

**IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION**

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|--|---|-------------------------|
| <b>IN RE GENETICALLY MODIFIED RICE</b> | ) |                         |
| <b>LITIGATION</b>                      | ) | <b>4:06 MD 1811 CDP</b> |
|  | ) |                         |
|  | ) | <b>ALL CASES</b>        |
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**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION FOR PARTIAL  
SUMMARY JUDGMENT BASED ON EXPRESS FEDERAL PREEMPTION**

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## INTRODUCTION

Bayer CropScience LP<sup>1</sup> has filed a motion for partial summary judgment<sup>2</sup> based on an express preemption argument that is devoid of foundation or support. Bayer's arguments not only lack support but are internally inconsistent, and completely at odds with Congress' expressed intent that states should participate in the regulation of "any article, means of conveyance, plants, biological control organisms, plant pests, noxious weeds or plant products." 7 U.S.C. § 7756(b)(2)(A). Plaintiffs' state common law claims do not constitute "regulation" under any reasonable reading of the preemption provision on which Bayer relies, 7 U.S.C. § 7756(a). And none of Plaintiffs' claims regulate "in foreign commerce" as required for preemption under that statute. Bayer's position, if accepted, would invalidate a host of state statutes and regulations specifically authorized by Congress. Finally, Bayer's argument that preemption would serve congressional purpose in this case is flatly contradicted by what Congress has plainly

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<sup>1</sup> Other Bayer entities join in the motion as to "those cases in which they are parties." Bayer CropScience LP's Brief in Support of Its Motion for Partial Summary Judgment Based on Express Federal Preemption ("Br.") at 1 n.1. Plaintiffs refer to all these entities jointly as "Bayer." Defendant Starlink Logistics Inc. also has joined in the motion, adopting the motion and Bayer's arguments in their entirety. *See* Defendant Starlink Logistics Inc.'s Motion for Partial Summary Judgment Based on Express Federal Preemption and Incorporated Memorandum in Support. (D.I. 1094). This opposition responds to that motion as well. Bayer states that the motion "applies to market damage claims made by the Initial Trial Pool producer plaintiffs as well as damage claims made by all non-producer plaintiffs," but is focused on the claims of the Initial Trial Pool producer plaintiffs. Br. at 1. This opposition likewise focuses on those claims. Matters particular to other plaintiffs will be addressed in supplemental memoranda per CMO 15.

<sup>2</sup> Bayer titles its motion as one for "partial" summary judgment, suggesting its belief that the motion would not dispose of all claims. Bayer also states that it does not seek relief under the interstate preemption provision in 7 U.S.C. § 7756(b) "at this time" because "the application of this provision to the claims that are not preempted under the foreign commerce express preemption provision may depend upon additional discovery." Br. at 8 n.5. Bayer does not, however, identify the claims to which it refers. By not articulating which claims it believes are subject to foreign commerce preemption and which are not, and by taking a piecemeal approach to the subject of federal preemption, Bayer's motion is an invitation to confusion and waste of resources. Bayer filed its motion days before the parties were scheduled to meet with the Court-appointed Special Master for Settlement. Without speculating on Bayer's motives, the lack of legal, analytical or factual support for its arguments bears witness to hasty, or tactical, preparation. One must wonder why Bayer would wait over two years to present a motion that would dispose of hundreds of claims if Bayer believed it was likely to succeed.

stated in the Plant Protection Act, as well as well-settled Supreme Court precedent. From premise to conclusion, Bayer's position is untenable.

### **THE PLANT PROTECTION ACT AND 7 CFR PART 340**

The Plant Protection Act, 7 U.S.C. § 7701 et seq., ("PPA") became effective on June 20, 2000 as part of the larger Agricultural Risk Protection Act. The PPA authorizes the Animal and Plant Health Inspection Service ("APHIS"), an agency within the Department of Agriculture ("USDA"), to issue regulations implementing its provisions.

7 U.S.C. §§ 7711, 7712.<sup>3</sup> Pursuant to Section 7711(a),

[e]xcept as provided in subsection (c) of this section [providing for authorization by the USDA], no person shall import, enter,<sup>4</sup> export or move<sup>5</sup> in interstate commerce any plant pest, unless the importation, entry, exportation, or movement is authorized [by permit] and is in accordance with such regulation as the Secretary may issue to prevent the introduction of plant pests into the United States or the dissemination of plant pests within the United States.

7 U.S.C. § 7711(a). Pursuant to Section 7712(a),

[t]he Secretary may prohibit or restrict the importation, entry, exportation, or movement in interstate commerce of

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<sup>3</sup> Regulations regarding the introduction of genetically altered organisms and products were originally promulgated in 1987. *See* 52 Fed. Reg. 22892 (June 16, 1987) (final rule effective July 16, 1987). Prior to passage of the PPA, the regulations found at 7 C.F.R. Part 340 were based on APHIS' authority under legislation including the Plant Quarantine Act (7 U.S.C. § 161 et seq.) and the Federal Plant Pest Act (7 U.S.C. § 150aa et seq.). These Acts were "subsumed into the Plant Protection Act . . . in 2000 along with other provisions." 73 Fed. Reg. 60008, 60009 (October 9, 2008). The regulations in force under the prior legislation remained applicable under the PPA pending the Secretary's adoption of new regulations that superseded the old ones. 7 U.S.C. § 7758(c). The Secretary did not adopt superseding regulations, but continued the existing regulations in effect, amending from time to time in due course. *See* 65 Fed. Reg. 49471 (Aug., 14, 2000); 66 Fed. Reg. 21049 (April 27, 2001).

<sup>4</sup> "Enter" is defined as "to move into, or the act of movement into, the commerce of the United States." 7 U.S.C. § 7702(3).

<sup>5</sup> The terms "move," "moving," and "movement" mean "(A) to carry, enter, import, mail, ship, or transport; (B) to aid, abet, cause, or induce the carrying, entering, importing, mailing, shipping, or transporting; (C) to offer to carry, enter, import, mail, ship, or transport; (D) to receive to carry, enter, import, mail, ship, or transport; (E) to release into the environment; or (F) to allow any of the activities described in a preceding subparagraph." 7 U.S.C. § 7702(9).

any plant, plant product, biological control organism, noxious weed, article, or means of conveyance, if the Secretary determines that the prohibition or restriction is necessary to prevent the introduction into the United States or the dissemination of a plant pest or noxious weed within the United States.

7 U.S.C. § 7712(a). In implementing these provisions, APHIS has adopted regulations addressing the “introduction” (*i.e.*, the importation, interstate movement and environmental release)<sup>6</sup> of certain genetically modified (sometimes referred to as “GM”) organisms that are plant pests “or are believed to be plant pests.” 7 C.F.R. Part 340 n.1. *See also* Br. at 5 (quoting 72 Fed. Reg. 14649 (March 29, 2007)).<sup>7</sup> Section 340.0 provides in part:

- (a) No person shall introduce any regulated article unless the Administrator is:
  - (1) Notified of the introduction in accordance with § 340.3, or such introduction is authorized by permit in accordance with §340.4, or such introduction is conditionally exempt from permit requirements under §340.2(b); and
  - (2) Such introduction is in conformity with all other applicable restrictions in this part.

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<sup>6</sup> The word “introduce” means “[t]o move into or through the United States, to release into the environment, to move interstate, or any attempt thereat.” 7 C.F.R. § 340.1.

<sup>7</sup> The Federal Plant Pest Act, under which APHIS originally adopted regulations in 7 C.F.R. Part 340 “was enacted to . . . protect American agriculture against invasion by foreign plant pests and diseases.” It confers authority on the USDA “to prevent the dissemination *into the United States* or interstate of plant pests.” 52 Fed. Reg. 22892 (June 16, 1987) at 22893 (emphasis added). APHIS does not regulate the non-interstate movement of GM material from the United States into foreign countries. *See* 7 C.F.R. Part 340; APHIS’ Biotechnology Questions and Answers on Permits at 2 (Question 8), attached to Plaintiffs’ Statement of Undisputed Facts (“SOF”) at ¶ 19. APHIS “may” certify freedom from plant pests or noxious weeds “according to the phytosanitary or other requirements of the countries to which the plants, plant products or biological control organisms may be exported.” 7 U.S.C. § 7718. APHIS does provide such certificates for exported goods, which are not required but offered only as a service. 7 C.F.R. § 353.2.

7 C.F.R. § 340.0. Under this provision, unless exempt, no person may introduce a “regulated article” unless the introduction is authorized by permit under Section 340.4, or under the notification procedure of Section 340.3.

Bayer’s motion is predicated on 7 U.S.C. § 7756(a), dealing with state regulation of articles in foreign commerce, which in no way purports to preempt Plaintiffs’ claims in this case. Section 7756 actually contains two express preemption clauses – one found in Section 7756(a), and the other in Section 7756(b). Bayer informed the Court only of the former. The latter, however, has direct bearing on Bayer’s motion. Section 7756 reads in pertinent part:

(a) Regulation of foreign commerce

No State or political subdivision of a State may *regulate in foreign commerce* any article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product in order –

- (1) *to control* a plant pest or noxious weed;
- (2) *to eradicate* a plant pest or noxious weed; or
- (3) *prevent the introduction or dissemination* of a biological control organism, plant pest, or noxious weed.

(b) Regulation of interstate commerce

(1) In general

*Except as provided in paragraph (2)*, no State or political subdivision of a State may regulate the movement in interstate commerce of any article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product in order to control a plant pest or noxious weed, eradicate a plant pest or noxious weed, or prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed, if the Secretary has issued a regulation or order to prevent the dissemination of the biological control organism, plant pest, or noxious weed within the United States.

(2) Exceptions

(A) Regulations consistent with Federal regulations

A State or a political subdivision of a State *may impose prohibitions or restrictions* upon the movement in interstate commerce of articles, means of conveyance, plants, biological control organisms, plant pests, noxious weeds, or plant products *that are consistent with and do not exceed the regulations or orders issued by the Secretary.*

7 U.S.C. § 7756(a)-(b) (emphasis added).<sup>8</sup>

As stated in Section 7756(b), states are free to regulate the movement in interstate commerce of any “article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product” if the Secretary has not issued a regulation or order to prevent the dissemination of that biological control organism, plant pest, or noxious weed within the United States. Even if the Secretary has done so, states are expressly permitted to impose prohibitions and restrictions that are consistent with the Secretary’s regulations or orders. Bayer’s interpretation of Section 7756(a) not only is contrary to the plain language of that statute, but would read the express permission of Section 7756(b) right out of the PPA.

**ARGUMENT**

**I. PLAINTIFFS’ CLAIMS ARE NOT EXPRESSLY PREEMPTED BY 7 U.S.C. § 7756(a).**

At the outset, it is noteworthy that Bayer does not assert any variant of implied preemption. Br. at 8 n.4. Thus, for purposes of this motion, Bayer concedes that: 1) there is no congressional intent to occupy the field leaving no room for state involvement; 2) there is no conflict between Plaintiffs’ claims and the federal scheme that would make

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<sup>8</sup> A state may also impose additional prohibitions or restrictions if there is a special need to do so. 7 U.S.C. § 7756(b)(2)(B).

it impossible for Bayer to comply with both state and federal law, and 3) permitting Plaintiffs' claims to go forward would not stand as an obstacle to the "accomplishment and execution of the full purposes and objectives of Congress." *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 64-65 (2002) (describing types of implied preemption).<sup>9</sup>

**A. The Court Must Apply A Presumption Against Preemption In Fields Traditionally Occupied By The States.**

Bayer asserts only express preemption. Accordingly, that claim must "focus in the first instance on the plain language of the statute, because it necessarily contains the best evidence of Congress' pre-emptive intent." *Sprietsma*, 537 U.S. at 62-63 (quoting *CSX Transp., Inc v. Eastwood*, 507 U.S. 658, 664 (1993)). Moreover, when interpreting the statute, there is a presumption against preemption of fields traditionally occupied by the States.

**1. Preemption is limited by the clear and manifest intent of Congress.**

The power to supplant state law is an extraordinary one in a federalist system. "Preemption radically alters the balance of state and federal authority, so the Supreme Court has historically refused to impose that alteration interstitially . . . The Court has expressed this principle as a presumption against preemption of state law." *White Buffalo Ventures LLC v. University of Texas at Austin*, 420 F.3d 366, 370 (5th Cir. 2005). Because the states are independent sovereigns, the courts have "long presumed that Congress does not cavalierly pre-empt state law causes of action." *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 449 (2005). Thus, preemption will not lie unless that was the "clear and manifest" purpose of Congress. *Id.*; *Medtronic, Inc. v. Lohr*, 518 U.S.

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<sup>9</sup> Bayer does make what amounts to a field preemption argument, but only in passing and without the barest effort to support it. *See Br.* at 17-18.

470, 485 (1996); *see also* *Shea v. Esensten*, 208 F.3d 712, 719 (8th Cir. 2000) (“historic police powers of the States [are] not be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”). This principle was very recently reaffirmed by the Supreme Court in *Wyeth v. Levine*, 55 U.S. \_\_\_, Slip Op., No. 06-1249 (March 4, 2009), and *Altria Group, Inc. v. Good*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 538 (2008). Both cases make clear that when addressing questions of preemption, the court “start[s] with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Wyeth*, Slip Op. at 8; *Altria*, 129 S. Ct. at 543. “That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States.” *Altria*, 129 S. Ct. at 543.<sup>10</sup> “Thus, when the test of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily ‘accept the reading that disfavors pre-emption.’” *Id.* (quoting *Bates*, 544 U.S. at 449).

## 2. Plaintiffs’ claims fall within traditional areas of state concern.

Traditional areas of state concern obviously include common law torts. *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 50-51 (1st Cir. 1991); *Drake v. Laboratory Corp. of Am. Holdings*, 290 F. Supp.2d 352, 364 (E.D.N.Y. 2003). The protection of agricultural products within a state’s borders also is a historic local concern. *See, e.g., Florida Lime & Avocado Growers v. Paul*, 373 U.S. 123, 144 (1963) (“the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern”); *Guam Fresh, Inc. v. Ada*, 849 F.2d 436 (9th Cir. 1988) (state statute dealing with the

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<sup>10</sup> This presumption against preemption applies regardless of whether there has been a history of federal regulation in the area. The presumption proceeds from “respect for the States as independent sovereigns in our federal system” and the corresponding assumption that Congress “does not cavalierly pre-empt state-law causes of action.” Slip Op. at 8 n.3 (internal quotations and citations omitted). “The presumption thus accounts for the historic presence of state law but does not rely on the absence of federal regulation.” *Id.*

spread of plant pests protect an area of particularly local concern, and are not preempted by federal statute covering the same subject); *see also, e.g., Missouri K&T Ry. Co. v. Haber*, 169 U.S. 613 (1989) (state had permissible local interest in protecting against importation of cattle “capable of communicating disease to domestic cattle”); *Maine v. Taylor*, 477 U.S. 131 (1986) (state statute prohibiting importation of baitfish served legitimate local purpose of protecting native fisheries from adulteration by non-native species). Traditional areas of state concern regarding agricultural interests include protection from both physical and economic injury. *See, e.g., Florida Lime & Avocado Growers*, 373 U.S. at 139, 146 (local concern with agricultural products includes not only health and safety, but prevention of economic loss); *Parker v. Brown*, 317 U.S. 341 (1943) (state legitimately protected local interest in stabilizing price of local agricultural product). Consumer protection also is a topic traditionally occupied by the states. *Chamberlan v. Ford Motor Co.*, 314 F. Supp.2d 953, 959 (N.D. Cal. 2004).

### **3. The plain language of Section 7756(a) defeats Bayer’s motion.**

With or without benefit of the presumption, the plain language of Section 7756(a) defeats Bayer’s motion. By its terms, the statute preempts a discretely described category of state action consisting of three components: 1) a State may not “regulate”; 2) “in foreign commerce”; 3) an article, means of conveyance, plant, biological control organism, plant pest, noxious weed, or plant product “in order” to effect one of three objectives: (i) to “control a plant pest or noxious weed”; (ii) to “eradicate a plant pest or noxious weed”; or (iii) to “prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed.” 7 U.S.C. § 7756(a)(1)-(3). Each of these components must be present for preemption to apply. None are present here.

**B. Section 7756(a) Does Not Apply to Common Law Claims.**

Congress has used numerous terms over the years to describe what it intends to preempt. For example, in the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), Congress provided that States “shall not impose or continue in effect any *requirements* for labeling or packaging in addition to or different from those required under this subchapter.” 7 U.S.C. § 136v(b). In the Federal Cigarette Labeling and Advertising Act, it similarly used the words “*requirement or prohibition.*” 15 U.S.C. § 1334(b). The Federal Omnibus Transportation Employee Testing Act provides that a State may not “prescribe, issue or continue in effect a *law, regulation, standard or order*” inconsistent with federal regulations. 49 U.S.C. § 45106(a).<sup>11</sup> *See also, e.g.*, 49 U.S.C. § 20106 (Federal Railroad Safety Act preempts state “*law, rule, regulation, order or standard*”);<sup>12</sup> 29 C.F.R. § 1910.1200(a)(2) (OSHA Hazard Communication Standard “preempt[s] any legal *requirement* of a state or political subdivision of a state pertaining to [chemical hazards]”);<sup>13</sup> 15 U.S.C. § 1392(d) (National Traffic and Motor Vehicle Safety Act provides that “no state . . . shall have any authority either to establish or to continue in effect . . . any *safety standard* . . . not identical . . . to the Federal standard.”).<sup>14</sup> A body of law has grown up around whether words and phrases such as these include state

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<sup>11</sup> Even this broad language has been found to not preempt state common law tort claims. *Drake*, 290 F. Supp.2d at 373.

<sup>12</sup> This language was found to embrace state law claims, but only if the federal regulation “substantially subsume[s] the subject matter” of the state common law. *CSX*, 507 U.S. at 664.

<sup>13</sup> This regulation has been found to preempt only positive state enactments and not common law claims. *In re Welding Fume Products Liability Litig.*, 364 F. Supp.2d 669 (N.D. Ohio 2005). OSHA itself has been held not to preempt tort claims, because its purpose is to override state “standards” relating to occupational health and safety, not “private rights and remedies traditionally afforded by state laws of general application.” *Id.* (citing *Pedraza v. Shell Oil Co.*, 942 F.2d 48 (1<sup>st</sup> Cir. 1991)).

<sup>14</sup> This language has been found not to preempt common law claims. *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1519 (7th Cir. 1994).

common law. In enacting Section 7756(a), Congress chose only to preempt state “regulation.” Bayer has not cited *a single case* in which a statute using the word “regulate” or “regulation” alone (like the statute here) was found to preempt common law claims, and Plaintiffs have found none.

**1. Bayer’s own legal authority supports interpreting Section 7756(a) to preempt only positive state enactments.**

Without any salient legal support, Bayer contends that “claims for damages such as the ones asserted here constitute an attempt to ‘regulate’ LLRICE.” Br. at 2; *see also id.* at 9-10. Bayer relies primarily on *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) for that proposition. It is odd that it should do so. The analysis and holdings in that case do not support, but condemn, Bayer’s interpretation of Section 7756(a).

In *Cipollone*, the plaintiffs asserted common law claims of failure to warn about the hazards of smoking, breach of express warranties, fraudulent misrepresentation and negligence. Defendants argued that the 1965 Federal Cigarette Labeling and Advertising Act, and its successor, the Public Health Cigarette Smoking Act of 1969, preempted these claims. The 1965 Act (in Section 4) mandated a particular warning on cigarette packages in order to “adequately inform[] the public that cigarette smoking may be hazardous to health,” and to protect the national economy “from the burden imposed by diverse, nonuniform and confusing cigarette labeling and advertising regulations.” 505 U.S. at 514. That Act contained a preemption provision (in Section 5) providing that:

- (a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
- (b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the

packages of which are labeled in conformity with any provisions of the Act.

*Id.* at 514. In 1969, Congress enacted the Public Health Cigarette Smoking Act, which amended the 1965 Act in various ways. Among other things, the 1969 Act modified the preemption provision to state:

- (b) No *requirement or prohibition* based on smoking and health shall be imposed *under State law* with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

*Id.* at 515 (emphasis added). The Court analyzed the preemptive scope of *both* these provisions based on their express language and by comparing one version to the other.

In the 1965 Act, Congress referred only to “statements” relating to smoking and health, which related to the “warning” provided for in Section 4. Thus, the Court held that this provision “merely prohibited state and federal rulemaking bodies from mandating particular cautionary statements on cigarette labels . . . or in cigarette advertisements.” *Id.* at 518. The Court further explained that “[b]eyond the precise words of these provisions, this reading is appropriate for several reasons.” First, it said, “we must construe these provisions in light of the presumption against the preemption of state police power [that] reinforces the appropriateness of a narrow reading of § 5.” Second, the warning required in Section 4 did not “by its own effect foreclose additional obligations imposed under state law.” Third, “there is no general inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions.” *Id.* at 518. The Court determined that the preemption language in the 1965 Act was “best read as having superseded only *positive enactments by legislatures or administrative agencies* that mandate particular warning

labels.” *Id.* at 518-19 (emphasis added). The Court also stated that “*the term ‘regulation’ most naturally refers to positive state enactments by [state legislatures or agencies], not to common-law damages actions.*” *Id.* at 519 (emphasis added). The Court concluded that the 1965 Act pre-empted only state “rulemaking bodies from mandating particular contrary statements and did not pre-empt state law damages actions.” *Id.* at 519-520.

Turning to the 1969 Act, the Court found that its language was “much broader” than the 1965 Act. *Id.* at 520. The Court explained: “[T]he later Act bars not simply ‘statement[s],’ but rather ‘requirement[s] or prohibition[s] . . . imposed under State law.’” *Id.* (alteration original). It thus “*alter[ed]* the reach” of Section 5. *Id.* at 521 (emphasis added). The amended language also expressly referred to “State law,” which includes common law rules of liability. *Id.* at 522.<sup>15</sup> Thus, the Court found that the phrase “requirement or prohibition” includes state common law. *Id.* at 521, 522.<sup>16</sup> Significantly, the Court explained that while “the 1965 version of [the preemption provision] was

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<sup>15</sup> Even while finding that the phrase “requirements and obligations” encompassed state law claims, the Court held that the statute did not preempt *all* common law claims. Rather, it determined that “in light of the strong presumption against preemption narrowly construing the precise language of §5(b)” each claim must be individually examined to determine whether it was, in fact, preempted. *Id.* at 423. Based on this analysis, Plaintiffs’ claims are not preempted even if this Court somehow concludes that “regulate” includes state common law. First, while Plaintiffs’ market loss harm is based on foreign countries’ *reaction* to Bayer’s contamination of the U.S. rice supply, none of their claims base liability (seek to impose a duty) relating to the movement of LLRICE into some other country. *See* discussion, *infra*, at 24-25. Second, Section 7756(a) does not preempt any and all state regulation – only that sort of regulation that seeks to “control,” “eradicate” or “prevent” the introduction or dissemination of a biological control organism, plant pest, or noxious weed. This language connotes prospective prescription of the specified evil. Plaintiffs bring claims for damages, not injunctive relief. *See* discussion, *infra*, at 27-30.

<sup>16</sup> The other cases cited by Bayer also address federal preemption statutes containing the word “requirements.” *Riegel v. Medtronic, Inc.*, \_\_\_ U.S. \_\_\_, 128 S.Ct. 999, 1007 (2008) (construing the Medical Device Amendments of 1976); *National Bank of Commerce v. Dow Chemical Co.*, 165 F.3d 602, 607-08 (8th Cir. 1999) (construing FIFRA’s language prohibiting states from imposing “any requirements for labeling or packaging in addition to or different from those required under [FIFRA].”). The language at issue in *National Bank of Commerce* was later held not to preempt state tort claims that did not impose requirements for labeling or packaging or claims that were inconsistent with FIFRA. *See Bates*, 544 U.S. at 444-45, 447.

precise and narrow on its face[,] the obviously broader language of the 1969 version extended that section’s pre-emptive reach. *Id.*

Section 7756(a) does not refer to state “requirements” or “prohibitions.” It does not use the word “standard”. It does not refer to state “law”. It does not combine these or any other words with the single word employed – “regulate.” The statute refers solely to state regulation and no more. The *Cipollone* plurality defined “regulation” as a positive state enactment, in contrast with state common law.<sup>17</sup> To use that Court’s phrase, Bayer offers no “good reason to believe” that Congress did not mean what it said. 505 U.S. at 522.

## 2. Additional authority supports this interpretation.

In *Missouri K&T*, the Supreme Court considered a state statute granting a right of action for damages to persons whose cattle were infected by diseased cattle brought into the state. The Court found that this statute was not “in any just sense, a regulation of commerce [because]. . . [i]t did nothing more than declare, as a rule of civil liability in Kansas, that anyone driving, shipping or transporting . . . into any county in that State [diseased] cattle . . . should be responsible in damage to any person injured thereby.” 169 U.S. at 627. Also, the statute could not “be deemed a regulation of commerce . . . simply because it may incidentally or indirectly affect such commerce . . . . That statute, we repeat, only embodies a rule of civil conduct prescribed by a statute whose government is competent to regulate . . . the relative rights and obligations of all within its jurisdiction.” *Id.* In short, the state statute providing a right of action for damages did not regulate

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<sup>17</sup> Justice Blackmun, writing for three of the Justices, “disagreed that the Labeling Act preempted state law claims at all, concluding that the phrase ‘state law’ in § 5(b) referred only to ‘positive enactments such as statutes and regulations.’” *Altria*, 129 S.Ct. at 505 (quoting *Cipollone*, 505 U.S. at 535).

commerce, but “only declare[d] a general principle respecting the liability of all persons within the jurisdiction of the state for torts resulting in [injury].” *Id.* at 632.<sup>18</sup>

In *Leipart v. Guardian Industries, Inc.*, 234 F.3d 1063 (9th Cir. 2000), the Ninth Circuit found that state common law claims were not preempted by the federal Consumer Product Safety Act, which provides that no State “shall have any authority to establish or to continue in effect any provision of a safety *standard or regulation* which prescribes any requirement as to [identified activities] . . . unless such requirements are identical to the requirements of the federal standard.” *Id.* at 1066 (quoting 15 U.S.C. § 2075(a)) (emphasis added). The Court found that common law tort claims did not constitute “regulations,” and even if certain of the claims constituted “requirements,” they were not preempted if based on violations imposed by federal standards. *Id.* at 1068, 1070.

In *Lohr*, the Court *rejected* the argument that by using the word “requirement,” in the Medical Device Amendment, Congress “signaled an intent to deprive States of any role” in protecting against dangerous medical devices. Rather, the Court found that the word “requirement” in that statute referred to positive state enactments of statutory and regulatory law. 518 U.S. at 489. In *Sprietsma*, the plaintiff sued an outboard boat engine designer for failing to equip the engine with propeller guards. Defendant argued that the common law claims were preempted by the Federal Boat Safety Act, a “comprehensive” enactment intended to establish national standards and encourage “greater uniformity of boating laws and regulations.” 537 U.S. at 523. The Act’s preemption clause provides:

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<sup>18</sup> The Court relied in part on *Telegraph Co. v. James*, 162 U.S. 650 (1896), in which it upheld a Georgia statute requiring telegraph companies to receive dispatches and transport them with due diligence, and imposing a penalty for failing to do so. There, it stated: “Can it be said that the imposition of a penalty for the violation of a duty which the [defendant] owed by the [common law] is a regulation of or an obstruction of . . . commerce . . .? We think not.” *Missouri K&T*, 169 U.S. at 635 (quoting *James*, 162 U.S. at 660).

Unless permitted by the Secretary . . . a State or political subdivision of a State may not establish or continue in effect, or enforce *a law or regulation* establishing a . . . safety standard or imposing a requirement for associated equipment . . . .

*Id.* at 524 (quoting 46 U.S.C. § 4306) (emphasis added). The Court found that the phrase “law or regulation” was “most naturally read as not encompassing common law claims for two reasons.” *Id.* at 526. The Court employed a strict construction of the preemption language, finding that the article “a” before the word “law” implies a discreteness embodied in statutes and regulations but not common law. Second, it said, “a word is known by the company it keeps.” *Id.* (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)). “[T]he terms ‘law’ and ‘regulation’ used together in the preemption clause indicated that Congress pre-empted only positive enactments. If ‘law’ were read broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express reference to ‘regulation’ . . . superfluous.” *Id.*

Here, Section 7756(a) uses *only* the word “regulate,” evincing a narrowly expressed and specific intent to preempt only positive state enactments. Congress used no word or phrase that would provide reference to state common law.

Common law torts are “less an arrogation of regulatory jurisdiction over [a particular issue] than a neutral forum for the orderly adjustment of private disputes.” *In re Welding Fume*, 364 F. Supp.2d at 686 (quoting *Pedraza*, 942 F.2d at 53). “Congress has long demonstrated aptitude for expressly barring common law actions where it so desires. The absence of such an explicit [or even implicit] reference to state common law . . . therefore counsels against a finding of express preemption.” *Myrick*, 13 F.3d at 1520 (quoting *Taylor v. General Motors Corp.*, 875 F.2d 816, 824-25 (11th Cir. 1989)).

Bayer's sweeping interpretation of Section 7756(a) would require great "interference with state legal remedies, producing a serious intrusion into state sovereignty while simultaneously wiping out the possibility of remedy for [Plaintiffs'] alleged injuries." *Lohr*, 518 U.S. at 488. "It is, to say the least, 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.'" *Id.* at 487 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)).

**C. None of Plaintiffs' Claims Seek to Regulate Articles "In Foreign Commerce."**

Even assuming that Plaintiffs' common law claims can somehow be viewed as "regulation," none attempts to regulate an article "in foreign commerce." Bayer makes the remarkable suggestion that a state may not regulate an article if it is even "available for export." Br. at 4. *See also id.* at 10.<sup>19</sup> In this day of global commerce, and particularly in the area of agricultural goods, Bayer's interpretation would strangle the ability of states to regulate anything, even within their own borders, if there is a possibility that it will be sold overseas. This interpretation is contrary to the language of Section 7756(a), and would virtually eviscerate Congress' recognition of state interests in Section 7756(b).

**1. Section 7756(a) is expressly limited to articles "in" foreign commerce as opposed to articles merely "affecting" it.**

State regulation, "in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it." *Sherlock v. Alling*, 93 U.S. 99, 103

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<sup>19</sup> In another portion of its brief, Bayer mischaracterizes Plaintiffs' claims as "based upon the introduction of LLRICE into foreign commercial channels." Br. at 2; *see also id.* at 3 ("[Bayer] . . . is therefore entitled to summary judgment on all of Plaintiffs' damage claims that arise from the presence of LLRICE in foreign commerce."). This mischaracterization seems to indicate that Bayer itself reads Section 7756(a) as operating only upon an article that is "in" or has entered into foreign commerce.

(1876); *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 428 (1963). “A state law may not be struck down on the mere showing that its administration affects . . . commerce in some way.” *Head*, 374 U.S. at 429. The express language of Section 7756(a) avoids any dilemma of whether Plaintiffs’ claims “affect” foreign commerce. Its preemptive effect extends only to regulation of an article “in” foreign commerce. That word has a narrow meaning that must be given effect.

The phrase “in” commerce is not synonymous with “affecting” commerce. *United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 276 (1975).<sup>20</sup> The Supreme Court has “drawn a sharp distinction between activities in the flow of interstate commerce and intrastate activities that affect interstate commerce.” *Id.* at 280 (citing *Schechter Corp. v. United States*, 295 U.S. 495, 542-44 (1935)). “Congress, as well, [has] repeatedly acknowledged its recognition of the distinction between legislation limited to activities ‘in commerce,’ and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce.” *Id.* “The history of Commerce Clause enactments reveals that the terms ‘in commerce’ and ‘affecting commerce’ are ones Congress uses regularly to create federal jurisdiction pursuant to its commerce power, and thus these terms have taken on particularized meanings.” *U.S. v. Ballinger*, 395 F.3d 1218, 1231 (11th Cir. 2005).

As defined by the Supreme Court, there are “three broad categories of Congress’ Commerce Clause authority: regulation of the channels of interstate commerce; regulation of the instrumentalities of interstate commerce; and regulation of intrastate

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<sup>20</sup> In this case, the Supreme Court considered the reach of Section 7 of the Clayton Act and whether it applied to activities of a business operating intrastate but affecting commerce. The Court gave a plain-language reading of the word “in” commerce, holding that it was less expansive than “affecting” commerce. Congress later amended the Clayton Act to expand its coverage to activities “affecting commerce” in response to the decision. H.R. Rep. No. 1107, 93d Cong., 2d Sess. 29-31 (1974).

conduct that substantially affects interstate commerce.” *Id.* at 1231 (citing *U.S. v. Lopez*, 514 U.S. 549, 558-59 (1995)). “Congress has at its disposal a specialized set of linguistic tools that enable it to clearly express just what type of commerce . . . it is asserting.” *Id.* “The words ‘affecting commerce,’ as the Supreme Court has repeatedly explained, are ‘words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power.” *Id.* at 1232 (citing cases). “The words ‘in commerce,’ in sharp contrast, have a much narrower meaning.” *Id.* “[A] statute employing the language ‘in commerce,’ the Court has said, covers ‘only persons or activities within the flow of interstate commerce.’” *Id.* (citing cases). “For more than 175 years of Commerce Clause precedent, this much has been clear: ‘Within the flow of commerce’ denotes movement of people or things across . . . borders.” *Id.* (citing cases). *See also, e.g., United States v. Schaefer*, 501 F.3d 1197 (10th Cir. 2007) (interpreting 18 U.S.C. §§ 2252(a)(2), making it a crime to receive child pornography by visual image that “has been mailed, or has been shipped or transported in interstate or foreign commerce,” to require evidence that the images traveled across state lines).

“In marked contrast to the broad ‘affecting commerce’ . . . language utilized in [other] statutes, . . . Congress retained the narrower ‘in commerce’” language in Section 7756(a). *Am. Bldg. Maint.*, 422 U.S. at 281. In its plain sense, this language means that the article regulated must be in movement into or out of the United States. *See Ballinger*, 395 F.3d at 1231. This interpretation otherwise is consistent with the goal expressed in the PPA and 7 C.F.R. Part 340 to prevent the *movement* of articles that may introduce or spread plant pests into or throughout this country. As with other statutes using the term “in” commerce, Congress had at least part of its focus on the channels of

commerce “in order that those channels will not become the *means* of promoting or spreading evil, whether of a physical, moral or economic nature.” *Id.* at 1227-28 (citing *e.g., Ky. Whip & Collar Co. v. Ill. Cent. R.R. Co.*, 299 U.S. 334, 347 (1937)) (“The anticipated evil or harm may proceed from something inherent in the subject of transportation as in the case of diseased or noxious articles, which are unfit for commerce.”) (emphasis in original).

Bayer states that Congress has determined that “all plant pests, noxious weeds [and] plants regulated under this title . . . are in or affect interstate or foreign commerce.” *Br.* at 10 (quoting 7 U.S.C. § 7701(9)). It is noteworthy that 7 U.S.C. § 7701(9) on which Bayer relies speaks of articles that are “in *or affect*” foreign commerce. By contrast, when speaking of preempting the regulation of those articles, 7 U.S.C. § 7756(a) uses only the phrase “*in* foreign commerce.” This distinction clearly indicates Congress’ understanding – and demarcation – of regulating articles that may be “in” foreign commerce versus those that may only “affect” it. Congress preempted only the former.

To read Section 7756(a) broadly to preclude state regulation of articles within their own borders because that regulation may in some respect indirectly “affect” or tangentially “involve” foreign commerce not only is contrary to its plain wording, but would “give a federal agency pervasive control over myriads of local businesses in matters heretofore traditionally left to local custom or local law. . . . An inroad upon local conditions and local standards of such far-reaching import as is involved here, ought to await a clearer mandate from Congress.” *Am. Bldg. Maint.*, 422 U.S. at 277.

**2. Bayer's interpretation of Section 7756(a) conflicts with Section 7756(b).**

The expansive interpretation advanced by Bayer also is at direct odds with Section 7756(b), which expressly permits states to “impose prohibitions or restrictions upon the movement in interstate commerce” of articles that are consistent with federal regulations. Clearly, Congress permits states to regulate plant pests and other articles that move into their borders. As clearly, Congress treats as distinct the movement of such articles through the United States (addressed in Section 7756(b)), and their movement between the United States and other countries (addressed in Section 7756(a)). Congress obviously contemplated that agricultural products grown in this country would be exported. *See, e.g.*, 7 U.S.C. § 7701 (6) (“export markets could be severely impacted by the introduction or spread of plant pests or noxious weeds into or within the United States”). If Section 7756(a) is interpreted to embrace every product “destined for export,” it swallows virtually all state regulation in contravention of the express permission granted by Section 7756(b).

**3. Bayer's interpretation invades principles of state sovereignty.**

Bayer's position also invades the very heart of federalist principles and state sovereignty. The Commerce Clause grants Congress the power to “regulate commerce with foreign nations and among the several states.” Const. art I, § 8 cl.3. The Supreme Court has interpreted this power to carry a negative limitation upon state regulation known as the “dormant” aspect of the Commerce Clause. This limitation “is driven by concern about economic protectionism – that is, regulatory measures designed to benefit [domestic] economic interests by burdening [foreign] competitors.” *Dep't of Revenue of Ky. v. Davis*, \_\_\_ U.S. \_\_\_, 128 S.Ct. 1801, 1808, 170 L.Ed.2d 685 (2008). At the same

time, however, “[t]he law has had to respect a cross purpose as well, for the Framers’ distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy.” *Id.* “[A] government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the clause abhors.” *Id.* at 1810. And courts “should be particularly hesitant to interfere . . . under the guise of the Commerce Clause where a local government engages in a traditional government function.” *Id.* (quoting *United Haulers Ass’n, Inc. v. Oneida-Herkinmer Solid Waste Mgmt. Auth.*, 550 U.S. \_\_\_, 127 S.Ct. 1786, 1796, 167 L.Ed.2d 655 (2007)). From earliest days, the Supreme Court has recognized the legitimate state interest in preventing the spread of animal or plant disease or other offending traits into state borders. State regulation of this kind is “not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated or property descend or be distributed . . . because application to contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the state off from [such] legislation . . . .” *Missouri K&T*, 169 U.S. at 632-33.

**4. Bayer does not contend that Plaintiffs’ claims operate against foreign commerce.**

Bayer does not suggest that any common law claim asserted by Plaintiffs operates upon the import or export of rice.<sup>21</sup> There is no assertion that if any claim is successful, a

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<sup>21</sup> In *Intel Containers Int’l Corp. v. Huddleston*, 507 U.S. 60 (1993), the Supreme Court upheld a state sales tax on the lease of cargo containers within Tennessee for use exclusively in international shipping. Container Conventions entered into by the United States prohibited any tax chargeable “by reason of importation” or “collected upon or in connection with the importation of goods.” *Id.* at 65. The state tax was not expressly preempted by this language since it was “of general application that does not

judgment for Plaintiffs will impede the flow of commerce with foreign nations. There is no hint that Plaintiffs' claims would somehow discriminate, or operate against foreign interests in favor of the United States. *See, e.g., Republic of Turkey v. OKS Partners*, 797 F. Supp. 64 (D. Mass 1992) (Commerce Clause protects foreign business entities only from legislation seeking to "prefer domestic business interests"; state was not "penalizing those who deal in foreign commerce in favor of its own citizenry"); *PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp. 2d 1179, 1202 (C.D. Cal. 2000) (state statute barring sale or distribution of repatriated cigarettes originally intended for sale in foreign countries did not discriminate against foreign retailers).<sup>22</sup>

Plaintiffs assert common law claims for, *e.g.*, nuisance, strict liability, negligence and negligence per se. As an initial matter, a state's common law cannot be considered a "regulation" within the meaning of the dormant Commerce Clause. *See, e.g., Crowley v. Cybersource Corp.*, 166 F. Supp.2d 1263 (N.D. Cal. 2001) (Defendant "cites no cases removing commercial activity from the reach of state tort law on dormant Commerce Clause grounds and the Court has found none."); *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777 (3d Cir. 1992) ("Though there are numerous cases holding state legislative

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discriminate against imported products either in its purpose or effect" and indeed, "bears no relation to importation whatsoever." *Id.* at 69.

<sup>22</sup> In fact, Bayer seems to assert just the opposite, contending, that Plaintiffs' state law theories "would import the European Union's standards and policies concerning genetically modified crops" in contravention of United States' standards. Br. at 18-19. While this assertion is plainly wrong (*see infra* at 35-37), it demonstrates the utter lack of prohibited state activity for purposes of a Commerce Clause analysis, which is not concerned with activity alleged to favor foreign interests over domestic interests. *Davis*, 128 S.Ct. at 1809. Such a concern "would lead to unprecedented and unbounded interference . . . with state and local government." *Id.* (quoting *United Haulers Ass'n*, 127 S.Ct. at 1796). Nor does the Commerce Clause protect individual or corporate business interests or the structuring of markets. *See, e.g., Wine And Spirits Retailers Inc. v. Rhode Island*, 481 F.3d 1, 15-16 (1st Cir. 2007) (The fact that state laws "may have a negative impact on [a company's] business model" does not show discriminatory effect. The dormant Commerce Clause does not protect "particular business structures or methods of operation."); *Tennessee Scrap Recyclers Ass'n v. Bredesan*, No. 08-5824, 2009 WL 348834 (6th Cir., Feb. 13, 2009) (same).

action invalid under the dormant commerce clause, we have found none invalidating liability founded on principles of state common law.”); *see also Benitez-Allende v. Alean Aluminio Do Brasil, S.A.*, 857 F.2d 26, 31 (1st Cir. 1988) (state may exercise long-arm jurisdiction over foreign defendant, which “does not involve instrumentalities of commerce . . . [but] concerns tort law, a subject matter that historically belongs to the states.”) (internal quote omitted). In any event, Plaintiffs’ common law claims do not in any way impact the movement of LLRICE between the United States and any foreign country. Each addresses Bayer’s conduct (within the United States) and its injury-producing effect on the residents of that state. To say that state tort law impermissibly “regulates” any activity that effectuates some external consequences is a far-reaching and far-fetched proposition. The absurd result of such reasoning would be an evisceration of state tort law (and most other state law), which in its broadest sense usually does have some kind of extraterritorial effects. *See, e.g., Bowman v. Niagara Machine and Tool Works, Inc.*, 832 F.2d 1052, 1056 (7th Cir. 1987) (upholding state statute of limitations on strict liability claims; burdens affecting litigations do not affect the stream of commerce but raise “particularly local concerns [and] [t]he mere fact that such considerations may also affect commercial decisions . . . does not implicate the Commerce Clause.”).<sup>23</sup> As importantly, if 7 U.S.C. § 7756(a) had the preemptive scope

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<sup>23</sup> *See also American Rockwool, Inc. v. Owens-Corning Fiberglas Corp.*, 640 F.Supp. 1411 (E.D.N.C. 1986) (upholding North Carolina Unfair Trade Practices Act, N.C. Gen. Stat. § 75-1.1 (1994) as against Commerce Clause challenge); *Itco Corp. v. Michelin Tire Corp., Commercial Div.*, 722 F.2d 42, 48 n. 9 (4th Cir.1983) (same). “Any time a single state’s law is applied to multi-state conduct, there is *some* effect on interstate commerce in the broadest sense, but that effect rarely burdens interstate commerce to a constitutionally impermissible extent.” *American Rockwool*, 640 F. Supp. at 1428

Bayer attributes to it, it would also invalidate a wide array of state statutes dealing with protection of crops within their borders.<sup>24</sup>

**5. Plaintiffs' claims base liability against Bayer only on contamination of the U.S. rice supply.**

Bayer's suggestion that Plaintiffs assert some sort of violation (or duty) in connection with LLRICE "in foreign commerce" is just wrong. Plaintiffs do allege that LLRICE found its way into the European market (Master Consolidated Amended Class Action Complaint (D.I. 1010) ("Complaint") ¶¶ 112-115), but Plaintiffs do not rely on that fact as an element of liability. Plaintiffs do not allege that Bayer violated any export treaty, statute, or regulation prohibiting the export of GM material onto foreign soil. At every possible point in the Complaint, Plaintiffs assert that what Bayer did wrong was to contaminate the *United States'* commercial rice supply. Complaint ¶¶ 174, 183, 224, 235, 240, 252, 256, 274, 283, 289, 330, 339, 375, 392, 409, 428, 439, 459. The result of that contamination was that foreign countries imposed restrictions upon, or refused outright to accept, any long-grain rice grown in the United States. This result was the

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<sup>24</sup> Many states have enacted statutes protecting against damage to crops. *See, e.g.*, Ark. Code 2-15-201; Ariz. Rev. Stat. Ann. § 3-114; Colo. Rev. Stat. § 35-31-201; Fla. Stat. § 604.60; Ga. Code § 4-11-30; Hawaii Rev. Stat. § 141-8; Iowa Code § 717A.2; Kan. Stat. Ann. § 47-1827; Miss. Code § 69-49-1; Mo. Rev. Stat. § 537.353; N.H. Rev. Stat. Ann. § 539:9; N.C. Gen. Stat. § 1-539.2B; N.D. Cent. Code § 32-03-53; Okla. Stat. tit. 2 § 5-105; 18 Pa. Cons. Stat. § 3310; 42 Pa. Cons. Stat. § 8313; S.C. Code Ann. § 46-1-75; S.D. Codified Laws Ann. § 21-60-1; W. Va. Code § 19-19-6. At least seven have enacted statutes regarding genetically modified organisms. *See* Fla. Stat. § 581.083; Idaho Code § 22-2016; Minn. Stat. §§ 18F.07; Neb. Rev. Stat. § 2-10,113; Wash. Rev. Code § 17.24.051; *see also* Ill. Rev. Stat. 430 §§ 95/0.01 *et seq.* (authorizing regulations); S.C. Code Ann. § 46-9-40 (same). It cannot be "properly concluded that because the products of domestic enterprise in agriculture. . . may ultimately become the subject of foreign commerce," the means "by which enterprise is fostered or protected, is legitimately within the import of the phrase foreign commerce . . . A pretension as far reaching as this would extend to contracts . . . would control the pursuits of the planter, the grazier, [and] the manufacturer . . . for there is not one of these avocations the results of which may not become the subjects of foreign commerce . . . Such a pretension would effectually prevent or paralyze every effort at internal improvement by the several states." *Samuel Veazie And Levi Young v. Wyman B.S. Moor*, 55 U.S. 568, 574 (1852) (emphasis added). *See also Taylor*, 477 U.S. at 151 (state retains "broad regulatory power to protect . . . the integrity of its natural resources"); *Eubanks v. Tucker*, 54 F. Supp. 1001 (S.D. Tex. 1944) (upholding state regulation of the sale of fish against challenge from wholesalers importing fish from Mexico).

*consequence* of Bayer's contamination and why Plaintiffs suffered market loss damages – it is not the basis of *liability* under any of their claims.

Because none of Plaintiffs' claims seek to “regulate [LLRICE] in foreign commerce,” Section 7756(a) does not apply. The Court need go no further. Nonetheless, Plaintiffs will address the remainder of Bayer's interpretive creations.

**D. None of Plaintiffs' Claims Fall Within the Objects of Section 7756(a).**

The last component of Section 7756(a) is that the state regulation be adopted “in order – (1) to control a plant pest or noxious weed; (2) to eradicate a plant pest or noxious weed; or (3) prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed.” 7 U.S.C. §7756(a)(1)-(3). None of Plaintiffs' claims fall into these categories.

**1. Bayer does not demonstrate that LLRICE is a “plant pest” or “noxious weed.”**

Bayer contends that Plaintiffs' claims constitute an attempt to regulate a “plant pest,” or “noxious weed” (inartfully separating these words from the remainder of the statute). Br. at 10-12.<sup>25</sup> Relying solely on allegations in the Complaint, Bayer says that LLRICE is, in fact, a plant pest or noxious weed. What Plaintiffs actually allege is that LLRICE is a “regulated article” subject to the provisions of 7 C.F.R. Part 340. Complaint ¶¶ 212, 263, 305, 345, 397. The fact that LLRICE was a regulated article does not *necessarily* mean it is a noxious weed or plant pest.

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<sup>25</sup> Bayer also asserts that LLRICE is a “plant” or “plant product,” but these words are not found in Section 7756(a), subparts (1), (2) or (3). Bayer does not suggest that LLRICE is a “biological control organism” within the meaning of Section 7756(a) (3).

During the time period at issue, APHIS did not regulate GM materials as noxious weeds,<sup>26</sup> and Bayer provides no evidence that LLRICE has been given that designation. Plaintiffs' claims in regard to the requirements of 7 C.F.R. Part 340 do not require that LLRICE be a "noxious weed."<sup>27</sup> See 7 C.F.R. §340.1 (defining "regulated article"); Complaint, Counts 6, 12, 17, 22, 28. Neither do they require that LLRICE actually be a "plant pest." A "regulated article" subject to the requirements of 7 C.F.R. Part 340 is defined as "[a]ny organism which has been altered or produced through genetic engineering, if the donor organism, recipient organism, or vector or vector agent belongs to any genera or taxa designated in § 340.2 and meets the definition of plant pest, or is an unclassified organism and/or an organism whose classification is unknown, or any product which contains such an organism, or any other organism or product altered or produced through genetic engineering which the Administrator, determines is a plant pest or has reason to believe is a plant pest . . . ." 7 C.F.R. § 340.1. See also 73 Fed. Reg. at

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<sup>26</sup> See 7 C.F.R. Part 340. On July 17, 2007, APHIS published a Draft Programmatic Environmental Impact Statement ("DEIS") evaluating regulatory alternatives under consideration, and soliciting public comment. See SOF ¶ 15; 72 Fed. Reg. 39021 (July 17, 2007). One of the issues under consideration was whether APHIS should broaden its "regulatory scope beyond genetically engineered organisms that may pose a plant pest risk to include genetically engineered plants that may pose a noxious weed risk and genetically engineered organisms that may be used as biological control agents." 72 Fed. Reg. at 39024 (Issue 1). On October 9, 2008, APHIS published a proposed revision to its regulations. 73 Fed. Reg. 60008 (October 9, 2008). APHIS explained the scope of its current regulation: "APHIS administers regulations in 7 CFR part 340 . . . the current regulations govern the introduction (importation, interstate movement, or release into the environment) of certain GE organisms termed 'regulated articles.' Regulated articles are essentially GE organisms which might pose a risk as a plant pest." *Id.* at 60009. One of the proposed revisions is to expand the scope of 7 C.F.R. § 340.0 to include noxious weeds. *Id.* at 60011.

<sup>27</sup> Bayer seems to suggest that because LLRICE was physically within the U.S. rice supply and caused damage, it is *ipso facto* a noxious weed or plant pest. Br. at 11-12. Bayer's logic proceeds from allegations in the Complaint addressing one aspect of Plaintiffs' damage. But Plaintiffs' damage does not necessarily depend upon the physical presence of LLRICE in their fields given that it was commingled within the U.S. rice supply resulting in testing, other restrictions, and the refusal of foreign trade partners to accept U.S. long-grain rice. For example, APHIS took action to prevent the planting and distribution of the long-grain rice seed Clearfield CL 131 because testing revealed the possible presence of genetic material, which turned out to be LLRICE. SOF ¶ 4-8. On December 28, 2006, the Arkansas State Plant Board passed new regulations that banned the planting of Cheniere rice in the state in 2007 and 2008, and required testing of all seed for the LLRICE trait SOF ¶ 9. These actions harmed rice producers whether or not LLRICE was actually present within their own fields.

60009 (“Regulated articles are essentially GE organisms which *might* pose a risk as a plant pest.”) (emphasis added). Based on this definition, LLRICE is regulated whether or not it is *actually* a plant pest, as required by Section 7756(a)(1), (2), and (3).

Of course, Plaintiffs’ claims also must “regulate” LLRICE “in foreign commerce” for Section 7756(a) to apply, which they do not.

**2. Plaintiffs’ claims do not seek to “control,” “eradicate,” or “prevent” the dissemination of plant pests or noxious weeds.**

Plaintiffs’ claims also are not founded on any duty to control, eradicate or prevent the dissemination of plant pests or noxious weeds in foreign commerce. In fact, the claims they assert does not address these articles at all. Rather, they are based on general legal tenets of common applicability.

While finding that state common law claims fell within the phrase “requirements or prohibitions” in Public Health Cigarette Smoking Act of 1969, the Court in *Cipollone* limited the preemptive reach of the statute to claims for which the legal duty constituted a “requirement or prohibition based on smoking or health” that is “imposed under State law with respect to . . . advertising or promotion.” 505 U.S. at 524. Thus, claims based on practices unrelated to advertising or promotion were not preempted. *Id.* at 524-25. Neither were the plaintiffs’ breach of warranty claims. *Id.* at 525. Plaintiffs’ fraudulent misrepresentation claims also were not preempted because they were “predicated not on a duty ‘based on smoking and health’ but rather, on a more general obligation – the duty not to deceive.” *Id.* at 528-29. The same was true of the plaintiffs’ claim of conspiracy to misrepresent or conceal facts concerning the health hazards of smoking. *Id.* at 530. In *Altria*, the Court engaged in a similar restrictive analysis, holding that common law duties that are general in nature and not targeted to smoking and health are not

preempted, and also that *harms* related to smoking and health are not the same as rules related thereto. 129 S.Ct. at 547.

In *Altria*, the Court analyzed a statute providing that “no requirement or prohibition based on smoking and health shall be imposed under State law.” *Id.* at 544 (*quoting* 15 U.S.C. § 1334(b)). The Court endorsed the interpretation adopted by the plurality in *Cipollone* holding that “the phrase ‘based on smoking and health’ modified the state-law rule at issue rather than a particular application of that rule.” 129 S. Ct. at 545. In other words, the inquiry is “whether the legal duty that is the predicate of the common-law damages action constitutes a ‘requirement or prohibition based on smoking and health.’” *Id.* (*quoting* *Cipollone*, 505 U.S. at 524). Thus, the Court held that a general State law duty not to deceive was not preempted. *Id.* at 549. The Court specifically rejected the argument that “a general prohibition of deceptive practices is ‘based on’ the harm caused by the specific kind of deception to which the prohibition is applied in a given case.” *Id.* at 547.

Similarly, the common law bases for Plaintiffs’ claims do not relate to plant pests, noxious weeds, or the control, eradication, or dissemination thereof. They are general tenets of liability having general application. *See Cipollone*, 505 U.S. at 528-29; *Altria*, 129 S.Ct. at 54; *see also U.S. v. Stanko*, 491 F.3d 408, 418 (8th Cir. 2007) (“[N]othing in the text of the FMIA indicates an intent to preempt state unfair trade practices laws in general.”). The North Carolina Unfair Trade Practices Act (Count 33) also does not deal particularly with plant pests or noxious weeds and does not constitute a “regulation” of those articles. *See, e.g., Total T.V. v. Palmer Communications, Inc.*, 69 F.3d 298, 301 (9th Cir. 1995) (California Unfair Practices Act did not “regulate” rates for purposes of

federal Cable Act preemption clause providing that no state may “regulate the rates for the provision of cable services.” Congress “clearly did not intend the Cable Acts to preempt generally applicable state antitrust laws such as the [California statute.]”).

The *only* claim asserted by Plaintiffs that even arguably deals with plant pests or noxious weeds are those Counts asserting negligence per se based on Bayer’s violation of 7 C.F.R. Part 340. Even here, however, a verdict in Plaintiffs’ favor would not be “in order to” – *i.e.*, for the purpose or with the effect of – “control[ing],” “eradicate[ing],” or “prevent[ing]” anything. Plaintiffs seek only damages, not injunctive relief. If anything, Congress’ choice of words in Section 7756(a) (“in order to” control, eradicate or prevent) solidifies the understanding that Section 7756(a) is meant only to preclude states from “regulating” via statute or regulation that prescribes current or future conduct (to the extent it involves an article “in foreign commerce”). While state enactments are “prescriptive or normative,” state common law claims for damages are “reactive,” or focus on conduct after an injury has occurred. *Pedraza*, 942 F.2d at 53 n.5. Even if Section 7756(a) were more broadly written to include state law “requirements” (which it was not), there is a difference between state law requirements and state law remedies. *See Symens v. SmithKline Beecham Corp.*, 152 F.3d 1050, 1055 (8th Cir. 1998) (holding that common law claims were not preempted by the Virus-Serum-Toxin Act, 21 U.S.C. §§ 151-159, to “the extent they sought relief for alleged violations of the federal substantive standards.”). And again, to fall within the ambit of Section 7756(a), whatever requirement the state might prescribe must be upon an article that is “in foreign commerce.” As discussed above, none of Plaintiffs’ claims predicate liability upon Bayer’s violation of any rule, standard, duty, requirement, or obligation pertaining to the

movement of LLRICE into or out of any foreign country.<sup>28</sup> And no action that Bayer might have taken to comply with any duty implicated (*e.g.*, placing a larger buffer around its experimental rice facilities or implementing more secure protections against contamination) implicate foreign commerce in any way.

For all the reasons addressed, Bayer's express preemption argument must fail. It is inconsistent with the plain language of Section 7756(a), is contrary to Section 7756(b), and wholly at odds with any reasonable interpretation of congressional intent not to displace matters of particularly local concern.

## **II. PLAINTIFFS' CLAIMS ARE CONSISTENT WITH THE PPA.**

Citing purported U.S. policy favoring genetically modified crops, Bayer complains that the use of state theories of tort liability "would discourage the further development of genetically engineered crops as those theories of liability are different from and much more restrictive than the federal governments' regulatory regime." Br. at 18. This argument smacks of implied field preemption, which Bayer professes not to be asserting. *Id.* at 8 n.5. Plaintiffs, however, will respond. First, Bayer is completely wrong if it is suggesting that Congress sanctioned the unapproved introduction of regulated articles, even at "low levels" within the United States. Second, Bayer's characterization of APHIS' conclusion in regard to the unauthorized introduction of LLRICE is spectacularly overstated. Third, Bayer's suggestion that state involvement in genetically modified material has been prohibited is expressly contradicted by Section 7756(b). Finally, Plaintiffs' damage claims are entirely consistent with federal standards.

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<sup>28</sup> Again, the negligence per se claims alleging 7 C.F.R. Part 340 (Counts 6, 12, 17, 22, 28) concern the unauthorized introduction of LLRICE into the *United States'* rice supply, not the rice supply of any foreign country.

**A. Low-Level Presence Of LLRICE Is Not Sanctioned By APHIS.**

Bayer strongly implies, if it doesn't say so outright, that the U.S. Government has sanctioned the "low-level presence of LLRICE in commercial rice." Br. at 7, 19. As Bayer must know, this is not true.

The regulations at 7 C.F.R. Part 340 do not make any exception for "low-level" presence of GM material that has been introduced without permit or notification under the procedures outlined in 7 C.F.R. § 340.3 and 7 C.F.R. § 340.4. *See* 7 C.F.R. § 340.0 ("No person shall introduce *any* regulated article unless" he does so by permit or notification) (emphasis added). APHIS issues permits or accepts notifications of release that require adherence to certain performance standards to "ensure complete confinement of the GE material." BRS Factsheet (February 2006) (SOF ¶ 10). *See also* APHIS Factsheet (March 2005) (GE material must be introduced in accordance with specified performance standards "to ensure confinement of the regulated material") (SOF ¶ 11); APHIS Policy on Responding to the Low-Level Presence of Regulated Genetically Engineered Plant Materials (SOF ¶ 12) at 1 ("The mixing of low levels of GE plant materials may result in unauthorized introductions of regulated materials in, for example, commercial seeds and grain. . . .[T]he developer must adhere to APHIS regulations and requirements to ensure, through appropriate measures, confinement of the regulated material.") (emphasis added). *Accord* APHIS Low-Level Presence Fact Sheet, March 2007 (SOF ¶ 13) at 1 ("Developers must adhere to certain performance standards or conditions to ensure that the regulated GE organisms do not persist in the environment or enter the food or feed supply.").

On March 27, 2007, APHIS published a “Policy on Responding to the Low-Level Presence of Regulated Genetically Engineered Plant Materials.” 72 Fed. Reg. 14649 (March 27, 2007).<sup>29</sup> There and subsequently, APHIS discussed this policy, which is directed to how APHIS *responds* to low-level presence. “Developers must [still] comply with all APHIS regulations and permit conditions *to prevent the release of regulated GE material.*” March 27, 2007 APHIS News Release (SOF ¶ 14) (emphasis added). Whether or not APHIS takes remedial or enforcement action, an unauthorized introduction at any level is still a violation. 72 Fed. Reg. at 14649. In its July 17, 2007 DEIS (SOF ¶ 15), APHIS addressed the low-level policy in connection with regulatory alternatives being evaluated. *See also* 72 Fed. Reg. 39021 (July 17, 2007). It stated:

Issue 7.           The current regulations *have no provision for* the low-level presence of regulated articles in commercial crops, food, feed, or seed of GE plant material that has not completed the required regulatory processes. *Should low-level occurrences of a regulated article be exempted from regulation?*

DEIS at vii-viii (emphasis added); 72 Fed. Reg. at 39024 (same). In commentary, APHIS reiterated that “current regulations do not expressly allow for [low-level] occurrence.” APHIS stated that it was considering revision to make low-level incidents “non-actionable,” meaning that “agency action to restrict movement or otherwise prevent environmental introduction is not necessary.” APHIS made clear, however, that “such

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<sup>29</sup> This policy was not a formal rule but a “clarification” or “guidance” document. These policy statements are not binding. *See* OMB Notice Bulletin, 72 Fed. Reg. 3432, 3434 (Jan. 25, 2007) (a guidance document does not “impose a legally binding requirement”). APHIS’ March 26, 2007 Policy on Responding to Low-Level Presence expressly states: “The policy statement does not confer any rights upon or create any rights for any person and does not operate to bind APHIS or the public . . . .” 72 Fed. Reg. 14649.

materials *are still regulated and any introductions not in accordance with the regulations or permit conditions are unlawful.*” SOF ¶ 16, DEIS at 152-153 (emphasis added).<sup>30</sup>

It has always been, and continues to be, APHIS’ policy to contain and prevent the release of unapproved GM material, regardless of its level. In any event, Bayer does not begin to explain how APHIS’ policy on low-level presence is relevant to the issue before this Court, *i.e.*, whether 7 U.S.C. § 7756(a) expressly preempts Plaintiffs’ claims. The Court should disregard Bayer’s citation to this policy, as well as its mischaracterizations about APHIS’ investigation discussed below.

**B. APHIS’ Enforcement Decision Against Bayer Is Not Relevant.**

Bayer also states that “APHIS investigated the very acts and circumstances that gave rise to this litigation, and not only declined to pursue enforcement action against Bayer, but also did not impose any restrictions on the use, consumption or export of commercial rice containing trace amounts of LLRICE.” Br. at 18; *see also id.* at 7.<sup>31</sup> Bayer suggests that Plaintiffs’ claims are in “contrast” with these supposed findings, but does not elaborate on this suggestion or provide any meaningful analysis in terms of how this bears on its preemption analysis. Indeed, it appears that Bayer brings forth APHIS’ investigative report for no reason other than to add flavor and some sort of perceived sympathy value. That effort is completely inappropriate here where the merits of

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<sup>30</sup> APHIS has now published proposed revisions to its regulations. 73 Fed. Reg. 60008 (October 9, 2008). It did *not* eliminate low-level presence from regulatory oversight. APHIS does propose “to establish criteria under which the occurrence of a low level presence (LLP) of GE materials in seeds or grain may not be cause for agency remedial action.” *Id.* at 60025. However, “[t]hese criteria are intended to apply *only* to APHIS’ decision to take or order remedial action in the event that LLP occurs.” Noncompliance with regulations would still be a violation. *Id.*

<sup>31</sup> Bayer’s representation that APHIS did not act to impose restrictions on the use or consumption of commercial rice contaminated by LLRICE is, of course, wrong. APHIS certainly did impose such restrictions. On and after March 4, 2007, APHIS took action to prevent the planting and distribution of Clearfield CL 131, and on March 9, 2007, APHIS prohibited further distribution or planting of 2005, 2006 and 2007 registered or certified Clearfield CL 131 rice seed. SOF ¶ 4-8.

Plaintiffs' claims are not at issue. The only question is whether Plaintiffs' claims are expressly preempted by Section 7756(a) relating to articles in foreign commerce.

Bayer does not go so far as to actually say that APHIS determined that Bayer did nothing wrong, although Bayer implies it. Whether by words or implication, however, any suggestion that APHIS made such a determination is flatly incorrect.

In its "Report of LibertyLink Rice Incidents" ("LLRICE Report") (attached to Bayer's motion as Exhibit B-1), APHIS stated that one of the objectives of its investigation was to determine "whether any USDA regulations were violated." See LLRICE Report at 4. APHIS did not expressly state an answer to that question, but did characterize the entry of LLRICE 601 and LLRICE 604 into the commercial rice supply as an "unauthorized release." *Id.* at 2. APHIS otherwise stated that: "Given the lack of available information and evidence, APHIS was unable to make any *definitive* determinations that could have resulted in enforcement action . . . during the investigation, it was discovered that some records that might have been pertinent had not been maintained and were not available. LLRICE Report at 2-3 (emphasis added). Clearly, APHIS' decision not to pursue enforcement action was not based on a finding that Bayer did or did not violate the PPA or any of its corresponding regulations, but instead was based on what APHIS deemed to be a lack of available evidence.<sup>32</sup> In *Sprietsma*, the Supreme Court held that "[t]he FTC's failure to require [defendants] to correct their allegedly misleading use of 'light' [cigarette] descriptors is not evidence

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<sup>32</sup> APHIS recently gave a summary "of major incidents of *noncompliance* with APHIS biotechnology regulations from 1995 through present." Bayer's LLRICE release is listed among these incidents. APHIS Newsroom Publication (last modified May 29, 2008) (SOF ¶ 17) (emphasis added).

[that it condoned that use]; agency nonenforcement . . . is not the same as a policy of approval.” 129 S.Ct. at 550. The same is true here.

At bottom, whether or not APHIS took enforcement action against Bayer has no bearing on whether Section 7756(a) preempts Plaintiffs’ claims.

**C. Plaintiffs’ Claims Are Not Preempted by Federal Regulation.**

Bayer also suggests that Section 7756(a) embodies a congressional decision that “individual state laws should not be used to hinder” the development of genetically engineered crops regulated under a federal regulatory regime. Br. at 19 (citing *Riegel*, 128 S.Ct. at 1009). This is an unarticulated field preemption argument. It has no merit. Bayer does not forthrightly assert field preemption because it legitimately cannot make that argument. As an initial matter, the comprehensiveness of a federal agency’s treatment of a particular subject does not indicate a congressional intent that the states should have no involvement. *Faculty Senate of Florida Int’l Univ. v. Winn*, 477 F. Supp. 2d 1198, 1205 (S.D. Fla. 2007). Here, Congress expressly spoke to whether USDA regulation should occupy the field exclusively to oust all state participation, concluding in Section 7756(b) that it should not. In Section 7756(a), Congress spoke narrowly and precisely about what should be the area of exclusive federal activity: regulation of articles that are “in foreign commerce.” The fact that APHIS regulates importation of GM materials *into* the United States, but not their export *out* of the United States, also indicates a narrow view of Congress’ concerns. *See supra* note 7. Perhaps Congress was concerned that a state would quarantine an imported crop inconsistent with federal action, and in that way hinder the Federal Government’s ability to deal with the importing country. That scenario is not involved in this case.

To the extent Bayer is arguing that Plaintiffs' claims "engender foreign policy problems," Sections 7756(a) and 7756(b) speak to the contrary. Section 7756(a) does not bar common law claims, and prohibits states from regulating only articles "in" foreign commerce. Section 7756(b) expressly permits states to regulate consistent with standards set by APHIS. "Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not pre-empted. *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 600 (8th Cir. 2005) (quoting *Cipollone*, 505 U.S. at 517); *see also Davenport v. Farmers Ins. Group*, 378 F.3d 839, 842 (8th Cir. 2004) ("When Congress has spoken expressly, however, the preemptive scope of the federal law is governed entirely by the express language."); *Itel Containers*, 507 U.S. at 75 (state tax on a transaction occurring in the state did not affect a tax in connection with "importation," the only thing prohibited by Container Conventions with foreign countries). The Supreme Court has "never suggested . . . that the Foreign Commerce Clause insists that the Federal Government speak with any particular voice." *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 13 (1986). By expressly permitting state involvement, Congress has indicated that "the essential attributes of nationhood will not be jeopardized by States acting as independent economic actors." *Id.* at 12. Indeed, "[i]t would turn dormant Commerce Clause analysis entirely upside down to apply it . . . in such a way as to *reverse* the policy that the Federal Government has elected to follow." *Id.* (emphasis original).

**D. Plaintiffs' Claims Are Consistent With Congressional Intent.**

In *Guam Fresh*, the Ninth Circuit held that state statutes regulating agricultural pests, plant disease, and quarantine were not preempted by the Plant Quarantine Act of

1912, one of the predecessors of the PPA. Like Section 7756(b), the version of the Plant Quarantine Act in effect at the time gave states the authority to participate in the regulation of plant pests. “[I]t is clear that Congress contemplated a statutory scheme in which state regulation supplements federal law by restricting the entry of [plant] pests of particularly local concern.” 849 F.2d at 438. This “services the central purpose of the statute, which is to prevent the spread of plant pests and diseases.” *Id.* “If states are not free to prevent infestations from being turned away at their borders, many pests and diseases will spread . . . . In this context, it cannot be said that the provisions of the [state agricultural law], which are designed to serve the same purpose, are in conflict with the federal scheme.” *Id.*;<sup>33</sup> *see also Parker*, 317 U.S. at 367 (upholding state statutes to stabilize marketing and maintain prices of raisin crops; effect on interstate commerce was not greater than contemplated by the federal statutes).

There is a “legion of cases upholding parallel requirements to federal violations as actionable under state law.” *In re Medtronic, Inc.*, 465 F. Supp.2d 886, 900 (D. Minn. 2006). State law damage claims that are consistent with federal standards do not impermissibly tread on federal ground. To the contrary, state tort law often is complimentary to federal regulatory schemes, providing an “important remedial role” in compensating injured parties. *Sprietsma*, 537 U.S. at 64. The Supreme Court has stated:

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<sup>33</sup> In *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000), cited by Bayer, the Court struck down a Massachusetts law restricting the authority of state agencies to purchase goods from companies doing business with Burma under an *implied* conflict preemption analysis, finding that the statute was an obstacle to the accomplishment of Congress’ objectives under a federal act imposing sanctions on Burma. Bayer does not make an implied conflict preemption argument here, and does demonstrate how Plaintiffs’ claims in any way make impossible Bayer’s compliance with both federal and state law, or impair the Federal government’s relations with any foreign country. *See Wyeth*, Slip Op. at 15 (defendant failed to offer “clear evidence” of conflict preemption).

Nothing in [the federal statute] denies . . . a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements . . . . [A]dditional elements of the state-law cause of action would make the state requirements narrower, not broader, than the federal requirement. While such a narrower requirement might be ‘different from’ the federal rules in a literal sense, such a difference would surely provide a strange reason for finding pre-emption of a state rule insofar as it duplicates the federal rule. The presence of a damages remedy does not amount to the additional or different ‘requirement’ that is necessary under the statute; rather, it merely provides another reason for . . . [compliance] with identical existing ‘requirements’ under federal law.

*Lohr*, 518 U.S. at 495. *See also Wyeth*, Slip Op. at 18; *Bates*, 544 U.S. at 449. The claims Plaintiffs assert are consistent with, and only reinforce, the federal scheme.

### **CONCLUSION**

For all these reasons, Bayer’s motion for partial summary judgment should be denied.

Respectfully submitted,

**GRAY, RITTER & GRAHAM, P.C.**

By: /s/ Don M. Downing  
Don M. Downing, Bar # 41786  
Gretchen Garrison, Bar # 3189  
701 Market Street, Suite 800  
St. Louis, Missouri 63101-1826  
Tel: (314) 241-5620  
Fax: (314) 241-4140  
ddowning@grgpc.com  
ggarrison@grgpc.com

*Plaintiffs’ Designated Co-Lead and Co-Interim Class Counsel and Liaison Counsel*

By: /s/ Adam J. Levitt  
Adam J. Levitt  
Stacey T. Kelly  
**WOLF HALDENSTEIN ADLER  
FREEMAN & HERZ LLC**  
55 West Monroe Street, Suite 1111  
Chicago, Illinois 60603  
Tel: (312) 984-0000  
Fax: (312) 984-0001  
levitt@whafh.com

*Plaintiffs' Designated Co-Lead and Co-  
Interim Class Counsel*

Richard J. Arsenault  
John Randall Whaley  
Jean Paul P. Overton  
**NEBLETT BEARD & ARSENAULT,  
LLP**  
2220 Bonaventure Court, P.O. Box 1190  
Alexandria, Louisiana 71301  
Tel: (800) 256-1050  
Fax: (318) 561-2591

Scott E. Poynter  
**EMERSON POYNTER LLP**  
500 President Clinton Avenue, Suite 305  
Little Rock, Arkansas 72201  
Tel: (501) 907-2555  
Fax: (501) 907-2556

Stephen A. Weiss  
Diogenes P. Kekatos  
James A. O'Brien III  
**SEEGER WEISS LLP**  
One William Street  
New York, New York 10004  
Tel: (212) 584-0700  
Fax: (212) 584-0799

Joe R. Whatley Jr.  
Deborah Clark Weintraub  
Adam P. Plant  
**WHATLEY DRAKE & KALLAS LLP**  
2001 Park Place North, Suite 1000  
Birmingham, Alabama 35203  
Tel: (205) 328-9576

Fax: (205) 328-9669

William Chaney  
James L. Reed  
William J. French  
Michael Kelsheimer  
Drew York  
**LOOPER REED & MCGRAW**  
1601 Elm Street Suite 4100  
Dallas, Texas 75201  
Tel: (214) 237-6403  
Fax: (214) 953-1332

Ralph E. Chapman  
Sara B. Russo  
**CHAPMAN, LEWIS & SWAN**  
501 First Street  
P. O. Box 428  
Clarksdale, Mississippi 38614  
Tel: (662) 627-4105  
Fax: (662) 627-4171

*Plaintiffs' Executive Committee*

**CERTIFICATE OF SERVICE**

I, the undersigned, do hereby certify that I have this 10th day of March 2009, electronically filed a copy of the foregoing with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the parties of record.

/s/ Don M. Downing