IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: SYNGENTA AG MIR 162 CORN LITIGATION	)	MDL No. 2591
	)	
	)	Case No. 14-md-2591-JWL
This Document Relates To:	)	
	)	
The DeLong Co., Inc. v. Syngenta AG, et al., No. 17-2614-JWL	)	

MEMORANDUM AND ORDER

This single case within this multi-district litigation (MDL) presently comes before the Court on the motion by defendants (collectively "Syngenta") for summary judgment (Doc. # 106). For the reasons set forth below, the Court concludes that this action is barred by the applicable statute of limitation.[1] The Court therefore **grants** the motion, and Syngenta is awarded judgment on plaintiff's claims.

I. Summary Judgment Standards

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine dispute as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *See Burke v. Utah Transit Auth. & Local 382*, 462 F.3d 1253, 1258 (10th Cir. 2006). An issue

[1] In light of this conclusion, the Court declines to address Syngenta's other arguments for summary judgment on particular claims.

of fact is "genuine" if "the evidence allows a reasonable jury to resolve the issue either way." *See Haynes v. Level 3 Communications, LLC*, 456 F.3d 1215, 1219 (10th Cir. 2006). A fact is "material" when "it is essential to the proper disposition of the claim." *See id.*

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. *See id.* (citing *Celotex*, 477 U.S. at 325).

If the movant carries this initial burden, the nonmovant may not simply rest upon the pleadings but must "bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which he or she carries the burden of proof." *See Garrison v. Gambro*, Inc., 428 F.3d 933, 935 (10th Cir. 2005). To accomplish this, sufficient evidence pertinent to the material issue "must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein." *See Diaz v. Paul J. Kennedy Law Firm*, 289 F.3d 671, 675 (10th Cir. 2002).

Finally, the Court notes that summary judgment is not a "disfavored procedural shortcut;" rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." *See Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

II. Analysis

A. Accrual of the Cause of Action

Plaintiff The DeLong Co., Inc. ("DeLong") is an exporter of Dried Distillers Grains with Solubles ("DDGS"), a corn by-product. DeLong's sole remaining claim is one of negligence against Syngenta. Specifically, DeLong alleges that Syngenta was negligent in its commercialization of Vitpera and Duracade, genetically-modified corn seed products, before those products' traits were approved for import by China. The parties agree that DeLong's negligence claim is governed by the substantive law of Wisconsin, where DeLong resides. *See In re Syngenta AG MIR 162 Corn Litig.*, 2019 WL 4013962, at *4 n.4 (D. Kan. Aug. 26, 2019) (Lungstrum, J.) (dismissing non-negligence claims in this action); *see also In re Syngenta AG MIR 162 Corn Litig.*, 131 F. Supp. 3d 1177, 1188 (D. Kan. 2015) (Lungstrum, J.) (substantive law of each MDL plaintiff's home state governs that plaintiff's claims).

The parties further agree that DeLong's negligence claim is governed by Wisconsin's six-year statute of limitations. *See* Wis. Stat. § 893.52(1). The Wisconsin Supreme Court has set forth the relevant law concerning the accrual of a tort claim as follows:

> A claim for relief accrues when there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it. A tort claim is not capable of present enforcement until the plaintiff has suffered actual damage. Actual damage is harm that has already occurred or is reasonably certain to occur in the future. Actual damage is not the mere possibility of future harm.

See Hennekens v. Hoerl, 465 N.W.2d 812, 815-16 (Wis. 1991) (internal quotations and citations and footnotes omitted).[2]

DeLong filed the instant suit against Syngenta on October 11, 2017. Thus, the issue is whether DeLong's negligence claim accrued before October 11, 2011. Syngenta argues that DeLong's claim is time-barred because before October 2011 DeLong already knew that Syngenta had commercialized Viptera without Chinese approval and already believed that Syngenta should be responsible for its costs incurred because of that commercialization. In response, DeLong does not dispute that by October 2011 it already knew of the allegedly negligent commercialization and the risk and possibility of harm therefrom, but it argues that it had not actually suffered harm by that date (or at least that a question of fact exists). The Court concludes that Syngenta has shown as a matter of law, based on uncontroverted evidence, that DeLong had suffered harm by that date and that DeLong's claim therefore accrued more than six years before it filed this suit.

Syngenta first points to evidence that by October 2011 DeLong was already preparing and taking steps to deal with the presence of MIR 162, the unapproved trait, in the corn supply. Bo DeLong, a vice president who was deposed as DeLong's corporate representative, testified that after DeLong learned that a product containing MIR 162 was being sold beginning in 2010 for harvest in 2011, DeLong began making preparations to

[2] In addition, the Wisconsin Supreme Court has adopted the discovery rule, holding that tort claims accrue on the date the injury is discovered or with reasonable diligence should be discovered. *See Hansen v. A.H. Robins, Inc.*, 335 N.W.2d 578, 583 (Wis. 1983). DeLong has not argued, however, that it did not discover any injury at the time of its occurrence, and thus DeLong has not argued that the discovery rule applies here.

have corn products brought only to certain facilities. When asked whether there was a cost to DeLong associated with those steps, Mr. DeLong testified as follows:

> Well, we had to isolate it. We had to have a separate dump facility. We didn't know how much we were going to receive, although we thought the amounts were going to be fairly minimal based on what Syngenta told us or what we had been told as far as the amount that was grown initially the first year.
>
> And so we basically tied up, you know, a separate dump pit, leg dryer and finished – so we had to have a dump pit, leg dryer, wet holding tank and a finished product tank that we tied up for that corn to keep it isolated.

Mr. DeLong stated that DeLong began these preparations for isolation in August or September 2011. In addition, in August 2011, Mr. DeLong drafted a document in which he noted that Viptera had not been approved for import by China and listed a number of steps that Syngenta and others in the industry should take to prevent DDGS produced from Viptera corn from entering the export channel to China. In the final step, Mr. DeLong stated that "[a]ll costs of all testing/diversion both on inbound corn and outbound DDGS should be to Syngenta's account." In his deposition, Mr. DeLong answered in the affirmative when asked whether that final step reflected his belief in 2011 "that Syngenta should be responsible for reimbursing DeLong and others in the grain trade for the additional costs that DeLong was incurring as a result of dealing with the commercialization of MIR 162." Thus, Syngenta has submitted evidence that DeLong was already experiencing deleterious effects of Syngenta's commercialization of Viptera – thereby suffering harm – by August and September 2011.

DeLong responds by noting that Syngenta has not cited evidence that DeLong had actually undertaken any of those listed steps, including testing, by October 2011. That may

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