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages, and the defense of complicity under section 340A.801. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault. The doctrine of last clear chance is abolished.
>
> Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident.

Minn. Stat. § 604.01, subd. 1a.

The law in Minnesota does not prohibit the allocation of fault to nonparties. "The Minnesota Supreme Court has long been clear that '[i]t is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tortfeasors either by operation of law or because of a prior release.'" *Gaudreault v. Elite Line Servs., LLC*, 22 F. Supp. 3d 966, 980 (D. Minn. 2014) (quoting *Lines v. Ryan*, 272 N.W.2d 896, 902-03 (Minn. 1978)); *see also Staab I*, 813 N.W.2d at 77.

A. Allocation of Fault for MUTPA Claim

Plaintiffs move the Court to declare there is no allocation of fault for their claim for violation of MUTPA. Since the Court has dismissed this claim in Section I.A, *supra*, the Court need not address the allocation of fault under this claim.

B. Allocation of Fault to Grain Handlers and Exporters

Plaintiffs next seek to preclude allocation of fault to Cargill, ADM, Trans Coastal Supply Co., or any other grain handlers and exporters (collectively "grain handlers"). Plaintiffs have not asserted any claims against the grain handlers in this litigation. Syngenta did not assert any third-party claims against the grain handlers during the period when third-party claims may be made

automatically. Syngenta then moved the Court to file a third-party complaint against Cargill and ADM. The Court denied the motion by Order dated September 14, 2016. As noted above, the grain handlers' nonparty status does not preclude allocating fault to them. *See Staab I*, 813 N.W.2d at 77.

Syngenta argues that the jury should determine allocation of fault to the grain handlers, if any, because there is sufficient evidence of their negligence. To recover on a negligence claim, a plaintiff must show: "(1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) that the breach of the duty was a proximate cause of the injury." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014). Syngenta points to evidence that: (1) Cargill refrained from sending U.S. corn to China for a year before it knew that all U.S. corn would have detectable amounts of MIR162; (2) Cargill chose to ship corn to China knowing it was risking rejection; and (3) Cargill elected to test shipments for the presence of MIR162, discovered they tested positive, and sent the shipments to China.

Plaintiffs move the Court to hold that the Grain Standards Act ("GSA") preemption precludes assigning fault to grain handlers. The other courts in this coordinated litigation have determined that the GSA preempts both claims by plaintiffs and Syngenta against grain handlers. *See In re Syngenta AG MIR 162 Corn Litig.*, No. MDL No. 2591, 2016 WL 4382772, at *2 (D. Kan. Aug. 17, 2016); *In re Syngenta Mass Tort Actions*, No. 3:16-cv-00255-DRH, 2017 WL 54345, at *3 (S.D. Ill. Jan. 4, 2017); *In re Syngenta AG MIR 162 Corn Litig.*, No. MDL No. 2591, 2016 WL 1312519, at *2-3 (D. Kan. Apr. 4, 2016). While this Court did not specifically hold that claims by Syngenta against the grain handlers were preempted, it noted that such claims would be futile due to GSA preemption when denying Syngenta's motion to file a third-party complaint against Cargill and ADM. In addition, the Court found the GSA preempted any claims between Plaintiffs and Syngenta relating to grain handling.

Federal preemption operates to displace and nullify state law. Restatement (Third) of Torts: Product Liability, § 4 cmt. e; *see also Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("[e]ven where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law."). This is in contrast to situations involving immunity where a party is shielded from damages. Minnesota permits the allocation of fault to parties that are immune from liability. *See Anderson v. Stream*, 295 N.W.2d 595, 600 n. 5 (Minn. 1980). The GSA does not immunize parties against state penalties or judgments. Nor does it provide immunity from suit or liability. Congress could have enacted statutory immunity but chose instead to preempt state law. Federal preemption negates the existence of a duty that existed under state common law. In the absence of a duty, the grain handlers cannot be found at fault.

Syngenta's argument that a common law duty is a state law "requirement" preempted by federal law only when it is applied to impose liability but not when it is used to allocate fault is not persuasive. "Common-law liability is premised on the existence of a legal duty, and a tort judgment therefore establishes that the defendant has violated a state-law obligation" to carry out the actions required to fulfill a particular legal duty. *Riegel v. Medtroninc, Inc.*, 552 U.S. 312, 324 (2008). Syngenta's argument fails to account for the fact that in order to allocate fault, a jury must determine that the entity was negligent; such a finding requires the imposition of and finding of a common law duty on the entity. Similarly, Syngenta's argument that allocation of fault only requires a finding of causal responsibility regardless of duty fails.

Even if GSA preemption was not a bar to negligence in this instance, fault could not be allocated to the grain handlers because a claim for negligence against the grain handlers would fail as a matter of law. "The existence of a duty of care is a threshold question because a defendant

cannot breach a nonexistent duty." *Id.* If a duty of care does not exist, the court need not reach the remaining elements of a negligence claim. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011). When a defendant has no duty under state law, defenses that require imposing a duty such as comparative fault also fail. *Resolution Trust Corp. v. Greenwood*, 798 F. Supp. 1391, 1398 (D. Minn. 1992).

The grain handlers did not owe a duty to prevent the harmful conduct by others in the absence of a special relationship with the injured party. Minnesota law imposes a duty to act with reasonable care for the protection of others when: (1) the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff; and (2) when action by someone other than the defendant creates a foreseeable risk of harm to the plaintiff and the defendant and plaintiff stand in a special relationship. *See In re Target Corp. Customer Data Sec. Breach Litig.*, 64 F. Supp. 3d 1304 (D. Minn. 2014) (quotation omitted). Although the Court has found that Syngenta owed a duty based on the interconnected industry and market, the negligence alleged by the grain handlers occurred farther down the supply chain and after the alleged negligence by Syngenta. The Court did not conclude that every member of the industry owes a duty to every participant in the industry to prevent any possible harm from all actions. The allegedly negligent conduct Syngenta identifies is that they shipped corn to China knowing that MIR162 had infiltrated the U.S. corn supply and MIR162 had not been approved by China. There is no evidence that the grain handlers had a special relationship with Minnesota non-Viptera corn growers sufficient to impose a duty. Unlike recognition of the duty underlying the claims against Syngenta, recognition of such a duty in the grain handlers would create too great a risk of open-ended liability.

In addition, causation for a negligence claim against the grain handlers is missing. A negligent act is a direct, or proximate, cause of harm if the act was a substantial factor in the harm's

occurrence. *George v. Estate of Baker*, 724 N.W.2d 1, 10 (Minn. 2006). However, "if the harm would have occurred even without the negligent act, the act could not have been a substantial factor in bringing about the harm." *Id.* (citing Restatement (Second) of Torts § 432 (1965)). There is no evidence that the same trade disruption would not have occurred if only the grain handlers had decided not to ship to China. The Chinese market would still be lost regardless if exporters shipped U.S. corn to China to be rejected or did not ship U.S. corn to China.

In addition, Syngenta's argument that the grain handlers' decision to ship corn to China was a concurrent cause is rejected. "In some cases, there may be more than one direct cause of an accident. Concurring causes are direct or proximate causes that act contemporaneously or so nearly together that the chain of causation is not broken, and together cause the injury that would not have resulted in the absence of either one." *Curtis v. Klausler*, 802 N.W.2d 790, 794 (Minn. Ct. App. 2011) (citations omitted). It must first be established that a factor is a cause before it can be said to be a concurrent cause. *Roemer v. Martin,* 440 N.W.2d 122, 123 (Minn.1989). As noted above, the grain handlers' decision to ship corn to China was not a cause of the trade disruption. Syngenta's alleged negligence in commercializing Viptera and Duracade is not contemporaneous with the grain handlers' shipment of corn to China. Reasonable minds could not find that grain handlers were a substantial factor in causing the trade disruption and Plaintiffs' alleged injuries.

In summary, Syngenta's defense to allocate fault to the grain handlers is dismissed with prejudice. The defense fails because federal preemption from the GSA acts to nullify any duty that could be imposed to find the grain handlers negligent. Even if the Court did not find preemption negated an allocation of fault, the grain handlers could not be found negligent as a matter of law for lack of a duty and causation. Plaintiffs' motion is granted and fault will not be allocated among any grain handlers.

C. Allocation of Fault to China

Syngenta seeks to allow the jury to allocate fault to nonparty China. As discussed above, Minn. Stat. § 604.01, subd. 1a requires that all the elements of a claim be satisfied in order to allocate fault to an entity. A claim for negligence requires that the defendant owe the plaintiff a duty. *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2011). The Chinese government is not a participant in the interconnected corn market identified in this litigation because it does not produce, buy, or sell corn. Therefore, China did not owe Plaintiffs a duty arising out of the interconnected market.

Syngenta argues China had obligations to participants in the corn market by its role as a regulator with the authority to determine which corn could be imported and by virtue of restrictions that China voluntarily undertook limiting its exercise of that authority when it became a signatory to treatises as a member of the World Trade Organization. Specifically, Syngenta argues China agreed to be bound by the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"). The SPS Agreement provides that "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life of health [and] is based on scientific principles," and also that "[s]anitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade." SPS Agreement Art. 2(2). Syngenta asserts that the SPS Agreement is self-enforcing because Congress incorporated the SPS Agreement into federal law through the Uruguay Round Agreements ("URA"). Syngenta argues that as part of federal law, the SPS Agreement creates individual rights.

Plaintiffs argue that the SPS Agreement, as incorporated into federal law by the URA is not a self-enforcing treaty. Non-self-executing treaties are only enforceable "pursuant to legislation to

carry them into effect." *Medellin v. Texas*, 552 U.S. 491, 504-05 (2008). The URA precludes a private right of action. 19 U.S.C.A. § 3512. Syngenta's attempt to argue 19 U.S.C. § 3512 precludes providing a remedy but still creates a duty is unconvincing. The extension of a duty from a sovereign nation as a signatory to the WTO based on the SPS Agreement that does not provide a private cause of action to individual citizens is too tenuous. The Court concludes China did not owe Plaintiffs a duty under the SPS Agreement. Plaintiffs' motion is granted; and the jury will not be allowed to allocate fault to China.

D. Comparative Fault of Plaintiffs

Minnesota is a comparative fault state and the defense of contributory negligence has been abolished. *Barnes v. Hammerschmidt*, 182 N.W.2d 875, 876 (Minn. 1971). The defense of comparative fault is governed by Minn. Stat. § 604.01, which serves to diminish a plaintiff's recovery "in proportion to the amount of fault attributable to [plaintiff]." Minn. Stat. § 604.01, subd. 1. The requirements of a causal relationship applies to comparative fault. *Id.* "Evidence of unreasonable failure to avoid aggravating an injury or to mitigate damages may be considered only in determining the damages to which the claimant is entitled. It may not be considered in determining the cause of an accident." *Id.* In order for comparative fault to apply, the alleged negligence of Plaintiffs must be a direct cause of the injury. *See Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 907 (Minn. 1990).

Negligence is the failure to exercise reasonable care. *Domagala v. Rolland*, 805 N.W.2d 14, 20 (Minn. 2011). "Reasonable care is the care a reasonable person would use in the same or similar circumstances." *Id.* First, the Court notes that any duty imposed upon Plaintiffs would be subject to the same GSA preemption analysis. Therefore, any requirement of inspection or description based on the presence of genetic traits in Viptera or Duracade as a condition of shipment or sale of grown

corn in interstate or foreign commerce is preempted. In general, stewardship measures based on containment or channeling are preempted but isolation measures applying actions taken with regard to seed and not corn are not preempted.

In addition, Plaintiffs could not be contributorily negligent as a matter of law for lack of causation. Negligent conduct is the direct cause of harm to another if it is a substantial factor in bringing about the harm. *George v. Baker*, 724 N.W.2d 1, 10-11 (Minn. 2006); Restatement (Second) Torts § 431 (1965). "Although proximate cause is generally a fact question for the jury, it becomes a question of law and may be disposed of by summary judgment 'where reasonable minds can arrive at only one conclusion." *Curtis v. Klausler*, 802 N.W.2d 790, 793 (Minn. Ct. App. 2011) (quoting *Lubbers v. Anderson*, 539 N.W.2d 398, 402 (Minn. 1995)). That is the case here. There is no basis for Syngenta's argument that Plaintiffs, who did not plant Viptera or Duracade, caused or otherwise acted unreasonably by failing to prevent Viptera grown by other farmers from cross-pollinating with their corn. Syngenta's argument that once MIR162 was approved by the USDA and was lawfully a part of the U.S. commodity corn supply, non-Viptera growers had a duty to follow restrictions for "specialty corn" is rejected. No reasonable juror could find that Plaintiffs acted unreasonably or were a substantial factor in bringing about the injuries.

E. Superseding Cause

Syngenta has asserted the affirmative defense that China's refusal to accept shipments of U.S. corn containing Viptera and delay in approving MIR162 constitutes a superseding cause. "Generally speaking, a superseding, intervening cause is an act of plaintiff or of a third person, in no way caused by defendant's negligence, or a force of nature, occurring after defendant's negligent act or omission and operating as an independent force to produce the injury." *Hafner v. Iverson*, 343 N.W.2d 634, 637 (Minn. 1984) (*quoting Medved v. Doolittle*, 19 N.W.2d 788, 791 (Minn. 1945)).

A superseding cause "breaks the chain of causation set in operation by a defendant's negligence, thereby insulating his negligence as a direct cause of the injury." *Lennon v. Pieper,* 411 N.W.2d 225, 228 (Minn. Ct. App. 1987). An intervening act is a superseding cause that insulates the original tortfeasor from liability if (1) its harmful effects occur after the original negligence, (2) it has not been brought about by the original negligence, (3) it actively worked to bring about a result that otherwise would not have followed from the original negligence, and (4) it must not have been foreseeable by the original wrongdoer. *Canada by Landy v. McCarthy,* 567 N.W.2d 496, 507 (Minn.1997); *Wartnick v. Moss & Barnett,* 490 N.W.2d 108, 113 (Minn. 1992). Unless all four elements are satisfied, an intervening cause cannot be considered superseding. *Wartnick,* 490 N.W.2d at 113.

Plaintiffs move the Court to dismiss this affirmative defense. Plaintiffs argue China's refusal to accept corn shipments was not a superseding cause, as a matter of law, because: (1) it was brought on by Syngenta's negligence in its commercialization of the unapproved MIR162 trait; (2) China's rejection was both reasonably foreseeably by Syngenta, and actually foreseen; and (3) Syngenta's claim that China rejected U.S. corn for political reasons is purely speculative and is not supported by sufficient evidence to survive summary judgment. "Although the purpose of an affirmative defense is to defeat another claim, rather than seek damages, assertion of an affirmative defense nonetheless requires the defendant to maintain the assertion by proffering evidence to satisfy the burden of proof." *BankCherokee v. Insignia Dev., LLC*, 779 N.W.2d 896, 902 (Minn. Ct. App. 2010) (citing *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008)).

China's decision to reject U.S. corn containing Viptera was not independent of, and was brought on by, Syngenta's allegedly negligent commercialization of MIR162. An intervening act is not a superseding cause when the act was "a normal reaction to the stimulus of a situation created

by the defendant's wrong." *Johnson v. Chicago Great W. Ry. Co.,* 242 Minn. 130, 135, 64 N.W.2d 372, 377 (1954). Rather, it "must be independent in the sense that it must not be stimulated by the defendant's conduct." *Henjum v. Bok,* 261 Minn. 74, 76, 110 N.W.2d 461, 462-63 (1961). If China was following its regulatory protocols, China rejected U.S. corn because it contained MIR162. The rejection was thus brought on by Syngenta's commercialization of MIR162. Any action by China concerning the approval or rejection of the import of corn based on the presence or absence of MIR162 was related to and dependent on the alleged negligence by Syngenta. Because China's rejection of U.S. corn was not independent of Syngenta's actions, it cannot be a superseding cause.

Furthermore, China's rejection of U.S. corn based on the presence of MIR162 was reasonably foreseeable by Syngenta. When an intervening event is "a normal, foreseeable consequence" of the original act, the subsequent act is not a superseding intervening cause as a matter of law. *State v. Olson,* 435 N.W.2d 530, 534 (Minn. 1989). In the January 9, 2017 Order granting Plaintiff's motion to amend to add a claim for punitive damages, the Court reviewed in length the evidence demonstrating Syngenta was aware that its conduct of commercializing Viptera without approval for import from a foreign market could result in a trade disruption. The evidence shows the knowledge came from prior releases of GM traits by Syngenta and other companies and foreseeability was shown in numerous discussions among Syngenta employees on how to react to the situation.

However, Syngenta alleges that China rejected U.S corn for non-scientific and political reasons, unrelated to the presence of MIR162. If this allegation is proven, China's decision to reject U.S. corn would then be independent of Syngenta's negligent conduct. A jury could reasonably find that such a rejection was unrelated to Syngenta's acts that allegedly led to the presence of a particular trait in corn shipped to China. In the event the rejection was politically-motivated, it

would also not be reasonably foreseeable by Syngenta. Since Syngenta was following the regulatory application process for approval, it would not be reasonably foreseeable that China would reject U.S. corn for other reasons.

Plaintiffs argue that Syngenta's argument that China rejected U.S. corn for political reasons is purely speculative and unsupported by any direct evidence. A non-movant cannot defeat summary judgment with "unverified and conclusory allegations." *Gradjelick v. Hance*, 646 N.W.2d 225, 230 (Minn. 2002). The Court, however, must view all evidence in a light most favorable to the nonmoving party, and must resolve all factual inferences against the moving party. *Nord v. Herreid*, 305 N.W.2d 337, 339 (1981).

Syngenta argues that there is evidence that both the delay in approving MIR162 and rejecting the shipments of U.S. corn were politically-motivated. With respect to the approval of Syngenta's dossiers for MIR162, Syngenta has presented evidence that its MIR162 application had passed the Chinese National Biosafety Committee's assessment but Minister of Agriculture Han did not approve the application, along with 18 other applications. With respect to rejection of the shipments of corn, Syngenta has presented evidence that MIR162 was in shipments to China prior to November 2013 but either not tested for or the zero tolerance policy was not enforced. Syngenta's expert Shull also opined on market and crop factors that occurred in November 2013 that could have contributed to the rejection at that time. Plaintiffs dispute all of this evidence, indicating there is evidence as demonstrated in the MDL class action trial, that China had scientific concerns regarding allerginicity and Daphnia with Syngenta's application; that all 19 applications were not signed due to a change in staff; and many comments regarding China's motivations are opinion and speculative. The Court concludes that a genuine issue of fact exists whether China rejected U.S. corn for political reasons.

Plaintiffs allege that China's rejection of U.S. corn occurred within and because of a functioning science-based regulatory system. Syngenta claims the rejection was not science-based but rather politically-motivated. If the rejection was based on the presence of MIR162 through a functioning regulatory system, China's action was not independent of Syngenta's allegedly negligent commercialization and cannot operate as a superseding cause. If the rejection was not based on scientific reasons and was politically-motivated, China's action was independent of Syngenta's allegedly negligent conduct and would not have been foreseeable. It thus could operate as a superseding cause in that instance. Syngenta will bear the burden of proving this affirmative defense.

F. Restraint of Trade / Antitrust

Syngenta has asserted as an affirmative defense that Plaintiffs' claims are barred because Plaintiffs seek to unlawfully restrain trade in violation of law and public policy. Plaintiff moves the Court to dismiss Syngenta's affirmative antitrust defense. Syngenta argues that some of the duties Plaintiff seeks to impose on Syngenta would be a violation of antitrust laws. "Federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior." *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n. 8 (1987). In the *Mensik* Summary Judgment Order, the Court stated, "because Syngenta has not asserted a valid antitrust or restraint of trade affirmative defense, but has rather raised an evidentiary issue, Plaintiffs' motion should be granted with respect to Syngenta's Forty Third Defense, allowing the parties to take up the evidentiary issue at the proper time and through the proper procedure."

Syngenta argues that this affirmative defense is not an evidentiary issue but rather one of preemption that precludes a duty of care such as the Court has found with FIFRA and GSA. Syngenta has not cited to any specific applicable statutory provision or specific conduct that is

allegedly preempted. Syngenta has simply argued that as an example, it could not be required to coordinate with competitors or exporters to delay its entry into the market. The Court concludes that this affirmative defense should be dismissed as a matter of law. If Syngenta believes a federal statute preempts a duty imposed in this case, it failed to identify the exact federal statute and conduct preempted. Plaintiffs' summary judgment motion on this issue is granted.

G. Mitigation of Damages

Plaintiffs seek summary judgment on Syngenta's affirmative defense that Plaintiffs failed to mitigate damages. Under Minnesota law, Plaintiffs had a duty to take reasonable steps necessary to prevent or mitigate damages. *See McKay's Family Dodge v. Hardrives, Inc.*, 480 N.W.2d 141, 147 (Minn. Ct. App. 1992). Syngenta has the burden of establishing that Plaintiffs have not used reasonable efforts to mitigate their damages. *Glass v. IDS Fin. Servs.*, 778 F. Supp. 1029, 1075 (D. Minn. 1991). Syngenta argues Plaintiffs could have mitigated their damages by taking the following actions.

1. Switching to Crops Other Than Corn

Syngenta argues that Plaintiffs should have grown crops other than corn to mitigate their damages. Plaintiffs argue this imposes an unreasonable burden. The evidence shows that each of the class representatives grows both soybeans and corn and usually employ some sort of crop rotation. The deposition testimony that there are several considerations involved in determining what crop to grow such as soil pH and composition, suitability for certain crops, effect of certain crops on the land, and potential sales of the crop. China began rejecting U.S. shipments of corn in November 2013. By that time, Plaintiffs had planted their crops for the 2013 growing season and could not have switched to a new crop for that year. It is unreasonable to require Plaintiffs to switch crops in order to mitigate damages.

2. Changes to Plaintiffs' Corn Sales

Syngenta also argues Plaintiffs could have mitigated their damages either by storing their corn and waiting for a higher price, selling their corn on futures contracts, or by selling to a different buyer. Plaintiffs' damages model demonstrates that changing the contract type would not alter or mitigate the Plaintiffs' injuries because they all are tied to the price on the Chicago Board of Trade. And although local markets may have their own basis price, all markets move with the futures price.

3. Feeding Plaintiffs' Corn to Livestock

Syngenta argues that plaintiffs should have fed the corn they grew on their farms for feeding livestock to mitigate their damages. None of the class representatives raised livestock during the relevant period of time. Syngenta has not presented evidence that feeding the corn to livestock would in fact have mitigated any damages.

The Court concludes that such evidence is insufficient as a matter of law. Syngenta has not provided direct evidence that had any of the Plaintiffs taken any of the actions their damages would be decreased. The testimony of the class representatives show there are many considerations in making farming decisions and there is no evidence that they acted unreasonably. The jury would be left to speculate with respect to the reasonableness of any Plaintiffs' actions as well as the amount of change in damages. Plaintiffs are entitled to summary judgment on the affirmative defense of mitigation of damages.

H. Assumption of Risk

Syngenta claims Plaintiff's claims are barred by the doctrine of assumption of the risk. Plaintiffs claim this defense fails as a matter of law. "[O]ne who voluntarily assumes a duty must exercise reasonable care or he will be responsible for damages resulting from his failure to do so." *Ironwood Springs*, 801 N.W.2d at 198. "When the facts are undisputed and reasonable

people can draw only one conclusion, assumption of the risk is a question of law for the court." *Andren v. White-Rodgers Co.*, 465 N.W.2d 102, 105 (Minn. Ct. App. 1991).

Minnesota law recognizes both primary and secondary assumption of the risk. *Schneider v. Erickson*, 654 N.W.2d 144, 148 (Minn. Ct. App. 2002). A plaintiff becomes subject to primary assumption of the risk "by voluntarily entering into a situation where there are well-known, incidental risk, [and] the plaintiff consents to look out for himself and relieve the defendant of his duty." *Id.* Application of primary assumption of the risk is "not dependent upon the wisdom or reasonableness of the plaintiff's consent." *Daly v. McFarland*, 812 N.W.2d 113, 120 (Minn. 2012) (quotation omitted). When applicable, the primary assumption of risk doctrine completely bars a plaintiff's claim because it negates the defendant's duty of care to the plaintiff. *Springrose v. Willmore,* 292 Minn. 23, 24, 192 N.W.2d 826, 827 (1971). "Minnesota courts rarely apply primary assumption of the risk, and have found that its application is only appropriate under limited circumstances." *Schneider*, 654 N.W.2d at 149. Syngenta's primary assumption of the risk defense fails because Plaintiffs did not consent to relieve Syngenta of its duty. There is no evidence that Plaintiffs consented to relieve Syngenta of its duty to act reasonably in the commercialization of a GMO corn seed by the act of growing corn.

Secondary assumption of the risk is an affirmative defense whereby "the relative fault of the plaintiff and defendant is apportioned under the comparative-negligence statute." *Id.* at 148. "The basic elements of primary and secondary assumption of the risk are the same and include whether the plaintiff had (a) knowledge of the risk, (b) an appreciation of the risk, and (c) a choice to avoid the risk but voluntarily chose to take it." *Id.* at 149. Syngenta's defense of primary assumption of the risk fails as a matter of law. Syngenta's affirmative defense of secondary assumption of the risk fails because Plaintiffs did not have knowledge of the risk, an

appreciation of the risk, or make a voluntary choice to undertake the risk. There is no evidence that Plaintiffs had either full knowledge or an appreciation of the risk that China would reject U.S. corn due to Viptera contamination. The class representatives testified that they were generally unaware of Viptera or the status of import approval by other countries. The only knowledge they expressed was after China rejected corn imports in 2013. This demonstrates knowledge after-the-fact and not an appreciation of the risk before it occurred. Syngenta argues that Annexstad and Ward testified that they were aware of the *StarLink* incident and thus knew of and should have known of the risk of a trade disruption. General knowledge of possibilities does not evidence a voluntary choice to assume the risk of the possibility. In addition, the act of growing non-Viptera corn does not demonstrate a voluntary choice to undertake the risk. The Court finds that no reasonable jury could find that Plaintiffs knew the risk associated with purchasing Viptera seed, that they appreciated the risk of a trade disruption, or that they voluntarily chose to incur it. Syngenta's defense of assumption of the risk is dismissed as a matter of law.

T.M.S. and L.J.M.