UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE SYNGENTA AG MIR162 CORN LITIGATION	No. 2:14-MD-02591-JWL-JPO
THIS DOCUMENT RELATES TO: The Kansas and Nationwide Classes Certified by the Court Only	MDL No. 2591

PRETRIAL ORDER

A pretrial conference was conducted in this case on January 30, 2017, by U.S. District Judge John W. Lungstrum and U.S. Magistrate Judge James P. O'Hara. The plaintiffs, Five Star Farms, Beaver Creek Farms Inc., Demmer Farms Inc., Grafel Farms LLC and D & S Grain & Cattle Co., Inc., David Polifka and the David Polifka Revocable Living Trust, and Charles Frickey and the Charles Frickey Rev. Trust (collectively, "Plaintiffs"), appeared through counsel, Patrick J. Stueve, Don M. Downing, William B. Chaney, Scott Powell, Rachel Schwartz, Brad Wilders, Gretchen Garrison, and Jayne Conroy. The defendants, Syngenta AG, Syngenta Crop Protection AG, Syngenta Corporation, Syngenta Crop Protection, LLC, Syngenta Seeds, Inc. (now known as Syngenta Seeds, LLC), and Syngenta Biotechnology, Inc. (now merged with Syngenta Crop Protection, LLC, with Syngenta Crop Protection, LLC, as the remaining entity) (collectively, "Syngenta" or "Defendants"), appeared through counsel, Edwin U, Ragan Naresh, Thomas Schult, and Jennifer Wieland.

This pretrial order supersedes all pleadings and controls the subsequent course of this case. It will not be modified except by consent of the parties and the court's approval, or by order of the court to prevent manifest injustice. Fed. R. Civ. P. 16(d) & (e); D. Kan. Rule 16.2(b).

1. PRELIMINARY MATTERS.

This Pretrial Order applies only to Count I (Lanham Act, on behalf of the nationwide producer class) and Count XXII (negligence, on behalf of the Kansas producer class) of Producer Plaintiffs' Third Amended Class Action Master Complaint, ECF No. 2531. The Court orders these claims to be tried separately from the remaining claims, classes and plaintiffs included in the Producer Plaintiffs' Third Amended Class Action Master Complaint, ECF No. 2531. All other claims made by and on behalf of all plaintiffs and the certified or uncertified classes alleged in ECF No. 2531 are hereby specifically preserved as alleged in ECF No. 2531 and will be addressed in one or more additional Pretrial Orders. The trial of the nationwide Lanham Act claim does not preclude class members of the nationwide class (other than members of the Kansas producer class) from separately trying the additional claims alleged in ECF No. 2531.

a. Subject Matter Jurisdiction. Subject matter jurisdiction is invoked under 28 U.S.C. § 1331, 15 U.S.C. § 1121(a) and 28 U.S.C. § 1332(d)(2)(A) and (C) and supplemental jurisdiction under 28 U.S.C. § 1367(a), and is not disputed.

b. Personal Jurisdiction. The court's personal jurisdiction over the parties in the Kansas and Nationwide Classes Certified by the Court is not disputed.[1]

c. Venue. Venue in this court for the Kansas and Nationwide Classes Certified by the Court is not disputed.[2]

d. Governing Law. Subject to the court's determination of the law that applies to the case, the parties believe and agree that the substantive issues in this case are governed by the following laws:

For the Kansas class

The Kansas law of negligence

Punitive damages pursuant to Kan. Stat. Ann. § 60-3701

For the nationwide class

The Lanham Act, 15 U.S.C. § 1051, *et seq.*, and specifically 15 U.S.C. §§ 1117, 1125

2. STIPULATIONS.[3]

[1] Syngenta's position is subject to, and without waiver of, its ongoing objections to (i) a joint trial of the nationwide, Lanham Act class claims with the Kansas state class claims (ECF No. 2606), (ii) trying the claims of non-Kansas residents in this Court (ECF No. 2681), (iii) the Court's December 2, 2016 order regarding the nationwide trial (ECF No. 2727), and (iv) the Court's certification for class action treatment of any of these cases and claims (ECF No. 2335 and *In re Syngenta AG MIR 162 Corn Litigation*, No. 16-607 (10th Cir.) (Doc. No. 01019703228)). All such objections by Syngenta are expressly preserved.

[2] Syngenta's position is subject to, and without waiver of, the objections noted in footnote 1.

[3] By stipulating to the facts set forth in this section, the parties do not waive, and instead expressly preserve, each side's right to elicit testimony and present evidence regarding these facts, and to assert additional facts, at summary judgment or trial. These stipulations are without waiver of any party's relevance objections.

a. The following facts are stipulated. The parties may later agree to additional stipulated facts in advance of trial.

1. Five Star Farms is a partnership whose partners, Bret Kendrick, Gary Kendrick, and Ronald Kendrick, are citizens of Kansas.

2. Five Star Farms planted corn in 2013, 2014, 2015 and 2016 in Stanton and Grant Counties, Kansas.

3. Five Star Farms has never knowingly planted Agrisure Viptera or Agrisure Duracade corn.

4. Plaintiffs Beaver Creek Farms Inc., Demmer Farms Inc., Grafel Farms LLC and D & S Grain & Cattle Co., Inc., are citizens of Kansas.

5. Plaintiffs Beaver Creek Farms Inc., Demmer Farms Inc., Grafel Farms LLC and D & S Grain & Cattle Co., Inc. planted corn in 2013, 2014, and 2015 in Decatur County, Kansas.

6. Plaintiffs Beaver Creek Farms Inc., Demmer Farms Inc., Grafel Farms LLC and D & S Grain & Cattle Co., Inc. have never knowingly planted Agrisure Viptera or Agrisure Duracade corn.

7. David Polifka is a citizen of Kansas who farms as David Polifka Revocable Living Trust.

8. David Polifka has planted corn in 2013, 2014, 2015 and 2016 in Gove County, Kansas.

9. David Polifka has never knowingly planted Agrisure Viptera or Agrisure Duracade corn.

10. Charles Frickey is a citizen of Kansas who farms as the Charles Frickey Rev. Trust.

11. Charles Frickey has planted corn in 2013, 2014, and 2015 in Decatur County, Kansas.

12. Charles Frickey has never knowingly planted Agrisure Viptera or Agrisure Duracade corn.

13. Syngenta AG is a corporation organized and existing under the laws of Switzerland with its principal place of business in Switzerland.

14. Syngenta AG is a publicly traded company on the SIX Swiss Exchange and American Depositary Receipts for Syngenta AG are traded on the New York Stock Exchange.

15. Syngenta AG was formed in 2000 as a result of the demerger of the Novartis agribusiness from Novartis AG and of the Zeneca agrochemicals business from AstraZeneca PLC, and the combination of these businesses into Syngenta AG.

16. Syngenta Crop Protection AG is a corporation organized and existing under the laws of Switzerland with its principal place of business in Switzerland.

17. Syngenta Corporation is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Delaware.

18. Syngenta Corporation is a subsidiary of Syngenta AG.

19. Syngenta Crop Protection, LLC, is a limited liability company organized and operating under the laws of the State of Delaware with its principal place of business in Greensboro, North Carolina.

20. Syngenta Crop Protection, LLC, is a subsidiary of Syngenta Seeds, LLC.

21. Syngenta Biotechnology Inc. merged with Syngenta Crop Protection, LLC, effective on December 31, 2014. The named surviving entity from the merger of Syngenta Biotechnology and Syngenta Crop Protection, LLC is Syngenta Crop Protection, LLC.

22. Syngenta Seeds, Inc. converted to Syngenta Seeds, LLC on December 31, 2015.

23. Syngenta Seeds, LLC is a Delaware limited liability company.

24. Syngenta Seeds, LLC's sole member is Syngenta Corporation.

25. Syngenta Crop Protection AG, Syngenta Corporation, Syngenta Crop Protection LLC and Syngenta Seeds, LLC are direct or indirect subsidiaries of Syngenta AG.

26. Syngenta AG's Board of Directors is involved in the strategic direction and strategic plans for the various Syngenta entities.

27. Syngenta AG's Board of Directors has delegated operational management to the Syngenta Executive Committee, and the Syngenta Executive Committee's role includes formulating certain corporate policies and strategic plans relating to activities that may impact various Syngenta entities.

28. Certain members of Syngenta AG's Executive Committee have also served as members of the Board of Directors of Syngenta Crop Protection AG, Syngenta Corporation, Syngenta Crop Protection LLC, and/or Syngenta Seeds, LLC.

29. Syngenta AG's subsidiaries report their finances to their parent corporation and Syngenta AG's financial statements reflect the finances of its subsidiaries.

30. Syngenta created MIR162, which is a genetically-modified corn trait that is included in corn seeds Syngenta markets and sells as Agrisure Viptera ("Viptera" or "Agrisure Viptera").

31. Syngenta created Event 5307, which is a genetically modified corn trait that is included in corn seeds Syngenta markets and sells as Agrisure Duracade ("Duracade" or "Agrisure Duracade").

32. Seeds marketed as Agrisure Duracade contain Event 5307.

33. U.S. Dried Distillers Grains with Solubles (otherwise known as DDGS) are corn ethanol by-products that are often used as feed for livestock.

34. Syngenta filed its Public Interest Assessment Supporting Registration of MIR162, Bt11xMIR162, and Bt11xMIR162xMIR604 Maize with the U.S. Environmental Protection Agency ("EPA") in May 2007.

35. Syngenta submitted a Petition for Determination of Nonregulated Status for Insect-Resistant MIR162 Maize to the United States Department of Agriculture ("USDA"), which was dated August 31, 2007.

36. The USDA deregulated MIR162 in April 2010.

37. MIR162 received regulatory import approval in China in December 2014.

38. Syngenta filed its Public Interest Assessment Supporting US EPA Registration of 5307 Corn and the Breeding Stacks Bt11 × MIR604 × TC1507 × 5307 and Bt11 × MIR162 × MIR604 × TC1507 × 5307 Corn with the EPA in March 2011.

39. Syngenta filed its Petition for Determination of Nonregulated Status for Rootworm-Resistant Event 5307 Corn to the USDA, which was dated April 22, 2011.

40. The USDA deregulated Event 5307 in January 2013.

41. Syngenta began selling Viptera in the United States in 2010 for planting in spring 2011.

42. Syngenta began selling Duracade in the United States in 2013 for planting in spring 2014.

43. One place where corn futures and options are traded is the Chicago Board of Trade.

44. China began rejecting shipments of U.S. corn in November 2013.

b. The parties have stipulated to the admissibility of the following exhibits for purposes of summary judgment:

1. Deposition Exhibit 1: Notice of Fed. R. Civ. P. 30(b)(6) Videotaped Deposition of Defendants
2. Deposition Exhibit 8: Syngenta Group Structure as per December 31, 2007
3. Deposition Exhibit 9: Syngenta Group Structure as per December 31, 2008
4. Deposition Exhibit 10: Syngenta Group Structure as per December 31, 2009
5. Deposition Exhibit 11: Syngenta Group Structure as per December 31, 2010
6. Deposition Exhibit 12: Syngenta Group Structure as per December 31, 2011
7. Deposition Exhibit 13: Syngenta Group Structure as per December 31, 2012
8. Deposition Exhibit 14: Syngenta Group Structure as per December 31, 2013

9. Deposition Exhibit 15: Syngenta Group Structure as per December 31, 2014

10. Deposition Exhibit 16: Syngenta Group Structure as per September 30, 2015

11. Deposition Exhibit 20: Petition for Determination of Nonregulated Status of Insect-Resistant MIR162 Maize, dated August 31, 2007

12. Deposition Exhibit 21: Petition for Determination of Nonregulated Status of Rootworm-Resistant Event 5307 Corn, dated November 30, 2010

13. Deposition Exhibit 203: August 17, 2011 letter from Chuck Lee

14. Deposition Exhibit 1494: Syngenta's Plant with Confidence Fact Sheet

15. The 578 documents produced by each Plaintiff

3. FACTUAL CONTENTIONS.

a. Plaintiffs Assert the Following Allegations in Connection with the Causes of Action They Are Pursuing:

Plaintiffs are Kansas corn farmers who bring this action on behalf of other Kansas corn farmers and on behalf of a nationwide class of corn farmers. Mindful of the Pretrial Order's Instructions not to "recite every factual nuance that will be presented at trial," Plaintiffs include a concise summary of their allegations. A more detailed statement of Plaintiffs' factual contentions is included in Producer Plaintiffs' Third Amended Class

Action Master Complaint, ECF No. 2531.

Syngenta is a biotech company that develops and sells agricultural products, including genetically-modified ("GM") corn seeds. Syngenta developed MIR162, which is a GM trait included in corn seeds Syngenta markets and sells as Agrisure Viptera, and Event 5307, which is a GM trait included in corn seeds Syngenta markets and sells as Agrisure Duracade. The Kansas corn farmer-Plaintiffs and the members of the Kansas and nationwide classes have never knowingly planted Viptera or Duracade seeds.

Harvested U.S. corn is sold as a commodity in countries around the world on a global market. China is one of a number of countries that has purchased U.S. corn and U.S. corn byproducts, such as distillers dried grains with solubles ("DDGS"). By 2010, China was a large and growing export market for U.S. produced corn and DDGS.

Countries across the world have their own processes and timetables for reviewing and approving new GM traits for cultivation (i.e., allowing the GM seed to be grown in-country) or importation (i.e., allowing the crop containing the GM trait to be imported and sold in-country). Some countries do not allow any GM products to be cultivated or imported, some freely allow GM products and others, including the United States and China, have regulatory systems designed to individually evaluate new GM products to ensure that such GM products are safe for humans, animals and the environment.

Biotech companies introducing new GM products have educated all industry stakeholders regarding the consequences that can occur from selling new GM products before these products are approved for importation in export markets like China. An

unapproved trait that is widely commercialized can and, without adequate precautions spearheaded by the biotech company, likely will end up in exports to countries that have not approved that GM product, which can cause significant trade disruptions. This potential harm is why biotech companies, including Syngenta, have pledged to stakeholders to act reasonably in the timing, scope and manner of introducing a new GM product to ensure that export markets for that crop are preserved. Biotech companies do not generally commercialize a new GM trait until they have approval in all important export markets.

In 2007, Syngenta applied to the United States Department of Agriculture for deregulation of the MIR162 trait in the United States. Syngenta also sought import approval of MIR162 in countries around the world that were important corn and corn by-product export markets for U.S. corn farmers. Specifically, Syngenta applied for import approval in China in 2010, which Syngenta's executives and employees recognized as an important and growing market for U.S. corn exports. The harm that would result if Syngenta commercialized Viptera without Chinese approval was foreseeable to and actually foreseen by Syngenta and its executives.

When the USDA deregulated MIR162 in 2010, China and other major import markets had not yet approved MIR162. Syngenta had a decision to make. It could: wait until major import markets like China approved Viptera, which it had pledged to do; undertake a narrowly-tailored launch of Viptera in the United States, ensuring that Viptera corn would not enter the corn export market; or it could immediately and widely

sell Viptera throughout the United States, thereby creating the risk that U.S. corn farmers would lose the Chinese export market. Syngenta chose to widely market and sell Viptera to U.S. corn farmers beginning in 2010.

By regulation, China requires specific in-country tests of new GM products to ensure that the products are safe for the Chinese people and the specific environment in China. From the submission of the initial application, which Syngenta made in February 2010, through the in-country testing process, the average Chinese approval time for a new GM product was at least 28 months, assuming there are no significant delays in completing the required in-country tests or concerns raised by the application and testing. At the time Syngenta decided to sell Viptera in the United States, Syngenta knew or should have known it was unlikely to receive Chinese approval by the time Viptera corn was harvested in 2011.

On or about May 6, 2010, Syngenta received official permission from China to import Viptera seeds for in-country testing. But in granting this permission, China identified problems with Syngenta's initial application that Syngenta would need to address. Because of an internal "legal entity" issue within Syngenta, Syngenta did not import Viptera seeds into China for in-country testing until June 2011, a delay of nearly a year that ensured no Chinese in-country tests occurred in 2010 and risked missing the planting season for in-country tests in 2011. Ultimately, Syngenta rushed the in-country tests and the analysis of these tests to submit its new application in November 2011. This November 2011 application did not reference or explain Syngenta's published Daphnia

research showing that Viptera could cause environmental problems. By Chinese regulation, China then had 270 days to review or reject this application.

China rejected this application in May 2012 and identified scientific issues with this submission. Throughout 2012, 2013 and 2014, Syngenta submitted new applications. Each time, China reviewed and rejected the application citing on-going scientific concerns about the safety and environmental impact of Viptera, including questions related to Syngenta's Daphnia research and Syngenta's inadequate responses to its questions. Ultimately, Syngenta promised to publish a peer-reviewed paper reconciling its original Daphnia study results with additional studies that did not show a similar environmental risk, which Syngenta did in October 2014. In December 2014, China approved Viptera for import.

Because the Chinese approval process is confidential, Syngenta alone knew the status of its Chinese MIR162 applications and did not disclose the specific scientific concerns raised by China. Throughout the application process and as uncovered in discovery, Syngenta undertook a series of actions designed to enhance its efforts to broadly commercialize Viptera in the U.S. Syngenta mislead stakeholders regarding the scope of the Viptera launch. In August 2011, Syngenta sued Bunge North America, Inc. to prevent Bunge from erecting warning signs or refusing to accept Viptera. Syngenta misleadingly informed its stakeholders regarding the anticipated timeline for Chinese approval of Viptera. For example, Syngenta initially told its stakeholders that it expected Chinese approval before the first Viptera harvest in fall 2011 and later sent an August 17,

2011 letter to farmers stating that it was "still awaiting import approval from China, which we expect in late March 2012." Syngenta knew or should have known that these types of statements were misleading. Syngenta additionally mislead stakeholders regarding the importance of China as an export market for U.S. corn, including by distributing a "Plant with Confidence Fact Sheet" that contained deceptive statements regarding the importance of China.

In March 2013, while the Viptera application was still pending, Syngenta submitted an application for import approval for Event 5307. Even though Syngenta estimated that Chinese approval of Duracade would not occur until at least fall 2015, Syngenta launched Duracade in the United States in fall 2013 without Chinese approval.

In summer 2013, Chinese buyers stopped placing orders for U.S. corn despite a growing need for livestock feed and the availability of U.S. corn. In September 2013, it was revealed that Chinese buyers had placed significant orders for U.S. grain sorghum, an inferior source of livestock feed that did not contain any unapproved GM traits. In or around October 2013, Chinese officials detected MIR162 in shipments of U.S. corn. In November 2013, China began rejecting shipments containing millions of metric tons of U.S. corn because that corn contained MIR162, which had not been approved for import into China. With full knowledge of this trade disruption, Syngenta continued with its plans to launch sales of Duracade in the U.S. in late 2013. Because Duracade has yet to receive Chinese import approval, the de facto ban on U.S. corn exports to China continues to this day. China's de facto ban on U.S. corn exports has caused financial

harm to Plaintiffs, who have suffered from depressed corn prices due to the loss of the large and growing Chinese corn export market, losses which continue through today.[4]

b. Syngenta Asserts the Following Defenses in Response to Plaintiffs' Allegations:

This case is about Syngenta's commercial U.S. launch of a new biotech corn event, MIR162, after it was fully approved for unrestricted U.S. planting in the United States by all relevant U.S. government agencies: the U.S. Department of Agriculture, the U.S. Environmental Protection Agency, and the U.S. Food and Drug Administration. These agencies found, and there is no dispute, that MIR162 is safe and effective. In fact, MIR162 has been approved in nearly fifty countries for food, feed, and/or cultivation, including for import into China.

Syngenta is a seed manufacturer and crop protection company. It has thousands of U.S. employees and its seeds business and research & development functions are centered in the United States. Syngenta develops, among other things, biotech corn seeds, which enable U.S. producers to grow higher volume and better-quality corn using fewer resources, including pesticides. The availability of biotech seeds has increased farm incomes by billions of dollars and more than 90% of U.S. corn is grown from biotech seeds.

[4] In its September 11, 2015 Memorandum and Order (ECF No. 1016) granting in part and denying in part Syngenta's Motion to Dismiss, the Court held that Plaintiffs failed to plausibly allege physical harm as a result of the contamination of the U.S. corn supply with MIR162 and/or Event 5307. Plaintiffs expressly preserve those allegations, and the right to appeal that ruling, following trial.

Syngenta began developing MIR162 in the 1990s. From 1994 until 2010, Syngenta conducted hundreds of trials of MIR162, consistent with all U.S. rules and regulations. Syngenta invested over $100 million in developing MIR162, which is an award-winning product.

By fall 2010, MIR162 had been approved by the United States, Japan, Canada, Mexico, Korea, Taiwan, and other countries. The countries that had approved MIR162 by that time accounted for the overwhelming majority of U.S. corn in the prior year. After receiving these approvals, Syngenta began selling Viptera seed, which contains MIR162, in the United States in fall 2010, for U.S. planting in the spring of 2011.

The National Corn Growers Association and Others Supported the Launch of Viptera

Before beginning the sale of Viptera, Syngenta consulted with numerous industry organizations, including the National Corn Growers Association (NCGA). The NCGA supported the sale of Viptera given U.S. farmers' desire to have access to safe and effective new biotechnologies like MIR162 and because MIR162 had received U.S. and Japanese approval. At that point, Japan had imported U.S. corn for more than 50 consecutive years and had implemented a reliable, science-based regulatory system that permitted regulatory review without any preconditions. The NCGA and other industry groups including the U.S. Grains Council also noted that Syngenta's launch of Viptera satisfied the requirements of the voluntary launch policy issued by the Biotechnology Industry Organization (BIO). Accordingly, the NCGA did not deem it necessary or request that Syngenta implement any channeling program or limited launch for Viptera.

When Viptera was launched in the United States, China had not yet approved MIR162 for import. Syngenta filed its initial application for import approval in China in March 2010, the earliest opportunity it was allowed to do so under Chinese regulations. When Syngenta filed its MIR162 import approval dossier, it was generally understood that import approval would take approximately two years.

When Syngenta launched MIR162, China had historically been a net exporter of corn, not a net importer of corn. China is one of the world's largest producers of corn, in large part because China has a long-standing "food security" policy ensuring self-sufficiency in corn. China's massive domestic corn production, its long-standing policy of self-sufficiency in corn, the Chinese government's active intervention in the markets, and other reasons have long meant Chinese corn imports could not be predicted with any degree of certainty. Because China was historically insignificant as an importer of corn (it accounted for 0.2% of U.S. corn in the year Syngenta began selling Viptera) and had a non-functioning regulatory system, at the time Syngenta began selling Viptera, no biotech company had ever delayed launch of a fully-approved U.S. corn product in the United States simply because China had not yet approved it for import.

Syngenta's Application for MIR162 Import Approval in China

Syngenta filed its initial application for MIR162 in China in March 2010 and its completed application including the results of in-country testing for MIR162 in China in November 2011. Syngenta's anticipated approval date for MIR162 was spring of 2012. Syngenta consistently conveyed that estimate to farmers and the grain trade.

Other biotech companies were seeking import approval from China for their traits at this same time. In spring 2012, Syngenta and others anticipating a spring 2012 approval were told by the Chinese Ministry of Agriculture ("MOA") that approval was imminent. But 2012 turned out to be a year of political transition in China, and not a single new biotech event by a non-Chinese company was approved. MOA officials also explained that China would use the biotechnology approval system to control the amount of corn coming into China as part of China's overall food security policy.

In June 2012, Syngenta and other biotech companies received questions from the MOA on their import approval applications. Syngenta immediately informed farmers and the grain trade, through their respective associations, of these questions. Over the next 2.5 years, Syngenta received sporadic "questions" from Chinese regulators. Although Syngenta promptly responded, the questions delayed MIR162 approval. Several times, more than 270 days passed with no action on the MIR162 application by Chinese regulators in violation of Chinese law. In December 2014, as a result of a political effort by the U.S. government, China approved MIR162 (and other genetically modified seed events by other companies that had also been delayed by China).

The Grain Trade's Shipments to China and China's Rejection of Corn

When Syngenta launched Viptera, ADM and Cargill were not shipping U.S. corn into China. After the launch, these companies began considering shipping MIR162 corn to China despite the fact that it is illegal to ship unapproved biotech events into China. After initially refraining from violating Chinese law by shipping corn that they knew or

had reason to know contained MIR162 to China, ADM and Cargill began to do so in 2012 and 2013. ADM and Cargill represented to the Chinese government that each shipment did not contain MIR162. Cargill delivered multiple shipments of corn to China even though it had tested the shipments, and those shipments tested positive for MIR162. Cargill's and ADM's conduct caused and/or contributed to plaintiffs' alleged harm and further confirms why Syngenta is not liable.

In November 2013, China began rejecting shipments of U.S. corn, citing the detection of MIR162. Before then, China had accepted U.S. corn containing MIR162 for at least two years. After November 2013, China continued to accept shipments of corn from Argentina, where MIR162 had also been widely commercialized.

China's rejection of shipments of U.S. corn came shortly after the world price for corn had dropped significantly. A worldwide drought in 2012 had resulted in record-high corn prices. In 2013, however, favorable weather worldwide resulted in the largest worldwide corn crop in history, causing U.S. corn prices to drop. By contrast, as a result of Chinese corn support policies, the price of Chinese corn remained high. It was only after this gap had emerged, and as China developed a massive excess of corn, that China began rejecting U.S. corn. It was widely understood (and confirmed in contemporaneous correspondence by multiple industry participants) that China's motivations for rejection U.S. corn were driven by economic or political considerations.

China's Rejection of Corn Had No Impact on U.S. Corn Prices

China's rejection of corn had no meaningful impact on U.S. corn prices. U.S. corn

prices are largely determined by supply and demand relationships in the U.S. market. A decline in U.S. exports to China does not necessarily translate into an aggregate decline in demand for U.S. corn exports. Economic theory and evidence indicate that global corn trade flows are highly flexible and adjust rapidly to changing market conditions. While exports from the United States to China declined in 2013/14 and 2014/15, that decline was offset by increases in exports from the United States to other countries.

This result is confirmed by the use of a vector error correction model (VECM) to estimate the price impact of the November 18, 2013 rejection announcement and the virtually simultaneous November 15, 2013 EPA proposal to lower ethanol requirements. The VECM results indicate that, during the relevant period, but-for corn prices are not statistically distinguishable from actual corn prices. The results of the VECM are consistent across a variety of alternative model specifications and confirmed by market commentary, consideration of changes in futures and options markets, as well as econometric analysis of corn stocks.

4. LEGAL CLAIMS AND DEFENSES.

a. Legal Claims of Plaintiffs.[5]

[5] Plaintiffs specifically reserve all of their appeal rights with regard to the claims dismissed in the Court's Memorandum and Order granting in part Defendants' motion to dismiss, ECF No. 1016, and the Court's Memorandum and Order granting the motion to strike producer plaintiffs' expanded class allegations, ECF No. 1816. Plaintiffs also specifically reserve all of their appeal rights with regard to the theories and claims for which the Court entered judgment on the pleadings in ECF No. 2426.

Plaintiffs, on behalf of the nationwide class, assert that they are entitled to recover upon the following theory: Syngenta violated the false advertising sections of the Lanham Act, 15 U.S.C. § 1125(a), by misrepresenting the status, timing and importance of Chinese approval of MIR162 (Count I of Producer Plaintiffs' Third Amended Class Action Master Complaint, ECF No. 2531).

Plaintiffs, on behalf of the Kansas class, assert that they are entitled to recover upon the following theories: Syngenta was negligent in the timing, scope and manner in which it commercialized Viptera and Duracade (Count XXII of Producer Plaintiffs' Third Amended Class Action Master Complaint, ECF No. 2531); and, because of the nature of this willful, wanton and/or malicious conduct, Plaintiffs are entitled to punitive damages (¶ 566 of Count XXII of Producer Plaintiffs' Third Amended Class Action Master Complaint, ECF No. 2531).

b. Defenses of Defendants.

Syngenta asserts the following defenses:[6]

1. Plaintiffs fail to state a claim and cannot establish any element of their claims.

2. Any and all actions taken by Syngenta with respect to any of the matters alleged in this case were taken in good faith and in

[6] Syngenta recognizes that the Court has already addressed a number of these defenses. Defenses marked with an asterisk (*) are listed here solely in order to ensure that they are preserved for appeal. Syngenta reserves all rights of contribution and/or indemnity against any persons or entities to the fullest extent permitted by law.

accordance with established practice.

3. Plaintiffs' claims are barred because Syngenta's conduct was reasonable and based on independent, legitimate business and economic justifications.

4. Plaintiffs' claims against Syngenta are barred because Syngenta has complied with all applicable government standards and regulations and all applicable standards of care under all laws, regulations, industry practice, and state-of-the-art knowledge.*

5. Plaintiffs have failed to join necessary and indispensable parties to this litigation.*

6. Plaintiffs' claims are barred because plaintiffs' alleged injuries and damages were not legally or proximately caused by any acts or omissions by Syngenta and/or were caused, if at all, by the conduct of plaintiffs and/or third parties over which Syngenta had no authority or control. Syngenta cannot be held liable for loss or damage caused by such independent persons or entities, whether or not they are parties to this action.

7. Plaintiffs' claims are barred by the doctrines of intervening or superseding cause.

8. Plaintiffs' claims are barred, in whole or in part, because Syngenta exercised due care and took appropriate precautions against any

reasonably foreseeable acts or omissions of third parties and any reasonably foreseeable consequences of such acts or omissions.

9. Plaintiffs' claims are barred, in whole or in part, by the doctrines of primary and/or secondary assumption of the risk and contributory or comparative fault.

10. Plaintiffs' claims are barred because Syngenta owed no legal duty to plaintiffs.*

11. Plaintiffs' claims are preempted in whole or in part by federal or state law.*

12. Plaintiffs' claims are barred by the economic loss rule and its analogues under the laws of the applicable states.*

13. To the extent plaintiffs' alleged damages were caused by a misuse of any Syngenta product, there can be no liability against Syngenta.

14. Plaintiffs' claims are barred, in whole or in part, because they have no standing or capacity to bring some or all of the claims raised in the Complaint.*

15. Plaintiffs' claims are barred, in whole or in part, because they have not suffered, and will not suffer, any injury to a legally protected or cognizable interest by reason of Syngenta's conduct.

16. Plaintiffs fail to allege facts or a cause of action against Syngenta sufficient to support a claim for compensatory damages, attorneys'

fees and/or legal fees, or any other relief.

17. Plaintiffs are not entitled to damages because their damages, if any, are too legally uncertain, remote, indirect, and/or speculative.

18. Plaintiffs have failed to mitigate their damages, if any have occurred.

19. Plaintiffs' claims, based on misrepresentations are barred because plaintiffs did not reasonably rely on any representation of fact made by Syngenta.

20. Plaintiffs' claims may not be maintained as a class action because the named plaintiffs and the putative class and subclasses cannot satisfy the requirements of Federal Rule of Civil Procedure 23. Plaintiffs' putative class and subclasses are rife with individualized issues that cannot be adjudicated on a class-wide basis using common proof.*

21. Syngenta incorporates by reference, as though fully set forth herein, any and all defenses which are or may become available to it pursuant to the provisions of the Restatement (Second) of Torts § 402, Restatement (Third) Products Liability, and all comments thereto.

22. To the extent plaintiffs' claims would result in Syngenta paying damages to more than one claimant for the same alleged loss, they are barred because such multiple liability would violate rights

guaranteed to Syngenta by the United States Constitution, including, without limitation, rights guaranteed under the Due Process Clause of the Fourteenth Amendment, as well as the Kansas Constitution

23. No act or omission of Syngenta was malicious, willful, wanton, or fraudulent, nor did Syngenta act with conscious or intentional disregard of or indifference to the rights and safety of plaintiffs or others or in an egregiously wrongful manner. Thus no punitive damages may be granted.

24. Plaintiffs' claims for punitive damages are in violation of, and barred and/or limited by, Syngenta's state and federal constitutional rights, including Syngenta's rights under the Due Process Clause of the Fifth and Fourteenth Amendments and the Excessive Fines Clause of the Eighth Amendment of the United States Constitution.

25. To the extent plaintiffs attempt to seek equitable relief against Syngenta, plaintiffs are not entitled to such relief because they have an adequate remedy at law.

26. To the extent plaintiffs have received payments from other sources in satisfaction of their alleged damages, including, but not limited to, state, federal, and/or private crop protection and/or insurance programs, any damages recovered by the plaintiff from Syngenta must be reduced to the extent required by Kansas law.

27. Plaintiffs' claims are barred because plaintiffs' acts and omissions, including this lawsuit, seek to unlawfully restrain trade in violation of the law and public policy.

28. Plaintiffs' claims based on misrepresentations are barred to the extent they rely on statements that are constitutionally protected and/or are statements reflecting opinion, puffery, predictions, or expectations.

29. Plaintiffs' claims are barred to the extent that they seek to impose liability based on petitioning, speech, or conduct by Syngenta that is protected by the First Amendment and/or by analogous state statutes, including but not limited to the lawsuit brought by Syngenta in *Syngenta Seeds, Inc. v. Bunge N. Am.*, Inc., No. 11-cv-4074-MWB (N.D. Iowa); statements made by Syngenta to the USDA, EPA, and FDA, including in its petitions for deregulation of MIR162 and Event 5307; and Syngenta's other interactions with government agencies.

30. Plaintiffs' alleged damages were caused by the fault of third persons whose fault is attributable to plaintiffs, which bars or diminishes plaintiffs' right to recovery under Kan. Stat. Ann. § 60-258a.

31. Syngenta incorporates by reference, as though fully set forth herein, any and all defenses which are or may become available to it under

the Kansas Product Liability Act, Kan. Stat. Ann. § 60-3301 *et seq*.

5. DAMAGES AND NON-MONETARY RELIEF REQUESTED.

Plaintiffs seek all damages that Syngenta's conduct caused, contributed to cause, and/or was a substantial factor in causing.[7] Inclusive of these damages is the impact Syngenta's conduct had on the price class members have received and will continue to receive for their corn. Based upon data available to plaintiffs' damages experts as of the date of their most recent reports, those damages are up to $5.77 billion for the nationwide class and up to $235.4 million for the Kansas Class. The damages are calculated as of June 2017, the scheduled date of trial, by applying an appropriate 6% interest rate factor to both past and future damages.[8] The nationwide Lanham Act class additionally seeks Syngenta's profits, treble damages, costs and their attorneys' fees, as allowed under 15

[7] Syngenta disputes that its conduct caused any damages and disputes that Plaintiffs' damages methodologies are reliable, accurate, or tied to Plaintiffs' theories of harm, as explained in the reports tendered by Syngenta's experts.

[8] As explained herein, plaintiffs' experts included in their reports the amounts the nationwide class damages would need to be reduced in the event the Minnesota class was certified and excluded from the nationwide class, which now has occurred. Determination of any reductions attributable to opt-outs will have to await expiration of the opt-out period, and plaintiffs reserve their rights to supplement their expert reports to make these changes. In addition, plaintiffs reserve the right to supplement and revise their expert reports after updated data becomes available from the USDA and other sources. Plaintiffs anticipate that their experts will be able to provide supplemental reports incorporating any needed supplementations. Subject to timely receipt of 578 documents from the federal government, the parties have agreed that all such supplementation—limited specifically to supplementation based on new USDA data becoming available and supplementation based on opt-outs—be completed before May 1, 2017. The parties have also agreed that Syngenta will have an opportunity to take limited depositions of these experts by May 8, 2017 based on the supplementation and to submit expert reports responding to the supplementation by May 15, 2017. In the event a responsive expert report is tendered by Syngenta, the parties agree that Plaintiffs will have the opportunity to take a limited deposition of any expert who tenders such a report based on the supplementation by May 22, 2017.

U.S.C. § 1117. In addition to these damages, the Kansas class seeks punitive damages, as allowed under Kan. Stat. Ann. § 60-3701.

Plaintiffs have provided to Syngenta voluminous expert reports and reliance materials from Dr. Colin Carter and Dr. Bruce Babcock, plaintiffs' damage experts. Their reports contain detailed analyses of the nature of, bases for and calculations of the damages.[9] Both have given two depositions in this case, provided declarations in this case and testified live at the class certification hearing.

Both experts calculated the aggregate class damages for the nationwide class and the Kansas class and per bushel price impacts. Plaintiffs' expert reports contain alternative calculations and Plaintiffs' experts have also produced spreadsheets and referenced data produced by corn producers, which permit alternative calculations of damages depending upon when the jury determines the price impact began, whether in September or November 2013 or at some other point in time in the 2013/2014 marketing year.[10]

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[9] In an effort to shorten this section, Plaintiffs and Syngenta are in agreement that Plaintiffs may incorporate by reference their expert damages reports from Dr. Carter and Dr. Babcock, and that Syngenta may incorporate by reference its responsive expert damages reports.

[10] Based on that data, Dr. Babcock estimated that 13.95% of class members' marketing of their 2013 crop was priced before September 16, 2013. The same data can be utilized to identify the percentage of class members' marketings priced before November 18, 2013, or any other date in the 2013/2014 marketing year. *See* Babcock Exp 000006130; Expert Report of Bruce A. Babcock, Oct. 24, 2016, Materials Considered in Forming Opinions by Dr. Bruce Babcock, at 4-14. For example, if the impact date were November 18, 2013, the data shows that that 37.19%. of all 2013 class member marketings were before that date, thus leading to alternative damage calculations for the Nationwide Class of $5,397,400,000 and $3,678,400,000 for the "No TRQ" and "TRQ" scenarios, respectively, and for the Kansas Class of $221,700,000 and $151,200,000 for the "No TRQ" and "TRQ" scenarios, respectively. *Id.* To the extent there is any conflict

Dr. Babcock uses a multi-year supply and demand model to analyze and calculate damages. Dr. Babcock has included alternative damage calculations relevant to his methodology, both on an aggregate and per bushel basis, depending upon whether the jury believes that China, in the "but for" world, would have removed its tariff rate quota ("TRQ") to permit it to import more corn at the lower tariff rate that applied to imports under the quota (as the market analysts were predicting prior to the de facto embargo).[11] Dr. Babcock also included alternative damage calculations, under both his "TRQ" and "no TRQ" scenarios, should the Court rule that financial benefits class members received from a sorghum price increase are not barred by the collateral source rule or otherwise and may properly be used to offset class damages.[12]

Dr. Babcock calculated that if the TRQ would have been removed, nationwide class damages are $5.7706 billion and Kansas Class damages are $235.4 million. If the TRQ would not have been removed, the nationwide class damages are $3.9517 billion and the Kansas Class damages are $161.3 million.

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between the expert reports and/or testimony provided by Dr. Babcock and the summary of his reports provided by Plaintiffs here, Syngenta asserts that the reports and/or testimony control. Plaintiffs do not believe there are any conflicts.

[11] The aggregate damage calculations are set forth in this section. Dr. Carter's weekly per bushel damage calculations are set forth in Table 17 of his report. Dr. Babcock's annual per bushel damage calculations are set forth in Table 12 of his report.

[12] If sorghum benefits are used to offset corn damages, Dr. Babcock's determination is that the "no TRQ" damages are $5.5688 billion for the nationwide class and $228.1 million for the Kansas class, and the "TRQ" damages are $4.0660 billion for the nationwide class and $212.2 million for the Kansas class.

Dr. Carter uses an event study to analyze and calculate damages. Ultimately Dr. Carter calculated damages for the nationwide class of $4.679 billion (June 2017 dollars) and Kansas class damages of $192 million (June 2017 dollars).

These damage calculations will need to be reduced given the Minnesota court's subsequent certification of a Minnesota class and the Court's exclusion of the Minnesota class from the nationwide class. Plaintiffs' experts included in their reports the amount the nationwide class damages would need to be reduced in the event the Minnesota class was certified and excluded from the nationwide class. *See* Expert Report of Colin A. Carter, Nov. 15, 2016, at 70, n.120 ("If the Minnesota class is certified and it is excluded from the nationwide class, the damages for the nationwide class would need to be reduced by $406 million."); Expert Report of Bruce A. Babcock, Oct. 24, 2016, at 97 n.60 ("If the Minnesota class is certified then I estimate aggregate Minnesota damages to be $497 million if the TRQ had been removed and $341 million if the TRQ had been kept in place. If the Minnesota class is certified and it is excluded from the nationwide class, the damages for the nationwide class would need to be reduced by these amounts.").

6. AMENDMENTS TO PLEADINGS.

None.[13]

7. DISCOVERY.

[13] Plaintiffs specifically reserve all of their appeal rights with regard to the Court's denial of their Motion to Amend. ECF Nos. 2330, 2502.

Under the scheduling order and any amendments, all written discovery for the bellwether discovery pool was to have been served by March 15, 2016, and all depositions for the bellwether discovery pool were to have been completed by May 2, 2016.

Discovery is incomplete, in that:

1. Certain third parties, who have been subpoenaed in this litigation, are continuing their rolling productions of documents responsive to these subpoenas. Once these productions are substantially complete, the parties intend to schedule depositions of these third parties.

2. For the third parties that are continuing to produce documents, these same third parties may or have indicated that they intend to withhold or claw back otherwise responsive documents from production on the basis of privilege. The parties have yet to receive privilege logs for such documents and would meet and confer with the third party upon timely receipt of such logs to determine whether there are privilege issues to raise with the Court.

3. The parties are continuing to meet and confer regarding documents withheld by Syngenta on its privilege logs.

4. The parties are continuing to meet and confer regarding certain of Plaintiffs' discovery responses.

5. Both parties identified certain individuals in their December 22, 2016, preliminary witness list that have not been the subject of discovery, and

discovery is not complete as to those individuals. The parties will meet and confer to discuss these individuals and, if unable to agree with respect to the discovery related to these individuals, will raise any issues with the Court.

6. The parties are continuing to meet and confer regarding Plaintiffs' Requests for Admissions and the related Interrogatory regarding Defendants' responses to the Amended Order Regarding Qualification of Documents Generated by a Party as Authentic and/or Records of Regularly Conducted Activity (ECF No. 1744).

7. Related to the discovery above, the parties are continuing to meet and confer regarding the Amended Order Regarding Qualification of Documents Generated by a Party as Authentic and/or Records of Regularly Conducted Activity (ECF No. 1744) and additional discovery, as contemplated by the Order, that may be required to establish the authenticity and/or admissibility of certain deposition exhibits.

8. On December 29, 2016 and pursuant to Section X of Scheduling Order No. 2, ECF No. 1098, Plaintiffs sent Syngenta a letter containing technical objections to the sufficiency of Syngenta's expert witness disclosures. Syngenta sent a letter in response on January 5, 2017. Syngenta is in the process of providing certain materials that should resolve these objections.

In addition to the discovery in the above paragraphs, unopposed discovery may continue after the deadline for completion of discovery so long as it does not delay the briefing of or ruling on dispositive motions or other pretrial preparations. The parties have requested that the Court be available to resolve any disputes that arise during the course of such extended discovery.

8. MOTIONS.

a. Pending Motions.

None.

b. Additional Pretrial Motions.

After the pretrial conference, the parties intend to file the following motions:

1. Summary judgment motions;

2. *Daubert* motions;

3. Potential motions regarding the outstanding discovery listed above; and

4. Potential in limine motions prior to trial.

The dispositive-motion deadline, as established in the scheduling order and any amendments (see ECF Nos. 2368 and 2563), is **February 6, 2017**.

On December 22, 2016, Syngenta disclosed the expert report of Barry K. Goodwin, who is scheduled by agreement for a deposition on January 31, 2017.[14] Dr. Goodwin was asked, in part, to rebut the expert testimony of Dr. Carter. In addition to

[14] The parties rescheduled Dr. Goodwin's deposition for January 31, 2017 in light of the change in the pretrial conference date.

addressing Dr. Carter's analysis, Dr. Goodwin's report puts forth a new vector error correction model that purports to show that China's de facto ban on U.S. corn exports "did not have an appreciable effect on Kansas City and Minnesota corn prices after November 18, 2013."

As discussed during the pretrial conference, no later than **February 3, 2017**, Plaintiffs may file a motion seeking leave to allow Dr. Carter to submit a rebuttal report, limited only to addressing Dr. Goodwin's new vector error correction model. As discussed during the pretrial conference, Syngenta's response to Plaintiffs' anticipated motion with regard to Dr. Carter must be filed by **February 10, 2017**, and any reply brief by Plaintiffs must be filed by **February 13, 2017**. The parties' principal briefs on this motion must be limited to 5 double-spaced pages, with any reply limited to 2 pages. If they are granted leave to use Dr. Carter as a rebuttal expert, Plaintiffs propose that Dr. Carter be produced for a deposition limited solely to this rebuttal report by February 20, 2017, and that any *Daubert* motion related to this rebuttal report would be due by March 3, 2017, with opposition and reply brief deadlines of March 17 and 27, 2017, respectively.

Syngenta opposes the rebuttal report proposed by Plaintiffs. Plaintiffs seek to submit a third report from Dr. Carter to respond to the report submitted on Syngenta's behalf by Dr. Goodwin, who concludes that Plaintiffs' experts' methodologies substantially overstate damages. Plaintiffs further propose that related *Daubert* briefing be delayed until March 2017. Since the Court set the merits experts disclosure schedule

more than a year ago, the parties and the Court have proceeded on the understanding that each side would have one opportunity to disclose their merits experts, and that summary judgment motions and *Daubert* motions would follow thereafter. *See* ECF No. 1098 § X. As Syngenta will explain in response to a motion seeking leave, Plaintiffs' proposed rebuttal report is contrary to the Court's orders and should not be permitted.

The parties should follow the summary-judgment guidelines available on the Court's website:

http://www.ksd.uscourts.gov/summary-judgment/

The parties believe they need more than the 30 pages allowed by D. Kan. Rule 7.1(e) for the arguments and authorities sections of their summary judgment briefs or memoranda, but the parties have not reached agreement on the exact form or page limits. In this regard, the court rules as follows: The page limit is extended in this complex case to 100 pages for each movant and opposing party. As agreed by the parties, they shall file multi-issue, comprehensive summary judgment motions, instead of separate motions on discrete issues. Further, for any movant, the 100-page limit is a combined one, i.e., it includes both the opening brief(s) and any reply brief(s), so counsel should plan accordingly.

c. Motions Regarding Expert Testimony. All motions to exclude testimony of expert witnesses pursuant to Fed. R. Evid. 702-705, *Daubert v.*

Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), or similar case law, must be filed by **February 7, 2017**; briefs in opposition to such motions must be filed by **February 28, 2017**, and any reply briefs must be filed by **March 14, 2017**. See ECF No. 2791.

On January 24, 2017, the court granted a consent motion to extend deadlines related to William Sheppard, one of Syngenta's non-retained testifying experts. The deposition of Mr. Sheppard shall occur on **February 9, 2017**. Any *Daubert* motion to exclude Mr. Sheppard's testimony is due **February 16, 2017**, with any response due **February 28, 2017** (the existing date for all *Daubert* responses). See ECF No. 2828.

The parties believe they need more than the 30 pages allowed by D. Kan. Rule 7.1(e) for the arguments and authorities sections of their *Daubert* briefs or memoranda, but the parties have not reached agreement on the exact form or page limits. In this regard, the court rules as follows: The parties shall file separate motions and briefs on each expert being challenged. The opening brief(s) and response(s) shall be limited to fifteen pages, and the reply brief(s) shall be limited to five pages.

9. TRIAL.

The special (i.e., No. 1) trial setting, as established in the scheduling order and any amendments, is **June 5, 2017, at 9:30 a.m., in Kansas City, Kansas.**

This case will be tried by jury. Trial is expected to take approximately 20 court days. The court will attempt to decide any timely filed dispositive motions at least 30 days before trial. If the case remains at issue after timely dispositive motions have been decided, then the trial judge may convene another pretrial conference (or simply enter a separate order) to address, among other things, the setting of deadlines for filing final witness and exhibit disclosures, exchanging and marking trial exhibits, designating deposition testimony for presentation at trial, motions in limine, and proposed jury instructions. The parties will meet and confer to discuss deadlines for these pretrial submissions and will submit a proposed pretrial scheduling order by **April 17, 2017**.

IT IS SO ORDERED.

Dated February 1, 2017, at Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
U.S. District Judge

s/ James P. O'Hara
James P. O'Hara
U.S. Magistrate Judge