STATE OF SOUTH DAKOTA)
:SS
COUNTY OF UNION)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

BEEF PRODUCTS, INC., BPI TECHNOLOGY, INC. and FREEZING MACHINES, INC., Plaintiffs, vs. AMERICAN BROADCASTING COMPANIES, INC., ABC NEWS, INC., DIANE SAWYER, JIM AVILA, DAVID KERLEY, GERALD ZIRNSTEIN, CARL CUSTER, and KIT FOSHEE, Defendants.	CIV# 12-292 Judge Cheryle Gering **PLAINTIFFS' OPPOSITION TO ABC DEFENDANTS' MOTION TO DISMISS ALL CLAIMS OF PLAINTIFF BEEF PRODUCTS, INC.**

CRARY HUFF RINGGENBERG
HARTNETT & STORM, P.C.

Daniel L. Hartnett
Sabrina L. LaFleur Sayler
711 Sioux Point Road, Suite 200
Dakota Dunes, South Dakota 57049
Tel.: (605) 232-3340
Fax: (605) 232-8931

WINSTON & STRAWN LLP

Dan K. Webb (pro hac vice)
J. Erik Connolly (pro hac vice)
Nicole E. Wrigley (pro hac vice)
35 West Wacker Dr.
Chicago, Illinois 60601
Tel: (312) 558-5600
Fax: (312) 558-5700

Attorneys for Plaintiffs Beef Products, Inc., BPI Technology, Inc., and Freezing Machines, Inc.

TABLE OF CONTENTS

Page

INTRODUCTION 1

OVERVIEW OF ARGUMENT 2

SUMMARY OF FACTS 4

LEGAL STANDARDS 6

ARGUMENT 7

I. The Court only determines whether a reasonable juror could conclude that Defendants stated or implied false facts. 7

A. Defendants mischaracterize the scope of actionable defamation and disparagement. . 8

1. Defendants are liable for publishing "opinions" that imply false facts. 8

2. Defendants are liable for implying false facts that are not expressly stated. 10

3. Publications that contain accurate and inaccurate facts are actionable. 11

B. Defendants raise disputed issues of fact for the jury to decide, not grounds for dismissal. 13

II. The Complaint adequately alleges claims based on Defendants' description of LFTB as "pink slime" (Counts 1 & 10). 15

A. Defendants' description of LFTB as "pink slime" implied several false facts. 15

1. Defendants implied LFTB is not beef, not safe, and not nutritious. 16

2. Defendants told consumers they were providing facts, not rhetorical hyperbole. . 18

3. There is no precedent for concluding Defendants' description was merely rhetorical hyperbole. 19

B. Defendants' description was not substantially true. 21

C. Defendants' non-defamatory interpretation of "pink slime" is irrelevant. 22

III. The Complaint adequately alleges claims based on Defendants' other false statements about BPI and LFTB. 23

A. Defendants falsely stated that LFTB is not really beef (Counts 2 & 11). 23

1. Defendants' statements were not substantially true. 24

2. Defendants are liable for publishing alleged "opinions." 26

B. Defendants falsely stated that LFTB is a filler (Counts 3 & 12). 27

C. Defendants falsely stated that LFTB is a substitute product (Counts 4 & 13). 28

D. Defendants falsely accused BPI of economic and food fraud (Counts 5 & 14). 29

1. Defendants implied BPI defrauded consumers who purchased ground beef made with LFTB. 29

2. Defendants did not mitigate the false implication. 30

3. Defendants are liable for publishing alleged "opinions." 31

E. Defendants falsely described the raw material used by BPI to produce LFTB (Counts 6 & 15). 32

1. Defendants' descriptions were not substantially true. 32

2. Defendants are liable for publishing alleged "opinions." 34

F. Defendants falsely stated BPI's raw material was once used only for dog food and cooking oil (Counts 7 & 16). 35

G. Defendants falsely stated LFTB is more like a gelatin than beef (Counts 8 & 17). ... 36

H. Defendants falsely stated LFTB's protein comes from connective tissue (Counts 9 & 18). 38

IV. The Complaint adequately alleges claims based on Defendants' false implications about BPI and LFTB. 38

A. Defendants falsely implied that LFTB is not really beef (Counts 19 & 23). 39

1. A reasonable juror could conclude that Defendants implied LFTB is not really beef. 39

2. Defendants did not mitigate the false implication. 40

B. Defendants falsely implied that LFTB is not safe for consumption (Counts 20, 24 & 26). 42

1. A reasonable juror could conclude that Defendants implied LFTB is not safe. 42

2. Defendants did not mitigate the false implication. 44

C. Defendants falsely implied that LFTB is not nutritious (Counts 21 & 25). 45

1. Defendants concede they made false statements about LFTB's nutrition. 45

2. A reasonable juror could conclude that Defendants implied LFTB has little to no nutritional value. 46

3. Defendants did not mitigate the false implication. 47

D. Defendants falsely implied that BPI improperly obtained approval for LFTB (Count 22). 48

1. A reasonable juror could conclude Defendants implied BPI improperly obtained approval 48

2. Consumer comments demonstrate that Defendants' reports implied BPI improperly obtained approval. 50

V. Defendants improperly attempt to bar agricultural companies in South Dakota from seeking recourse for false statements about their products. 51

A. BPI can assert defamation claims because Defendants' false statements impugned BPI's reputation. 51

1. Defamation claims are permitted based on false statements about a plaintiff's product. 52

2. Defendants impugned BPI's reputation and integrity. 53

B. BPI can assert common law product disparagement claims because the AFPDA did not preempt them. 54

1. The AFPDA created a new statutory remedy for agricultural companies. 55

2. The AFPDA did not eliminate common law claims. 56

a. The AFPDA contains no language negating common law claims. 56

b. The AFPDA does not cover the whole subject matter of common law disparagement claims. 57

c. AFPDA is not the exclusive remedy for agricultural companies. 58

d. BPI's common law claims do not conflict with the AFPDA. 59

3. There is no precedent for preempting BPI's common law claims. 59

VI. The Complaint adequately alleges claims based on Defendants' interference with BPI's business relationships (Count 27). 61

A. Defendants concede the claim is adequately pled. 61

B. News organizations are not immune from tortious interference claims. 61

TABLE OF AUTHORITIES

Page(s)

CASES

Aequitron Med., Inc. v. CBS, Inc.,
No. 93-cv-950, 1994 WL 30414 (S.D.N.Y. Feb. 2, 1994) 62

Barber Asphalt Paving Co. v. Austin,
186 F. 443 (8th Cir. 1911) 58

Bell Atl. v. Twombly,
550 U.S. 544 (2007).....6

Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655,
39 F.3d 191 (8th Cir. 1994) 20

BJC Health sys. v. Columbia Cas. Co.,
348 F.3d 685 (8th Cir. 2003) 22

Brodsky v. Journal Publ'g Co.,
73 SD 343, 42 N.W.2d 855 (1950).....13

Brown & Williamson Tobacco Corp. v. Jacobson,
713 F.2d 262 (7th Cir. 1983) 62

Builders Supply Co., Inc. v. Carr,
276 N.W.2d 252 (S.D. 1979).....13

Burnett v. Myers,
42 SD 233, 173 N.W. 730 (1919).....57, 60, 61

Capuano v. Outlet Co.,
579 A.2d 469 (R.I. 1990).....36

Cianci v. New Times Publ'g Co.,
639 F.2d 54 (2d Cir. 1980).....7

City of Lemmon v. U.S. Fid. & Guar. Co.,
293 N.W.2d 433 (S.D. 1980).....60, 61

Clark Cnty. v. Sioux Equip. Corp.,
2008 SD 60, 753 N.W.2d 406.....56

Cont'l Nut Co. v. Robert L. Berner Co.,
345 F.2d 395 (7th Cir. 1965) 52

Curtis Publ'g Co. v. Butts,
388 U.S. 130 (1967) 62

Dulgarian v. Stone,
652 N.E.2d 603 (Mass. 1995) 63

Ferlauto v. Hamsher,
88 Cal. Rptr. 2d 843 (Cal. Ct. App. 1999) 14

Finck v. City of Tea,
443 N.W.2d 632 (S.D. 1989) 20, 21

Flamm v. Am. Ass'n of Univ. Women,
201 F.3d 144 (2d Cir. 2000) 9, 15, 19

Fox Sports Net N., LLC v. Minn. Twins P'ship,
319 F.3d 329 (8th Cir. 2003) 21

Frontier Props. Corp. v. Swanberg,
488 N.W.2d 146 (Iowa 1992) 58

Gambardella v. Apple Health Care, Inc.,
863 A.2d 735 (Conn. App. Ct. 2005) 14

Gaylord Broad. Co., L.P. v. Francis,
7 S.W.3d 279 (Tex. App. 1999) 7, 9, 15

Gen. Prods. Co. v. Meredith Corp.,
526 F. Supp. 546 (E.D. Va. 1981) 7, 11, 53

George Golf Design, Inc. v. Greenbrier Hotel Corp.,
No. 5:10-cv-01240, 2012 WL 4748812 (S.D. W.Va. Oct. 4, 2012) 10, 15

Georgetown Manor, Inc. v. Ethan Allen, Inc.,
991 F.2d 1533 (11th Cir. 1993) 62

Graco, Inc. v. PMC Global, Inc.,
No. 08-1304, 2009 WL 904010 (D.N.J. Mar. 31, 2009) 10

Gross v. New York Times Co.,
623 N.E.2d 1163 (N.Y. Ct. App. 1993) 9, 14, 19, 31

Hobart v. Ferebee,
2004 SD 138, 692 N.W.2d 509 56

Hohm v. City of Rapid City,
2008 SD 65, 753 N.W.2d 895 60

Hok Sport, Inc. v. FC Des Moines, L.C.,
495 F.3d 927 (8th Cir. 2007) 56

Huggins v. Povitch,
No. 131164/94, 1996 WL 515498 (N.Y. Sup. Ct. Apr. 19, 1996) 63

Hy Cite Corp. v. Regal Ware, Inc.,
No. 10-cv-168-WMC, 2011 WL 1206768 (W.D. Wis. Mar. 15, 2011) 15, 53

Hyland v. Raytheon Technical Servs. Co.,
670 S.E.2d 746 (Va. 2009) 8, 14

In re Brockmueller,
374 N.W.2d 135 (S.D. 1985) 56

Int'l Galleries, Inc. v. La Raza Chi., Inc.,
No. 05-C-4991, 2007 WL 3334204 (N.D. Ill., Nov. 2, 2007) ..... passim

Interphase Garment Solutions, LLC v. Fox Television Stations, Inc.,
566 F. Supp. 2d 460 (D. Md. 2008) 63

Ira Green, Inc. v. J.L. Darling, Corp.,
No. 3:11-cv-05796, 2012 WL 4793005 (W.D. Wash. Oct. 9, 2012) 52

Johnson v. Columbia Broad. Sys., Inc.,
10 F. Supp. 2d 1071 (D. Minn. 1998) 7, 11

Jones v. Woodworth,
24 SD 583, 124 N.W. 844 (1910) 57

Kappenman v. Compassionate Care Hospice of the Midwest, LLC,
No. 09-4039, 2012 WL 602315 (D.S.D. Feb. 23, 2012) 9, 14

Keuchle v. Life's Companion P.C.A., Inc.,
653 N.W.2d 214 (Minn. Ct. App. 1994) 14, 35

Kiesz v. Gen. Parts, Inc.,
No. 05-1043, 2007 WL 963489 (D.S.D. Mar. 28, 2007) 14

Kohrt v. MidAmerican Energy Co.,
364 F.3d 894 (8th Cir. 2004) 56

Kusher v. Beverly Enters., Inc.,
317 F.3d 820 (8th Cir. 2003) 22

LeDoux v. Nw. Publ'g, Inc.,
521 N.W.2d 59 (Minn. Ct. App. 1994) 11, 14, 35

Lundell Mfg. Co., Inc. v. Am. Broad. Cos.,
98 F.3d 351 (8th Cir. 1996) ..... passim

Mansfield v. Pitney Bowes, Inc.,
No. 12-cv-10131, 2013 WL 947191 (D. Mass. Mar. 12, 2013) 59

Mashburn v. Collin,
355 So.2d 879 (La. 1977) 20

McBride v. Merrell Dow & Pharm. Inc.,
717 F.2d 1460 (D.C. Cir. 1983) 7, 12

McKeon v. Ewert,
55 SD 545, 226 N.W. 754 (1929) 60, 61

McNamee v. Clemens,
762 F. Supp. 2d 584 (E.D.N.Y. 2011) 8

McQueen v. Fayette Cnty. Sch. Corp.,
711 N.E.2d 62 (Ind. Ct. App. 1999) 10, 16

Memphis Publ'g Co. v. Nichols,
569 S.W.2d 412 (Tenn. 1978) 7, 12

Metabolife Int'l, Inc. v. Wornick,
264 F.3d 832 (9th Cir. 2001) 35, 52

Milkovich v. Lorain Journal Co.,
497 U.S. 1 (1990) 7, 8, 9, 10

Modern Prods., Inc. v. Schwartz,
734 F. Supp. 362 (E.D. Wis. 1990) 10, 52

Morton Grove Pharm., Inc. v. Nat'l Pediculosis Ass'n, Inc.,
494 F. Supp. 2d 934 (N.D. Ill. 2007) 53

Mr. Chow v. Ste. Jour Azur S.A.,
759 F.2d 219 (2d Cir. 1985) 20

N. Am. Truck & Trailer, Inc. v. M.C.I. Commc'n Servs., Inc.,
2008 SD 45, 751 N.W.2d 710 6

Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin,
418 U.S. 264 (1974) 20

Org. for a Better Austin v. Keefe,
402 U.S. 415 (1971) 63

Overcast v. Billings Mut. Ins. Co.,
11 S.W.3d 62 (Mo. 2000) 58

Overstock.com, Inc. v. Gradient Analytics, Inc.,
61 Cal. Rptr. 3d 29 (Cal. Ct. App. 2007) ..... passim

Pace v. McGrath,
378 F. Supp. 140 (D. Md. 1974) 7

Paint Brush Corp. v. Neu,
1999 SD 120, 599 N.W.2d 384 ..... passim

Pegasus v. Reno Newspapers, Inc.,
57 P.3d 82 (Nev. 2002) 20

Process Controls Int'l, Inc. v. Emerson Process Mgmt.,
753 F. Supp. 2d 912 (E.D. Mo. 2010) 10, 14, 41, 53

Quality Processing, Inc. v. Adams Bank & Trust,
9 F.3d 1360 (8th Cir. 1993) 57, 58

Quartana v. Utterback,
789 F.2d 1297 (8th Cir. 1986) 11

Ramharter v. Olson,
26 SD 499, 128 N.W. 806 (1910) 31, 55

Rockwood Bank v. Gaia,
170 F.3d 833 (8th Cir. 1999) 9

Rudolph v. Herman,
4 SD 283, 56 N.W. 901 (1983) 60

S. Volkswagen, Inc. v. Centrix Fin., LLC,
357 F. Supp. 2d 837 (D.M.D. 2005) 31

San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters,
125 F.3d 1230 (9th Cir. 1997) 15

Schaffer v. Spicer,
88 SD 36, 215 N.W.2d 134 (1974) 14

Schatzberg v. State Farm Mut. Auto. Ins. Co.,
877 F. Supp. 2d 232 (E.D. Pa. 2012) 11, 31

Schimke v. Karlstad,
87 SD 349, 208 N.W.2d 710 (1973) 60

Scotvold v. Scotvold,
68 SD 53, 298 N.W. 266 (1941) 60

Seminole Tribe of Fla. v. Times Publ'g Co., Inc.,
780 So.2d 310 (Fla. Dist. Ct. App. 2001) 63

Sisney v. Best Inc.,
2008 SD 70, 754 N.W.2d 804 6

Smith v. Des Moines Pub. Sch.,
259 F.3d 942 (8th Cir. 2001) 10, 14

Spreadbury v. Bitterroot Pub. Library,
856 F. Supp. 2d 1195 (D. Mont. 2012) 62

Springer v. Swift,
59 SD 208, 239 N.W. 171 (1931) 13

Stanley v. Carrier Mills-Stonefort Sch. Dist. No. 2,
459 F. Supp. 2d 766 (S.D. Ill. 2006) 16

State v. Shadbolt,
1999 SD 15, 590 N.W.2d 231 60

Steak Bit of Westbury, Inc. v. Newsday, Inc.,
334 N.Y.S.2d 325 (Sup. Ct. 1972) 20

Stevens v. Iowa Newspapers, Inc.,
728 N.W.2d 823 (Iowa 2007) 12

Tomblin v. WCHS-TV8,
434 F. App'x 205 (4th Cir. 2011) 7, 11, 12, 19

Toney v. WCCO Television Midwest Cable & Satellite, Inc.,
85 F.3d 383 (8th Cir. 1996) 10, 11

Turner v. KTRK Television, Inc.,
38 S.W.3d 103 (Tex. 2000) 8, 11

Unelko Corp. v. Rooney,
912 F.2d 1049 (9th Cir. 1990) 9

Weinstein v. Bullick,
827 F. Supp. 1193 (E.D. Pa. 1993) 7

Weller v. Am. Broad. Cos., Inc.,
283 Cal. Rptr. 644 (Cal. Ct. App. 1991) 12

Weyrich v. New Republic, Inc.,
235 F.3d 617 (D.C. Cir. 2001) 20

Xcentric Ventures, LLC v. Stanley,
No. CV-07-0954, 2007 WL 1795811 (D. Ariz. June 21, 2007) 16

Youngquist v. Am. Ry. Express Co.,
49 SD 373, 206 N.W. 576 (1926) 55

STATUTES

21 U.S.C. § 342(a)(1) & (2) 17

21 U.S.C. § 601(m)(1) & (2) 17

SDCL § 20-10A-1 56

SDCL § 20-10A-2 56

SDCL § 20-10A-3 56

Beef Products, Inc., BPI Technology, Inc., and Freezing Machines, Inc., collectively referred to as "BPI," submit the following in opposition to Defendants' Motion to Dismiss All Claims.[1]

INTRODUCTION

BPI has produced lean finely textured beef ("LFTB") for nearly 20 years. BPI uses an innovative process to remove fat from beef trimmings to produce a 95% lean beef. LFTB is 100% beef made from USDA-inspected beef. LFTB is safe. BPI uses industry-leading safety procedures and testing protocols. LFTB is nutritious. It provides the same protein and vitamins as other beef. Based on these facts, and on the increasing consumer demand for lean ground beef, BPI became one of the most successful beef producers in the country.

Then along came Defendants, who executed an unprecedented disinformation campaign against BPI and LFTB. Over the course of one month, Defendants published over two dozen news reports in which they made nearly ***200 false statements*** about LFTB, the raw material used to make LFTB, the process to make LFTB, and the USDA's approval of LFTB. Consumers who watched and read Defendants' reports concluded that BPI was defrauding them by selling a product that is not safe, not nutritious, and not even beef. In one month, Defendants manufactured a consumer backlash against BPI and LFTB that nearly destroyed the enterprise that BPI's owners, the Roth family, had spent a lifetime building.

Defendants now ask the Court to excuse their misconduct because, they say, their statements were true, close enough to being true, or just empty opinions and hyperbole. That may be their view of things, but the facts alleged in the Complaint tell a very different story. The Complaint details each of the false statements, explains why the statements were false, explains

[1] Defendants American Broadcasting Companies, Inc., ABC News, Inc., Diane Sawyer, Jim Avila and David Kerley are collectively referred to as "Defendants."

the false implications created by the statements, sets forth some of the evidence showing that Defendants knew their statements and implications were false, and identifies contemporaneous comments by consumers showing they were misled by Defendants' reports. Since the Court assumes that the facts alleged in the Complaint are true, as opposed to Defendants' version of events, the motion to dismiss must be denied.

OVERVIEW OF ARGUMENT

Try as they may, Defendants cannot change the tone and tenor of their reporting. This was not a series of reports about labeling. (Mem. at 1.)[2] Nor was this an attempt to provide competing views about a food product. (*Id.* at 1, 5-6.) This was a multi-faceted disinformation campaign by one of the most powerful news organizations in the world. Defendants knowingly and intentionally published false statements about a product they now concede is safe and nutritious lean beef. The Complaint alleges sufficient facts to state plausible claims against Defendants that entitle BPI to commence discovery.

First, the Complaint adequately alleges claims based on Defendants' identification of LFTB as "pink slime" ***137 times*** during their reports. Defendants said that "pink slime" is "not really beef" but, instead, is a "filler" and "substitute" used in ground beef. They also said that "pink slime" is an "adulterant" made from the "most contaminated" parts of the cow. Defendants used this term to imply that LFTB is not beef, not safe, and not nutritious. When ABC News calls a safe and nutritious food "slime" 137 times during "investigative" reports, it is not mere rhetorical hyperbole. Consumers who watched and read Defendants' reports certainly did not think so.

---

[2] "Mem." refers to the Memorandum in Support of the ABC Defendants' Motion to Dismiss All Claims of Beef Products, Inc.

Second, the Complaint adequately alleges claims based on Defendants' other false statements about LFTB and the raw material used to make LFTB. "Pink slime" was just the tip of the iceberg. The Complaint identifies 113 other false statements by Defendants about LFTB and its raw material, including stating it is "not really beef," more like a "gelatin" than beef, and made from "waste" and "scraps" exposed to "fecal matter." The Complaint alleges facts showing that each of these statements were false and that Defendant knew it. Defendants may disagree with the facts alleged in the Complaint, but the Court assumes they are true for purposes of the motion.

Third, the Complaint adequately alleges claims based on Defendants' implication of false facts about BPI and LFTB. Defendants' reports—individually and collectively—implied that LFTB is not really beef, not really safe for consumption, and not really nutritious. They also implied that BPI improperly obtained approval for LFTB from the USDA. While Defendants now protest that their reports could not possibly imply these facts, consumers who actually watched and read Defendants' reports at the time concluded that they were implying these exact false facts. A reasonable juror could reach the same conclusion.

Fourth, BPI can assert defamation claims against Defendants because they attacked BPI's reputation and integrity. BPI spent 20 years earning a reputation as the producers of one of the safest lean beefs in the world. Defendants reported that BPI was the "maker of pink slime." They indicated that BPI produced a "questionable" and "suspect" product that was being "hidden" in ground beef. They also indicated that the only way BPI was able to put this product into the marketplace was because a USDA official (with "links" to the beef industry, i.e., BPI) overruled scientists before taking a lucrative position with BPI's supplier. Defendants' reports were as much of an attack on BPI itself as on BPI's product.

Fifth, BPI can assert common law product disparagement claims because they are not preempted by the Agricultural Food Product Disparagement Act (AFPDA). The Legislature enacted the AFPDA to give agricultural companies an additional statutory remedy to pursue if someone knowingly disparages the safety of their product. Defendants make the ***unprecedented*** assertion that, instead of providing agricultural companies in South Dakota with additional protection, the AFPDA actually deprives them of the right to pursue common law claims. There is not a single word in the AFPDA indicating that the Legislature intended to eliminate, negate, or change the right of agricultural companies to protect themselves by pursuing common law claims.

SUMMARY OF FACTS

On March 7, 2012, Diane Sawyer appeared on television sets across the country to announce the results of a "startling" ABC News investigation. (Compl. Ex. 2.) She reported that ground beef sold in supermarkets contained "pink slime." (*Id.*) Consumers thought they were purchasing 100% ground beef but instead were getting a combination of beef and "slime." The "pink slime" is a "filler" made from "waste" that was not considered beef by USDA scientists. (*Id.*) However, the "pink slime" was being hidden in ground beef because a USDA official with "links to the beef industry" overruled USDA scientists before leaving for a lucrative board position with BPI's supplier. (*Id.*) In short, consumers who purchased ground beef made with the "pink slime" were the victims of an "economic fraud." (*Id.*)[3]

Unfortunately, this was just the beginning. Between March 7 and April 3, Defendants published 11 national news broadcasts, wrote 14 news reports, and posted dozens of statements on social media websites. (Compl. ¶¶126-28.) Defendants described LFTB as "pink slime," a

[3] Exhibit 1 is a DVD with all the ABC broadcasts at issue. Transcripts of these broadcasts are attached to the Complaint as Exhibits 2-12.

"filler," an "adulterant," and a "salvage" product. (*Id.* ¶¶267-68.) They said it is "not really beef," is a "cheap substitute" for ground beef, and is more like "gelatin" than beef. (*Id.* ¶¶268-71.) They said the raw material used to make "pink slime" is "scraps" and "waste" from the "most contaminated parts of the cow" and is "highly exposed to fecal matter." (*Id.* ¶529.) And they reported that consuming "pink slime" does not "do [consumers] any good," because its protein comes "mostly from connective tissue, not muscle meat." (*Id.* ¶547.)

Consumers who watched and read Defendants' reports received very clear, and very inaccurate, messages. Based on Defendants' reports, consumers came to believe that LFTB is "not beef," but rather is a "poison" that has "no nutritional value." (Compl. ¶¶312-15; Compl. Appx. 3-6.) They also concluded that BPI had "conspired" with the USDA to get LFTB approved and was now "defrauding" consumers who thought they were getting "100% ground beef." (*Id.*) Defendants were well aware that consumers were reaching these false conclusions based on what they reported. (*Id.* ¶317.) However, instead of setting the record straight, in report after report, Defendants repeated and expanded upon their false statements about LFTB, the process to make LFTB, the raw material used, and the USDA's approval.

Defendants used the consumer backlash they created to decimate demand for LFTB. On March 8, Defendants began to publish a blacklist of grocery store chains that sold ground beef containing "pink slime" instead of "pure meat" and encouraged consumers to contact the stores. (Compl. ¶¶329-30.) They started the blacklist knowing that they had convinced consumers that ground beef with LFTB was not "100% ground beef" and that it contained an unsafe, potentially poisonous, product. (Compl. ¶¶334-37.) Their list had its intended and predictable impact. Grocery stores that had done business with BPI for decades stopped selling ground beef made with LFTB due to the consumer backlash. (*Id.* ¶¶330-40.) That is what a powerful news

organization can do when it publishes dozens of stories with false information about a safe and nutritious product.

Defendants nearly destroyed an American success story. Before March 7, 2012, BPI sold approximately 5 million pounds of LFTB per week, operated four production facilities, and employed 1,300 men and women. (*Id.* ¶¶3, 91.) BPI had won nearly every innovation and food safety award possible for a beef producer. (*Id.* ¶4.) One month later, BPI's sales had declined to less than 2 million pounds per week, three of the production facilities were closed, and 700 men and women had lost their jobs. (*Id.* ¶19.) BPI went from being known as the producer of the safest and leanest beef in the world to being known simply as the producer of "pink slime." That is what Defendants did.

LEGAL STANDARDS

Motions to dismiss are "viewed with disfavor and seldom prevail." *N. Am. Truck & Trailer, Inc. v. M.C.I. Commc'n Servs., Inc.*, 2008 SD 45, ¶6, 751 N.W.2d 710, 712. For purposes of the motion, the Court assumes that "all the allegations in the complaint are true (even if doubtful in fact)." *Sisney v. Best Inc.*, 2008 SD 70, ¶7, 754 N.W.2d 804, 808 (*quoting Bell Atl. v. Twombly*, 550 U.S. 544, 555 (2007)). The Court also construes the allegations "in a light most favorable to the pleader to determine whether the allegations allow relief." *Id.* at 809. The question is whether, with these assumptions, the Complaint alleges a "plausible" cause of action against Defendants. *Bell Atl.*, 550 U.S. at 555. The Complaint should not be dismissed even if the Court "entertains doubts as to whether the pleader will prevail in the action." *N. Am. Truck*, 751 N.W.2d at 712 (quotation marks omitted).

ARGUMENT

Reporters and news organizations can be held liable when they publish ***one story*** that states or implies ***one false fact*** about a plaintiff or its product.[4] Here, Defendants published nearly 200 false statements about BPI and LFTB. The Complaint identifies each challenged statement, alleges facts showing the statements and implications of the statements were false, and identifies evidence showing Defendants knew the statements and implications were false. A complaint with this level of detail, discussing a disinformation campaign of this breadth and scope, states plausible claims that entitle BPI to commence discovery.

I. The Court only determines whether a reasonable juror could conclude that Defendants stated or implied false facts.

Defendants overstate the Court's responsibility on a motion to dismiss. At the pleading stage, the Court only determines whether a reasonable juror "could conclude" that Defendants stated or implied false facts about BPI and LFTB. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990); *Paint Brush Corp. v. Neu*, 1999 SD 120, ¶47, 599 N.W.2d 384, 396. On a motion to dismiss, the Court does not determine whether Defendants, in fact, stated or implied false facts. The Court only determines if a reasonable juror ***could*** reach that conclusion. *Milkovich*, 497

---

[4] *E.g.*, *Tomblin v. WCHS-TV8*, 434 F. App'x 205, 211 (4th Cir. 2011) (reversing summary judgment); *Lundell Mfg. Co., Inc. v. Am. Broad. Cos.*, 98 F.3d 351, 360-62 (8th Cir. 1996) (reversing judgment); *McBride v. Merrell Dow & Pharm. Inc.*, 717 F.2d 1460, 1465 (D.C. Cir. 1983) (denying dismissal); *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 60-61 (2d Cir. 1980) (reversing dismissal); *Int'l Galleries, Inc. v. La Raza Chi., Inc.*, No. 05-C-4991, 2007 WL 3334204, at *10 (N.D. Ill., Nov. 2, 2007) (denying summary judgment); *Johnson v. Columbia Broad. Sys., Inc.*, 10 F. Supp. 2d 1071, 1076-77 (D. Minn. 1998) (denying summary judgment); *Weinstein v. Bullick*, 827 F. Supp. 1193, 1199 (E.D. Pa. 1993) (denying summary judgment); *Gen. Prods. Co. v. Meredith Corp.*, 526 F. Supp. 546, 554 (E.D. Va. 1981) (denying summary judgment); *Pace v. McGrath*, 378 F. Supp. 140, 144 (D. Md. 1974) (denying summary judgment); *Gaylord Broad. Co., L.P. v. Francis*, 7 S.W.3d 279, 283 (Tex. App. 1999) (affirming denial of summary judgment); *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978) (reversing directed verdict).

U.S. at 21 (the "dispositive question" is whether a reasonable juror "could conclude" the defendant implied false facts); *Paint Brush*, 599 N.W.2d at 396 (the "dispositive question" is whether a reasonable juror "could conclude" that the statements "imply a false assertion of objective fact").

The Court should consider the totality of circumstances when making this determination. *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 61 Cal. Rptr. 3d 29, 40 (Cal. Ct. App. 2007). The Court considers the other language used in the publications, the context in which the statements were made, and the knowledge of the consumers who heard or read the statements. *Id.* at 40; *see also McNamee v. Clemens*, 762 F. Supp. 2d 584, 600 (E.D.N.Y. 2011) (court considers "statement or publication as a whole, tested against the understanding of the average" reader or listener); *Hyland v. Raytheon Technical Servs. Co.*, 670 S.E.2d 746, 751 (Va. 2009) (statement "must be considered in view of any accompanying opinion and other stated facts"). The Complaint states plausible claims if a reasonable juror could conclude that the "gist" or "sting" of Defendants' publications stated or implied false facts based on these factors. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000).

A. Defendants mischaracterize the scope of actionable defamation and disparagement.

Based on Defendants' motion, one would think that it was nearly impossible to adequately allege claims for disparagement and defamation. In reality, the scope of actionable defamation and disparagement is much greater than Defendants suggest.

1. Defendants are liable for publishing "opinions" that imply false facts.

Contrary to their suggestions, Defendants are liable for publishing alleged "opinions" about BPI and LFTB. (Mem. at 28-37, 48.) In *Milkovich*, the Supreme Court explained:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth.

> Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications. . . .

Milkovich, 497 U.S. at 18-19. The "threshold question is not whether a statement might be labeled opinion, but rather whether a reasonable [juror] could conclude that the statements imply an assertion of objective fact." *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990) (internal quotations omitted).

Using this standard, defendants may be held liable for publishing self-proclaimed and self-identified opinions that imply false facts about the plaintiff or its product. *E.g.*, *Paint Brush*, 599 N.W.2d at 397-98 (denying summary judgment where counterclaim-defendant sent letter stating "in [their] opinion what [counterclaim-plaintiff is] doing is flagrantly deceptive"); *Kappenman v. Compassionate Care Hospice of the Midwest, LLC*, No. 09-4039, 2012 WL 602315, at *12 (D.S.D. Feb. 23, 2012) (denying summary judgment where defendant published letter stating that it "believes" plaintiff was "harassing" defendant's employees); *Overstock.com*, 61 Cal. Rptr. 3d at 40 (affirming decision to deny dismissal where analyst published reports stating that it believed plaintiff's accounting was improper); *Gross v. New York Times Co.*, 623 N.E.2d 1163, 1168 (N.Y. Ct. App. 1993) (reversing dismissal where news organization implied false facts even though "couched in the language of hypothesis or conclusion").

The same is true for statements that convey a speaker's subjective judgment about plaintiff or its product. Statements that include some subjective judgment on the part of the speaker are, nonetheless, actionable when they imply objectively false facts. *E.g.*, *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 150-53 (2d Cir. 2000) (implying plaintiff engaged in unethical conduct); *Rockwood Bank v. Gaia*, 170 F.3d 833, 842 (8th Cir. 1999) (describing plaintiff's performance as "weak"); *Gaylord Broad. Co.*, 7 S.W.3d at 283 (implying plaintiff was

"hardly working"); *George Golf Design, Inc. v. Greenbrier Hotel Corp.*, No. 5:10-cv-01240, 2012 WL 4748812, at *6-7 (S.D. W.Va. Oct. 4, 2012) (describing plaintiff's work as "sub-par"); *Process Controls Int'l, Inc. v. Emerson Process Mgmt.*, 753 F. Supp. 2d 912, 932-33 (E.D. Mo. 2010) (implying plaintiff's product was relatively unsafe); *Graco, Inc. v. PMC Global, Inc.*, No. 08-1304, 2009 WL 904010, at *34 (D.N.J. Mar. 31, 2009) (describing technology as "old"); *Modern Prods., Inc. v. Schwartz*, 734 F. Supp. 362, 363-64 (E.D. Wis. 1990) (implying plaintiff's product presented a health risk); *McQueen v. Fayette Cnty. Sch. Corp.*, 711 N.E.2d 62, 66-67 (Ind. Ct. App. 1999) (stating plaintiff "undermined" basketball program).

2. Defendants are liable for implying false facts that are not expressly stated.

Defendants fare no better with their repeated protest that they cannot be held liable for something they did not expressly state. (Mem. at 38-40, 50.) Defendants are liable for both what they expressly stated and what they implied about BPI and LFTB. "A publisher is, in general, liable for the *implications* of what he or she has said or written, not merely the specific, literal statements made." *Toney v. WCCO Television Midwest Cable & Satellite, Inc.*, 85 F.3d 383, 392 (8th Cir. 1996) (citing Robert D. Sack & Sandra S. Barron, LIBEL, SLANDER AND RELATED PROBLEMS 85 (2d ed. 1994)). Indeed, the Supreme Court explained that the "dispositive question" is whether a reasonable juror could conclude that defendant's statements ***"imply"*** one or more false facts. *Milkovich,* 497 U.S. at 21 (emphasis added). Any other rule would improperly allow a defendant to "accomplish indirectly what they could not do directly." *Toney*, 85 F.3d at 395.

Based on these principles, defendants are routinely held liable for implying false facts even if not expressly stated. *E.g.*, *Smith v. Des Moines Pub. Sch.*, 259 F.3d 942, 947-48 (8th Cir. 2001) (affirming judgment where defendant implied, but did not state, that plaintiff was a

dangerous employee); *Quartana v. Utterback*, 789 F.2d 1297, 1301 (8th Cir. 1986) (reversing dismissal where defendant implied, but did not state, that plaintiff was a liar); *Johnson*, 10 F. Supp. 2d at 1076-77 (denying summary judgment where news organization implied, but did not state, that plaintiff was a negligent surgeon); *Gen. Prods.*, 526 F. Supp. at 554 (denying summary judgment where news organization implied, but did not state, that plaintiff's chimneys were safe for only one type of stove); *LeDoux v. Nw. Publ'g, Inc.*, 521 N.W.2d 59, 68 (Minn. Ct. App. 1994) (affirming judgment where news organization implied, but did not state, that plaintiff had stolen city funds).

3. Publications that contain accurate and inaccurate facts are actionable.

Defendants' attempt to shield themselves from liability by arguing that individual statements were "substantially true" also misses the point. (Mem. at 27-37.) Defendants are liable for implying false facts about BPI and LFTB even if their individual statements were literally accurate. "[T]he literal accuracy of separate statements will not render a communication 'true' where . . . the implication of the communication as a whole was false." *Schatzberg v. State Farm Mut. Auto. Ins. Co.*, 877 F. Supp. 2d 232, 242 (E.D. Pa. 2012) (quotations omitted). The Eighth Circuit explained:

> [T]he touchstone of implied defamation claims is an artificial juxtaposition of two true statements or the material omission of facts that would render the challenged statement(s) non-defamatory. Under this definition, a defendant does not avoid liability by simply establishing the truth of the individual statement(s); rather, the defendant must also defend the juxtaposition of two statements or the omission of certain facts.

Toney, 85 F.3d at 387. A publication may "convey a substantially false and defamatory impression" even if each statement is true. *Turner*, 38 S.W.3d at 115.

For this reason, courts routinely hold defendants liable for implying false facts even though their individual statements were literally or substantially true. *E.g.*, *Tomblin*, 434 F.

App'x at 211 (reversing summary judgment where news organization broadcast literally true facts that implied plaintiff's worker abused a child); *McBride*, 717 F.2d at 1465 (reversing dismissal where news organization published article with accurate facts that implied plaintiff's testimony was for sale); *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 831-32 (Iowa 2007) (affirming reversal of summary judgment where news organizations published literally true facts that implied plaintiff fabricated stories); *Memphis*, 569 S.W.2d at 420-21 (reversing directed verdict where news organization published materially accurate facts that implied plaintiff committed adultery).

The same logic defeats Defendants' argument that they cannot be held liable for false implications because they acknowledged (***on occasion***) that LFTB is beef, safe, and nutritious. (Mem. at 11-12, 38-41.) Defendants are liable for stating and implying false facts even though they also published some accurate information because the focus is on the overall gist of the publications. *E.g.*, *Tomblin*, 434 F. App'x at 211 (reversing summary judgment where news organization implied that plaintiff's worker abused child even though defendant reported that plaintiff denied the allegation); *Lundell*, 98 F.3d at 360-62 (reversing judgment and rejecting news organization's argument that other aspects of its publication negated false implication); *Int'l Galleries*, 2007 WL 3334204, at *10 (denying summary judgment where news organization published article implying corporate plaintiff deceived consumers even though defendant reported that plaintiff denied accusation); *Overstock.com*, 61 Cal. Rptr. 3d at 41, 43 (affirming denial of dismissal where defendant published multiple reports stating it believed plaintiff's accounting was improper even though reports mentioned that plaintiff "vehemently denied" defendant's theory); *Weller v. Am. Broad. Cos., Inc.*, 283 Cal. Rptr. 644, 651-53 (Cal. Ct. App. 1991) (affirming judgment for plaintiff and finding that news organization did not negate the

impression that plaintiff had engaged in wrongdoing by reporting that there were "conflicting" stories about what happened).

B. Defendants raise disputed issues of fact for the jury to decide, not grounds for dismissal.

Beyond mischaracterizing the scope of actionable defamation and disparagement, Defendants' motion violates a cardinal rule of civil procedure. The Court accepts the factual allegations in the Complaint as true and, therefore, dismissal "is a proper remedy only when no issue of fact is raised." *Builders Supply Co., Inc. v. Carr*, 276 N.W.2d 252, 255 (S.D. 1979). Nearly every argument raised by Defendants is based on their interpretation of a disputed issue of fact. There are clearly issues that a jury should decide after the parties take discovery. But given the Complaint's allegations, there are ***no undisputed facts*** that would warrant dismissal of any claim.

For example, Defendants argue that some of their statements are reasonably susceptible to a non-defamatory interpretation. (Mem. at 25, 37, 39.) That is not grounds to dismiss the Complaint. The Court only determines whether Defendants' statements ***could*** convey a defamatory meaning. If so, the jury should decide if Defendants' statements did, in fact, have a defamatory or non-defamatory meaning. *E.g.*, *Brodsky v. Journal Publ'g Co.*, 73 SD 343, 348, 42 N.W.2d 855, 857 (1950) (a "question for the jury is presented" if the publication "is susceptible of different interpretations, one of which is defamatory and the other not"); *Springer v. Swift*, 59 SD 208, ¶¶9-12, 239 N.W. 171, 177 (1931) (the jury decides the issue if "the language is ambiguous or susceptible of more than one interpretation, one of which would be defamatory and the other not"); *Lundell*, 98 F.3d at 360 (the jury decides the "meaning conveyed" when "the language used is capable of two meanings, including the one ascribed by a complainant").

Defendants also argue that none of their statements implied false facts about BPI or LFTB. (Mem. at 11-12, 38-43.) That is not for the Court to decide on a motion to dismiss. The Court only determines whether a reasonable juror ***could*** conclude Defendants stated or implied false facts. If so, the jury will decide what Defendants actually implied with their statements. *Paint Brush,* 599 N.W.2d at 397 (whether a statement implies a false fact "is a question for the jury"); *Ferlauto v. Hamsher*, 88 Cal. Rptr. 2d 843, 849 (Cal. Ct. App. 1999) ("issue should be resolved by a jury" if statement can be reasonably construed as fact or opinion); *Gross*, 623 N.E.2d at 1166 (motion to dismiss should be denied if circumstances could lead a "reasonable reader" to conclude defendant stated or implied facts).

Finally, Defendants argue that all of their statements were substantially true. (Mem. at 22-37.) Yet, again, that is not an issue for the Court to decide. "The truth or falsity of a disputed statement is an issue for the trier of fact." *Kiesz v. Gen. Parts, Inc.*, No. 05-1043, 2007 WL 963489, at *18 (D.S.D. Mar. 28, 2007) (applying South Dakota law). Courts should allow a jury to decide the issue when a plaintiff disputes the truth of a defendant's statement and implication. *E.g.*, *Schaffer v. Spicer*, 88 SD 36, 41, 215 N.W.2d 134, 138 (1974) (reversing summary judgment for defendant); *Smith*, 259 F.3d at 947-48 (affirming judgment for plaintiff); *Lundell*, 98 F.3d at 360 (reversing judgment for defendant); *Kappenman*, 2012 WL 602315, at *12 (denying summary judgment); *Process Controls*, 753 F. Supp. 2d at 932-33 (denying dismissal); *Int'l Galleries*, 2007 WL 3334204 at *10 (denying summary judgment); *Hyland*, 670 S.E.2d at 751 (reversing summary judgment); *Gambardella v. Apple Health Care, Inc.*, 863 A.2d 735, 742 n.6 (Conn. App. Ct. 2005) (reversing dismissal); *Keuchle v. Life's Companion P.C.A., Inc.*, 653 N.W.2d 214, 218-19 (Minn. Ct. App. 1994) (affirming judgment for plaintiff); *LeDoux*, 521

N.W.2d at 67-68 (same); *Gaylord Broad.*, 7 S.W.3d at 283-84, 286 (denying summary judgment).

II. The Complaint adequately alleges claims based on Defendants' description of LFTB as "pink slime" (Counts 1 & 10).

Defendants spend the most time attempting to defend and justify their identification of LFTB as "pink slime." (Mem. at 23-28.) Defendants described LFTB as "pink slime" a staggering 137 times during their news reports. (Compl. ¶¶167-70, 390-94, 477-81.) They told consumers that "pink slime" is hiding in ground beef. (*Id.*) They reported on which stores sold ground beef with "pink slime," and they identified BPI as the "maker of pink slime." (*Id.*) However, LFTB is not "pink slime." (Compl. ¶¶178-88). It is safe and nutritious lean beef. (*Id.*) Counts 1 and 10 assert plausible claims because describing LFTB as "pink slime" was factually inaccurate and falsely implied that LFTB is not safe for consumption, has little to no nutritional value, and is not really beef.

A. Defendants' description of LFTB as "pink slime" implied several false facts.

Defendants argue that "[i]t is hard to imagine a more prototypical example of non-actionable 'rhetorical hyperbole' . . . than the term 'pink slime.'" (Mem. at 23.) It is not hard at all. Defendants' description of LFTB as "pink slime" is actionable because a reasonable juror ***could conclude*** that the description implied false facts about the product. *E.g.*, *Flamm*, 201 F.3d at 152 (describing plaintiff as an "ambulance chaser" implied unethical conduct); *San Antonio Cmty. Hosp. v. S. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1237 (9th Cir. 1997) (describing plaintiff's facility as "full of rats" implied negative facts about facility); *George Golf*, 2012 WL 4748812, at *6-7 (describing plaintiff's work as "off the charts" implied work was below standard); *Hy Cite Corp. v. Regal Ware, Inc.*, No. 10-cv-168-WMC, 2011 WL 1206768, at *6-7 (W.D. Wis. Mar. 15, 2011) (describing plaintiff's product as a "knock off" and made with

"dirty steel" implied plaintiff used an unprofessional manufacturing process); *Xcentric Ventures, LLC v. Stanley*, No. CV-07-0954, 2007 WL 1795811, at *7 (D. Ariz. June 21, 2007) (describing plaintiff lawyers as "partners in slime" implied unethical conduct); *Stanley v. Carrier Mills-Stonefort Sch. Dist. No. 2*, 459 F. Supp. 2d 766, 774-75 (S.D. Ill. 2006) (describing plaintiff's daycare as "filthy" implied negative facts about location); *McQueen*, 711 N.E.2d at 64, 66-67 (stating plaintiff "destroyed" the basketball program implied negative facts about his job performance).

1. Defendants implied LFTB is not beef, not safe, and not nutritious.

Describing a food as "pink slime," standing alone, implies that the product is a repulsive, filthy, and disgusting liquid or fluid. (Compl. ¶¶173-74.) However, Defendants did not describe LFTB as "pink slime" in isolation. (*Id.* ¶175.) Defendants prominently identified LFTB as "pink slime" 137 times, while at the same time making dozens of other false statements about the product. (Counts 2-9, 11-26.) In this context, a reasonable juror could conclude that Defendants' description of LFTB as "pink slime" implied several false facts about the product.

First, Defendants' description of LFTB as "pink slime" implied it is not really beef. (Compl. ¶¶131, 564, 627.) Defendants described LFTB as "pink slime" while also stating that LFTB is "not really beef," "not what the typical layperson would consider meat," a "salvage" product, more "like gelatin than beef," a "filler," and "not what it purports to be . . . [m]eat." (*Id.* ¶¶190-92, 268, 564-70, 627-33.) The Complaint identifies 92 different statements by the Defendants that implied LFTB is not really beef in addition to describing LFTB as "pink slime." (Counts 2-5, 8, 11-13, 17, 19, 23.) The Complaint also identifies 154 comments by consumers who concluded, after reading Defendants' reports, that LFTB is not beef. (Compl. ¶312; Compl. Appx. 3.) These facts indicate that Defendants' description of LFTB as "pink slime" implied it is not beef.

Second, Defendants' description of LFTB as "pink slime" implied it is not really safe for consumption. (Compl. ¶¶130, 580, 643, 678.) Defendants described LFTB as "pink slime" while also stating that the product is an "adulterant," i.e., a poisonous substance. (*Id.* ¶¶584(g), 647(g).)[5] They reported that the raw material used to make "pink slime" comes from "contaminated parts of the cow," is "exposed to fecal matter," and contains "higher levels of bacteria." (*Id.* ¶¶442-43, 529-30.) The Complaint identifies 69 different statements by Defendants that implied LFTB is not safe for consumption, in addition to describing LFTB as "pink slime." (Counts 6-7, 15-16, 20, 24, 26.) The Complaint also identifies 169 comments by consumers who concluded, after reading Defendants' reports, that LFTB is not safe for consumption. (Compl. ¶313; Compl. Appx. 4.) These facts indicate that Defendants' description of LFTB as "pink slime" implied it is not safe for consumption.

Third, Defendants' description of LFTB as "pink slime" implied it has little to no nutritional value. (Compl. ¶¶133, 596, 659.) Defendants described LFTB as "pink slime" while also stating the product is a "filler" and "more like gelatin than beef." (*Id.* ¶¶191, 194, 269, 271, 412-414, 460, 499-501, 547.) They reported consuming "pink slime" would not "do you any good" because its protein comes from "connective tissues" instead of "muscle meat." (*Id.* ¶¶194-95, 460, 468, 547, 555.) The Complaint identifies 112 different statements by the Defendants that implied LFTB is not nutritious in addition to describing LFTB as "pink slime." (Counts 3-5, 8-9, 12-14, 17-18, 21, 25.) The Complaint also identifies 28 comments by consumers who concluded, after reading Defendants' reports, that LFTB is not nutritious.

[5] A food product is considered an "adulterant" when it "contains any poisonous or deleterious substance which may render it injurious to health" or "unsafe." 21 U.S.C. § 342(a)(1) & (2); 21 U.S.C. § 601(m)(1) & (2).

(Compl. ¶314; Compl. Appx. 5.) These facts indicate that Defendants' description of LFTB as "pink slime" implied it has little to no nutritional value.

Fourth, Defendants' description of LFTB as "pink slime" implied it was technically slime. Defendants described LFTB as "pink slime" while also stating that it is "more like gelatin than beef," had the consistency of "meat jello," "looks kind of like Play-Doh," and is made from "mostly fat and connective tissue." (Compl. ¶¶171, 194, 442, 460, 529, 547.) Consumers who watched and read Defendants' reports concluded that that LFTB is "slime," "extra fat laden slime," a "slime filler," "poison," "bacteria-laden waste," "nasty pink gunk," and "chemically processed junk." (Compl. Appx. 3-5.) These facts indicate that Defendants' description of LFTB as "pink slime" implied it was technically slime.

2. Defendants told consumers they were providing facts, not rhetorical hyperbole.

Defendants' contention that they did not imply any facts when they described LFTB as "pink slime" is undermined by (1) the other statements they made about the product and (2) contemporaneous consumer reactions to their publications. Their contention is further undermined by Defendants' self-proclaimed status as investigative journalists reporting on an important issue. (Compl. ¶¶113-24.) A reasonable juror could conclude that Defendants' description of LFTB as "pink slime" implied false facts about the product based on who was making the statements, where they were making them, and how they were making them–i.e., the totality of the circumstances.

To start, Defendants described LFTB as "pink slime" during their prime-time news programs and online news website. (Compl. ¶¶114-18.) Defendants promote those platforms as places where consumers can go to get facts. (*Id.*) Their use of the description during ***news broadcasts and reports*** led readers and viewers to believe that Defendants were conveying facts

about LFTB. *E.g.*, *Flamm*, 201 F.3d at 151-52 (description of plaintiff in a "fact-laden directory" implied facts about plaintiff); *Int'l Galleries*, 2007 WL 3334204, at *8 (presenting article as a "news piece" supported finding that defendant's statements implied facts); *Overstock.com*, 61 Cal. Rptr. 3d at 43 (a reader could conclude defendant was asserting facts because defendant held itself out as having "specialized knowledge" and providing reliable information); *Gross*, 623 N.E.2d at 1169 (a reader could view the article as stating actual facts since it was presented as a news piece with facts from persons with relevant knowledge).

Moreover, the broadcasts and reports in which Defendants described LFTB as "pink slime" had a serious tone. Defendants told consumers that they were reporting information uncovered as a result of a "startling ABC News investigation" based on information provided by USDA scientists and whistleblowers. (*See*, *e.g.*, Compl. Ex. 2 at 1.) The serious tone of their publications led readers and viewers to conclude that Defendants were conveying facts about LFTB when describing it as "pink slime." *E.g.*, *Tomblin*, 434 Fed. App'x, at 210 ("seriousness and drama with which [news organization's] broadcast was made" weighed in favor of finding that defendant implied false facts); *Int'l Galleries*, 2007 WL 3334204, at *7 (news organization's publication of an "alert" regarding fraud supported finding that defendant's statements implied facts); *Overstock.com*, 61 Cal. Rptr. 3d at 43 ("serious" tone of defendant's reports supported conclusion that defendant was asserting facts about plaintiff's accounting practices); *Gross*, 623 N.E.2d at 1169 (news organization's publications were presented as the result of a "thorough investigation," which supported finding that defendant's statements implied facts).

3. There is no precedent for concluding Defendants' description was merely rhetorical hyperbole.

Defendants argue that "[c]ourts across the country" have rejected "defamation claims over similar—and indeed, far more vituperative—terminology than employed in the ABC News

reports." (Mem. at 24.) Defendants are far too modest about their own vituperation. They made nearly 200 different false statements about LFTB, including identifying it as "pink slime" 137 times. None of the cases cited by Defendants involve repeating a factually inaccurate term this many times during a series of investigative news reports, while simultaneously making other false statements about the plaintiff and its product.[6]

Restaurant reviews. Four of the cases cited by Defendants were restaurant reviews. *See Mr. Chow v. Ste. Jour Azur S.A.*, 759 F.2d 219, 226-29 (2d Cir. 1985); *Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 89 (Nev. 2002); *Mashburn v. Collin*, 355 So.2d 879, 887-91 (La. 1977); *Steak Bit of Westbury, Inc. v. Newsday, Inc.*, 334 N.Y.S.2d 325, 328-30 (Sup. Ct. 1972). These were light-hearted reviews, published one time, that discussed whether the restaurant's food met the reviewer's personal taste. Here, Defendants described LFTB as "pink slime" 137 times on news programs and news websites supposedly offering factual information about a food product gathered during an investigation.

Politics and unions. Four of the cases cited by Defendants involved political commentary and union promotions. *See Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 284-86 (1974) (union newsletter); *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 624-25 (D.C. Cir. 2001) (political article); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) (union picket signs); *Finck v. City of Tea*, 443 N.W.2d 632, 636 (S.D. 1989) (comment by city employee). Again, political commentary is different from a news report. People expect those sources to provide spin and opinions to support their political ideology, unlike fact-based

---

[6] Many of Defendants' statements are false for more than one reason. (Compl. Appx. 1.) The actual number of false facts stated by Defendants far exceeds 200.

investigative journalism. A statement published by a major news organization is perceived differently than a proclamation on a union sign.

Accurate reports. Two of the cases cited by Defendants involved allegedly defamatory language in otherwise overall accurate reports. *See Fox Sports Net N., LLC v. Minn. Twins P'ship*, 319 F.3d 329, 337 (8th Cir. 2003); *Finck*, 443 N.W.2d at 636. In those cases, the court concluded that the alleged colorful language was not actionable because the gist of the reports was entirely accurate. Here, Defendants described LFTB as "pink slime" while also making dozens of other false statements about the product that reinforced the suggestion that "pink slime" is not beef, not safe, and not nutritious.

B. Defendants' description was not substantially true.

Defendants argue that their description of LFTB as "pink slime" is "not actionable because [it is] substantially, if not literally, true." (Mem. at 27.) A jury should decide this disputed issue of fact for two reasons. (*Supra* at 13-14.) First, as explained above, Defendants' description of LFTB as "pink slime" is actionable because it implied provably false facts. It implied that LFTB is not beef, not safe for consumption, and not nutritious. The Complaint includes multiple allegations explaining why those factual implications are not accurate. (Compl. ¶¶202-09, 234-41, 280-90.)

Second, Defendants' description is actionable because LFTB is not slime. Slime is a repulsive, filthy, and disgusting liquid or fluid. (Compl. ¶¶173-74.) LFTB is not slime. (*Id.* ¶¶178-88, 280-90.) LFTB is safe and nutritious beef. (*Id.* ¶¶72-87.) LFTB and slime are different physically and nutritionally. (*Id.*) LFTB does not even look like slime. (*Id.* ¶182; Compl. Exs. 105-07.) Defendants' description, on its face, was factually inaccurate, not substantially true. Defendants may disagree, but the Court assumes the facts alleged in the Complaint are true.

The evidence cited by Defendants—a patent application and sampling manual—only shows there is an issue for the jury to decide. (Mem. at 27.) To start, the court should not rely on either of the documents, because they were not attached to the Complaint and are being used by Defendants to contest BPI's factual allegations. *See BJC Health Sys. v. Columbia Cas. Co.*, 348 F.3d 685, 688 (8th Cir. 2003) (holding that district court's consideration of documents outside the complaint was not proper on a motion to dismiss since the documents were not undisputed); *Kusher v. Beverly Enters., Inc.*, 317 F.3d 820, 831-31 (8th Cir. 2003) (affirming district court's decision to ***not*** take judicial notice of documents in deciding a motion to dismiss where the facts and inferences from the documents were disputed).

Moreover, Defendants' discussion of these documents is misleading. Defendants argue that describing LFTB as "slime" is substantially true because it is described as a "viscous paste" according to a 1978 patent application. (Mem. at 27.) But the 1978 patent application does not discuss LFTB. BPI did not exist in 1978, and no one was producing LFTB in 1978. The 1978 patent application says nothing about the product BPI was producing 24 years later, when Defendants described LFTB as "pink slime."

Defendants also argue that describing LFTB as "slime" is substantially true because a sampling manual refers to the raw material at one stage of the production process as a "slurry." (Mem. at 28.) Why the unidentified author of this particular manual used the term "slurry" is unknown. The USDA's official position is that LFTB is 100% beef, not "pink slime" or a "slurry." (Compl. ¶¶74, 206). Regardless, the manual's description is factually inaccurate. Neither LFTB nor its raw material is a "slurry," for the same reasons they are not slime.

C. Defendants' non-defamatory interpretation of "pink slime" is irrelevant.

Defendants argue that "BPI fails to mention the more neutral definitions of slime" such as ""a thick, sticky, slippery substance, which certainly fits LFTB." (Mem. at 25 n.7, 27.) This

argument is irrelevant. As noted above, on a motion to dismiss, the Court only determines whether the statement is reasonably susceptible to a defamatory interpretation. (*Supra* at 13.) The possibility of a non-defamatory interpretation of the challenged language only means there is an issue of fact for the jury to decide. (*Id.*)

Here, the Complaint alleges that describing LFTB as "pink slime" is reasonably susceptible to a defamatory meaning because (1) the description implied LFTB is not beef, not safe for consumption, and not nutritious; (2) the description implied LFTB is a repulsive, filthy, and disgusting liquid or fluid; and (3) consumers who read the description concluded that LFTB is slime as opposed to safe and nutritious beef.

III. The Complaint adequately alleges claims based on Defendants' other false statements about BPI and LFTB.

The Complaint asserts 16 claims against Defendants for making false statements about LFTB and its raw material above and beyond describing it as "pink slime," and for making false statements about BPI above and beyond describing it as the "maker of pink slime." (Counts 2-9, 11-18.) Defendants make the same arguments with respect to all of these false statements. They argue their statements were "substantially true" and, if not, were merely empty opinions devoid of facts. Both of these arguments are inconsistent with the allegations in the Complaint and raise issues for the jury to decide, not grounds for dismissal.

A. Defendants falsely stated that LFTB is not really beef (Counts 2 & 11).

Defendants reported that "pink slime" is not beef. (Compl. ¶¶190, 402-03, 489-90.) They said that "pink slime" is not "what it purport[ed] to be . . . [m]eat." (*Id.*) They said "the product is not really beef." (*Id.*) They said former USDA scientists "didn't feel it was meat" and "didn't [] consider it beef." (*Id.*) Defendants stated that "pink slime" is not really beef 27 times.

(*Id.*) However, LFTB is beef. (*Id.* ¶¶202-09.) Counts 2 and 11 assert plausible claims because stating and implying LFTB is not really beef was factually inaccurate.

1. Defendants' statements were not substantially true.

Defendants argue that their descriptions of LFTB as something other than beef were "indisputably true." (Mem. at 41.) However, the Complaint alleges that their descriptions were "indisputably" false. The Complaint includes 20 paragraphs explaining why each of their statements was false and how Defendants knew it. (Compl. ¶¶202-21.) Defendants may now try to offer a justification for their statements but that is not grounds for dismissal because it is a disputed issue of fact. (*Supra* at 7.)

Typical person's meat. Defendants argue that LFTB is not what a typical person would consider meat because it is the "product of a 'mechanical process.'" (Mem. at 41.) LFTB is precisely what a typical person considers meat. LFTB is the meat that remains on the bovine after the butcher removes the prime cuts. It is 100% beef made from USDA-inspected beef trimmings. (Compl. ¶¶49, 54.) The typical person's definition of meat is "the edible flesh of animals." (*Id.* ¶203.) LFTB meets that definition. (*Id.*) Taken to its logical conclusion, no "ground" beef would be considered meat by Defendants, as all ground beef is the product of a mechanical process. (Compl. ¶¶45-60.)

Fresh ground beef. Defendants argue that LFTB is not the same as fresh ground beef because it is frozen and treated with ammonia. (Mem. at 41.) But fresh ground beef is commonly made with frozen and treated beef. Frozen beef is shipped from around the world to make ground beef. Beef and trimmings would spoil during shipment if not frozen. And nearly all beef is treated with an intervention as part of the butchering process. (Compl ¶48.) BPI's use of an intervention (i.e. ammonia hydroxide) and a freezing process does not differentiate LFTB from the other beef and trimmings used by processors to make ground beef.

Defendants also argue that LFTB cannot possibly be the same as fresh ground beef because labeling guidelines define "fresh" as having "not been frozen" and having not "treated with an antimicrobial substance." (Mem. at 41 n.13.) Defendants fail to mention that the agency responsible for writing and enforcing these guidelines, the USDA, disagrees with their argument. The USDA approved the use of LFTB in "fresh" ground beef (Compl. ¶¶72, 74, 80), just as the USDA approved the use of other frozen beef and trimmings that have had antimicrobial agents applied. Defendants are misinterpreting the USDA's guidelines.

Ground beef. Defendants argue that LFTB is "not the same as ground beef" because it is not purchased or consumed on its own. (Mem. at 42.) But the trimmings from which most ground beef is produced are not purchased or consumed on their own. They are independently ground and then blended together to make ground beef. (Compl. ¶¶61-62.) The end product is then purchased and consumed. However, if they were not destined for use to make ground beef, all of the components—LFTB, other beef cuts, and beef trimmings—could be purchased and consumed on their own. (*Id.* ¶¶49, 51.) They are all beef.

Defendants' argument is also inconsistent with how ground beef is made. Processors receive beef (LFTB, other cuts, and trim) from around the world. They then grind the various types of beef. (*Id.* ¶¶62-63.) At this stage, the ground LFTB is "ground beef" just like all of the other components are "ground beef." The different grinds, i.e., the different ground beefs, are then blended together to achieve the desired lean ratio for the end product. (*Id.* ¶¶50, 62-63.) Ground LFTB is ground beef. (Compl. Exs. 106, 107.)

Salvage product. Defendants argue that LFTB is a salvage product because it is made from trimmings that otherwise would be wasted. (Mem. at 42.) Not true. Beef trimmings are used to make a variety of consumable products, including ground beef. (Compl. ¶¶50-51.) The

trimmings are not wasted and are not "waste." (*Id.* ¶¶243-46.) BPI maximizes the economic value of the trimmings by isolating the lean portion. (*Id.* ¶50.) Beef that is 95% lean made from "high quality" USDA-inspected trimmings is not a salvage product. (*Id.* ¶243.)

2. Defendants are liable for publishing alleged "opinions."

As a fallback, Defendants argue that they should not be held liable because all they did was publish the opinions of so-called "LFTB critics." (Mem. at 41-42.) However, as discussed above, Defendants are liable for publishing "opinions" that state or imply objectively false facts. (*Supra* at 14.) Whether a food product is beef or meat is an objective fact. Indeed, it is standard identification used by the USDA and can be scientifically, nutritionally, and biologically established.

Here, Defendants published reports quoting former USDA scientists and a former BPI Tech employee saying that LFTB is "not really beef," "not fresh ground beef," and "not what the typical person would consider meat." (Compl. ¶¶190, 402-03, 489-90.) They also published reports stating that former USDA scientists "didn't consider [LFTB] to be beef," and "didn't feel [LFTB] was meat," and that LFTB is "unlike what they call real ground beef." (*Id.*) These statements are factual in nature and are objectively false. Clearly, BPI can prove its product is beef and meat. BPI did so when the USDA approved LFTB and can do so again with a jury.

Moreover, Defendants are not being forthcoming when they suggest all they did was publish opinions of "LFTB's critics." Defendants, themselves, falsely stated that LFTB is not really beef. For example, Defendants said LFTB is not "what it purport[ed] to be . . . [m]eat," that only "Organic" ground beef without LFTB is "pure meat," that ground beef with LFTB is "suspect," and that LFTB is not "[ground] beef." (Compl. ¶¶190, 402-03, 489-90.) All of these statements are objectively false because LFTB is what it purports to be: beef and meat.

B. Defendants falsely stated that LFTB is a filler (Counts 3 & 12).

Defendants described "pink slime" as a filler. (Compl. ¶¶191, 412-14, 499-01.) They said "pink slime" is a "filler" used to "pump up" and "pad" the volume of ground beef. (*Id.*) They said it is a "questionable," "cheap," and "inexpensive" filler. (*Id.*) They described "pink slime" as a filler 47 different times. (*Id.*) However, LFTB is not a filler. It is safe and nutritious lean beef. (*Id.* ¶¶210-15.) Counts 3 and 12 assert plausible claims because describing LFTB as a filler was factually inaccurate and falsely implied LFTB is not really beef and has little to no nutritional value.

Defendants argue their description of LFTB as a filler was "substantially true" and "any subjective assessment conveyed" by describing LFTB as a filler is not a "provably false statement of fact." (Mem. at 29-30.) However, the Complaint alleges facts showing that describing LFTB as a filler ***is*** a "provably false statement of fact." LFTB is not a filler, because it is beef combined with other beef to make ground beef. (Compl. ¶211.) Fillers are non-beef products such as cracker meal, bread crumbs, and soy. (*Id.*) The USDA would have required LFTB to be separately labeled in ground beef if it were a filler. (*Id.* ¶212.) These facts, which the Court assumes true, show that "filler" is not a substantially true description of LFTB but rather is provably false.

The evidence cited by Defendants establishes only that there is a disputed issue of fact for the jury to decide. (Mem. at 29-30.) LFTB is a "component" of ground beef and is "blended" with other components to make ground beef. That does not make LFTB a filler. Processors grind LFTB, other beef, and trimmings as the first step to producing ground beef. (Compl. ¶¶61-62.) They then blend or combine the various grinded beefs together to achieve the desired

percentage of lean ground beef. (*Id.*) Neither LFTB nor the other beef and trimmings are fillers because they are all beef that is blended and combined together to make ground beef.[7]

C. Defendants falsely stated that LFTB is a substitute product (Counts 4 & 13).

Defendants described "pink slime" as a "substitute" added to ground beef. (Compl. ¶¶192, 422-23, 509-10.) They said selling ground beef that includes "pink slime" is "economic fraud" because it is a "cheap substitute" added to ground beef. (*Id.*) They repeated this accusation six times. (*Id.*) LFTB is not a substitute, because LFTB is beef. (*Id.* ¶¶210-15.) Counts 4 and 13 assert plausible claims because calling LFTB a substitute was factually inaccurate and falsely implied LFTB is not really beef and has little to no nutritional value.

As with their description of LFTB as a filler, Defendants argue that calling LFTB a substitute was substantially accurate or non-actionable opinion. (Mem. at 29-30.) Once again, this argument is defeated by the factual allegations in the Complaint. The Complaint alleges LFTB is not a substitute because it is beef combined with other beef to make ground beef. (Compl. ¶¶211-14.) By definition, LFTB cannot be a substitute used in making ground beef, because it is beef. Soy, for example, would be a substitute if used when making ground beef, because it is not beef itself. The same is not true for LFTB. Defendants' statements are not substantially true but instead are provably false.

The affidavit cited by Defendants only demonstrates that there is a fact issue for the jury to decide. (Mem. at 30.) LFTB is a "replacement for a portion of lean boneless beef." (*Id.*) That does not mean it is a "substitute" added in ground beef. LFTB is lean beef. Processors use

---

[7] Defendants cite an article by Food Safety News (FSN) to demonstrates that their description of LFTB as a filler is substantially true. (Mem. at 30.) FSN is a website operated by Bill Marler's law firm, counsel for Defendants Zirnstein and Custer. The Complaint states "some of the information that has been published by FSN regarding BPI and LFTB is not factually accurate." (Compl. ¶142 n.5.)

varying percentages of lean beef when making ground beef. Processors can use LFTB, which is 95% lean, or some other lean beefs when making ground beef. None of them are substitutes, because they are all lean beefs. Moreover, the Court should not consider the affidavit on a motion to dismiss because it was not attached to the Complaint. (*Supra* at 6.)

D. Defendants falsely accused BPI of economic and food fraud (Counts 5 & 14).

Defendants reported that using LFTB in ground beef labeled 100% beef is fraudulent. (Compl. ¶¶192-93, 432-33, 519-20.) They said that, according to a former USDA microbiologist and "whistleblower," the use of "pink slime" in ground beef is "economic fraud" because it is a "cheap substitute" added to ground beef. (*Id.*) They also said the use of "pink slime" is "food fraud." (*Id.*) However, the use of LFTB in ground beef is not fraudulent because it is safe and nutritious lean beef. (*Id.* ¶¶201-21, 436, 522-23.) Counts 5 and 14 assert plausible claims because the accusation that the use of LFTB in ground beef is fraudulent was factually inaccurate and falsely implied that ground beef made with LFTB contains something that is not beef, not safe, and not nutritious.

1. Defendants implied BPI defrauded consumers who purchased ground beef made with LFTB.

Defendants argue that their reports cannot "be reasonably understood to mean that anyone actually engaged in fraud." (Mem. at 49.) They also argue their reports "cannot be understood as having leveled [a fraud charge] *at BPI*." (*Id.* at 50.) Both of these arguments are undermined by comments made by the consumers who actually watched and read Defendants' reports. (Compl. ¶315; Compl. Appx. 6.) Comments posted to Defendants' reports leave no doubt that consumers believed that BPI was defrauding them. Consumers concluded that BPI is "dup[ing]" the public, engaged in "a fraud," selling a "deceptive" product," and "scamming consumers." (*Id.*) Defendants' reports can be "reasonably understood" as leveling a fraud

charge against BPI, because that is precisely what consumers concluded when they watched and read Defendants' reports.

A reasonable juror could reach the same conclusion about Defendants' reports as these consumers. Defendants reported that the use of "pink slime" in ground beef is "economic fraud," while at the same time describing it as "not really beef" but instead a "salvage" product made from waste once used only in dog food and cooking oil. (Compl. Exs. 2, 13.) They then reported that LFTB does not appear on labels "because, over the objections of its own scientists, USDA officials with links to the beef industry label[ed] pink slime meat." (*Id.*) These statements all imply that consumers were being deceived when they purchased ground beef. They thought they were paying for 100% safe and nutritious beef, but instead they received a product that was part beef and part "pink slime."

Defendants' charge of fraud was leveled at BPI. BPI was the ***only*** company mentioned in the reports where Defendants said the use of LFTB in ground beef was economic fraud. (*Id.*) Defendants reported that BPI is the "maker" of pink slime, that the official who overruled USDA scientists was connected to the beef industry (i.e., BPI), that the official received $1.2 million from BPI's supplier after approving "pink slime," and that the official's approval resulted in hundreds of millions of dollars for BPI. (*Id.*) This context implied that BPI was, at the very least, a participant in the economic fraud, because it was the company that stood to profit.

2. Defendants did not mitigate the false implication.

Defendants argue that their reports "make clear that no one actually engaged in fraud . . . because the government had approved the labeling decision." (Mem. at 49-50.) This acknowledgement does not prevent a reasonable juror from concluding that Defendants implied BPI participated in a fraud. (*Supra* at 7.) Defendants reported that the USDA's approval was over the objection of scientists ("whistleblowers"), done based on the color of the product alone,

and by an official with links to the beef industry who received $1.2 million from BPI's supplier after she left the USDA. (Compl. Exs. 2, 13.) Defendants discredited the USDA's approval of LFTB with these false statements. Therefore, it is not surprising that consumers concluded that BPI and others were defrauding them, notwithstanding Defendants' acknowledgement of the USDA's approval.

3. Defendants are liable for publishing alleged "opinions."

Defendants argue that their accusations of economic and food fraud "reflect the subjective opinion of a former USDA scientist that consumers should be told that LFTB is in the ground beef that they buy." (Mem. at 48.) The issue is not whether the accusations reflect someone's opinion, but whether a reasonable juror could conclude that the accusations implied objectively false facts. (*Supra* at 14.) Here, the context in which the accusations were made implied that ground beef made with LFTB should not be labeled 100% beef because it does not contain 100% safe and nutritious beef. Those are objectively false facts.

An accusation of fraud, like the one published by Defendants, is actionable when a reasonable juror could conclude it implies something the plaintiff can prove is false. *E.g.*, *Ramharter v. Olson*, 26 SD 499, 499, 128 N.W. 806, 808 (1910) (denying dismissal where publication implied plaintiff was "guilty of deception in his business" by saying he "humbugged" customers); *Schatzberg*, 877 F. Supp. 2d. at 243-44 (denying dismissal where defendant implied plaintiff was being investigated for fraudulent billing practices); *S. Volkswagen, Inc. v. Centrix Fin., LLC*, 357 F. Supp. 2d 837, 843 (D. Md. 2005) ("without question . . . labeling an entity a 'fraud' is a defamatory statement"); *Gross*, 623 N.E.2d at 1168 (reversing dismissal where news organization published multiple reports implying plaintiff engaged in cover ups); *Int'l Galleries*, 2007 WL 3334204, at *9-10 (denying summary judgment

where news organization published one article implying that plaintiff engaged in a "fraud" by selling copies of paintings instead of real works).[8]

E. Defendants falsely described the raw material used by BPI to produce LFTB (Counts 6 & 15).

Defendants described the raw material used by BPI to make LFTB as contaminated "waste" and "scraps." (Compl. ¶¶224, 442-43, 529-30.) They reported that the raw material "comes from the parts of the cow most susceptible to contamination," "is highly exposed to fecal matter," has "carcass remains," "higher levels of bacteria," and "more contaminants" than beef cuts. (*Id.*) They repeated these descriptions 20 times. (*Id.*) However, BPI does not use contaminated waste and scraps. (*Id.* ¶¶242-50.) It uses high quality, USDA-inspected beef trimmings to make LFTB. (*Id.*) Counts 6 and 15 assert plausible claims because Defendants' descriptions of the raw material were factually inaccurate and falsely implied the end product (LFTB) is not safe for consumption and has little to no nutritional value.

1. Defendants' descriptions were not substantially true.

Defendants argue that "there is no question that the raw material was accurately described." (Mem. at 32.) To the contrary, the Complaint alleges that Defendants' descriptions were false because BPI uses USDA-inspected beef trimmings, not contaminated waste and scraps. (Compl. ¶242.) The trimmings are of "similar quality and wholesomeness as all other" USDA-inspected beef. (*Id.* ¶243.) They are "high quality USDA inspected trimmings." (*Id.*)

---

[8] In a footnote, Defendants argue the Court should dismiss Count 14 because their accusation was about the "labeling of ground beef" and "not about the product itself." (Mem. at 31, n.10.) Not true. The accusation was made in the context of explaining why LFTB should not be used in ground beef labeled 100% beef. A reasonable juror could conclude that the accusation implied that LFTB should not be used in such ground beef because LFTB is not beef, not safe for consumption, and not nutritious. That is about the product.

These allegations show that Defendants' descriptions were not substantially true. Defendants may disagree, but that is an issue for the jury to decide. (*Supra* at 7.)

Scraps. Defendants argue that "it is hard to imagine a more accurate term to describe" the raw material used by BPI than "scraps" because the trimmings contain fat. (Mem. at 32.) It is not hard at all. The beef industry describes the raw material as "high quality USDA inspected trimmings" and, specifically, "not scraps." (Compl. ¶¶243-44.) All beef contains fat and muscle meat. It is hard to imagine describing the raw material used by BPI as "scraps" when processors use those same trimmings to make ground beef without isolating the lean as BPI does. (*Id.* ¶50.)

Waste. Defendants argue that it was substantially accurate to describe the raw material as waste trimmings because they "[used] the same term as BPI." (Mem. at 34.) That is inaccurate. BPI has never described its raw material as waste. BPI and the American Meat Institute have explained that BPI's process "recovers lean meat [from the trimmings] that would otherwise be wasted." (Compl. Exs. 33, 59.) The lean portion of the trimmings is wasted because it is not economically feasible to isolate that portion by hand. (Compl. ¶245.) However, trimmings are not wasted (or waste), because they are used to make a variety of consumable products, including ground beef. (*Id.* ¶¶50, 245-46, 249.) The waste refers to not getting the full economic value from the trimmings, not that they are actually waste (i.e., going to the landfill) as Defendants stated.[9]

Low-quality and low-grade. Defendants argue that the trimmings "could not be called anything other than low-quality or low-grade" because they have a high fat content. (Mem. at 32.) However, the beef industry (and retail) calls the trimmings "high quality" and "wholesome

[9] Defendants cite an article by FSN to demonstrate that their description of the trimmings as "waste" is substantially true. (Mem. at 30.) As noted above, the Complaint explains that information published by FSN is not factually accurate. (Compl. ¶142 n.5.)

cuts of beef." (Compl. ¶¶243-44.) Trimmings generally contain more fat than the prime cuts removed during the butchering process. That does not mean trimmings, in general, are low-grade and low-quality; and it certainly does not mean the trimmings used by BPI are low-grade and low-quality. In fact, fat content is not an accurate measure of quality, as "prime" cuts of meat are preferred specifically because they have more marbling or fat than choice, select, or other USDA grades of beef.

Defendants gain no traction by referring to the patent application for a freezing roller. (Mem. at 32.) The patent application discusses the use of the freezing roller with "undesirable animal products." (Def. Ex. B at 4.) But, the patent application was submitted in 1978, BPI did not exist in 1978, and no one was producing LFTB in 1978. The patent application's reference to "undesirable animal products" is not a reference to the USDA-inspected beef trimmings used by BPI to make LFTB.

2. Defendants are liable for publishing alleged "opinions."

Defendants argue that "assessments like low-quality and low-grade are inherently subjective and, thus, non-actionable." (Mem. at 33.) This argument is irrelevant. Counts 6 and 15 are based on the Defendants' description of the raw material as contaminated waste and scraps. (Compl. ¶¶442-43, 529-30.) Defendants do not claim that describing the raw material as contaminated waste and scraps is "inherently subjective." Accordingly, Counts 6 and 15 are based on actionable false statements even if the Court agreed with Defendants with respect to the "low-quality" and "low-grade" descriptions.

Of course, Defendants are wrong with respect to low-grade and low-quality. Defendants described the trimmings as low-grade and low-quality while also reporting that the trimmings come from the most contaminated parts of the cow, are highly exposed to fecal matter, and are high in bacteria. In that context, a reasonable juror could conclude that Defendants' description

of the raw material as low-quality and low-grade implied it was not safe for consumption. BPI can prove that the trimmings it uses are "high quality" and safe for consumption. (Compl. ¶¶243-48.) Accordingly, Defendants' descriptions are actionable even if they have a subjective component. (*Supra* at 14.)

F. Defendants falsely stated BPI's raw material was once used only for dog food and cooking oil (Counts 7 & 16).

Defendants reported that BPI makes "pink slime" from trimmings "once only used in dog food and cooking oil." (Compl. ¶¶225, 451, 538.) They also reported the trimmings were "sold only to dog food or cooking oil suppliers" before BPI found a way to "disinfect" them with ammonia. (*Id.*) Defendants repeated this assertion six times. (*Id.*) However, the trimmings used by BPI have ***never*** been used only for dog food and cooking oil. (*Id.* ¶¶50, 243-47, 249.) They have ***always*** been used in a variety of consumable products, including ground beef. (*Id.*) Counts 7 and 16 assert plausible claims because Defendants' statements were factually inaccurate and falsely implied the end product (LFTB) is not safe for consumption and has little to no nutritional value.

Defendants argue their statement was "at most a 'minor inaccurac[y]'" because it is "undisputed" that the raw material was "often" used for dog food and cooking oil. (Mem. at 35.) This argument is neither legally nor factually correct. There is no immunity for minor inaccuracies. Minor inaccuracies that, in context, imply false facts are actionable. *E.g.*, *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 849-50 (9th Cir. 2001) (reversing dismissal where news organization falsely stated that the main ingredient in plaintiff's product was a "synthetic ephedrine" when, in fact, the main ingredient was a naturally occurring ephedrine); *Keuchle*, 653 N.W.2d at 218-19 (affirming judgment where defendant falsely stated plaintiff was given an "order" when, in fact, plaintiff had received an "inquiry" from her boss); *LeDoux*, 521

N.W.2d at 67 (affirming judgment where news organization falsely stated plaintiff had his driveway "paved" when, in fact, the driveway was "covered" with asphalt shavings); *Capuano v. Outlet Co.*, 579 A.2d 469, 478 (R.I. 1990) (reversing summary judgment where thrust of news report implied plaintiff was part of organized crime even though defendant claimed only incidental inaccuracies).

Moreover, this was not a "minor inaccuracy." Defendants knew their statements were false and knew the trimmings were often used in human, not dog, food. (Compl. ¶¶50, 243-47.) Nonetheless, they repeatedly reported that the trimmings were once used only for dog food and cooking oil, while also stating that the trimmings come from contaminated parts of the cow, are exposed to fecal matter, and are high in bacteria. Defendants' inaccurate statements about the past use of the raw material furthered the implication that the raw material used by BPI is not safe for consumption and that the "pink slime" made from these trimmings is not really safe. These are both false facts.[10]

G. Defendants falsely stated LFTB is more like a gelatin than beef (Counts 8 & 17).

Defendants described "pink slime" as "more like gelatin than beef and less nutritious." (Compl. ¶¶194, 460, 547.) They reported it was more like "gelatin than beef," more like "gelatin than ground beef," and more like "gelatin than meat." (*Id.*) They also reported that "pink slime" has the consistency of "meat jello." (*Id.*) However, LFTB is not a gelatin, it is not more like gelatin than beef, and it does not have the consistency of meat jello. (*Id.* ¶¶216-21.) Counts 8 and 17 assert plausible claims because Defendants' statements were factually inaccurate and falsely implied LFTB is not really beef and has little to no nutritional value.

[10] Defendants, once again, cite an article from FSN in support of their contention that the trimmings were "often" used for dog food and cooking oil. As discussed above, the Complaint explains that information from FSN is not factually accurate. (Compl. ¶142 n.5.)

Defendants argue that describing the "consistency" of LFTB as more like gelatin than beef is not "substantially untrue" and involves "subjective judgment" that cannot be proven false. (Mem. at 37.) Once again, Defendants are ignoring the allegations in the Complaint, presenting an argument based on their version of events, and asking the Court to resolve a dispute that should be left for the jury. But, before getting there, the record should be set straight. Defendants did ***not*** merely state that LFTB has the "consistency" of gelatin. They reported that "pink slime" is more like gelatin than beef, meat, and ground beef. (Compl. ¶¶194, 460, 547.)

The Complaint alleges facts showing that these statements are objectively and provably false. Gelatin is a "water-soluble protein prepared from collagen and used in food preparation as the basis of jellies." (*Id.* ¶217.) JELL-O is a gelatin. LFTB is not. The raw material used to make LFTB, the process to make LFTB, the physical nature of LFTB, and the nutritional value of LFTB are all different than gelatin. (*Id.*) A visual inspection of LFTB versus a gelatin also demonstrates that LFTB is not like gelatin and does not have the consistency of gelatin. (*Id.* Exs. 105-07.) In fact, the USDA would not allow LFTB in ground beef if it was gelatin or like gelatin. (*Id.* ¶218.)

These facts establish that Defendants' description, even if it has a subjective component, is actionable because it states and implies provably false facts. (*Supra* at 14.) The evidence cited by Defendants only shows there is a disputed issue of fact for the jury to decide. First, Defendants claim that "BPI admits that the consistency of LFTB is different from beef" because it is a different texture. (Mem. at 37.) While LFTB is "finely textured," it does not have the consistency of gelatin and is not like gelatin. Second, Defendants again cite the 1978 patent application for their contention that LFTB is a "viscous paste." (*Id.*) But as discussed above, the patent application is not discussing LFTB.

H. Defendants falsely stated LFTB's protein comes from connective tissue (Counts 9 & 18).

Defendants reported that "pink slime" is not as "nutritious as ground beef" because "the protein comes mostly from connective tissue, not muscle meat." (Compl. ¶¶195, 468, 555.) They also said that BPI uses "mostly fat and connective tissue" to make "pink slime." (*Id.*) However, LFTB's protein comes from muscle meat, not connective tissue. (*Id.* ¶¶219-20, 289.) Counts 9 and 18 assert plausible claims because Defendants' statements were factually inaccurate and falsely implied that LFTB is not really beef and has little to no nutritional value.

Defendants argue that BPI's claims are "based on the allegation that ABC chose the wrong adverb to qualify statements that are otherwise concededly true." (Mem. at 34.) Hardly. Defendants' statements were not even close to being accurate. BPI's process to make LFTB removes connective tissue from the beef trimmings. (Compl. ¶55.) That is the purpose of the de-sinewer. (*Id.*) As a result, LFTB's protein, like that of other beef, comes from muscle meat. (*Id.* ¶¶219, 289.) Every aspect of Defendants' statement was false, not just the adverb.

Defendants also argue that "it is immaterial whether the protein from connective tissue is more or less than 50 percent" because BPI allegedly concedes that LFTB is not "as nutritious as ground beef." (Mem. at 36.) BPI has made no such concession. BPI specifically alleges facts showing that LFTB is as nutritious as ground beef. (Compl. ¶¶281-82.) Defendants' description of LFTB's protein source is not "immaterial," because it was factually inaccurate and falsely implied LFTB is a nutritionally void or inferior product.

IV. The Complaint adequately alleges claims based on Defendants' false implications about BPI and LFTB.

The Complaint asserts seven claims against Defendants based on their false implications that LFTB is not beef, not safe, and not nutritious, as well as their false implication that BPI improperly obtained approval for LFTB. These claims are based on the totality of Defendants'

news reports. Individual reports, as well as the collective impact of all of Defendants' reports, implied these false facts.

A. Defendants falsely implied that LFTB is not really beef (Counts 19 & 23).

The Complaint identifies 170 false statements by Defendants that implied LFTB is not really beef but instead is some imitation product. (Compl. ¶¶190-97; 564-71, 627-34.) Defendants now concede that LFTB is beef. Accordingly, the only issue is whether their publications falsely implied it is not.

1. A reasonable juror could conclude that Defendants implied LFTB is not really beef.

Defendants argue that their reports "did not state, and cannot reasonably be understood to have meant, that LFTB is not beef or meat." (Mem. at 43.) This argument is built on a false legal premise. Defendants can be held liable for implying LFTB is not beef even if they did not expressly say so, which they did. (*Supra* at 14.) Moreover, this argument is inconsistent with the reaction of consumers who watched and read Defendants' reports. Consumers concluded, based on what Defendants said, that LFTB is "not pure beef," not "100% beef," and simply not "beef." (Compl. ¶312, Compl. Appx. 3.) They also concluded that ground beef made with LFTB is not "100% ground beef." (*Id.*) The Complaint identifies 154 comments by consumers who concluded that LFTB is not beef based on Defendants' reporting. (*Id.*)

A reasonable juror could likewise conclude that Defendants implied LFTB is not really beef. Defendants reported that LFTB is "pink slime." They said it "is not what it purports to be . . . [m]eat," is "not really beef," and is "not what the typical layperson would consider meat." They stated that former USDA scientists "didn't consider [LFTB] beef" and "didn't feel it was meat." Instead of describing it as 100% beef, they described "pink slime" as a "filler," a "salvage" product, and a "cheap substitute" for ground beef. Finally, they said that "pink slime"

was more "like a gelatin" than beef or meat. All of these statements implied that LFTB was not beef.

Defendants' discussion of the USDA's approval of LFTB furthered the implication that LFTB is not really beef. (*Infra* at 48-50.) They said USDA scientists ("whistleblowers") objected and warned against the use of LFTB in ground beef labeled 100% beef, that a USDA official with links to the beef industry overruled the scientists, and that the official did so because the product is pink. They also reported that the official who approved LFTB received a lucrative position with BPI's supplier shortly after leaving the USDA. All of these statements implied that LFTB would not be allowed in ground beef labeled "100% beef" if the USDA's decision was based on science. According to Defendants, the science showed LFTB is "not really beef."

And the Defendants reinforced the false implication that LFTB is not really beef by stating that the use of LFTB in ground beef is "economic" and "food" fraud. According to Defendants, only organic ground beef that does not contain LFTB is "pure meat." Everything else is "suspect." By making these statements, Defendants implied that consumers were not getting 100% beef when they purchased ground beef made with LFTB. Instead, they were getting a certain percentage of beef and a certain percentage of non-beef "pink slime." Defendants did not need to expressly state that LFTB is not beef, which they did, to imply that fact and to create that impression with consumers.

2. Defendants did not mitigate the false implication.

Defendants argue that their publications did not imply LFTB is not beef because they accurately reported that LFTB is made from "beef trimmings" and that LFTB is considered by some to be beef. (Mem. at 40-41.) This argument is also premised on a mischaracterization of defamation/disparagement law and is inconsistent with consumers' reactions to Defendants' publications. Defendants can be held liable for implying LFTB is not really beef even if they

published some accurate information about the product. (*Supra* at 14.) Moreover, consumers who watched and read the totality of Defendants' reports—the accurate and inaccurate statements—concluded that LFTB is not beef based on what Defendants said. The totality of Defendants' publications, as discussed above, individually and collectively implied LFTB is not really beef.

Beef trimmings. On occasion, Defendants accurately reported that LFTB is made from beef trimmings. (Mem. at 40-41.) However, they also falsely reported that the trimmings are contaminated waste and scraps, consist of "mostly fat and connective tissues," are "unlike" what scientists consider "real ground beef," and were once used only for dog food and cooking oil. Defendants' acknowledgement in some reports that LFTB is made from "beef trimmings" was undermined by these other false statements about the raw material used by BPI.

Considered beef. Defendants accurately reported, in some but not all of their reports, that BPI and the USDA consider LFTB to be beef. (Mem. at 41 n.12.) However, they also reported that LFTB is "pink slime," "not really beef," a "filler," a "salvage" product, "not what the typical person would consider meat," and "not what it purport[ed] to be . . . [m]eat." These other statements were intended to, and did, convey to consumers that BPI's and the USDA's stance on LFTB was deceptive and misleading to consumers. Defendants further undermined the weight consumers gave to comments by BPI and the USDA by implying that the USDA's approval of LFTB was not legitimate and that BPI (and the beef industry) was defrauding consumers by using LFTB in ground beef.

Process. Defendants argue that their reports "accurately describe the process" to make LFTB. (Mem. at 40-41.) That is not true. Defendants falsely described the raw material used by BPI at the start of the process. They falsely described BPI's desinewing process by stating

LFTB's protein comes mostly from connective tissue. They falsely described BPI's tempering process by stating that LFTB "cooks" and "simmers" the trimmings. (Compl. ¶¶585, 648.) They falsely described BPI's ammonia hydroxide process by stating BPI "sprays" LFTB with ammonia to "disinfect" it. (*Id.* ¶¶586, 649, 684.) Defendants not only misrepresented the process to make LFTB, their descriptions of the end product (LFTB) were knowingly false.

B. Defendants falsely implied that LFTB is not safe for consumption (Counts 20, 24 & 26).

The Complaint identifies 151 false statements by Defendants that implied LFTB is not safe for consumption. (Compl. ¶¶223-29; 580-87, 643-50, 678-85.) Defendants now concede that LFTB is safe. Accordingly, as with the false implication regarding beef, the only issue is whether their publications falsely implied it is not.

1. A reasonable juror could conclude that Defendants implied LFTB is not safe.

Defendants argue that the "implication that BPI strains the hardest to divine from ABC's reporting is that LFTB 'is not safe for public consumption.'" (Mem. at 38.) BPI does not need to strain hard at all. All BPI (and the Court) needs to do is review the comments by consumers who actually watched and read Defendants' reports. (Compl. ¶313, Compl. Appx. 4.) Consumers concluded that BPI is "poisoning" people, that LFTB is a "poison," and that BPI produces a product that is not "safe." (*Id.*) They conclude that the use of LFTB in ground beef likely causes "cancer" and other "diseases or illnesses." (*Id.*) The Complaint identifies 169 comments by consumers who concluded that LFTB is not safe for consumption based on Defendants' reporting. (*Id.*)

A reasonable juror could certainly conclude, like these consumers, that Defendants implied LFTB is not really safe. Defendants described LFTB as "pink slime" 137 times. Describing food as slime indicates it is a repulsive, filthy, and disgusting liquid or fluid. (*Supra*

at 7.) They also described LFTB as an "adulterant." Describing food as an adulterant indicates it contains a poisonous or deleterious substance that makes it unsafe. (*Supra* at 17 n.4.) Defendants' descriptions of LFTB implied the product is something that consumers should not be eating—"slime" and "adulterant" are not descriptions that consumers readily associate with safe food.

Defendants furthered the implication that LFTB is not really safe for consumption by falsely describing the raw material used to make it. They said the raw material to make "pink slime" is "waste" and "scraps" from the "most contaminated" parts of the cow that are "highly exposed to fecal matter" and contain "carcass remains" and "higher levels of bacteria." So bad are these trimmings, according to Defendants, they were "once used only for dog food and cooking oil." (*Supra* at 4-5.) These statements implied that LFTB is made from a raw material that is not fit for human consumption.

Defendants reinforced this false implication by distorting the process used by BPI to make LFTB. First, Defendants falsely described BPI's tempering of the raw trimmings. BPI receives chilled trimmings and tempers them to their pre-slaughter temperature. (Compl. ¶56.) The trimmings are never cooked or simmered. (*Id.* ¶¶56, 261-66.) Nonetheless, Defendants falsely said that the trimmings are "slightly cooked" and "simmered." (*Id.* ¶¶585, 648.) And they reported that this process increases "the level of pathogens and the level of spoilage bacteria" in LFTB. (*Id.*) Defendants thus implied that LFTB contaminates fresh ground beef by introducing a cooked product with increased levels of pathogens. (*Id.* ¶227.)

Second, Defendants falsely described BPI's use of ammonia hydroxide. Ammonia is used in hundreds of food products. (*Id.* ¶254.) BPI uses a microscopic amount of ammonia hydroxide (measured in parts per million) to increase the natural pH level of the beef. (*Id.* ¶58.)

Defendants falsely described BPI's use of ammonia hydroxide by saying that the trimmings are "sprayed," "sanitized," and "disinfect[ed]" with ammonia to "kill bacteria" and "germs." (*Id.* ¶¶586, 649, 684.) These false statements implied that "pink slime" is more dangerous to consume than beef because its raw material must be sanitized and disinfected with sprays of ammonia. That is simply not true.

Finally, as if to erase any doubt about whether they were implying that LFTB is not safe for consumption, Defendants reported that knowledgeable people will not eat ground beef with "pink slime." For example, in their early reports, Defendants told consumers that a "whistleblower" from the USDA "won't buy it" and an organic butcher "won't sell or serve [it to] his family." (Compl. Exs. 2, 4.) These statement might appear innocuous standing alone, but in light of Defendants' other statements, the message was clear. Defendants were telling consumers that, if they were concerned about their safety, they too should avoid consuming ground beef with "pink slime."

2. Defendants did not mitigate the false implication.

Defendants argue that their reports did not imply LFTB is not safe but, instead, gave LFTB an "unequivocal safety endorsement." (Mem. at 13.) That is an overstatement. Describing LFTB as a "pink slime" and "adulterant" made from contaminated "scraps" and "waste" that must be "disinfected" with ammonia is definitely not an unequivocal safety endorsement. And consumers did not understand Defendants were providing an unequivocal safety endorsement. Instead, consumers came away with the understanding that "pink slime" is a "poison" they should not consume. A reasonable juror could reach the same conclusion based on the totality of Defendants' publications notwithstanding their so-called "unequivocal" endorsement. (*Supra* at 7.)

One reason that consumers reached that conclusion, and a reasonable juror could, is that Defendants did not always provide their "safety endorsement" of LFTB. Indeed, Defendants' first online report on "pink slime" did not include any mention that the product is safe for consumption. (Compl. Ex. 13.) In fact, of the 25 reports that Defendants published about LFTB, by their own count, an "endorsement" was included in only 11 reports. (Mem. at 11-12.) Defendants' occasional "endorsement" certainly did not impact the implications created by their false statements during their other reports.

Moreover, Defendants' so-called "safety endorsements," were pretty insignificant. None of the Defendants vouched for the safety of LFTB. They ***occasionally***, but not always, reported that the USDA and BPI consider LFTB to be safe. (Mem. at 11-12.) However, they buried these statements within the reports and undermined the credibility of those sources. Defendants said that the USDA had approved LFTB over the objection of USDA scientists because officials had links to the beef industry. Defendants said the BPI was defrauding consumers by "hiding" a "pink slime" in ground beef labeled 100% beef. By discrediting the USDA and BPI, Defendants made sure consumers did not believe the safety endorsement these groups provided.

C. Defendants falsely implied that LFTB is not nutritious (Counts 21 & 25).

The Complaint identifies 172 false statements by Defendants that implied LFTB has little to no nutritional value. (Compl. ¶¶268-76, 596-03, 659-66.) Defendants now concede that LFTB is a nutritious lean beef. Accordingly, as with the other false implications, the only issue is whether their publications falsely implied it is not nutritious.

1. Defendants concede they made false statements about LFTB's nutrition.

Defendants argue they were "careful" only to state that "LFTB is not as nutritious as other components of ground beef" and "not as nutritious as ground beef." (Mem. at 39-40 n.11.)

These concessions show that Defendants were "careful" to make false statements about LFTB. Stating that LFTB is not as nutritious as ground beef or other components of ground beef is false. (Compl. ¶¶280-86.) Therefore, Defendants have conceded that Counts 21 and 25 state plausible claims because they knowingly published false statements about LFTB's nutritional value.

The Complaint alleges several facts showing that Defendants' statements about LFTB's nutritional value were false. LFTB's nutritional value is equal to, if not better than, ground beef without LFTB. (*Id.* ¶281.) LFTB has "substantially identical nutritional value as USDA ground beef," a nutritional comparison shows LFTB and 90/10 ground beef are "virtually identical," and LFTB is "nutritionally equivalent" to ground beef. (*Id.* ¶282.) BPI and others told Defendants that claiming LFTB "is less nutritious than other ground beef is false," but Defendants published their statements anyway. (*Id.*)

2. A reasonable juror could conclude that Defendants implied LFTB has little to no nutritional value.

Once again, Defendants argue that their reports "cannot be read to imply that LFTB is 'not nutritious.'" (Mem. at 39.) And, once again, the consumer comments show that Defendants are wrong. (Compl. ¶314; Compl. Appx. 5.) Consumers who read Defendants' report concluded that "this pink slime doesn't really have nutritive value," "the pink slime has NO nutritional value," "[p]ink slime has much less nutritional value than muscle," and "[p]ink slime is not as nutritious as regular beef." (*Id.*) The Complaint identifies 28 comments by consumers who concluded that LFTB is not nutritious based on what Defendants said. (*Id.*) Defendants are asking the Court to reach a conclusion inconsistent with the reaction of consumers who watched and read Defendants' reports at the time.

Of course, the Court should not do so, because a reasonable juror could conclude that Defendants implied LFTB has little to no nutritional value. Defendants reported that LFTB is

"less nutritious" than beef and "less nutritious than pure ground beef." (Compl. ¶¶460, 547.) They made these statements about a product they had already described as "pink slime," an "adulterant," and "not really beef." It was a product made from "contaminated" waste and scraps. These statements implied that LFTB provides little to no nutritional value, because it is not really beef and is not really made from beef.

Defendants furthered that implication by describing LFTB as "filler" and "more like a gelatin" than beef. Defendants reported that consuming this "filler" and "gelatin" would "fill you up, but it's not going to do you any good." (Compl. ¶¶602, 665.) This implied that LFTB would not do consumers "any good" because it is simply a filler, like bread crumbs, that has little to no nutritional value. Or that it would not do consumer "any good" because it is simply a gelatin like JELL-O that has little to no nutritional value.

Finally, Defendants reinforced the false implication by misleading consumers about the protein provided by LFTB. Defendants falsely stated LFTB's protein "comes mostly from connective tissue, not muscle meat." Consumers expect a beef's protein to come from muscle meat. That is one of the reasons beef is nutritious. Defendants' statements indicated that any protein provided by LFTB is questionable or suspect, at best, because it does not come from the expected source (muscle meat). A reasonable juror could conclude that the totality of these false statements implied that LFTB adds little to no nutritional value to ground beef.

3. Defendants did not mitigate the false implication.

Defendants argue that they did not imply LFTB has little to no nutritional value because they published statements by sources indicating LFTB is "nutritious." (Mem. at 39.) This argument is flawed for the same reasons discussed in connection with Defendants' implication that LFTB is not beef and not safe. First, Defendants did ***not*** acknowledge that LFTB is nutritious in most of their reports—14 of the 25 reports have nothing close to an endorsement.

(*See* Compl. Exs. 2-3, 5-7, 10, 12-14, 16-18, 25-26.) Second, Defendants' acknowledgement that LFTB is nutritious was buried among dozens of false statements implying just the opposite. And, third, consumers concluded that LFTB is not nutritious based on the totality of Defendants' statements, including their occasional acknowledgement that LFTB is nutritious. A reasonable juror could reach the same conclusion, which means BPI's implication claim is viable even though Defendants occasionally published accurate information. (*Supra* at 7.)

D. Defendants falsely implied that BPI improperly obtained approval for LFTB (Count 22).

The Complaint identifies 22 false statements by Defendants that implied BPI improperly obtained approval for LFTB from the USDA. (Compl. ¶¶292-96, 614-18.) Defendants argue that "there is nothing in the ABC News reports even remotely suggesting that BPI engaged in improper conduct in connection with the USDA's approval process." (Mem. at 50-51.) BPI and Defendants obviously disagree. Accordingly, the issue for the Court is whether the Complaint alleges sufficient facts from which a reasonable juror could conclude that Defendants implied BPI improperly obtained approval.

1. A reasonable juror could conclude Defendants implied BPI improperly obtained approval.

The fact that Defendants did not expressly state BPI engaged in improper conduct to get LFTB approved by the USDA is not relevant. (*Supra* at 14.) The issue is whether the totality of their statements nonetheless created that implication. (*Id.*) On that issue, Defendants' first broadcast and first report (both on March 7) are excellent examples of how Defendants implied BPI improperly obtained approval for LFTB without expressly saying it. (Compl. Exs. 2, 13.)

Defendants open their reports by saying that a former USDA microbiologist, and now "whistleblower," has come forward to discuss a "pink slime" being used to in ground beef. (*Id.*) They go on to report that USDA scientists "warned against" using "pink slime" in ground beef

but that their "government bosses overruled them." (*Id.*) About these "bosses," Defendants said they had "links to the beef industry" and the woman (JoAnn Smith) who decided that the "pink slime" could go into ground beef received $1.2 million as director of BPI's supplier after she left the USDA. (*Id.*) Moreover, according to Defendants, the so-called "mother of pink slime," had no legitimate basis on which to overrule the scientists. (*Id.;* Compl. ¶616(f).) She approved LFTB because it was "pink" in color. (*Id.*)

Defendants' entire narrative is false. The USDA scientists interviewed by Defendants were not whistleblowers, there were no objections to LFTB by USDA scientists, no one overruled scientists, and the woman identified by Defendants (Smith) was ***not even the one*** who approved LFTB. (*Id.* ¶¶300-09.) She was not even at the USDA at the time. (*Id.*) Defendants' inaccurate description of the process implied that the USDA would never have approved LFTB if it were being reviewed based on its merits. BPI could get LFTB approved only through "links" to the USDA and the promise of a lucrative board position with its supplier.

Defendants reinforced this impression by describing the use of LFTB in ground beef as "economic fraud." (Compl. Exs. 2, 13.) Again, in their very first reports–the ones that set the tone for everything that followed–Defendants said that the "whistleblower" from the USDA considered the use of LFTB in ground beef to be "economic fraud" and that his colleague at the USDA did not consider LFTB to be beef or meat. (*Id.*) By making these statements, Defendants implied that consumers were being defrauded as a result of the decision made by the USDA in connection with BPI's product. They implied that this was happening because something improper took place at the USDA during the LFTB approval process—so say the "whistleblowers."

Defendants also left no doubt that it was BPI pulling the strings to get their product improperly approved by the USDA. Defendants specifically mentioned BPI (and not the name of BPI's supplier) in reporting on Smith's board appointment. They noted that Smith's decision led to hundreds of millions of dollars for BPI–the "maker of pink slime." (Compl. Ex. 2 at 3.) They also reported that the man who appointed Smith to his board was a "good friend" of BPI. (Compl. ¶616.) And BPI was the only "beef industry" company mentioned in their reports talking about USDA officials with "links" to the industry. (Compl. Exs. 2, 13.) Defendants reported that BPI was the company that stood to profit from the USDA approval of LFTB, so naturally, it was the company that improperly pushed it through "over the objections" of scientists.

2. Consumer comments demonstrate that Defendants' reports implied BPI improperly obtained approval.

The consumer comments are, once again, telling. Defendants argue they did not imply anything improper took place and, specifically, did not imply that BPI did anything wrong. (Mem. at 51.) Their argument is inconsistent with the conclusions reached by consumers who watched and read their reports. (Compl. ¶315; Compl. Appx. 6.) Consumers were outraged by the USDA's approval of LFTB. (*Id.*) Consumers said Smith "should be brought up on charges" because she received a "kick back" and had been "[bought] off." (*Id.*) They said she received a "cushy job" to avoid labeling LFTB. (*Id.*) And they said the approval of LFTB shows "money buys influence and the public is helpless to overcome the corruption." (*Id.*) The Complaint identifies 42 statements by consumers showing that they believed that the USDA's approval of LFTB was improper if not illegal. (*Id.*)

Consumers also specifically concluded that BPI was responsible for the "corruption" that led to the approval of LFTB. (*Id.*) Consumers wrote that the "USDA apparently conspired with

BPI" to keep pink slime off labels, that the "USDA, BPI, and the beef industry" got caught "scamming consumers," and that BPI's founder, Eldon Roth, and his "FDA accomplices should be in jail for defrauding the public." (*Id.*) While Defendants now argue they did not imply that BPI did anything wrong, the people who actually watched and read their reports believed that was ***precisely*** what Defendants were saying. A reasonable juror could reach the same conclusion.

V. Defendants improperly attempt to bar agricultural companies in South Dakota from seeking recourse for false statements about their products.

South Dakota is not a good state for agricultural companies if Defendants have their way. According to Defendants, agricultural companies cannot bring defamation claims when someone publishes false statements about their products. (Mem. at 43-48.) And, according to their view, agricultural companies also cannot bring common law disparagement claims because they have been preempted by the AFPDA. (Mem. at 13-22.) These two propositions would often leave South Dakota agricultural companies essentially without recourse when someone makes false statements about their products. Fortunately for agricultural companies in the State, Defendants are wrong on both items.

A. BPI can assert defamation claims because Defendants' false statements impugned BPI's reputation.

The Complaint asserts 13 defamation claims against Defendants for their false statements about BPI's product, the raw material BPI uses to make LFTB, BPI's process of making LFTB, and the USDA's approval of BPI's product. (Counts 1-9, 19-24.) BPI spent over 20 years earning a reputation as the provider of a safe and nutritious lean beef. (Compl. ¶¶1, 378-79.) Defendants attacked that reputation by stating and implying that BPI deceived consumers by producing an unsafe "pink slime."

1. Defamation claims are permitted based on false statements about a plaintiff's product.

Defendants argue that the Court should follow the "time honored" path and reject BPI's defamation claims that relate to the "nature and quality of BPI's product." (Mem. at 43-48.) That is simply wrong. A statement "may be published in circumstances that . . . disparage the quality of the product and at the same time impl[ies] the owner or vendor is dishonest, fraudulent, or incompetent, thus affecting the owner's or vendor's reputation." *Ira Green, Inc. v. J.L. Darling, Corp.*, No. 3:11-cv-05796, 2012 WL 4793005, at *12 (W.D. Wash. Oct. 9, 2012). When that happens, a corporate plaintiff can bring an action "for defamation as well as for disparagement." *Id.* In fact, "the same statement is [frequently] actionable both as disparagement of goods . . . and as a personal slander." Restatement 2d Torts §573(g) (1977).

Based on this principle, courts across the country have allowed companies to bring defamation claims when false statements about their products injure their reputations. *E.g.*, *Paint Brush*, 599 N.W.2d at 398 (reversing grant of summary judgment where counterclaim-defendant accused counterclaim-plaintiff of deception and sale of an inferior product); *Metabolife Int'l*, 264 F.3d at 847-850 (reversing dismissal where news organization implied plaintiff's product was not safe); *Lundell*, 98 F.3d at 360 (reinstating jury verdict for plaintiff where news organization stated plaintiff's recycling machine "does not work"); *Cont'l Nut Co. v. Robert L. Berner Co.*, 345 F.2d 395, 397 (7th Cir. 1965) (reversing dismissal where defendant implied the plaintiff's nuts may not meet "proper standards"); *Ira Green,* 2012 WL 4793005, at *12 (denying summary judgment where defendant stated plaintiff's product was "substandard"); *Modern Prods.*, 734 F. Supp. at 363-64 (denying summary judgment where defendant's book cover implied plaintiff's product presented health hazards); *Gen. Prods.*, 526 F. Supp. at 554 (denying summary judgment where publisher implied plaintiff's chimneys were safe for only one

type of stove); *Hy Cite*, 2011 WL 1206768, *6-7 (denying dismissal where defendant described plaintiff's product as a "knock-off" and made with "dirty steel"); *Process Controls*, 753 F. Supp. 2d at 932-33 (denying dismissal where defendant published advertisement stating its product was relatively safer than plaintiff's product); *Morton Grove Pharm., Inc. v. Nat'l Pediculosis Ass'n, Inc.*, 494 F. Supp. 2d 934, 943 (N.D. Ill. 2007) (denying dismissal where defendant questioned the "safety profile and effectiveness" of the chemical used in plaintiff's hair care product).

2. Defendants impugned BPI's reputation and integrity.

BPI spent nearly 20 years earning a reputation for producing safe and nutritious lean beef. (Compl. ¶¶1, 378-79.) Defendants nearly destroyed that reputation in one month. According to Defendants, BPI is not the producer of a safe and nutritious lean beef, but instead is the "maker of [a] pink slime" that was being hidden in ground beef. (*Id.* ¶392.) It is the producer of an "adulterant" made from "contaminated" waste and scraps once used only for dog food and cooking oil. Defendants implied that BPI is putting an unsafe product in the stream of commerce.

Moreover, Defendants stated BPI made "hundreds of millions of dollars" by hiding "pink slime" in ground beef. (Compl. ¶168.) BPI participated in an "economic fraud." (*Id.* ¶192.) Consumers believed they were purchasing 100% ground beef but what they got was part beef and part "pink slime." BPI was not helping ground beef processors sell lean ground beef for less, as was its existing reputation. (Compl. ¶¶325-26.) BPI was deceiving consumers into paying 100% full value for something that was a "cheap substitute."

The reason consumers were subjected to this fraud was because BPI improperly obtained approval from the USDA. According to Defendants, USDA scientists did not want BPI's product in ground beef. They objected to its use because it was not beef. However, they were overruled by an official with links to the beef industry (i.e., to BPI) who subsequently received

$1.2 million from a "good friend" of BPI. Before Defendants' reports, BPI was the maker of a USDA approved lean beef. Afterwards, BPI was the maker of a "pink slime" that got its product approved because a USDA official liked its color and ignored scientists.

Based on Defendants' statements, it is no wonder that consumers turned against BPI. The consumer comments are once again telling and demonstrate that Defendants did, in fact, attack BPI's reputation and integrity. Based on Defendants' reports, consumers concluded:

- "Being able to make 'fillers' and dupe the American public doesn't make it ok or safe."
- "Consumers around the world need to wake up to this blatant fraud . . . its about time that they get what they deserve for their deception."
- "It may be a beef by-product but no matter what you say about it, it represents a fraud."
- "Pink slime is definitely deceptive—consumers didn't know this disgusting filler was in our ground beef."
- "Beef Products Inc. can take their product and shove it back up where it came from on the cow. Thanks to their continued lies, we've been eating beef garbage formerly fed to dogs and cats."
- "I'm REALLY glad to hear BPI going under! This garbage they scrape up and spray with carcinogenic, toxic AMMONIA is to increase their PROFITS."

(Compl. Appxs. 3-6.) Defendants can protest that they did not intend to attack BPI's reputation and integrity, but these comments show that their publications did just that. A reasonable juror could reach the same conclusion.[11]

B. BPI can assert common law product disparagement claims because the AFPDA did not preempt them.

[11] None of the defamation cases cited by Defendants (Mem. at 44, 46-47) involve a disinformation campaign anywhere close to that alleged in the Complaint. Nor did they involve allegations showing that the false statements, in fact, hurt the plaintiffs' reputation with consumers. In those cases, the plaintiffs had not alleged sufficient facts to show that defendant's statements attacked their reputation. That is clearly not an issue in this case.

The Complaint asserts 12 common law product disparagement claims against Defendants based on their false statements about LFTB. (Counts 10-18, 23-25.) Defendants argue the Court should dismiss all of these claims because they have been preempted by the AFPDA. (Mem. at 13-22.) The Court should not take the unprecedented, and illogical, step of barring agricultural companies in South Dakota from asserting claims that can be brought by every other industry in the State when their products are attacked. *See, e.g.*, *Paint Brush*, 599 N.W.2d at 399 (counterclaim-defendant published false statements about quality of counterclaim plaintiff's brushes).[12]

1. The AFPDA created a new statutory remedy for agricultural companies.

Several states, including South Dakota, passed agricultural food product disparagement laws following the 1992 *Auvil* decision. South Dakota's statute is short (totaling 237 words) and focuses on a very specific set of circumstances. The South Dakota statute states, in part:

> Any producer of perishable agricultural food products who suffers damage as a result of another person's disparagement of any such perishable agricultural food product has a cause of action for damages and any other appropriate relief in a court of competent jurisdiction.
>
> "Disparagement" [means] dissemination in any manner to the public of any information that the disseminator knows to be false and that states or implies that an agricultural food product is not safe for consumption by the public or that generally accepted agricultural and management practices make agricultural food products unsafe for consumption by the public.

(SDCL 20-10A-2; 20-10A-1.) This statutory cause of action authorizes an agricultural company to recover up to treble damages if it can establish that the defendant knowingly published false

[12] Defendants contend that South Dakota did not recognize common law product disparagement claims prior to the AFPDA. (Mem. at 14.) That is not correct. South Dakota has long permitted plaintiffs to pursue claims when someone disparages their product. *E.g.*, *Ramharter*, 128 N.W. at 808-09 (discussing disparagement of property where defendants made false statement about plaintiff's stoves); *see also Youngquist v. Am. Ry. Express Co.*, 49 SD 373, 206 N.W. 576 (1926) (discussing libel claims where defendant made false statement about plaintiff's horses).

information regarding the safety of its product for consumption. (*Id.* 20-10A-3.) The issue for the Court, therefore, is whether the Legislature also intended to bar agricultural companies from pursuing common law product disparagement claims when they enacted the AFPDA. *See In re Brockmueller*, 374 N.W.2d 135, 137-38 (S.D. 1985) (recognizing that plaintiffs can pursue common law claims unless they conflict with the "will of the sovereign power").

2. The AFPDA did not eliminate common law claims.

No court has ever ruled that the AFPDA or other food disparagement statutes preempt, negate, or eliminate common law product disparagement claims by agricultural companies. As far as BPI can tell, no one has even tried to make such an argument. Defendants' contention that a statute intended to help agricultural companies should, in fact, be used against them to narrow their rights is, indeed, unprecedented. It is also wrong.

a. The AFPDA contains no language negating common law claims.

The Court's inquiry focuses on the AFPDA's language. "A statute's plain language normally expresses its intent." *Hobart v. Ferebee*, 2004 SD 138, ¶10, 692 N.W.2d 509, 512. The intent of the statute must be determined from its language and not from what others think it should have said. *Clark Cnty. v. Sioux Equip. Corp.*, 2008 SD 60, ¶28, 753 N.W.2d 406, 417. Accordingly, the Court should not interpret the AFPDA as preempting common law claims "unless that result is imperatively required by the language of the statute." *Hok Sport, Inc. v. FC Des Moines, L.C.*, 495 F.3d 927, 936-37 (8th Cir. 2007) (finding plaintiff could rely on common law remedy of piercing the corporate veil under Iowa law because language in the statute "does not indicate the Iowa legislature intended to preempt common law rights"); *Kohrt v. MidAmerican Energy Co.*, 364 F.3d 894, 901-02 (8th Cir. 2004) (finding plaintiff could assert

common law wrongful discharge claim under Iowa law because statute contained no express prohibition on such claims).

The AFPDA contains no language that indicates the Legislature intended for it to eliminate common law product disparagement claims. It does not state it is limiting, abridging, or altering common law claims in any respect. Nor does the statute say it is the "only" remedy for agricultural companies, the "sole" remedy, the "exclusive" remedy, or even the "primary" remedy. There is nothing to indicate that the Legislature intended the statute to narrow the scope of potential common law claims for disparagement of an agricultural company's food product. The Court should not conclude that the AFPDA preempts these common law claims absent such language.

b. The AFPDA does not cover the whole subject matter of common law disparagement claims.

The Court should also evaluate whether the remedial scheme developed by the AFPDA addresses all of the circumstances and injuries covered by the common law. Under South Dakota law, a statute does not provide an exclusive remedy unless it covers the whole subject matter. *Burnett v. Myers*, 42 SD 233, 233, 173 N.W. 730, 731 (1919); *e.g.*, *Jones v. Woodworth*, 24 SD 583, 124 N.W. 844, 845 (1910) (finding Code of Civil Procedure did not preempt common law on challenges to jury panel because Code was silent on that issue); *Quality Processing, Inc. v. Adams Bank & Trust*, 9 F.3d 1360, 1365 (8th Cir. 1993) (finding that the "narrow scope of the remedy created" by the Uniform Commercial Code indicates that it was not intended to preempt Nebraska's "much broader" common law tort of intentional interference with contract).

The AFPDA does not create a complete remedial scheme for product disparagement. It provides a statutory claim if (1) the plaintiff is an agricultural company, (2) the defendant

knowingly published a false statement about the plaintiff's product, and (3) the false statement implied the product was not safe for consumption. That is all. The statute does not address what happens if the false statement is not about a product's safety for consumption. It does not address what happens if the defendant acted with reckless disregard, but not knowingly. It does not address the remedies if the product is not considered an agricultural food product. The narrow scope of the AFPDA indicates the Legislature did not intend to preempt the common law, which provides a remedy for agricultural companies under all of these circumstances.

c. AFPDA is not the exclusive remedy for agricultural companies.

The Court should consider whether the AFPDA creates an additional right for agricultural companies or an exclusive remedy. A statute that creates an additional or cumulative right for a group does not preempt their common law rights. *E.g.*, *Quality Processing*, 9 F.3d at 1365 (finding UCC remedies "merely supplement common law remedies" because there was no "clear legislative intent to preempt" common law); *Barber Asphalt Paving Co. v. Austin*, 186 F. 443, 445 (8th Cir. 1911) (finding Iowa "statute was intended to confer a cumulative or additional right [to employees] rather than to abridge an existing one"); *Overcast v. Billings Mut. Ins. Co.*, 11 S.W.3d 62, 66-67 (Mo. 2000) (finding "statute does not purport to preempt the common law breach of contract remedy but only to add to that remedy"); *Frontier Props. Corp. v. Swanberg*, 488 N.W.2d 146, 149 (Iowa 1992) (finding statute was "cumulative" of a contractor's rights, "not exclusive" of common law actions).

The AFPDA creates an additional or cumulative right for agricultural companies under a specific set of circumstances. The statute allows agricultural companies to recover treble damages if a defendant knowingly publishes false statements regarding the safety of their products for consumption. The remedy—treble damages—is the key. *See Mansfield v. Pitney Bowes, Inc.*, No. 12-cv-10131, 2013 WL 947191, at *4 (D. Mass. Mar. 12, 2013) (finding statute

did not preempt common law because it "creates a right to treble damages . . . that [do] not exist in the common law and balances this right with a shortened recovery period"). Agricultural companies cannot recover treble damages under the common law. The Legislature elected to provide agricultural companies with an enhancement of common law damages by providing treble damages in certain circumstances. In doing so, the Legislature did not elect to include any language indicating this was the only remedy for agricultural companies that are victimized by false statements about their products.

d. BPI's common law claims do not conflict with the AFPDA.

BPI's common law claims do not conflict with the AFPDA. There are differences between common law product disparagement and the AFPDA. (Mem. at 15-16.) Those differences, however, do not mean there is a conflict. A plaintiff can recover treble damages if it satisfies the requirements of the AFPDA—including the knowledge, the subject matter, and timing requirements. A plaintiff cannot recover treble damages under the AFPDA if it does not satisfy those requirements. It is that simple. A plaintiff does not receive the remedy provided by the AFPDA if it only satisfies the requirements of the common law. Under those circumstances, the plaintiff is entitled to receive only the remedy permitted by the common law (actual and punitive damages).

3. There is no precedent for preempting BPI's common law claims.

None of the cases cited by Defendants involve statutes similar to the AFPDA. First, the AFPDA does not include any language indicating that compliance with its provisions is the only way an agricultural company may seek redress when its product has been disparaged. The statutes at issue in the cases cited by Defendants explicitly prohibited action that was permitted by common law. *E.g.*, *State v. Shadbolt*, 1999 SD 15, ¶¶16-17, 590 N.W.2d 231, 234 (statute prohibited individuals acting as bail bondsmen or runners unless they satisfied licensing

requirement); *City of Lemmon v. U.S. Fid. & Guar. Co.*, 293 N.W.2d 433, 438 (S.D. 1980) (statute prohibited reimbursement suits against parties other than principal); *McKeon v. Ewert*, 55 SD 545, 226 N.W. 754, 755 (1929) (statute prohibited agreements to toll statute of limitations "unless" done consistent with statute).

Second, the AFPDA does not comprehensively cover all circumstances addressed by common law rights and remedies. The statutes at issue in the cases cited by Defendants do. *E.g.*, *Hohm v. City of Rapid City*, 2008 SD 65, ¶17, 753 N.W.2d 895, 904 (finding preemption because "the detailed provisions of [the statute] express legislative intent to design a complete scheme of responsibility and liability for highway maintenance such that its requirements should be the only ones that were obligatory"); *Rudolph v. Herman*, 4 SD 283, 283, 56 N.W. 901, 902-03 (1983) (finding preemption where statute contained 38 sections establishing rights of purchases at foreclosure); *Schimke v. Karlstad*, 87 SD 349, 355, 208 N.W.2d 710, 713 (1973) (finding preemption because the statutes "completely cover the subject of ownership of real property and negate [the common law] doctrine"); *Burnett*, 173 N.W. at 730-31 (finding statutory remedy was "exclusive" based on the "degree of minuteness with which the Legislature went into the whole subject" of animal trespass).

Third, none of the AFPDA's provisions would be rendered null and void by permitting BPI to pursue its common law claims. In the cases cited by Defendants, the court would have to ignore a statutory obligation to follow the common law rule. *E.g.*, *Shadbolt*, 590 N.W. 2d at 234 (reliance on common law rule would nullify statutory provision requiring bail bondsmen and runners to be licensed); *Scotvold v. Scotvold*, 68 SD 53, 53, 298 N.W. 266, 267-68 (1941) (enforcing common law rule would nullify statutory provision granting women property rights after marriage); *Lemmon*, 293 N.W.2d at 438 (permitting common law claim would nullify

statutory provision barring claims against parties other than principal); *McKeon*, 226 N.W. at 755 (relying on common law rule would nullify statutory requirement that tolling agreement be signed by all impacted parties); *Burnett*, 173 N.W. at 731 (permitting common law claim would nullify notice requirement established by statute).

VI. The Complaint adequately alleges claims based on Defendants' interference with BPI's business relationships (Count 27).

The Complaint asserts one claim against Defendants for tortious interference with business relations. Defendants intentionally created a consumer backlash against ground beef made with LFTB based on false information, they identified the grocery store chains that were allegedly deceiving and endangering consumers by selling ground beef made with LFTB, and they encouraged consumers to put pressure on those grocery stores. (Compl. ¶¶310-51.) The predictable result was that grocery stores, and the processors who provide them with ground beef, were forced to stop doing business with BPI. (*Id.* ¶319.) Their decision was based entirely on the consumer backlash manufactured by Defendants. (*Id.*)

A. Defendants concede the claim is adequately pled.

Defendants do not argue that the Complaint does not adequately allege the elements of a tortious interference claim. Nor could they. The Complaint contains 40 paragraphs detailing how Defendants improperly interfered with BPI's relationships with grocery stores that sold ground beef made with LFTB and the processors who supplied them. (*Id.* ¶¶318-58.) The Complaint alleges Defendants knew of BPI's relationships, knew the publication of false information about LFTB would interfere with those relationships, and did so anyway. (*Id.* ¶¶692-99.) Defendants, therefore, concede that Count 27 states a plausible claim for tortious interference.

B. News organizations are not immune from tortious interference claims.

Instead of challenging the adequacy of BPI's allegations, Defendants argue that they cannot be sued for tortious interference because they were gathering and reporting the news. (Mem. at 53.) However, there is no such thing as "media impunity" for tortious interference. *Aequitron Med., Inc. v. CBS, Inc.*, No. 93-cv-950, 1994 WL 30414, at *10 (S.D.N.Y. Feb. 2, 1994) (Sotomayor, J.). News organizations have "no special privilege to invade the rights and liberties of others." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 150 (1967).

Based on this principle, reporters and news organizations may be held liable when they knowingly publish false information that interferes with the plaintiff's business relationships. *E.g.*, *Spreadbury v. Bitterroot Pub. Library*, 856 F. Supp. 2d 1195, 1201-02 (D. Mont. 2012) (denying summary judgment where defendant published article falsely stating plaintiff had been convicted of disturbing the peace); *Aequitron Med.*, 1994 WL 30414, at *10 (denying dismissal where defendant stated and implied that plaintiff's SIDS monitors did not work); *Overstock.com*, 61 Cal. Rptr. 3d at 42-44 (denying dismissal where defendants published multiple reports stating plaintiffs' accounting was improper); *see also Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 991 F.2d 1533, 1542-43 (11th Cir. 1993) (affirming judgment where defendant published advertisement that falsely stated plaintiff's franchise had been terminated due to financial problems).

None of the cases cited by Defendants stand for the proposition that news organizations can never be sued when they intentionally report false facts that injures a plaintiff's business relationships. In those cases, unlike here, the plaintiff conceded the defendant did not have improper motive or failed to plead that allegation. *E.g.*, *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 274 (7th Cir. 1983) (dismissal where plaintiff did not allege defendants had improper motives and, in fact, alleged motive was not to interfere with relationships); *Org.*

for a Better Austin v. Keefe, 402 U.S. 415, 418 (1971) (plaintiff did not assert tortious inference claim); *Interphase Garment Solutions, LLC v. Fox Television Stations, Inc.*, 566 F. Supp. 2d 460, 465-66 (D. Md. 2008) (dismissal where plaintiff did not allege improper motive and pled no facts showing improper motive); *Dulgarian v. Stone*, 652 N.E.2d 603, 609 (Mass. 1995) (summary judgment where plaintiff introduced no evidence of improper motives or means); *Huggins v. Povitch*, No. 131164/94, 1996 WL 515498, at *9 (N.Y. Sup. Ct. Apr. 19, 1996) (dismissal where plaintiff could not establish defendant implied false facts during broadcast); *Seminole Tribe of Fla. v. Times Publ'g Co., Inc.*, 780 So.2d 310, 318 (Fla. Dist. Ct. App. 2001) (affirming dismissal where plaintiff challenged information gathering as opposed to any publication by defendant).

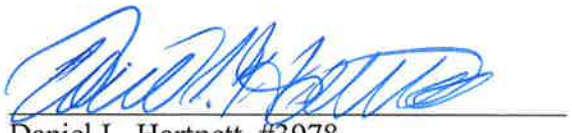
Moreover, the facts of this case are vastly different than the cases cited by Defendants. The scope and duration of Defendants' misconduct is unprecedented. Defendants made nearly 200 false statements about BPI and LFTB. They made the false statements knowing that consumers came to believe that LFTB is not beef, not safe, and not nutritious based on their reports. They made the statements knowing consumers were falsely concluding that they were being defrauded and deceived into purchasing ground beef made with LFTB. And they made the statements knowing that their reporting would drive ground beef made with LFTB off grocery store shelves. (Compl. ¶¶319, 341.) These facts demonstrate that Defendants "intentionally and improperly" interfered with BPI's business relationships and BPI has a plausible claim against them for doing so.

CONCLUSION

For these reasons, BPI respectfully requests the Court deny Defendants' Motion to Dismiss and allow the parties to proceed to discovery.

Dated: August 9, 2013

Respectfully Submitted,



Daniel L. Hartnett, #3978
Email: dhartnett@craryhuff.com
Sabrina L. LaFleur Sayler, #3483
Email: ssayler@craryhuff.com
CRARY HUFF RINGGENBERG
HARTNETT & STORM, P.C.
711 Sioux Point Road, Suite 200
Dakota Dunes, South Dakota 57049
Tel.: (605) 232-3340
Fax: (605) 232-8931

Dan K. Webb
Illinois Bar No. 2954087 (*pro hac vice*)
Email: dwebb@winston.com
J. Erik Connolly
Illinois Bar No. 6269558 (*pro hac vice*)
Email: econnolly@winston.com
Nicole E. Wrigley
Illinois Bar No. 6278747 (*pro hac vice)*
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, Illinois 60601
Tel.: (312) 558-5600
Fax: (312) 558-5700

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

The undersigned hereby certifies that this memorandum contains 19,926 words, inclusive of all footnotes and headings, and exclusive of the cover, table of contents, table of authorities, and counsels' names and addresses.

Daniel L. Hartnett

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Plaintiffs' Opposition to ABC Defendants' Motion to Dismiss All Claims of Plaintiff Beef Products, Inc.* was served by mail and e-mail upon:

Kevin T. Baine (kbaine@wc.com)
Carl R. Metz (cmetz@wc.com)
Dane H. Butswinkas (dbutswinkas@wc.com)
Williams & Connolly, LLP
725 – 12th Street NW
Washington, DC 20005-5901
Attorneys for American Broadcasting Companies, Inc., ABC News, Inc., Diane Sawyer, Jim Avila, and David Kerley

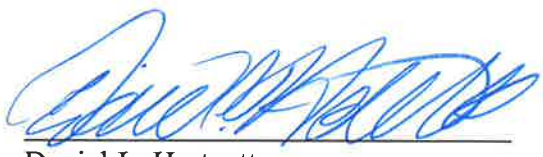
Scott N. Heidepriem (scott@jhalawfirm.com)
Ronald A. Parsons, Jr. (ron@jhalawfirm.com)
Johnson Heidepriem & Abdallah, LLP
P.O. Box 2348
Sioux Falls, SD 57101
Attorneys for American Broadcasting Companies, Inc., ABC News, Inc., Diane Sawyer, Jim Avila, and David Kerley

William D. Marler (bmarler@marlerclark.com)
Marler Clark LLP PS
1301 – 2nd Ave., Ste. 2800
Seattle, WA 98101-3808
Attorneys for Gerald Zirnstein and Carl Custer

Edwin E. Evans (eevans@dehs.com)
Vince M. Roche (vroche@dehs.com)
Davenport Evans
206 West 14th Street
PO Box 1030
Sioux Falls, SD 57101
Attorneys for Gerald Zirnstein and Carl Custer

Daniel M. Twetten (dan@loevy.com)
Loevy & Loevy
312 North May Street, Ste. 100
Chicago, IL 60607
Attorneys for Kit Foshee

Steven W. Sanford
Alex M. Hagan (ahagen@cadlaw.com)
Cadwell, Sanford, Deibert & Garry LLP
200 E. 10th St., Ste. 200
PO Box 2498
Sioux Falls, SD 57101-2498
Attorneys for Kit Foshee



Daniel L. Hartnett