STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF UNION	)	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' AMENDED AND SUBSTITUTED OPPOSITION TO ABC DEFENDANTS' MOTION TO DISMISS ALL CLAIMS OF PLAINTIFFS BPI TECHNOLOGY, INC. AND FREEZING MACHINES, INC.**

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Beef Products, Inc. ("BP"), BPI Technology, Inc. ("BPI Tech"), and Freezing Machines Inc. ("FMI"), collectively referred to as "BPI," submit the following in opposition to Defendants' Motion to Dismiss All Claims of BPI Tech and FMI.

INTRODUCTION

Defendants do not get to ignore the allegations in the Complaint. Nor do they get to change the facts. BP, BPI Tech, and FMI have produced lean finely textured beef ("LFTB") for the last 20 years. The three companies work together to develop, produce, distribute, sell, and market LFTB. The Roth family owns all three companies, the same senior management team runs the companies, and they all operate from a shared headquarters in Union County. The Complaint makes it abundantly clear that BP, BPI Tech, and FMI work as a collective unit when it comes to the production and sale of LFTB.

Defendants led a disinformation campaign targeting the business and product of all three companies. Defendants published false information about them and the product they produce and sell, the raw material they acquire, the process they innovated, and the USDA approval they obtained. The disinformation campaign targeted the reputation and integrity of the companies in conducting their business, and it destroyed business relationships developed by, belonging to, and benefiting all three companies. BPI Tech and FMI have as much right as BP to seek redress for the injuries caused by Defendants.

OVERVIEW OF ARGUMENT

Defendants' motion is not only premised on several inaccurate facts, it also mischaracterizes the law. First, BPI Tech and FMI can bring defamation claims even though the publications did not specifically name them. A plaintiff can bring a defamation claim if third parties may understand the publication to be about the plaintiff, regardless of whether it explicitly referenced the plaintiff. (*Infra* at 11-12.) The Complaint identifies numerous third

parties that may understand Defendants' publications to be about BPI Tech and FMI (in addition to BP), including participants in the beef industry, food safety organizations, ground beef processors, grocery store chains, and USDA officials. These third parties closely associate BPI Tech and FMI with the production and sale of LFTB and had long-standing relationships with the two companies prior to the disinformation campaign.

Second, BPI Tech and FMI can bring disparagement claims even though BP is also a producer of LFTB. The parties agree that producers can bring common law and statutory product disparagement claims. (*Infra* at 19-20.) The Complaint clearly alleges that BPI Tech and FMI are producers of LFTB. They are involved with, and participate in, every stage of the production process. BP is not, and has never been, the sole producer of LFTB. All three companies develop, market, produce, and sell LFTB. It is possible for a product to have more than one producer.

Third, BPI Tech and FMI can bring tortious interference claims even though they do not directly contract with customers for the sale of LFTB. A plaintiff can bring a tortious interference claim if the defendant interfered with a valid business relationship the plaintiff had with one or more third parties. (*Infra* at 31.) The Complaint alleges that BPI Tech and FMI had business relationships with grocery store chains and ground beef processors that were knowingly interfered with by Defendants. These business relationships did not belong to BP alone. All three companies developed and grew the relationships; all three companies were involved in selling LFTB as part of those relationships; and all three companies profited from them.

The facts alleged in the Complaint undermine every argument made by Defendants in their motion. Defendants implicitly ask the Court to reject the Complaint's allegations and rule based upon their version of events. Of course, the Court cannot do so. The Court assumes the

factual allegations in the Complaint are true when deciding a motion to dismiss. (*Infra* at 9.) Defendants will have the opportunity to dispute the facts alleged in the Complaint after the parties have taken discovery. At this stage, however, the claims of BPI Tech and FMI should not be dismissed, and Defendants' motion should be denied.

SUMMARY OF FACTS

Three facts undermine all of the arguments made by Defendants. First, BP, BPI Tech, and FMI all produce, market, and sell LFTB. (Compl. ¶¶2-3.) Second, BP, BPI Tech, and FMI each had business relationships with grocery store chains and processors who sold ground beef made with LFTB. (*Id.* ¶90.) Third, BP, BPI Tech, and FMI were targeted and injured by Defendants' disinformation campaign and other misconduct. (*Id.* ¶¶6-7.) These three facts establish that BPI Tech and FMI have plausible claims for defamation, disparagement, and tortious interference.

Defendants ignore these allegations in the Complaint. They treat allegations regarding BPI as referring to BP only. (Mem. in Supp. of ABC Defendants' Mot. to Dismiss All Claims of Pls. BPI Tech. and FMI ("Mem.") at 6.) That is inaccurate. The Complaint refers to BP, BPI Tech, and FMI collectively as "BPI" for a reason—that is how the three companies are owned, operated, and perceived. (Compl. ¶29.) All three companies produce LFTB, all three sell and market LFTB, all three have business relationships with grocery store chains and ground beef processors, and all three are closely associated with LFTB. The Court must evaluate whether BPI Tech and FMI have plausible claims based on the allegations in the Complaint, not based on Defendants' mischaracterization of those allegations.[1]

[1] Defendants argue that Plaintiffs use "BPI" to refer only to Beef Products, Inc. outside the confines of the Complaint. (Mem. at 6-7.) That is inaccurate. For instance, Defendants attached a 2010 affidavit of Richard Jochum to their motion to dismiss all claims (and ask this Court to

I. BP, BPI Tech, and FMI produce, market, and sell LFTB.

BP, BPI Tech, and FMI are all headquartered in Union County, South Dakota. (Compl. ¶¶25-27.) They are a group of "family-owned and operated companies that [have] established themselves as the nation's largest producer of LFTB." (*Id.* ¶2.) BP is "primarily responsible for preparing and selling LFTB" (*id.* ¶25), but BP does not act alone. BPI Tech "develop[s] technology and processing mechanisms for producing" LFTB. (*Id.* ¶26.) Among other things, BPI Tech provides the "technological support, sales and marketing services and administrative services" necessary to produce LFTB. (*Id.*) FMI develops the "equipment, systems, recipes and processing mechanisms" necessary to produce LFTB. (*Id.* ¶27.)

The Complaint explains that all three companies work together to produce LFTB. The Complaint explains that BPI (BP, BPI Tech, and FMI) is the "nation's largest producer of LFTB." (*Id.* ¶2.) It explains that BPI (BP, BPI Tech, and FMI) "operated four production facilities" for LFTB. (*Id.* ¶88.) It explains that BPI (BP, BPI Tech, and FMI) executes each stage of the production of LFTB. (*Id.* ¶¶53-60.) And it explains that the "beef industry and food safety organization[s] recognize BP, BPI Tech and FMI as closely associated with the production of LFTB." (*Id.* ¶28.)

BPI Tech was also responsible for obtaining USDA approval for LFTB. In 1991, BPI Tech obtained approval from the USDA to label BPI's product as "fat reduced beef" and to sell it for use in hamburgers. (Compl. ¶¶66-71.) In 1993, after further innovation and refinement, BPI Tech obtained approval from the USDA to label BPI's product as LFTB and to sell it for use in ground beef. (*Id.* ¶¶72-76.) In 2001, BPI Tech and BP obtained approval from the USDA for

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take judicial notice of it). In that affidavit, "BPI" refers to both BP ***and BPI Tech***. (*See* Ex. E at 1 to the ABC Defendants' Motion to Dismiss All Claims of Plaintiff Beef Products, Inc.)

the use of ammonia hydroxide as a processing aid during BPI's production of LFTB. (*Id.* ¶¶77-81.)

II. BP, BPI Tech, and FMI developed business relationships with grocery store chains and ground beef processors to sell LFTB.

BPI achieved success in large part due to its strong relationships with grocery store chains and ground beef processors. (Compl. ¶¶90, 323.) BPI sells LFTB to processors who combine it with other beef and trimmings to produce ground beef, which is then sold to grocery stores, restaurants, and other customers. (*Id.* ¶¶61-62, 322.) BPI worked with ground beef processors to demonstrate that using LFTB in ground beef results in better-tasting ground beef and does not compromise either the nutritional value or safety of the ground beef. (*Id.* ¶325.) BPI also worked with grocery store chains to encourage them to order ground beef made with LFTB for these same reasons. (*Id.* ¶¶322-23.) BPI's sales of LFTB were a direct result of the strong relationships it established with grocery store chains and processors over the course of 20 years. (*Id.* ¶¶91, 323, 326.)

The Complaint explains that all three companies developed, maintained, and grew business relationships with grocery store chains and ground beef processors. BPI (BP, BPI Tech, and FMI) "began the process of working with ground beef processors and others . . . to include LFTB in their ground beef" after receiving approval from the USDA. (*Id.* ¶89.) BPI (BP, BPI Tech, and FMI) "developed strong business relationships with several of the top 10 national grocery stores chains." (*Id.* ¶323.) BPI (BP, BPI Tech, and FMI) "spent years developing strong relationships with ground beef processors." (*Id.* ¶325.) BPI (BP, BPI Tech, and FMI) "spent hundreds of hours and millions of dollars developing these relationships over the years." (*Id.* ¶322.)

BPI Tech's interactions with grocery store chains and ground beef processors, in particular, were critical. BPI Tech was involved in "marketing LFTB" and "developing the relationships" with BPI's customers. (*Id.* ¶26.) BPI Tech "spent significant time and money developing relationships" with customers. (*Id.* ¶378.) And BPI Tech's relationships "with these grocery store chains and ground beef processors extend back several years." (*Id.*) The Complaint makes abundantly clear that BPI Tech's relationship with processors and chains led to orders for and sales of LFTB, and, of course, revenues and profits for all three companies.

III. BP, BPI Tech, and FMI were targeted and injured by Defendants' disinformation campaign and other misconduct.

In March 2012, Defendants began a disinformation campaign against BPI and LFTB. (Compl. ¶6.) Between March 7 and April 3, 2012, ABC aired 11 broadcasts and published 14 online reports about BPI and LFTB. (*Id.* ¶¶6-7.) In these reports, Defendants published nearly 200 false statements about BPI and LFTB and manufactured a consumer backlash against LFTB. (*Id.* ¶7.) The full scope of Defendants' misconduct is discussed in detail in BPI's opposition to Defendants' Motion to Dismiss All Claims of Plaintiff Beef Products, Inc.[2]

A. Defendants' disinformation campaign spread falsehoods about BPI and LFTB.

The Complaint details the numerous false statements Defendants made about BPI and LFTB. (*Id.* ¶¶167-309.) The statements impugned the reputation and integrity of all three companies. While Defendants did not mention BPI Tech and FMI by name, Defendants' statements were as much about them as they were about BP. Defendants made false statements about the product BP, BPI Tech, and FMI produced, the USDA approval that BP and BPI Tech obtained, and the production process developed by BP, BPI Tech, and FMI.

[2] BPI incorporates that opposition brief herein by reference.

The Product: Defendants published false statements about the product produced, marketed, and sold by BP, BPI Tech, and FMI. (*Id.* ¶¶20, 129-34.) Defendants described LFTB as a "pink slime." (*Id.* ¶¶20, 166-68.) They stated and implied that this "pink slime" is not beef. (*Id.* ¶¶20-21, 190-97.) They stated and implied that this "pink slime" is not nutritious and not safe for consumption. (*Id.* ¶¶20-21, 223-29, 268-76.) They stated that using LFTB in ground beef is "economic fraud." (*Id.* ¶¶20-21, 131, 193.) All of these statements and implications were false, and Defendants knew they were false. (*Id.* ¶¶178-88, 202-09, 234-41, 280-90.) Defendants' false statements about LFTB were of and concerning BPI Tech and FMI, because third parties inside and outside the beef industry knew that all three companies work together to produce, market, and sell the product.

The Approval: Defendants published false statements about the USDA approval obtained by BPI Tech for LFTB. (*Id.* ¶¶134, 192.) They stated that scientists at the USDA objected to the approval of LFTB. (*Id.* ¶¶134, 293.) They stated that objections by USDA scientists were overruled by their boss who had links to the beef industry. (*Id.* ¶¶134, 196, 293.) They stated that the USDA approved LFTB simply because it was pink in color. (*Id.* ¶¶12, 134, 196.) And they implied that a senior official within the USDA was financially compensated for her approval of LFTB. (*Id.* ¶¶294, 616.) All of these statements and implications were false, and Defendants knew they were false. (*Id.* ¶¶299-309.) Defendants' false statements about the USDA's approval were of and concerning BPI Tech because USDA officials, among others, knew that BPI Tech obtained approval for LFTB in 1993.

The Process: Defendants published false statements about the process developed and implemented by BP, BPI Tech, and FMI to produce LFTB. (*Id.* ¶¶43, 227.) They stated that BPI cooks and simmers the beef trimmings used to produce LFTB. (*Id.* ¶227.) They stated that

BPI sanitizes the beef trimmings by spraying them with ammonia. (*Id.* ¶228.) They stated that BPI's process does not eliminate connective tissue from the beef trimmings. (*Id.* ¶¶195, 272.) They stated that BPI's process results in a "pink slime" as opposed to beef. (*Id.* ¶¶166-68.) All of these statements were false, and Defendants knew they were false. (*Id.* ¶¶104-08, 178-88, 251-60.) Defendants' false statements about this process were of and concerning BPI Tech and FMI because third parties inside and outside the beef industry knew that all three companies work together to develop and implement the process.

B. Defendants improperly interfered with BPI's business relationships with grocery store chains and ground beef processors.

Defendants' disinformation campaign was only one part of their attack on BPI and LFTB. Defendants also attacked BPI's business relationships with grocery store chains and ground beef processors. Their attack was two-fold. They first used false statements about LFTB, like calling it "pink slime," to create a consumer backlash against the product. They then encouraged consumers to pressure grocery stores to reveal whether the stores sold ground beef with "pink slime" hidden in it, and they published their own blacklist identifying those grocery store chains that sold "pink slime" to customers. (Compl. ¶¶15, 17, 327-41, 347-51.) Chains that dropped "pink slime" received positive coverage, while others continued to appear on the blacklist. (*Id.* ¶338-39.)

Not surprisingly, BPI lost business from these grocery store chains and ground beef processors. No grocery store chain wanted to be on ABC's blacklist given the consumer backlash created by Defendants' disinformation campaign. (*Id.* ¶¶343-58.) Shortly after appearing on the list, nearly every major grocery store chain in the country that had been purchasing ground beef with LFTB stopped doing so, even though none of them had complaints about the quality or safety of LFTB. (*Id.* ¶340.) These chains could not risk being on the list and

losing customers. (*Id.* ¶¶329-330, 348.) As a result, many ground beef processors were forced to stop or significantly reduce their business with BPI. (*Id.* ¶350.) Customers that had done business with BPI for over 20 years cut back or ended their business relationships with BPI. (*Id.* ¶¶17-19, 346-57.)

C. Defendants' misconduct injured BPI.

Defendants' disinformation campaign and attack on BPI's business relationships had a devastating impact on BP, BPI Tech, and FMI. Each of the companies was financially injured by Defendants' misconduct. (Compl. ¶¶19, 359-62, 374-77.) LFTB sales decreased by more than 60%. (*Id.* ¶¶19, 360-62.) BPI was forced to close three of four production facilities. (*Id.* ¶¶19, 367.) And BPI was forced to fire over 700 employees. (*Id.* ¶19.) BPI has lost—and continues to lose—millions of dollars every month as a result of Defendants' misconduct. (*Id.* ¶350.) Its reputation has also suffered. (*Id.* ¶¶28 ("BP, BPI Tech and FMI . . . each suffered reputational damage as a result of Defendants' misconduct."), 378-79.) Defendants' actions have negatively influenced the estimation of BPI among those in the beef industry, with food safety organizations, with ground beef processors, with grocery store chains, and with consumers.

LEGAL STANDARD

Motions to dismiss are "viewed with disfavor and seldom prevail." *N. Am. Truck & Trailer, Inc. v. M.C.I. Comm. Serv., Inc.*, 2008 SD 45, ¶6, 751 N.W.2d 710, 712 (quoting *Nygaard v. Sioux Valley Hosp. & Health Sys.*, 2007 SD 34, ¶9, 731 N.W.2d 184, 190). 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, ¶18, 754 N.W.2d 804, 812 (quoting *Bell Atlantic 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 for the Court is whether, with these assumptions, the Complaint contains sufficient allegations, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic*, 550 U.S. at 570.

On a motion to dismiss, the issue is not whether BPI can ultimately prove its factual allegations or if Defendants have potential arguments against the facts alleged in the Complaint. The issue is simply whether the factual allegations in the Complaint establish plausible claims on behalf of BPI Tech and FMI. BPI Tech and FMI's claims should not be dismissed even if the Court "entertains doubts as to whether [they] will prevail in the action." *N. Am. Truck*, 751 N.W.2d at 712; *Guthmiller v. Deloitte & Touche, LLP*, 2005 SD 77, ¶6, 699 N.W.2d 493, 496. "The issue is not whether [BPI Tech and FMI] will ultimately prevail but whether [they are] entitled to offer evidence to support the claims." *Wetherill v. Geren*, 644 F. Supp. 2d 1135, 1137 (D.S.D. 2009). Here, BPI Tech and FMI are entitled to present evidence because the factual allegations in the Complaint establish that they have plausible claims.

ARGUMENT

The primary takeaway from Defendants' motion is that the parties disagree about many (if not all) of the critical facts in the case. BPI alleges that Defendants' publications were about BPI Tech and FMI; that BPI Tech and FMI produce LFTB; that BPI Tech and FMI had business relationships with grocery store chains and ground beef processors; and that Defendants' disinformation campaign and other misconduct targeted and injured BPI Tech and FMI. The Complaint includes facts supporting each of these allegations. Defendants dispute these facts. BPI Tech and FMI's claims should not be dismissed based on a factual dispute between the parties.

I. BPI Tech and FMI have a plausible basis for their defamation claims (Counts 1-9 & 19-22).

BPI Tech and FMI asserted 13 defamation claims based on the numerous false statements Defendants published about BPI and LFTB. Defendants argue that BPI Tech and FMI "do not, and cannot, allege that they were the subjects of the ABC news reports, and as a result they have no claim for defamation." (Mem. at 2.) This argument is based on a mischaracterization of the law and is inconsistent with the Complaint's allegations. BPI Tech and FMI have a plausible basis for their defamation claims because third parties reasonably may understand that Defendants' publications were "of and concerning" BP, BPI Tech, and FMI.

A. The issue is whether third parties may understand Defendants' publications to refer to BPI Tech and FMI, along with BP.

A publication does not need to name the plaintiff for it to be of and concerning the plaintiff. The "of and concerning" requirement is satisfied if third parties familiar with plaintiff reasonably "***may understand***" the publication to be of and concerning the plaintiff, even if the plaintiff is not named. *Brodsky v. Journal Publ'g Co.*, 73 SD 343, 347, 42 N.W.2d 855, 857 (1950) (emphasis added) (publication is "of and concerning" plaintiff if he or she is "sufficiently identified by reference in the article to facts and circumstances from which others may understand that such person is referred to"); *see also Brummett v. Taylor*, 569 F.3d 890, 892 (8th Cir. 2009) ("[T]he plaintiff need not be named if the alleged libel contains matters of description or other references therein, or the extraneous facts and circumstances . . . show that plaintiff was intended to be the object of the alleged libel, and was so understood by others." (quotation marks omitted)); *Ball v. Taylor*, 416 F.3d 915, 917 (8th Cir. 2005) (same); *Ruzicka v. Conde Nast Publ'ns, Inc.*, 999 F.2d 1319, 1322 and n.6 (8th Cir. 1993) ("In issues of identification . . . the relationship of the story to the plaintiff as a matter of identity is a question for the jury to be determined from the story as a whole . . . . The plaintiff need not be cited by name . . . ."); *Taj*

Mahal Travel, Inc. v. Delta Airlines Inc., 164 F.3d 186, 189 (3d Cir. 1998) ("A defamatory statement need not explicitly name a plaintiff, so long as it was understood to refer to it by at least one third party . . . ."); *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650, 651 (2d Cir. 1966) ("[T]he question is whether the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant." (quotation marks omitted)); *La Luna Enters., Inc. v. CBS Corp.*, 74 F. Supp. 2d 384, 391 (S.D.N.Y. 1999) ("[A] defamed person need not be named in the defamatory words if the communication as a whole contains sufficient facts or references from which the injured person may be determined by the persons receiving the communication." (quotation marks omitted)); *Allied Mktg. Grp., Inc. v. Paramount Pictures Corp.*, 111 S.W.3d 168, 173 (Tex. App. 2003) ("A publication is 'of and concerning' the plaintiff if persons who knew and were acquainted with the plaintiff understood from viewing the publication that the allegedly defamatory matter referred to the plaintiff.").

The issue for the Court, therefore, is whether the Complaint alleges sufficient facts to show that third parties may understand that Defendants' publications referred to BPI Tech and FMI. If so, the Court must deny the motion to dismiss. *See, e.g., Process Controls Int'l, Inc. v. Emerson Process Mgmt.*, 753 F. Supp. 2d 912, 932-33 (E.D. Mo. 2010) (denying dismissal even though neither plaintiff nor its products were named in the defaming publications, because plaintiff alleged it was the largest remanufacturer of the product discussed in the publications and was well known in the industry); *La Luna Enters. Inc. v. CBS Corp.*, 74 F. Supp. 2d 394, 390-91 (S.D.N.Y. 1999) (denying dismissal where defaming publication did not name or identify plaintiff because plaintiff's Russian restaurant appeared in footage played while defendant discussed illegal activities of Russian immigrants); *see also Gen. Prods. Co., Inc. v. Meredith Corp.*, 526 F. Supp. 546, 549-50 (E.D. Va. 1981) (denying summary judgment even though

plaintiff was not mentioned in publication because it was one of a small group of manufacturers of the defamed product); *Cont'l Nut Co. v. Robert L. Berner Co.*, 345 F.2d 395, 397 (7th Cir. 1965) (reversing dismissal where defaming publication did not attack plaintiff specifically but simply listed plaintiff as one of the importers the defamed product).[3]

B. The facts alleged demonstrate that there are third parties that may understand Defendants' publications to be of and concerning BP, BPI Tech, and FMI.

The Complaint alleges sufficient facts to show that at least five different groups may understand that the publications were about the three companies involved in producing LFTB—BP, BPI Tech, and FMI: (1) ***participants in the beef industry*** who closely associate BPI Tech and FMI with BP and the production of LFTB (Compl. ¶¶28, 41); (2) ***food safety organizations*** who closely associate BPI Tech and FMI with the production of LFTB and who have given awards to BPI Tech for its commitment to producing a safe beef product (*id.* ¶¶66-81); (3) ***ground beef processors*** that have long-standing relationships with BPI Tech and FMI (*id.* ¶¶61, 89-90); (4) ***owners of grocery store chains*** that have long standing relationships with BPI Tech and FMI (*id.* ¶¶28, 41); and (5) ***USDA officials*** involved in the approval process for LFTB and the use of ammonium hydroxide where BPI Tech submitted applications (*id.* ¶¶28, 41).

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[3] The Complaint specifically alleges the publications were about BP, BPI Tech, and FMI. (Compl. ¶¶2, 7.) The Complaint also includes factual allegations to show why several third parties may understand the publications were about BPI Tech and FMI. (*Id.* ¶¶28, 66-76, 87, 90, 323-25.) Defendants may argue that the Complaint did not specifically identify the third parties who, in fact, reasonably understood their publications to be of and concerning BPI Tech and FMI. That is not the proper test for a motion to dismiss, since that is a matter of proof, not pleading. *Thompson v. Summers*, 1997 SD 103, 567 N.W.2d 387; *see also Gruhlke v. Sioux Empire Fed. Credit Union, Inc.*, 2008 SD 89, ¶17, 756 N.W. 2d 399, 409 ("South Dakota still adheres to the rules of notice pleading, and therefore, a complaint need only contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'") (citing SD-CL 15-6-8(a)(1)).

The subject matter of Defendants' publications was sufficiently definite for these third parties, and others familiar with BPI Tech and FMI, to reasonably understand them to be referring to BPI Tech and FMI, as well as to BP. Defendants discussed the product that that third parties knew BPI Tech and FMI produced and sold. They discussed the technical process that third parties knew BPI Tech and FMI developed, designed, and implemented. They discussed the USDA approval process that third parties knew BPI Tech obtained. And they discussed the company (BP) that third parties closely associate with BPI Tech and FMI because they are owned by the same family, run by the same management team, and produce, market, and sell the same product. These allegations demonstrate why third parties familiar with BPI may understand that the alleged defamatory publications were about BPI Tech and FMI in addition to BP.

C. Defendants place too much emphasis on the explicit references to BP in their publications.

Defendants rely on their unequivocal identification of BP to argue that their news reports did not, and could not, refer to BPI Tech and FMI. (Mem. at 9.) There is no rule of law that says the explicit mention of one party forecloses the possibility that the publication was also "of and concerning" other parties. Given the nature of the statements at issue, the fact that Defendants specifically mentioned BP does not mean third parties could not and did not reasonably understand that the publications were about BPI Tech and FMI as well.

Defendants acknowledge that reference to persons or entities by implication may give rise to a defamation claim. However, they argue that the allegations and proof must be "to the exclusion of other possible subjects." (Mem. at 9-10.) That is simply not true. An explicit reference to another person or entity does not foreclose others from pursuing defamation claims. *See, e.g., Desnick v. Am. Broad. Cos., Inc.*, 44 F.3d 1345, 1349-50 (7th Cir. 1995) (stating that

"it is enough if the audience would be likely to think that the defendant was talking about the plaintiff" even if the publication identifies someone else); *Croixland Props. Ltd. P'ship v. Corcoran*, 174 F.3d 213, 216-17 (D.C. Cir. 1999) (finding "of and concerning" element satisfied even if other companies were named, because the statements could lead listener to understand statements were referring to plaintiff). A publication can be "of and concerning" more than one person or company; and the test is whether, in light of all the facts, third parties may understand the publication was about unnamed parties as well as those named.

Putting aside the obvious distinction that the cases cited by Defendants were decided at the summary judgment stage (or after verdict) (*see* Mem. at 11), none of the facts in those cases are similar to what occurred here. In *Ratner*, there was no evidence submitted to the Court to indicate that a reader would understand the defamatory statements to refer to the plaintiff. *Ratner v. Young,* 465 F. Supp. 386, 394 (D.VI. 1979). And in *Cardone*, *John*, and *Houseman*, the publications at issue included language that specifically excluded or narrowed the possibility of subjects other than the person or entity mentioned. *Cardone v. Empire B.C.B.S.*, 884 F. Supp. 838, 847 (S.D.N.Y. 1995); *John v. Tribune Co.,* 181 N.E.2d 105, 108 (Ill. 1962); *Houseman v. Publicaciones Paso del Norte, S.A DE, C.V.*, 242 S.W.3d 518, 526 (Tex. App. 207). In those cases, the plaintiffs tried to use broad language that could have referred to a larger group beyond just the plaintiffs. Here, however, the publications at issue were not broad or expansive enough to refer to any other entities that produced LFTB. Indeed, they are sufficiently definite to exclude any non-BPI producer of LFTB because Defendants explicitly and repeatedly identified BP, because Defendants described various aspects of the production process for LFTB that are unique to BPI, and because Defendants questioned the USDA approval process obtained by BPI for LFTB.

Moreover, the case highlighted by Defendants, *Kaufman v. Islamic Society of Arlington*, 291 S.W.3d 130 (Tex. App. 2009), is not instructive. In *Kaufman*, the plaintiff was an Islamic organization that sponsored an event at Six Flags along with other groups. *Id.* at 133. The defamatory article focused, almost exclusively, on a different organization—its activities, its sponsorship of the event, and its alleged connections to terrorist groups and radical projects. *Id.* at 145-46. The article did not mention the plaintiff, and the plaintiff had no connection to the organization specifically discussed. *Id.* at 146-47. The plaintiff argued that the article implicated other organizations involved in the event. *Id.* However, the court held that a reasonable reader would not view the article as concerning the plaintiff since the defamatory statements in the case exclusively regarded another, unrelated entity. *Id.* at 147. The court noted that the majority of the article did not concern the event itself, but rather it concerned the relationship of the specific group discussed to terrorist individuals and groups. *Id.* at 145-46.

Here, in contrast, because the statements at issue were about BP and LFTB, they also incriminated BPI Tech and FMI. Third parties closely associate the three companies and know that BPI Tech and FMI are involved in producing, marketing, and selling LFTB. Moreover, the statements at issue here do not implicate any non-BPI companies. Based on the context and subject matter of the defamatory statements, third parties familiar with these two companies would not necessarily confine their understanding of the statements to mean BP alone simply because Defendants only explicitly referenced BP. As Defendants readily acknowledge, the publications were about LFTB—a product of BPI Tech and FMI's.[4]

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[4] Defendants further argue that given their express references to BP, "there can be no ambiguity about whom ABC News ***intended*** to refer to in its reports." (Mem. at 12 (emphasis added.) They state that there is "no doubt as to whom ABC ***intended*** to refer to as the producer of LFTB." (Mem. at 11 (emphasis added)). This argument is of no use. A plaintiff need not show that the defendant intended to refer to the plaintiff. *Ruzicka*, 999 F.2d at 1322 ("The test is [not]

D. Defendants' factual arguments about BPI Tech and FMI do not change the Complaint's allegations.

Defendants' other arguments merely raise disputed issues of fact. The Complaint alleges sufficient facts for a jury to conclude that third parties may understand Defendants' publications to refer to BPI Tech and FMI, along with BP. Based on these allegations, which the Court assumes to be true, whether the publications were of and concerning them is an issue that should ultimately be decided by the jury. *See Barron v. Smith*, 19 SD 50, 101 N.W. 1105, 1107 (1904) ("[W]hether or not the article referred to the plaintiff is a question for the jury."); *Process Controls*, 753 F. Supp. 2d at 932 (a jury should decide fact dispute if "some question exists as to whether publication is 'of and concerning' plaintiff"); *Charles Atlas, Ltd. v. Time-Life Books, Inc.*, 570 F. Supp. 150, 153 n.3 (S.D.N.Y. 1983) (whether publication is "of and concerning" plaintiff is "generally left for ... [the] trier of fact"); *see also La Luna*, 74 F. Supp. 2d at 391 (rejecting argument that publication was not of and concerning plaintiff even though it was a "close call" based, in part, on the standard granting "plaintiff's complaint all reasonable and favorable inferences").[5]

1. Contemporaneous reactions that identify BP do not defeat the Complaint's allegations regarding BPI Tech and FMI.

Defendants argue that "there can be no ambiguity about whom ABC News intended to refer to in its reports [BP]" since "the multiple contemporaneous reactions to the ABC News

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the intent of the author...but rather the reasonable understanding of the recipient of the communication."); *Allied Mktg. Grp.*, 111 S.W.3d at 173 ("Because the test is based on the reasonable understanding of the viewer of the publication, it is not necessary for the plaintiff to prove that the defendant intended to refer to the plaintiff.").

[5] BPI acknowledges that there are circumstances where the facts alleged are so deficient that a court can conclude, at the motion to dismiss stage, that the publication was not of and concerning the plaintiff. This is not such a complaint or case. The detailed allegations in the Complaint showing BPI Tech and FMI's involvement with the product and company identified in the publications are unlike anything in the cases where the court ruled against the plaintiff at the pleading stage.

reports that are included as exhibits to the Complaint," "refer exclusively to [BP]." (Mem. at 12-13.) BPI attached various exhibits to the Complaint to support their allegations that the Defendants knew their statements were false. The exhibits do not mention BPI Tech or FMI. However, that omission does not mean that the Complaint's allegations are not sufficient to show that third parties may understand Defendants' publications to refer to BPI Tech and FMI, along with BP. *See, e.g., Process Controls*, 753 F. Supp. 2d at 933 (denying dismissal of defamation claim even though "none of the exhibits incorporated into the complaint name [plaintiff] or its products"); *see also La Luna*, 74 F. Supp. 2d at 391 (denying dismissal where a "reasonable jury could conclude" defendant's publication was about the plaintiff as well as its employees).

BPI was not required to attach all of the evidence to prove their claims at the pleading stage. "South Dakota still adheres to the rules of notice pleading, and therefore, a complaint need only contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Gruhlke*, 756 N.W. 2d 399, 409 (citing SDCL § 15-6-8(a)(1)). Discovery will confirm why third parties may understand the publications at issue to also be about BPI Tech and FMI. This evidence will include other articles about the companies, awards they received, advertisements they placed, and recognition of BPI Tech as one of the leading beef producers in the country by several trade magazines. However, at this stage, BPI's allegations in the Complaint are sufficient. Defendants' argument simply shows there is a disputed issue of fact to be decided by a jury after discovery.

2. BPI Tech and FMI's relationship with BP is relevant to show why third parties may understand the publications to be about BPI Tech and FMI.

Defendants argue that "it is of no moment that BPI Technology and Freezing Machines allege that they are related to BPI through common ownership and the preparation of consolidated financial statements." (Mem. at 15.) This argument misses the point. BPI Tech

and FMI's defamation claims do not stem from their relationship with BP. They have actionable defamation claims because third parties may understand the publications at issue to also implicate BPI Tech and FMI. The close relationship between the three companies—same owners, same management, same headquarters, and same business—is just one of the reasons for that understanding. The inquiry, indeed, also depends on the nature of the publications at issue.

The cases cited by Defendants do not support their argument. (Mem. at 15.) The courts in those cases acknowledge that defamatory statements referencing a company may implicate a related company if they discredit the way the company conducts its business. *See, e.g.*, *Jankovic v. Int'l Crisis Group*, 494 F.3d 1080, 1089 (D.C. Cir. 2007). The businesses of both BPI Tech and FMI were implicated by Defendants' publications. For example, the Complaint alleges that Defendants defamed BPI because their statements questioned the propriety of the USDA approval process for LFTB. (Compl. ¶¶134, 196.) This defamatory matter also implicates or concerns the business of BPI Tech, because it submitted LFTB for USDA approval. (*Id.* ¶72.) Defendants ignore the nature of the statements at issue and focus solely on the connection between the BPI companies. That is the wrong inquiry.

II. BPI Tech and FMI have a plausible basis for their statutory product disparagement claims (Count 26).

BPI Tech and FMI asserted claims against Defendants for violation of South Dakota's Agricultural Food Products Disparagement Act (the "AFPDA"), SDCL § 20-10A-1 *et seq.* Defendants argue that BPI Tech and FMI are not entitled to assert a claim under this statute because they "are not the producers of LFTB; only BPI is." (Mem. at 2.) This argument is inconsistent with the allegations in the Complaint. BPI Tech and FMI have a plausible basis for their claims because they ***are*** producers of LFTB.

A. BPI Tech and FMI are "producers" of LFTB under the AFPDA.

The AFPDA provides a cause of action for product disparagement, with the potential for treble damages, to producers of agricultural food products. The statute states:

> 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.

SDCL § 20-10A-2. Disparagement, for purposes of the AFPDA, is defined as "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." *Id.* § 20-10A-1(2).

The issue for the Court is whether BPI Tech and FMI qualify as producers within the meaning of the AFPDA. The statute does not define the term, and no court has interpreted it. The common understanding of the term varies. "Producer" is defined as a "person, company, or country that makes, grows, or supplies goods or commodities for sale" by *Oxford Dictionary* (*Oxford English Dictionary,* www.oed.com, last accessed Aug. 5, 2013); as "one who produces goods and services" by *Collins Dictionary* (*Collins American Dictionary,* www.collinsdictionary.com, last accessed August 5, 2013); and as "one that produces" by *Merriam-Webster* and *American Heritage Dictionary. Merriam-Webster's College Dictionary* 903 (10th ed. 1998); *The American Heritage Dictionary of the English Language,* (www.ahdictionary.com, last accessed Aug. 5, 2013). "Produce" also has a variety of meanings. It can mean to "bring forth" or to "cause to occur or exist," as defined by *American Heritage Dictionary.* (www.ahdictionary.com, last accessed Aug. 5, 2013.) Or it can mean to "make or manufacture . . . from components or raw materials," as defined by the *Oxford Dictionary.* (www.oed.com, last accessed Aug. 5, 2013.)

BPI Tech and FMI satisfy these definitions of "producer." BPI (BP, BPI Tech, and FMI) is the nation's largest producer of LFTB. BP, BPI Tech, and FMI participate in every step of the process to make LFTB. All three companies work together to make the product from raw materials (beef trimmings). All three companies then work together to supply and sell LFTB to processors who make ground beef. Based on these facts (*supra* at 4-5), all three companies satisfy the definition of producers. BPI Tech and FMI have a plausible basis for their AFPDA claims based on the allegations in the Complaint.

B. Defendants mischaracterize the Complaint's allegations.

Defendants argue that "the Complaint makes clear [that] only Beef Products, Inc. fits [the producer] definition, because it alone is 'in the business of producing, distributing and selling lean been products, including LFTB.'" (Mem. at 18.) The Complaint does ***not*** make that clear. The Complaint never alleges that BP "alone" produces, distributes, and sells LFTB. BP is in the business of producing, distributing, and selling LFTB. (Compl. ¶25.) But BP does not work alone; it works with BPI Tech and FMI to produce, distribute, and sell LFTB. (*Supra* at 4-6.) BPI knows better than Defendants who produces its product.

The Complaint repeatedly explains that BPI produces LFTB, BPI sells LFTB, and BPI is known throughout the beef industry and beyond as the producer of LFTB. It refers to BP, BPI Tech, and FMI collectively as "BPI" because that is how the three companies are owned, operated, and perceived. When the Complaint alleges that BPI is a producer of LFTB, it means that BP is a producer of LFTB, BPI Tech is a producer of LFTB, and FMI is a producer of LFTB. These factual allegations (*supra* at 3-5) must be assumed to be true. In fact, the Court must construe the allegations "in a light most favorable to the pleader to determine whether the allegations allow relief." *Sisney*, 754 N.W.2d at 809. These facts demonstrate that BPI Tech and

FMI are entitled to relief under the statute, notwithstanding Defendants' attempt to contradict these facts.

C. Defendants' submission of other documents does not defeat the Complaint's allegations regarding BPI Tech and FMI.

Defendants ask the Court to consider "public documents" that they argue reinforces their conclusion that BPI Tech and FMI are not producers of the LFTB. (Mem. at 18-19.) While these documents establish that BP is indeed a producer of LFTB, they do not disprove that BPI Tech and FMI are producers. It is entirely possible for a product to have more than one producer. Defendants cite no legal authority that holds otherwise. Nor do they cite legal authority holding that the documents they presented to the Court are even relevant to deciding whether a company is a producer. Whether or not BPI Tech and FMI are producers is a disputed issue of fact that must be decided after discovery.

Moreover, Defendants' analysis of the documents they cite is misleading. (Mem. at 18-19.) They claim BPI Tech merely provides technical and administrative support and FMI merely owns intellectual property. (*Id.* at 18.) What BPI Tech and FMI do is far more significant than Defendants suggest. The "services" performed by BPI Tech includes supervising employees working at the production plants, operating the machinery that produces LFTB, and acquiring raw material. And FMI does more than own intellectual property. It invents, develops, and refines the equipment used at every stage of production. Once again, BPI knows better than Defendants how LFTB is produced and the role played by each company.[6]

[6] Defendants' discussion of the public documents is factually inaccurate and inconsistent with the allegations in the Complaint. To correct the factual misstatements made by Defendants, BPI necessarily must discuss facts beyond those alleged in the Complaint. In doing so, BPI is not converting the motion to dismiss into a motion for summary judgment, but is merely correcting factual errors presented by Defendants.

Registration to do business. Defendants argue that BPI Tech cannot be a producer because it is no longer registered to do business in Nebraska, Kansas, and Texas—three of the states where BPI previously operated production facilities. (*Id.* at 19.) BPI Tech withdrew its certificates because the majority of its responsibilities with respect to the production of LFTB do not require a physical presence in those states. BPI Tech performs the majority of its responsibilities from corporate headquarters in South Dakota. In contrast, BP and FMI have certificates to do business in those states, because many of the functions they perform to produce LFTB involve maintaining a physical presence in those states.

The decision regarding which companies would maintain certificates to do business in the states with factories was based on how BPI produces LFTB. The production equipment for all factories is run remotely by BPI Tech from a command center in South Dakota. BPI operates in this manner to make sure that there is one central location, manned by BPI Tech, making critical decisions regarding LFTB production at all factories. BPI's technological innovations permitted BPI Tech to take on more responsibilities for the production of LFTB from a remote, centralized location. The suggestion that BPI Tech cannot be a producer because of this is simply inconsistent with how the companies operate the production process for LFTB.

"BPI" Trademark. Defendants argue that BPI Tech cannot be a producer because it transferred ownership of the "BPI" trademark to BP. (*Id.* at 7 n.3, 19.) This transfer has nothing to do with the roles and responsibilities of BP and BPI Tech with respect to the production of LFTB. The transfer empowered BP to prosecute claims for trademark infringement. The fact that BPI Tech does not own the BPI trademark anymore does not change the fact that BPI Tech produces LFTB, runs the machinery that produces LFTB, supervises nearly all of BP's employees, and handles all of the technical and administrative functions necessary for the

production of LFTB. The suggestion that BPI Tech cannot be a producer because of this transfer is simply inconsistent with how the companies operate the production process for LFTB.

Ownership of plants. Defendants note that BP is the registered owner of the plants where LFTB is produced. (*Id.* at 19 n.10.) That is irrelevant. Defendants have not cited any legal authority to support the contention that ownership of a production plant is required for a company to be considered a producer, or is even relevant to who is a producer of a product. The suggestion that BPI Tech and FMI cannot be producers because they are not the registered owners of the production plants is simply inconsistent with how the companies operate the production process for LFTB.

III. BPI Tech and FMI have a plausible basis for their common law product disparagement claims (Counts 10-18 & 23-25).

BPI Tech and FMI asserted twelve common law product disparagement claims based on Defendants' numerous false statements about BPI and LFTB. Defendants argue that BPI Tech and FMI are not entitled to assert these claims because (1) they are not manufacturers or producers of LFTB and (2) the AFPDA forecloses their claims since it "limits disparagement claims of an agricultural food product to the product's producer." (*Id.* at 2.) These arguments are inconsistent with the allegations in the Complaint, are based on an inaccurate legal standard, and are based on a misreading of the AFPDA.

A. BPI Tech and FMI are producers of LFTB.

As explained above, BPI Tech and FMI are producers of LFTB. (*Supra* at 19-20.) Thus, even if the Court agrees with Defendants' legal framework limiting common law product disparagement claims to manufacturers and producers (and it should not), BPI Tech and FMI have a plausible basis for their claims. *See, e.g.*, *Paint Brush Corp. v. Neu*, 1999 SD 120, ¶63,

599 N.W.2d 384, 399 (paintbrush manufacturer could assert product disparagement claim based on false statements about its product).

B. Traditional common law principles permit BPI Tech and FMI's claims since Defendants published false statements about their product and business.

BPI Tech and FMI's product disparagement claims against Defendants fall in the category of claims based on injurious falsehoods. "False communications which damage or tend to damage the reputation as to quality of goods or services are variously described as disparagement, product disparagement, trade libel, or slander of goods." *QSP, Inc. v. Aetna Cas. & Surety Co.*, 773 A.2d 906, 917 n.15 (Conn. 2001) (internal quotations omitted). These claims are grouped together in Restatement (Second) of Torts §623A under the general category of "injurious falsehood." *Id.*; *Paint Brush Corp.*, 599 N.W.2d at 399 (quoting §623A for elements of product disparagement under South Dakota law). The issue for the Court is whether BPI Tech and FMI can pursue injurious falsehood claims, e.g., product disparagement, even assuming they are not producers.

A plaintiff has a valid claim for injurious falsehood when the publication is of and concerning him or her, his or her business, or his or her product. *See* Restatement (Second) of Torts §623A illus. g (1977) (discussing causes of action available when publication is about "plaintiff's business or product"); Restatement (Second) of Torts §573 cmt. g (1977) (discussing when disparagement of goods may discredit a producer, manufacturer, owner, or vendor); *Bullpen Dist., Inc. v. Sentinel Ins. Co.*, No. C 12-0894, 2012 WL 1980910, at *4 (N.D. Cal. June 1, 2012) ("Disparagement may consist of the publication of matter derogatory to the plaintiff's title to his property, or its quality, or to his business in general.") (internal quotation omitted); *Kollenberg v. Ramirez*, 339 N.W.2d 176, 178 (Mich. App. 1983) (stating that plaintiff's business can be disparaged by false statements about its "existence or character, the manner in which it is

conducted, its employees, or its customers"). Courts have routinely permitted injurious falsehood claims by non-producers when the publication was about plaintiff's business in general or plaintiff's product. *See, e.g.*, *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 59 (2d Cir. 2002) (recognizing claim by clothing boutique); *Adobe Sys. Inc. v. Christenson*, No. 2:10-CV-00422, 2012 WL 3994285, at *13 (D. Nev. Sept. 10, 2012) (permitting claim by software distributor); *Seitz v. Rheem Mfg. Co.*, 544 F. Supp. 2d 901, 909 (D. Ariz. 2008) (permitting claims by inventors); *Gucci Am. Inc. v. Duty Free Apparel, Ltd.*, 277 F. Supp. 2d 269, 275-76 (S.D.N.Y. 2003) (construing counter-claim by retailer of designer merchandise); *Charles Atlas, Ltd. v. Time-Life Books, Inc.*, 570 F. Supp. 150, 152-53 (S.D.N.Y. 1983) (permitting claim by advertiser); *Prince v. Fox Television Stations, Inc.*, No. 107129, 2011 WL 5901926, at *8 (N.Y. Sup. Nov. 23, 2011) (permitting claim by restaurant proprietor with licensing rights).

BPI Tech and FMI satisfy this requirement for their disparagement claims for two primary reasons. First, the statements at issue involved BPI Tech and FMI's product, LFTB. Second, the statements at issue involved BPI Tech's and FMI's businesses. Defendants made false statements about the process to produce LFTB, the raw material used, the safety and quality of LFTB, and the USDA's approval of LFTB. (Compl. ¶¶167-72, 190-97, 223-29, 268-76, 292-96.) BPI Tech developed the process, operates the equipment, selects the raw material, oversees safety and quality assurance, and obtained USDA approval for LFTB. (*Supra* at 4.) Defendants also made false statements about the tempering of beef trimmings, the elimination of cartilage from LFTB, and the use of ammonia in producing LFTB. (Compl. ¶¶195, 227-28.) FMI designs and provides the equipment that tempers the trimmings, eliminates the cartilage, and introduces the ammonia. (*Supra* at 4.)

C. Product disparagement claims are not limited to manufacturers or producers.

While Defendants want to limit the class of plaintiffs who can pursue these claims, there is simply no precedent for limiting recovery to manufacturers or producers. Defendants only cite two cases—*Isuzu Motors, Ltd. v. Consumers Union of U.S.*, 12 F. Supp. 2d 1035 (C.D. Cal. 1998) and *Simmons Ford v. Consumer Union*, 516 F. Supp. 742 (S.D.N.Y. 1981)—that held a particular non-producer plaintiff could not seek relief for product disparagement. Neither case is similar to the facts presented here, and neither one created a general prohibition against disparagement claims by all non-producers. In those cases, a non-producer plaintiff attempted to assert a claim based on false statements about the way a car was manufactured or designed. The courts did not permit the plaintiffs to do so because the plaintiffs (a distributor, importer, and retailer) had no role in manufacturing or designing the cars. Since the statements at issue involved the construction or design and the plaintiffs had no involvement in the construction or design, none of the statements were about or "of and concerning" them. That is the not the case here. BPI Tech and FMI are alleged to be involved in various aspects of the LFTB production process, which was directly implicated by Defendants' publications.

The other cases cited by Defendants, likewise, do not prohibit disparagement claims by non-producers. (Mem. at 21-22.) Those cases stand for the uncontested proposition that a plaintiff must satisfy the of and concerning requirement, which is met here for the reasons discussed above. (*Supra* at 11.) Traditional common law principles, however, permit disparagement claims if the false statements "damage or tend to damage the reputation of the quality of goods or services." *QSP*, 773 A.2d at 918 n.15. This inquiry depends on the statements at issue and the totality of the circumstances, and not just a label attached to the plaintiff. *See, e.g., Adobe Sys.*, 2012 WL 3994285, at *13 (allowing distributor to bring

disparagement claim against the manufacturer). The particular statements at issue here, and the totality of the circumstances surrounding the three BPI companies, show why BPI Tech and FMI have plausible disparagement claims.

D. The AFPDA does not limit common law product disparagement claims to producers.

Defendants also argue that "as a matter of statute only 'the producer' can assert a claim for disparagement of an agricultural food product." (Mem. at 25.) They argue that since the AFPDA only permits claims by producers, the Court must limit common law claims to producers as well. (*Id.* at 25-26.) The AFPDA does not support this argument.[7]

First, the AFPDA does not state that its objective is to limit who can bring common law disparagement claims. If the Legislature intended to bar common law claims by non-producers, the AFPDA would have said so explicitly. *See Sanford v. Sanford*, 2005 SD 34, ¶19, 694 N.W.2d 283, 289 ("The Legislature knows how to include and exclude specific items in its statutes."); *State v. Young*, 2001 SD 76, ¶12, 630 N.W.2d 85, 89 (if the Legislature had "meant" for a statute to cover a particular subject matter, the Legislature "would have said so"). The Court should not read a proclamation into the AFPDA that the legislature did not include.

The case cited by the ABC Defendants—*City of Lemmon v. U.S. Fid. & Guar. Co.*, 293 N.W.2d 433—demonstrates that the Legislature knows how to bar common law claims when that is its intent. In *Lemmon*, the legislature had passed a statute providing that a surety could sue the principal if the surety had to satisfy the principal's obligation. The statute also explicitly stated that "the surety has no claim . . . against other persons." *Id.* at 438 (quoting SDCL § 56-2-14). With this language, the Legislature specifically barred common law claims by a surety

[7] Indeed, for the reasons stated in BPI's opposition to the ABC Defendants' motion to dismiss all claims of Beef Products, Inc., the AFPDA does not limit or preempt common law disparagement claims of agricultural companies. BPI incorporates that opposition brief herein by reference.

against everyone other than the principal. *Id.* The AFPDA does not contain similar language. The AFPDA does not even discuss the claims available to non-producers if their product has been disparaged.

Second, the AFPDA does not state that it is the exclusive remedy for disparagement of an agricultural food product. Certainly, the Legislature can create a statutory cause of action that becomes the exclusive remedy for certain misconduct. But before a court can conclude that a statutory cause of action has become the exclusive remedy, there must be "decisive evidence of an intention" by the Legislature to design a scheme that covers the entire subject matter at issue. *Hohm v. City of Rapid City,* 2008 SD 65, ¶15, 753 N.W.2d 895, 904 (quoting *Burnett v. Myers*, 42 SD 233, 233, 173 N.W. 730, 731 (1919)). The issue here, therefore, is whether the AFPDA contains "detailed provisions" that "express legislative intent to design a complete scheme of responsibility and liability for" disparagement of agricultural products, such that all common law claims by non-producers must be banned. *Id.*

The AFPDA does not contain any such detailed provisions. The AFPDA is a short statute, totaling 237 words. The statute addresses one situation—knowing false statements about the safety of an agricultural product. The statute discusses one potential remedy for the producer in that situation—a lawsuit for treble damages. The statute also limits the time period for pursuing such a lawsuit to one year. The statute does not address remedies available to non-producers. Nor does it address remedies available to a producer when someone publishes false statements about their agricultural product unrelated to safety. Nor does it address remedies when someone publishes false statements about safety with reckless disregard as opposed to knowingly. Under these circumstances, the Court has no basis for concluding that the AFPDA is

an exclusive remedy and that the Legislature intended to bar non-producers from pursuing all common law claims.

Third, Defendants' novel argument has never been accepted by a South Dakota court. The South Dakota Supreme Court has never held that the AFPDA should be interpreted to preclude common law disparagement claims other than those brought by producers. In fact, no court in any of the states that have agricultural food product disparagement acts has ever held that those statutes preclude common law disparagement claims by non-producers. Defendants' position is, indeed, without precedent. In the absence of any judicial authority on the subject, the Court should not limit the common law when the Legislature elected against including any language in the statute indicating that it intended to narrow the scope of plaintiffs for common law claims related to agricultural products.

IV. BPI Tech and FMI have a plausible basis for their tortious interference claims (Count 27).

BPI Tech and FMI each asserted a claim for tortious interference with business relationships against Defendants. Defendants argue that they cannot state a claim for three reasons: (1) "a party cannot use the artifice of a claim for tortious interference with business relations to circumvent the constitutional and statutory limitations imposed on its defamation and disparagement claims"; (2) "they do not allege that they, as opposed to BPI, had any business relationship that was the subject of interference"; and (3) "they have not alleged that the ABC Defendants actually knew of such relationships before the broadcast." (Mem. at 27-28.) None of their arguments has merit, and they are inconsistent with the allegations in the Complaint.

A. BPI Tech and FMI have not circumvented any statutory or constitutional limitations.

To start, BPI Tech and FMI have a plausible basis for their tortious interference claims since, as explained above, they have sufficiently alleged claims for defamation and

disparagement, including the requirement that the statements at issue be "of and concerning" them or their products or businesses. They have not attempted to circumvent any constitutional or statutory limitations on their claims. Indeed, their tortious interference claims are based, in part, on speech that is not protected by the First Amendment. Six of the seven cases cited by Defendants hold that a plaintiff cannot bring a tort claim based on speech that is affirmatively privileged by the First Amendment—for example, statements that were made without actual malice. (Mem. at 27-28 & n.14.) That is not the case here, where the claims are instead based, in large part, on statements that Defendants knew were false and misleading.

Moreover, tortious interference claims are not necessarily invalid if a plaintiff ultimately fails to prove all elements of a defamation claim. Defendants cite one case, *Isuzu Motors*, which held that, under California law, a plaintiff could not bring a tortious interference claim unless the false speech was of and concerning him. (Mem. at 28.) However, other cases have recognized that a plaintiff may still have a tortious interference claim even if a defamation claim is not successful. *See, e.g., Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union*, 39 F.3d 191, 196 n.8 (8th Cir. 1994) ("There may be instances in which a defamation claim, properly pled, may fail and yet a tortious interference claim may succeed."); *see also Am. Home Assurance Co. v. Greater Omaha Packing Co.*, No. 8:11CV270, 2012 WL 2061941, at *2 (D. Neb. June 7, 2012) (denying dismissal of tortious interference claim based on defamatory statements, and rejecting defendant's argument that the plaintiff must show actual malice since it was not a required element of tortious interference).

B. The Complaint alleges BPI Tech and FMI had business relationships with grocery store chains and ground beef processors.

Defendants argue the Complaint's allegations are not sufficient for BPI Tech and FMI to state a claim for tortious interference since any business relationships they formed "were for the

sale of LFTB by its manufacturer, BPI," and tortious interference requires a direct contract or relationship with a third party. (Mem. at 30-31.) That is inaccurate.

A plaintiff must allege "the existence of a valid business relationship or expectancy" to bring a tortious interference claim. *Dykstra v. Page Holding Co.*, 2009 SD 38, ¶39, 766 N.W.2d 491, 499 . A plaintiff can have a "valid business relationship" even if it is not the one signing a contract with the third party. *See, e.g.*, *Faiveley Transp. USA, Inc. v. Wabtec Corp.*, No. 10-Civ 4062, 2011 WL 189930, at *9 (S.D.N.Y. May 13, 2011) (permitting tortious interference claim by two non-contracting plaintiffs based on their affiliations with other plaintiffs and indirect business relationships with the third party); *Benfield Inc. v. Aon Re, Inc.*, No. 07-cv-2218, 2008 WL 80610, at *3 (D. Minn. Jan. 8, 2008) (noting that the plaintiff broker had a business relationship with the insurer even though there was no contract, but dismissing the claim on other grounds); *TVT Records v. Island Def Jam Music Grp.*, 279 F. Supp. 2d 366, 383-84 (S.D.N.Y. 2003) (permitting claim by subsidiary even though it was not a party to the parent's contract since it would have received a benefit from the contract), *rev'd on other grounds*, 412 F.3d 82 (2d Cir. 2005); *see also Kirch v. Liberty*, 449 F.3d 388, 402 (2d Cir. 2006) (evaluating whether the non-contracting party had a "close relationship" with the contacting party that would permit a tortious interference claim); *Brown v. AXA Re*, No. 02 Civ. 10138, 2004 WL 941959, at *8 (S.D.N.Y. May 3, 2004) (permitting claim by plaintiffs who negotiated a contract but were not parties to it).

The cases above recognize that "some indirect business relationships—even if not memorialized in a contract—are sufficient for a plaintiff to recover for tortious interference." *Faiveley*, 2011 WL 189930, at *9. Courts do not just look at the contract. Rather, courts consider the surrounding circumstances of a business relationship, including: whether the

plaintiff and contracting party shared senior management; whether the plaintiff and contracting party are related by ownership; whether the plaintiff interacted with the other contracting party; whether the plaintiff was directly harmed by the defendant's conduct or was a direct pecuniary beneficiary of the business relationship; and, whether the plaintiff collected and forwarded payments to a contracting party. *See, e.g.*, *Kirch*, 449 F.3d at 401; *Faiveley*, 2011 WL 1899730, at *9; *TVT Records*, 279 F. Supp. 2d at 383-84; *Benfield*, 2008 WL 80610, at *3.

Here, the Complaint alleges the existence of a valid business relationship or expectancy for all three plaintiffs—BP, BPI Tech, and FMI. BP, BPI Tech, and FMI each developed business relationships with grocery store chains and ground beef processors over the course of twenty years. BP, BPI Tech, and FMI each worked with grocery store chains and processors to demonstrate that LFTB should be included in their ground beef. BP, BPI Tech, and FMI each reasonably expected those business relationships to continue into the future. And BP, BPI Tech and FMI all directly profited from the sales of LFTB generated by those relationships. These factual allegations (*supra* 5-6, 9) show that BPI Tech and FMI are more integrally ingrained with the grocery store chains and processors than any of the plaintiffs in the tortious interference cases cited above or cited by Defendants.

Moreover, BPI Tech and FMI's relationship with the contracting party (BP) is closer than any of the plaintiffs in the cases cited by the parties. BP, BPI Tech, and FMI are privately held, closely related companies. All three are owned by the Roth family. All three share common management, have the same corporate headquarters, earn their revenue and profits from the sale of LFTB, and incur expenses and liabilities in connection with the sale of LFTB. BP and BPI Tech even prepare consolidated financial statements. BPI Tech and FMI were direct financial beneficiaries from the sale of LFTB to processors and the use of LFTB in ground beef sold at the

grocery stores. Given these allegations (*supra* at 1, 4-5, 8-9, 19), it is premature to conclude that BPI Tech and FMI do not have business relationships that were the subject of interference. This is a disputed issue of fact to be resolved after discovery.

C. The Complaint alleges that Defendants knew about BPI Tech and FMI's business relationships.

A plaintiff must allege "knowledge by [the defendant] of the [business] relationship or expectancy" to bring a tortious interference claim. *Dykstra*, 766 N.W.2d at 499. The Complaint included such an allegation:

> The ABC Defendants knew that national grocery store chains sold ground beef with BPI's product LFTB, and therefore knew that BPI had business relationships with those chains and the ground beef processors . . . . The ABC Defendants then intentionally and unjustifiably interfered with BPI's existing and prospective business relationships with these grocery store chains and ground beef processors.

(Compl. ¶694.) "BPI" in this paragraph, as it is used throughout the Complaint, refers to BP, BPI Tech, and FMI. (*See id.* ¶29.) Defendants argue BPI Tech and FMI "have not alleged that the ABC Defendants actually knew of such relationships before the broadcasts." (Mem. at 31.) They state that "[t]here is absolutely no allegation in the Complaint that the Defendants were aware that BPI Tech and Freezing Machines had business relationships that would be the subject of interference." (*Id.*) To the contrary, the paragraph above alleges that Defendants "knew that [BP, BPI Tech, and FMI] had business relationships with those [grocery store] chains and the ground beef processors" who sold ground beef to the chains.

Moreover, BPI Tech and FMI can pursue tortious interference claims even if Defendants now deny actual knowledge of their business relationships. Plaintiffs can bring tortious interference claims if the defendant had constructive knowledge of the business relationship, i.e., if the defendant would have learned of the plaintiff's relationship through reasonable inquiry. *See, e.g., Amigo Broad., LP v. Spanish Broad. Sys., Inc.*, 521 F.3d 472, 490 (5th Cir. 2008)

(defendant must have "knowledge of facts and circumstances that would lead a reasonable person to believe in the existence of the . . . business relationship"); *Nat'l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc.*, 791 F. Supp. 2d 33, 58 (D.D.C. 2011) (defendant "need not be shown to have had actual awareness of a business expectancy"); *Wesco Autobody Supply, Inc. v. Ernest*, 243 P.3d 1069, 1082 (Idaho 2010) (knowledge element satisfied "by knowledge 'of facts which would lead a reasonable person to believe that such [business] interest exists'"); *Cohen v. Battaglia*, 202 P.3d 87, 94 (Kan. App. 2009) ("[O]ur Supreme Court has never held that knowledge of the precise terms of a . . . business relationship is necessary . . . .").

Discovery will confirm whether Defendants knew about BPI Tech and FMI's business relationships, or whether they would have learned of them through reasonably inquiry. For example, it is clear that the Defendants would have learned of BPI Tech's role in the USDA approval process if they obtained documents from the USDA through a Freedom of Information Act request. Or they would have learned about BPI Tech from another Defendant, Kit Foshee, who ABC interviewed and is a former BPI Tech employee. Or they would have learned about BPI Tech if they had obtained information about the Black Pearl Award that BPI Tech received for advancing food safety and quality in connection with the production of LFTB. These are but a few examples of the information known or easily knowable by Defendants, which would have alerted them to BPI Tech's relationships with the companies buying and using LFTB.

The point is simple. It is premature to decide, as a matter of law, that Defendants did not know about and reasonably could not have known of BPI Tech and FMI's business relationships. The Complaint alleges they were aware of the relationships. Discovery will shed light on this disputed issue of fact. BPI Tech and FMI, at least, have plausible claims for tortious interference.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny Defendants' Motion to Dismiss All Claims of BPI Tech and FMI.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Plaintiffs' Amended and Substituted Opposition to ABC Defendants' Motion to Dismiss All Claims of BPI Technology, Inc. and Freezing Machines, Inc.* was served by mail and e-mail upon:

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