UNITED STATES DISTRICT COURT DISTRICT OF KANSAS	
In re Syngenta AG MIR162 Corn Litigation THIS DOCUMENT RELATES TO ALL CASES EXCEPT: *Louis Dreyfus Company Grains Merchandising LLC v. Syngenta AG, et al.*, No. 16-2788-JWL-JPO *Trans Coastal Supply Company, Inc. v. Syngenta AG, et al.*, No. 2:14-cv-02637-JWL-JPO *The Delong Co., Inc. v. Syngenta AG, et al.*, No. 2-17-cv-02614-JWL-JPO *Agribase International Inc. v. Syngenta AG, et al.*, No. 2:15-cv-02279-JWL-JPO	Civil File No.: 2:14-MD-02591-JWL-JPO MDL No. 2591

BASSFORD REMELE, P.A.'S MEMORANDUM OF LAW REGARDING ALLOCATION OF ATTORNEYS' FEES

INTRODUCTION

Many factors contributed to the historic $1,510,000,000 recovery on behalf of American corn producers, grain elevators, and ethanol plants, but perhaps the most unique and ultimately most impactful factor was the unprecedented level of coordination between leadership of the Minnesota and Kansas actions. From even before the appointment of counsel in the Minnesota case, leadership of the Kansas MDL and eventual lead counsel in the Minnesota action pledged to work together to prosecute their

clients' claims against Syngenta. Counsel made this decision despite the clear differences in the anticipated structure of their respective actions. The Minnesota case was to be a large mass tort action comprising tens of thousands of individual cases with a Minnesota-only class action. Conversely, the Kansas case was primarily intended to proceed with a number of class actions and only a small number of individually filed cases. Despite these differences, the Minnesota and Kansas leadership groups worked hand-in-hand to prepare and ultimately try the cases that led to this historic settlement.

The agreement to coordinate the prosecution of the Minnesota and Kansas actions was guided by the *Manual for Complex Litigation (Fourth)* [hereinafter "*Manual*"], which encourages "coordination among counsel . . . to reduce duplication and potential conflicts and to coordinate and share resources" and recognizes the importance of "agreements or understandings . . . between attorneys" to promote these goals and decrease conflicts among counsel. Manual §§ 10.225, 14.121. For that reason, the members of the "Remele/Sieben Group" of applicants, who were to lead the Minnesota litigation, reached out to Kansas leadership regarding the prospect of an agreement to coordinate their efforts. Ultimately, the members of the Remele/Sieben Group negotiated and executed a Joint Prosecution Agreement ("JPA") with the Kansas MDL leadership. The JPA provided a structure for sharing common benefit work, cooperation, and coordination of the prosecution of the claims against Syngenta, and established a

framework for allocating compensation related to such activities.[1] And while the JPA was never officially "approved" by any court, both the Minnesota and Kansas courts were aware of the terms of that agreement and issued Common Benefit Orders that were consistent with the JPA.

The JPA was not an academic exercise. From the execution of the agreement through the settlement, the Minnesota and Kansas leadership managed the litigation pursuant to its terms. Consistent with the JPA, Minnesota leadership paid $1,115,894 to the Kansas leadership for shared experts and discovery expenses. [*See* Remele Decl., ¶ 10.] In addition, after the settlement of the first case tried in Minnesota, Minnesota leadership remitted a portion of the recovery to Kansas leadership pursuant to the JPA. Further, Minnesota and Kansas leadership coordinated all offensive discovery pursuant to the framework set out in the JPA, including the review of millions of Syngenta documents and the depositions of Syngenta and third-party witnesses. Not only did this coordination allow for increased efficiency in terms of dealing with Syngenta and its attorneys, but it also economized the use of judicial resources in both Minnesota and Kansas. In sum, from the very beginning of this case, and throughout the litigation, the Kansas and Minnesota leadership groups have acted to increase cooperation and decrease

[1] Following a Minnesota state district court judge's appointment of the Minnesota Plaintiffs' Executive Committee, all but one member of the appointed leadership team in Minnesota executed a First Addendum to the Amended and Restated Joint Prosecution Agreement along the same terms as the original JPA. The only MN PEC member who refused to sign the agreement was Clayton Clark, who eventually resigned his leadership position and began filing his cases in Illinois to avoid paying any common benefit fees for the work performed in prosecuting his clients' cases against Syngenta.

conflicts, all for the ultimate benefit of their respective clients. That strategy allowed the plaintiffs to utilize the unique mass tort/class action structure, as well as the parallel state and federal tracks, to obtain a favorable result for U.S. corn farmers.

Now that the case against the defendant has concluded, as is often the case in this type of litigation, the attorneys have aimed their focus at each other. And while some amount of revisionism and competition is natural, we respectfully remind the Court of the singular cooperation that led to this excellent result. The unique dual-track nature of this case, along with the power of tens of thousands of individual lawsuits, ensured that Syngenta was fighting this litigation on two fronts. At the same time, the cooperation between Minnesota and Kansas leadership avoided duplication of efforts, preserved judicial resources, and decreased intra-plaintiff conflicts during prosecution of the case. This Court now has the opportunity to incentivize similar cooperation in future hybrid litigation and to set the standard for the allocation of attorneys' fees in such cases.

In the course of finalizing the settlement agreement and associated documentation, there has been a great deal of discussion among certain groups of counsel in support of voiding the JPA and its allocation of attorneys' fees and expenses. As set forth in detail below, Bassford Remele, as Co-Lead Counsel to individual claimants in the Minnesota action, we submit that voiding the JPA would set bad precedent for future complex litigation, and would be inequitable on the facts of this case.

The coordinated Syngenta litigation is unquestionably unique. Prior to this case, we are aware of no other instance in which the lead counsel of two parallel consolidated cases attempted to address the common issues that led to conflict in large litigation,

including how to allocate fees between class and individual counsel. Here, that issue was addressed *at the beginning of the case* for the express purpose of obviating the conflict that is now before the Court.[2]

The Court has a unique opportunity to craft a template for the allocation of fees in future mass tort/class action hybrid cases by recognizing the importance of agreeing on fee allocation at the front end of the litigation, thereby lessening future conflict and increasing the cooperation and conservation of judicial resources that are essential in large litigation. Moreover, by obviating or disregarding the JPA, the Court would be sending a message to future litigants that front-end agreements to cooperate in complex litigation may not be enforced, providing a substantial disincentive for future cooperation. Such a message would be particularly egregious where, as here, Minnesota and Kansas leadership spent nearly three years litigating their parallel cases pursuant to the terms of the JPA, and exchanging hundreds of thousands of dollars pursuant to that contract to foster continued cooperation and coordination. Finally, obviating or disregarding the JPA would have the added adverse consequence of disrupting the existing framework in the JPA for giving litigants their choice of forum as to where to pursue their claims. Over 70,000 individual claims were filed in Minnesota. The litigants who filed those claims in Minnesota did so for one reason: they believed that because of

[2] Kansas leadership will undoubtedly argue that in entering into the JPA, it did not foreclose its ability to also seek a class-attorney fee award. To be sure, the JPA does not preclude such an action. However, the Court's inquiry in determining fees is ultimately an equitable one. Therefore, as discussed in detail below, it will be difficult, if not impossible, for the Court to determine a total equitable fee allocation without seeing all of the final claims data.

the JPA, they had certainty as to how their claims would be prosecuted and how fees and expenses would be allocated pursuant to their contingent contracts.

For all these reasons, we believe that an equitable fee allocation can occur only after the claim period has closed and the respective courts have the raw claims data available to determine which clients have participated in the settlement. By waiting for final claims data, the Court will be able to analyze the relative success of the Minnesota and Kansas actions in obtaining an actual recovery for their clients and thereby determine the exact amount of the common benefit assessment required by the JPA. In addition, by delaying a final decision until all claims data is available, the respective camps of attorneys will have the opportunity to analyze that same data and supplement their arguments, providing the Court with additional authority based upon the actual "facts on the ground" at the conclusion of the claims process.

BACKGROUND OF THE MINNESOTA LITIGATION

One of the many difficult aspects of the Court's task in this case is to equitably determine the allocation of fees to counsel involved in cases that the Court did not have the opportunity to oversee. To this end, the Court should consider the work performed in the Minnesota action and the impact of that work on the ultimate global resolution of the litigation.[3]

The Minnesota Syngenta litigation began in late 2014. At that time, a number of Minnesota corn farmers began filing lawsuits against Syngenta in Minnesota state court.

[3] We join in and adopt the arguments advanced by co-lead counsel Daniel Gustafson and William Sieben regarding the effort undertaken in Minnesota and the substantial common benefit that resulted for all plaintiffs in the coordinated actions.

All of those cases asserted state-law tort claims, and given Syngenta's status at the time as a Minnesota domiciliary, these state-court cases were intended to create a "second front" in the nation-wide litigation against Syngenta. As this Court knows, those Minnesota cases, as well as others, were removed by Syngenta on the theory that the claims implicated the "federal common law of foreign relations." Attorneys from Bassford Remele, Watts Guerra, and other firms vigorously opposed these removals, and worked closely with the Kansas MDL leadership to secure the remand of these cases to state court. [*See* Federal MDL Doc. 395.]

A. Formation of the JPA Establishes the Framework for Cooperation and Sharing of Common Benefit Fees.

Given the volume of cases being filed in Minnesota state courts, it became clear to all involved that some form of consolidation would be required if remand was granted. To that end, and having already worked collaboratively with Kansas MDL leadership on the remand process, attorneys Lewis A. Remele, Jr., Francisco Guerra IV, Mikal C. Watts, Richard M. Paul III, Robert K. Shelquist, and William R. Sieben,[4] approached the Kansas leadership regarding the prospect of a JPA to coordinate the prosecution of parallel claims following remand. In June 2015, after substantial negotiations between the two sides, the Kansas leadership and members of the Remele/Sieben Group agreed to terms and executed the JPA. [Sealed Mot. by Watts Guerra for Leave to File

[4] This group of counsel eventually became known as the "Remele/Sieben Group" and is referred to as such throughout this submission.

"Confidential" Docs. Publicly, Exh. A.][5] The purpose of the JPA was best explained by the Kansas MDL Co-Lead Counsel in their Statement in Support of the Remele/Sieben Group that was filed in the Minnesota action. [*See* Remele Decl., Ex. A.] There, Kansas leadership explained that the JPA was intended to "foster coordination and cooperation of the groups' work together in connection with the prosecution of the Syngenta claims," and to "preemptively address[] issues that may arise in connection with Federal MDL and Minnesota MDL common benefit assessments." [*Id.* at ¶¶ 3-4.] Further, the JPA was enacted to "avoid all material duplication of effort, leverage the work product of both MDLs, and avoid a common benefit arbitrage between the Federal MDL and the Minnesota MDL that will promote distrust and dysfunction." [*Id.* at ¶ 9.] The JPA and the Kansas Co-Lead Statement in Support of the Remele/Sieben Group were submitted to Judge Sipkins in Hennepin County, Minnesota as a part of the Remele/Sieben Group's application for leadership.

On August 5, 2015, Judge Sipkins issued an Order Appointing Lead Counsel, naming all of the members of the Remele/Sieben Group, along with five members of the competing slate, to the Minnesota Plaintiffs' Executive Committee ("PEC") and naming Lewis A. Remele, Jr. and Frank Guerra Co-Lead Counsel, with Daniel Gustafson and William Sieben as Interim Co-Lead Counsel to the putative Minnesota class. [*See* Remele Decl., Ex. B.] In that Order, Judge Sipkins specifically discussed the JPA and its

[5] Co-Lead Counsel in the Minnesota case, Watts Guerra, will submit a motion to permit them to file the JPA under seal with the Court. Because that document has not been filed as of the time of this submission, we are unable to use a document number to reference that submission specifically.

commitment to cooperation as a factor in his decision appointing leadership. [*Id.* at 8.] Following the appointment of the PEC, the Minnesota Co-Lead Counsel and Co-Lead Class Counsel negotiated the First Addendum to Amended and Restated Joint Prosecution Agreement ("JPA First Addendum") to extend the JPA's framework of cooperation to members of the PEC that were not part of the Remele/Sieben Group. [*See* Sealed Mot. by Watts Guerra for Leave to File "Confidential" Docs. Publicly, Exh. B.]

In addition, the execution of the JPA First Addendum was intended to address fee issues, including those resulting from any Minnesota class recovery, early in the litigation. This was necessary because the JPA, which required only an 11% percent common benefit assessment, covered only coordination by Kansas and Minnesota leadership of the *individual* actions filed in Minnesota. To remedy this, the JPA First Addendum includes provisions ensuring that Minnesota leadership would pursue claims on behalf of the Minnesota class, while agreeing that any fees recovered from the Minnesota class would be split 65% to Minnesota and 35% to Kansas. Because of the commonality between the individual and class claims, Minnesota leadership viewed any class fees that might be recovered from the Minnesota class to be part of the entire allocation of common benefit fees that might be awarded for its work on both individual and class claims.

All but one member of the Minnesota PEC agreed to the terms of JPA First Addendum, and the document was executed in January of 2016. PEC member Clayton Clark chose to resign his position in the Minnesota leadership rather than agree to cooperate and pay for the common benefit work performed by counsel in the Federal

MDL. Following his resignation, Mr. Clark and his colleague, Martin Phipps, eventually began filing claims in Illinois for the apparent purpose of avoiding having to pay for, or contribute to, any common benefit work.

With the PEC established and the issues of coordination and common benefit fees addressed by the JPA, the Minnesota leadership immediately began work on behalf of its tens of thousands of individual farmer clients and the putative Minnesota class. The composition of the Minnesota PEC reflected the unique nature of the Minnesota case. Judge Sipkins' decision to appoint members from both slates of prospective leadership ensured that there was an adequately sized team of lawyers to advance the litigation, and that such lawyers had expertise in both mass tort and class litigation. This mix was useful because unlike either the Kansas or Illinois cases, Minnesota is the only venue in the coordinated Syngenta litigation that had both a significant number of individual cases and a class action. As the Court is aware, the number of individual cases ultimately filed in Minnesota state court vastly outnumbers the size of the Minnesota class itself, and totals over 70,000 individually filed cases from across the country.

B. The Court-Issued Common Benefit Orders Are Consistent With the JPA and Provide a Guide for the Reasonable Allocation of Fees.

With the JPA in place and the Minnesota PEC appointed, among the Minnesota Court's first priorities was the establishment of a Common Benefit Order. On October 29, 2015, Minnesota leadership submitted its proposed Common Benefit Order. On December 5, 2015, the Minnesota Court issued its Common Benefit Order. [Remele Decl., Ex. C.] The Minnesota Common Benefit Order was drafted to closely track the

Common Benefit Order issued in the Federal MDL, and to align with the terms of the JPA. [*See id.* at 6 ("Nothing in this section is intended to be inconsistent with the JPA or the Federal MDL Common Benefit Order . . . ").] The Common Benefit Orders, while not necessarily binding in the case of a class settlement, were the result of substantial discussions and revisions amongst counsel and reflect the intentions of signatories to the JPA. Accordingly, the Common Benefit Orders provide the Court with a guide for the reasonable and equitable division of fees.

C. The Work Performed in the Minnesota Litigation Created a Second Front in the Syngenta Litigation and Applied Substantial Pressure on Defendants.

From late 2015 through settlement, the Minnesota case placed substantial litigation and settlement pressure on Syngenta and was a substantial contributing factor to the ultimate success obtained on behalf of American corn farmers. Minnesota leadership recognized from the beginning that the liability issues relating to the individual claims and the class claims were essentially common, and that all offensive discovery, excepting specific damages issues, would apply equally to both individual and class claims. As a result, Minnesota leadership agreed to pursue all of its work on a common basis, without distinguishing between class and individual work.[6] Further, Minnesota leadership determined from the outset that any fees allocated to the Minnesota PEC for common benefit work would be submitted on a common basis, and no distinction would be made

[6] The JPA and its common benefit assessment provision incentivized Minnesota leadership to work cooperatively and not distinguish between work related to the individual claims and the class claims.

between the work done on individual claims versus class claims. Ultimately, this coordination proved very successful.

The Minnesota leadership drafted substantive briefings on over 50 separate legal questions and motions from the beginning of the case through the global settlement during the Minnesota class trial. This work included drafting over 200 pages of briefing in support of and opposing the summary judgment motions filed in the first Minnesota bellwether case, over 110 pages of briefing in support of and opposing summary judgment motions filed in the Minnesota class case, drafting a motion to amend to add a claim for punitive damages that consisted of over 100 exhibits, and obtaining favorable results on behalf of the plaintiffs on nearly every legal issue raised with the court. But beyond the volume of work performed, there can be little doubt of the *impact* that the work in the Minnesota case had in advancing the overall litigation. Given the volume of work, there is no practical means by which to recount the importance of the day to day work performed by Minnesota leadership that advanced the case against Syngenta. However, there are a few issues that bear special attention.

Establishing the Threat of Nationwide Punitive Damages

Unlike in the Kansas MDL, the Minnesota plaintiffs were required to bring a motion to amend their Complaint to add a claim for punitive damages. Under Minnesota law, a party may amend their Complaint to add a claim for punitive damages by presenting *prima facie* evidence of the defendants' deliberate disregard for the rights of others. *See* Minn. Stat. § 549.20, subd. 1(a); *Olson v. Snap Prods., Inc.*, 29 F. Supp. 2d 1027, 1034 (D. Minn. 1998). In October 2016, with discovery still ongoing, the

Minnesota leadership filed its Motion for Leave to Amend the Second Amended Complaint to Assert a Claim for Punitive Damages on behalf of the five bellwether cases that had been scheduled for trial. Those bellwether cases involved plaintiffs asserting state-law tort claims from four separate states: Nebraska, Minnesota, Ohio, and Iowa.

The Minnesota punitive damages brief presented nearly twenty pages of factual evidence and referenced approximately 100 documents demonstrating that Syngenta acted with deliberate disregard for the rights of American corn farmers. This motion was among the first, if not *the* first, opportunity for plaintiffs in the coordinated Syngenta litigation to present evidence to a court regarding Syngenta's conduct in a motion for substantive relief. The parties argued the punitive damages motion in December 2016.

On January 9, 2017, the Minnesota Court issued its Order permitting the Minnesota bellwether-trial plaintiffs to amend their Complaints to add a claim for punitive damages, and requested supplemental briefing regarding choice-of-law issues concerning the application of Minnesota law to the claims of the non-Minnesota bellwether trial plaintiffs. The Minnesota Court's punitive damages order provided an in-depth analysis of the evidence presented and concluded that "Syngenta knew that releasing Viptera prior to securing import approval in China created a high probability of trade disruption," but that despite that knowledge, Syngenta proceeded with the commercialization and then "acted to conceal its actions and shift blame to the grain trade, or China, or to the farmers themselves for the consequences." [Remele Decl., Ex. D at 33.] The Court summarized its view of Syngenta's conduct based on its review of the evidence, stating that "Syngenta was willing to risk the loss of the Chinese market for

U.S. corn, despite knowledge of the financial consequences that a trade disruption would have on American corn farmers." [*Id.*] The Minnesota punitive damages Order was a substantial success for the plaintiffs in Minnesota, as well as for plaintiffs throughout the coordinated Syngenta litigation.

As directed by the Court, the parties then briefed the question whether Minnesota law on punitive damages should apply to the claims on the non-Minnesota bellwether trial plaintiffs. The application of Minnesota punitive damages law was particularly important to the Minnesota litigation because *Mensik*, the first bellwether case set for trial, involved the claims of a Nebraska corn farmer. Nebraska law prohibits punitive damages. *See Golnick v. Callender*, 860 N.W.2d 180, 190 (Neb. 2015). The *Mensik* bellwether case was scheduled to be the first case tried in the entire coordinated litigation. Thus, having the ability to pursue punitive damages in that case would increase Syngenta's exposure, but more importantly, favorably impact the prospect of settlement by securing the right to seek punitive damages even in those states that banned exemplary damages. On April 11, 2017, the Minnesota Court issued its Order permitting the remaining non-Minnesota bellwether trial plaintiffs to amend their Complaints to add claims for punitive damages. [*See* Remele Decl., Ex. E.] The Court's Order permitting the assertion of punitive damages to claims arising from states that did not permit exemplary damages created the threat of nationwide punitive damages in the Minnesota litigation. With over 70,000 individual plaintiffs on file in Minnesota, the threat of punitive damages in *each* of those cases provided a strong incentive for Syngenta to pursue settlement negotiations.

Establishing the Viability of Viptera and Duracade Producer Claims

Farmers that grew corn containing Syngenta's Viptera and Duracade seed products were specifically excluded from the class definitions in both Minnesota and the Federal MDL. [*See* Federal MDL Doc. 2547 at 30-33; November 11, 2016 Order and Memorandum of Class Certification, at 13.] As such, any Viptera or Duracade grower seeking to recover for their losses was required to assert individual claims. In recognition of that fact, Minnesota leadership advocated for the inclusion of a Viptera or Duracade grower in the initial set of bellwether trials to provide the plaintiffs and Syngenta the opportunity to determine the viability of Viptera/Duracade producer claims. Farmer Daniel Mensik of Nebraska was selected to serve as the bellwether trial plaintiff for Viptera/Duracade grower claims. The Minnesota Court not only included the *Mensik* case in the initial set of bellwether trials, but scheduled the *Mensik* case as the first trial in the nation. As such, the *Mensik* case was prepared for an eventual trial, including briefing his claims on summary judgment.

Throughout the litigation, Syngenta took the position that Viptera/Duracade grower claims were barred by the application of stewardship agreements with Syngenta customers, which contained disclaimers and limitations of damages, as well as so-called "bag tags" with similar language that Syngenta argued created a contract upon the opening of the Syngenta seed bag. Under Syngenta's theory, the claims of all Viptera/Duracade growers would be barred due to the provisions of these contracts. The parties briefed the Stewardship Agreement issue on summary judgment in the *Mensik* case, which was filed concurrently with the Federal MDL's motion for summary

judgment on behalf of the Kansas class of plaintiffs. Syngenta dedicated over 10% of its brief in opposition to summary judgment in the *Mensik* case to the defense of its Stewardship Agreement arguments. However, the Minnesota Court's April 11, 2017 Order roundly rejected Syngenta's position, holding that "the Stewardship Agreement will not be enforced as a matter of law." [Remele Decl., Ex F at 32.] As such, the Minnesota leadership was able to successfully defeat Syngenta's primary legal argument against Viptera/Duracade growers, greatly increasing the pool of plaintiffs with viable claims against Syngenta and increasing Syngenta's overall exposure.

Establishing a Higher Per-Bushel Damages Model

In addition to increasing Syngenta's exposure by establishing the viability of Viptera/Duracade grower claims, the Minnesota litigation was able to expand Syngenta's potential liability by increasing the per-bushel damages claimed by individual claimants in the Minnesota action as compared to their class counterparts. This was accomplished through the expert analysis and report of Dr. Mohan Rao, who served as the damages expert for the individual claimants in the Minnesota case. As this Court knows, leadership for the Minnesota and Federal classes retained Drs. Bruce Babcock and Colin Carter as expert witnesses on the issue of damages.

Convinced that the value of their clients' claims was higher, Minnesota Co-Lead Counsel began discussions with Dr. Rao regarding his view of the potential damages. Ultimately, Dr. Rao's analysis concluded that the plaintiffs' per-bushel damages from the loss of the Chinese export market were nearly three times those calculated by Drs. Babcock and Carter for the primary damages period of November 2013 through

December 2014.[7] Syngenta's attempts to exclude Dr. Rao's analysis in the Minnesota litigation were denied, and Dr. Rao was prepared to testify on behalf of bellwether-plaintiff Mensik during the first-in-the-country trial scheduled for April 2017. Unfortunately, the *Mensik* case resulted in a mistrial and Dr. Rao never got the opportunity to testify prior to global settlement. Nonetheless, Dr. Rao's expert analysis and retention on behalf of the more than 70,000 individual plaintiffs in the Minnesota litigation drastically increased Syngenta's overall exposure and assisted in achieving the historic settlement.

Preventing the Allocation of Fault to Third-Parties and Plaintiffs

The Minnesota litigation also scored a substantial legal victory in defeating Syngenta's attempt to allocate or compare fault to non-party grain handlers Cargill and ADM, to the People's Republic of China, and to the plaintiffs themselves. As recognized by the Minnesota Court in its Order on plaintiffs' motion to amend to add a claim for punitive damages, one of Syngenta's primary defenses was to allocate fault to others in an attempt to decrease its responsibility and liability for its actions. [*See* Remele Decl., Ex. D at 33.] In two separate summary judgment motions, the Minnesota leadership defeated Syngenta's allocation of fault and comparative fault defenses, thereby substantially decreasing Syngenta's opportunity to deflect blame at trial. [*See, e.g.*,

[7] Dr. Rao's expert report calculated that per-bushel damages resulting from the loss of the Chinese export market at $.50 for the period of November 18, 2013 through December 7, 2014, and $.15 from December 8, 2014 through August 26, 2016. By contrast, Dr. Babcock calculated that damages as (at most) $.157 per bushel for marketing years 2013/14, $.19 for marketing years 2014/15, and $.116 for marketing years 2015/16. Dr. Carter calculated his damages at $.148 per bushel for marketing years 2013/14, $.13 for marketing years 2014/15, and $.085 for marketing years 2015/16.

Remele Decl., Ex. F at 25–28; *id.*, Ex. G at 20–28.] The practical effect of these rulings became increasingly clear during the trial on the Minnesota class' claims, in which Syngenta was repeatedly prevented from arguing that third parties were to blame for the loss of the Chinese export market.

Completing and Submitting Over 67,000 Plaintiff Fact Sheets to Defendants

Unlike the Kansas or Illinois actions, the Minnesota litigation required the preparation and submission of tens of thousands of Plaintiff Fact Sheets to Syngenta. All told, over 67,000 Plaintiff Fact Sheets ("PFSs") were submitted to Syngenta by plaintiffs with claims filed in the Minnesota litigation. [Remele Decl., ¶ 11.] Firms with clients in the Minnesota litigation expended 67,253 hours to complete and submit PFSs to comply with the Court's Order. [*Id.*] While this work may not be "Common Benefit Work" as that term is defined in the respective Common Benefit Orders,[8] there can be little doubt of the positive impact this work had in securing settlement of the global Syngenta litigation. The PFS process served to show Syngenta that the plaintiffs were prepared to vigorously prosecute their claims and to actively participate in the case.

D. The Minnesota Litigation Results in the First Settlement of a Syngenta Claim in the Nation.

Following the mistrial of the *Mensik* bellwether trial on April 26, 2017, the *Mensik* case was rescheduled for trial on July 10, 2017, immediately following the conclusion of the Kansas class trial in the Federal MDL. On June 28, 2017, bellwether-plaintiff Mensik

[8] As discussed *infra*, the Minnesota Co-Leads have submitted time received from scores of lawyers representing individual claimants who have argued that the time spent on PFS constitutes common benefit time. The Minnesota Leadership requests guidance from the Court as to whether these efforts do constitute common benefit time.

verbally accepted a settlement offer from Syngenta and agreed to dismiss his claims. Syngenta's settlement of the *Mensik* case was the first settlement in the coordinated Syngenta litigation, and the first instance in which Syngenta demonstrated a willingness to settle any claims.

E. The Global Syngenta Litigation Is Settled Only Days Before the Minnesota Class Plaintiffs Rest Their Case.

On September 11, 2017, the Minnesota class trial began in Hennepin County District Court. During the trial, Minnesota leadership selected a jury, took the adverse testimony of two of Syngenta's most critical witnesses, directed the testimony of non-retained expert Dr. Randal Giroux, and directed the testimony of two of the three class representatives. Following a brief delay in the Minnesota trial schedule to permit settlement negotiations, the global settlement was announced on September 26, 2017. The global settlement occurred just days prior to the Minnesota class plaintiffs resting their case and after nearly two weeks of trial. The Minnesota class litigation, which was jointly staffed and prosecuted by Minnesota class and individual counsel, placed substantial pressure on Syngenta to agree to final settlement in order to avoid a second devastating trial defeat following the success of Kansas leadership just months earlier.

OVERVIEW OF RECOMMENDED FEE AND EXPENSE ALLOCATION

Bassford Remele, as Co-Lead Counsel for the Minnesota individual plaintiffs, offers the following proposed basic framework for allocating attorneys' fees and expenses as part of the global settlement. We understand that the Court has indicated that

every farmer will receive the same per-bushel recovery regardless of whether they pursued their claims individually or as an absentee class member.

The recommended framework is premised on three primary assumptions:

1) One-third of the total settlement will be used for the payment of attorneys' fees and expenses.[9]

2) The Court will wait until final claims data is available to determine an equitable allocation of fees.

3) Any non-common benefit fees or expenses will be offset by common benefit fees and expenses, whether in the form of an assessment or in the reduction of a contingent fee percentage.

With these assumptions in mind, Bassford Remele proposes a fee and expense allocation framework that relies on two overarching positions: (1) the Court should rely on the JPA to set a benchmark common benefit fee percentage and subsequently apply an appropriate multiplier for common benefit fees, and (2) the Court should enforce the contingent fee contracts entered into between plaintiffs and their individually retained attorneys.

A. The Court Should Enforce the Joint Prosecution Agreement By Using it to Set a Benchmark Common Benefit Fee Percentage.

The Court should enforce the JPA, as amended and executed between the Minnesota and Kansas leadership groups. As this Court is aware, the JPA requires that individual claimants pay 11% of any recovery into a common benefit fund, of which 5.5% would to go to Minnesota leadership and 5.5% would go to Kansas leadership.

[9] We understand that other attorneys have formally noticed a motion to request that the Court establish this percentage as a fund to pay fees and expenses. We join in that motion and request the same relief.

Further, the JPA requires that any Minnesota class recovery be split 65% to Minnesota leadership and 35% to Kansas leadership.

Given the unique posture of this case, there are two methods for calculating the common benefit fee that would allow this Court to effectively honor the JPA and encourage coordination in future hybrid actions. First, the Court could strictly enforce the JPA by calculating common benefit fees as 11% of the total recovery obtained by Plaintiffs with individual cases filed in Minnesota, split that amount evenly between Minnesota and Kansas, and add multipliers based on lodestar and other relevant factors to arrive at a common benefit fee allocation that would be fair to both Minnesota and Kansas leadership. Alternatively, the Court could follow recent case law and apply the same common benefit benchmark percentage to the total settlement amount ($1,510,000,000), split that amount evenly between Minnesota and Kansas leadership, and use multipliers to adjust the common benefit fees so that they are fair to both Minnesota and Kansas leadership and consistent with the allocation under the JPA. Under either method, the common benefit fees would be paid from the one-third of the total settlement set aside for payment of fees, and therefore, the method chosen will have no impact on recovery by class versus individual plaintiffs.

Regardless of which approach the Court uses, the Court should delay its allocation of common benefit fees until all claims data is available. Without that data, the Court will not know which group of plaintiffs—individuals with filed cases versus absentee class members—ultimately files claims or the relative total recovery for those two groups. Further, claims data is necessary for the Court to know the value of the 11% assessment

on individual recoveries provided for in the JPA. Once the Court has that data, it will better be able to determine an equitable allocation of common benefit fees between Minnesota and Kansas.

B. The Court Should Recognize and Enforce the Contingent Fee Agreements.

The Court should recognize and enforce the contingent fee agreements entered into between plaintiffs and individually retained attorneys, which form the basis of the JPA common benefit assessment discussed above, with the following exceptions:

First, as will be discussed in detail below, the Court has inherent legal and discretionary authority to adjust the percentage in contingent fee contracts. As Co-Lead Counsel for Minnesota individual claimants, Bassford Remele proposes that, to the extent the Court reduces the contingent fee percentage awarded pursuant to the contracts to reflect an appropriate common benefit assessment or offset, the reduction should be graduated to recognize and reward the attorneys that did the most work to advance the case and procure the settlement. Accordingly, counsel representing Minnesota claimants should receive the highest contingent percentage. Counsel representing Illinois claimants, who also pursued individual claims against Syngenta, should receive the next highest percentage. The percentage awarded in Illinois should be substantially lower than that received by Minnesota counsel in recognition of the fact that Illinois counsel did not proceed beyond the earliest stages of litigation, did not actively participate in discovery or motion practice, and had a minimal influence on the ultimate settlement of the case. Finally, all other lawyers representing individual plaintiffs who did not file claims prior

to the settlement should receive the lowest contingent fee percentage. We leave it to the Court's discretion to determine the appropriate percentage for each category.

Second, to the extent this Court offsets a common benefit fee award percentage against contingent fees, the same offset should apply to all contingent fees regardless of whether the attorney signed the JPA. To hold otherwise would allow attorneys who refused to coordinate with Minnesota and Kansas leadership to "free ride" off the work completed by those groups. We believe that this basic framework, as analyzed in more detail below, will permit the Court to fairly and adequately compensate all counsel, encourage and incentivize future cooperation in hybrid actions, and honor the agreements that formed the foundation for success in this case.

ANALYSIS

I. THE COURT HAS BROAD AUTHORITY TO AWARD ATTORNEYS' FEES.

This Court has broad authority to award attorneys' fees incurred for the benefit of the settlement class, including reasonable fees to both the court-appointed leadership groups and the attorneys retained by individual plaintiffs. This includes the inherent authority to award common benefit fees, to review and approve contingent fees, and to enforce agreements between counsel relating to common benefit fees.

A. The Court Has Authority to Award Common Benefit Fees.

This Court has inherent authority to award attorneys' fees incurred for the common benefit of the settlement class. This authority is derived in part from the equitable doctrines of *quantum meruit* and unjust enrichment. *See, e.g., In re Vioxx Prod.*

Liab. Litig., 760 F. Supp. 2d 640, 647–48 (E.D. La. 2010) [hereinafter *Vioxx*] (citing *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190, at *4 (E.D. Mo. Feb. 24, 2010) [hereinafter *Genetically Modified Rice*], *aff'd*, 764 F.3d 864 (8th Cir. 2014)); *In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, MDL No. 05–1708 (DWF/AJB), 2008 WL 3896006, at *4 (D. Minn. Aug. 21, 2008) [hereinafter *Implantable Defibrillators*]. The *Manual* further provides that courts have authority to award fees "where a common fund has been created by the efforts of a plaintiff's attorney and [that this authority] rests on the principle that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." *Manual* § 14.121.

"MDL courts have consistently cited the common fund doctrine as a basis for assessing common benefit fees in favor of attorneys who render legal services beneficial to all MDL plaintiffs." *Vioxx*, 760 F. Supp. 2d at 647–48. In doing so, courts have recognized that one of the primary reasons to award common benefit fees is to prevent unfair "free-riding" and to require all who benefitted from the work to share in the expense. *See, e.g., In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-MD-02323-AB, 2018 WL 1635648, at *2 (E.D. Pa. Apr. 5, 2018) [hereinafter *NFL*]; *Genetically Modified Rice.*, 2010 WL 716190, at *5. As stated by the U.S. Supreme Court, "persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." *Boeing Co. v. Van Genert*, 444 U.S. 472, 478 (1980).

In addition, this Court has the power to award common benefit fees as part of its authority to manage complex litigation. Courts have held that such power derives from both the managerial power over consolidated litigation, as well as from a court's inherent equitable authority. *See Genetically Modified Rice*, 2010 WL 716190, at *4; *Implantable Defibrillators*, 2008 WL 3896006, at *5; *see also Manual* § 22.62. Moreover, the authority to award fees as part of managing complex litigation is recognized by Fed. R. Civ. P. 23(h), which states that a court "may award reasonable attorneys' fees" in the context of a class action. Courts have expanded the authority granted by Fed. R. Civ. P. 23 to the mass tort context by reasoning that mass torts "ha[ve] many of the characteristics of a class action and may properly be characterized as a quasi-class action subject to general equitable powers of the court." *In re Zyprexa Prods. Liab. Litig.*, 424 F.Supp.2d 488, 491 (E.D. N.Y. 2006).

B. The Court Has Authority to Set Contingent Fees.

The Court also has authority to determine the reasonableness of the contingent fees contracted for between attorneys and individual clients. *See, e.g.*, *In re Michaelson*, 511 F.2d 882, 888 (9th Cir. 1975) ("The court has the authority to inquire into fee arrangements to protect clients from excessive fees and suspected conflicts of interest."); *Karim v. Finch Shipping Co.*, 233 F. Supp. 2d 807 (E.D. La. 2002), *aff'd*, 374 F.3d 302 (5th Cir. 2004) ("Among the broad equitable powers of a federal court is its supervisory capacity over an attorney's contingent fee contracts."). In this case, the individually retained attorneys not only did work for the benefit of their own clients, but their work ultimately served to benefit the entire settlement class. Therefore, the Court's inherent

authority to adjust contingent fees, combined with its authority to award common benefit fees, provides the Court with the discretion necessary to fashion fee awards in a way that is equitable to all parties involved.

II. AGREEMENTS BETWEEN COUNSEL RELATING TO THE DIVISION OF ATTORNEYS' FEES ARE ENFORCEABLE AND ENCOURAGE COOPERATION AND COORDINATION AMONGST COUNSEL.

Although the Court clearly has broad authority to award common benefit fees, the case law is less clear regarding a Court's authority to abrogate agreements between counsel relating to how court-awarded fees will be divided. *See, e.g.*, *Rutenbeck v. Grossenbach*, 867 P.2d 36, 37 (Colo. App. 1993) ("As long as the agreement to divide the fee was based on a good faith division of services and responsibility at the time of contracting, the fee agreement should be binding."). Moreover, abrogating the fee-sharing agreement between counsel in this case (in the form of the JPA) would only serve to discourage cooperation and coordination in future cases.

This Court should give broad deference to the fee sharing agreements incorporated in the JPA. The *Manual* and case law from around the country uniformly state that prospective agreements regarding fee sharing amongst counsel advance the public policy of encouraging coordination among attorneys involved in mass actions. First, section 14.215 of the *Manual* states that "[e]arly in the litigation, the court should define designated counsel's functions, determine the method of compensation . . . and establish the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions." Second, section 14.121 acknowledges the importance of "understandings reached with counsel at the time of appointment

concerning the amount or rate for calculating fees" and "any agreements or understandings, including side agreements, between attorneys and their clients or other counsel involved in the litigation." Third, in discussing judicial review of fee applications, section 14.231 suggests "[e]stablishing at the outset of the case the method of compensation and, if possible, any percentage formula that will be used." Finally, section 22.62 stresses the importance of "organizing counsel to help coordinate cases among state and federal courts." Thus, the *Manual* is clear that addressing fee allocation early in a case is crucial to ensuring coordination and cooperation rather than division and divisiveness.

Well aware of this authority and acquainted with the threat of fee litigation, the leadership groups in Minnesota and Kansas followed the *Manual*'s recommendations by entering into the JPA to promote coordination and avoid fee disputes. Following the adoption of the JPA, both this Court and the Minnesota Court recognized the importance of these agreements by entering Common Benefit Orders adopting similar provisions and, in Minnesota, specifically noting that "[n]othing in this section is intended to be inconsistent with the JPA or the Federal MDL Common Benefit Order . . . ." [Remele Decl., Ex. C at 6.] Therefore, at a minimum, this Court should give substantial deference to the self-ordering negotiated by counsel when allocating fees between the leadership groups. A fee award or allocation that conflicts with the JPA would discourage parties from following the *Manual* and coordinating efforts in the future.

III. ENFORCING THE JPA AND THE INDIVIDUAL CONTINGENT FEE CONTRACTS DOES NOT PRECLUDE AWARDING EQUITABLE COMMON BENEFIT FEES.

There are recent cases that grapple with the inherent tension that results in cases requiring the allocation of fees and expenses where there are individually retained attorneys with contingent agreements as well as court-appointed counsel seeking class fee awards. *See, e.g.*, *NFL*, 2018 WL 1635648 (E.D. Pa. Apr. 5, 2018); *Evans v. TIN, Inc.*, Civ. No. 11-2067, 2013 WL 4501061, at *1 (E.D. La. Aug. 21, 2013); *Vioxx*, 760 F. Supp. 2d 640 (E.D. La. 2010). These cases provide the Court a reasonable framework from which to proceed with the division of fees in this case. However, while these cases certainly provide helpful guidelines, none of them is directly analogous because none involve a JPA executed by leadership in which the two primary sets of counsel have already agreed to a formula for allocating fees and expenses.

There can be no true dispute that the legal work that ultimately led to Syngenta's settlement of this case was completed by the leadership in the Minnesota and Kansas cases. Accordingly, in determining the fair allocation of fees and expenses to be awarded, the Court should focus on the fee and expense framework constructed by those two leadership groups at the outset of the litigation. The Minnesota and Kansas leadership groups executed the JPA specifically to avoid the conflicts associated with reconciling the application of a fee methodology that involves both contingent fee recoveries in individual cases and class recoveries from class action settlements or recoveries. Therefore, the JPA should provide the starting point for the Court's allocation

methodology because it represents the intentions of the two leadership groups *at the outset of the case*.

During the prior negotiations regarding fee allocation in this case, various individuals have advocated that the JPA was abrogated by the settlement and is no longer enforceable. Without addressing the legal question whether a settlement can abrogate a private contract under which parties have operated for almost three years, abrogating the JPA makes little sense. The JPA represents a clear manifestation of agreement between Kansas and Minnesota leadership as to how to address the allocation of fees. The JPA provides this Court with a straightforward starting point from which the Court may begin its fee and expense allocation analysis. Once the final claims data becomes available, this Court will be able to analyze the fee allocation provided for by the JPA, and then use its discretion to adjust that fee allocation by using multipliers and its inherent discretion to review fee contracts in order to arrive at an allocation it deems fair and equitable in compensating for both private contingent fee agreements and common benefit work.

IV. THE COURT SHOULD AWARD CONTINGENT FEES WITH A COMMON BENEFIT OFFSET.

As this Court knows, more than 70,000 individual plaintiffs filed suit in the Minnesota litigation. Each of those plaintiffs was represented by one or more attorneys who worked to advance the interests of their clients and the case as a whole. Unlike many cases involving individual counsel and court-appointed leadership, the individually retained attorneys in Minnesota did substantial work that advanced the litigation as a whole. Individually retained attorneys drafted complaints and notices to conform, assisted

in completing discovery in the bellwether discovery process, gathered documents, submitted over 67,000 PFSs to Syngenta's counsel, and are now guiding their clients through the claims process. No other jurisdiction in the coordinated Syngenta litigation required a similar level of involvement of individually retained attorneys. As such, we respectfully submit that the contingent fee agreements between the individually retained attorneys and their clients in the Minnesota action should be honored. To the extent that the Court determines that a reduction of the overall contingent award is warranted, we submit that the Court should tier the contingent awards to reflect the work completed by individually retained counsel in the Minnesota case as compared to in other venues, for all the reasons noted above.

A. Awarding Contingent Fees in Conjunction with Common Benefit Fees.

Awarding contingent fees in conjunction with common benefit fees is also supported by recent case law. In both *NFL* and *Vioxx*, the courts used a three-step process for awarding contingent fees. In those cases, the courts first determined the reasonable common benefit fee using the percentage of the fund method summarized below. Next, the courts analyzed the work performed in the case as though it was completed *solely* by individually retained attorneys without the benefit of court-appointed leadership, and determined the reasonable contingent fee based on that analysis. Finally, those courts then offset the common benefit fee percentage (calculated in step one) against the reasonable contingent fee percentage (calculated in step two). The final number following the offset represented the total cap on contingent fee recoveries in those cases. This

method should be similarly employed in this case to ensure that contingent fee recoveries are awarded in a manner that is equitable to all counsel.

In addition to providing guidance on the procedure for awarding contingent fees and offsetting those fees against common benefit awards, the *NFL* and *Vioxx* decisions provide guidance on the appropriate contingent fee to award in complex cases like this. In the *NFL* case, the Eastern District of Pennsylvania issued two fee decisions, one regarding common benefit fees awarded and the second dealing with contingent fees for individually retained plaintiffs' attorneys ("IRPAs"). *See NFL*, MDL No. 2323, 2018 WL 1635648, at *1 (E.D. Pa. Apr. 5, 2018). These decisions provide this Court with the best example of the procedure by which the Court should analyze and ultimately allocate both common benefit and contingent fees in this case.

As discussed previously, the first decision in the *NFL* case used the percentage of the fund method and applied a benchmark percentage of 11% of the total recovery, analyzed the appropriateness of the percentage based on various factors, and then completed a lodestar check for reasonableness. *NFL*, 2018 WL 1635648, at *3–9. This Court should follow that same methodology in calculating common benefit fees in this case.[10]

[10] It is understood from prior discussions that the Court does not intend to award fees in a manner that would result in a different per bushel recovery for plaintiffs with individually retained counsel versus absentee class members, as was the case in the *NFL* and *Vioxx* cases. However, the basic framework utilized by those Courts can be employed in a manner that provides for the same level of per bushel recovery for all plaintiffs and a fair and reasonable allocation of both contingency and common benefit fees.

After determining the appropriate common benefit fee award (as a percentage of the total recovery), the *NFL* court turned its attention to contingent fees in its second decision. At the outset, the court recognized the reality that, in that case, like here, "two sets of attorneys—IRPAs and Class Counsel—have worked to achieve results for individual Class Members." *NFL*, 2018 WL 1658808 at *2. The Court then held that "a one-third contingent fee best approximate[s] the risk and work that the two sets of attorneys (Class Counsel and IRPAs) undertook in this case." *Id*., at *3 (quoting the Expert Report of Professor William B. Rubenstein). In other words, the court determined 33% was a reasonable contingent fee. *Id*. at *1. The Court then then offset the 11% awarded as common benefit fees by capping contingent fees at 22%. *Id*.

While this Court should follow the *NFL* framework with respect to both common benefit and contingent fees, the factual differences in this case warrant higher fee percentages than were awarded in that case. Like here, *NFL* involved court-appointed leadership and individually retained attorneys that did *some* work to benefit the settlement class. However, in that case the work of the individually retained plaintiffs' attorneys was limited to shepherding their clients through the claims process. As such, the Court limited the total fee to 33% (11% common benefit and 22% contingent) because the work completed by the IRPAs was limited in scope. *NFL*, 2018 WL 1658808 at *3. That is not the case here. In Minnesota, IRPAs did substantial substantive work, such as collecting documentation and completing PFSs, in addition to assisting their clients with complete of the claims process. Simply put, the IRPAs in this case did far more work than their counterparts in *NFL*.

Second, in *NFL*, 47% of the plaintiffs that filed claims to the settlement fund had IRPAs. *Id.* at *1. Here, we do not yet have claims data to demonstrate which clients successfully recovered. However, if we are correct and the percentage of recoveries is higher for plaintiffs with individual counsel that argues in favor of a higher contingent award for those IRPAs.

Finally, the *NFL* court awarded costs in addition to the contingent fee award to IRPAs. In this case, the vast majority of IRPAs paid all costs for their respective clients and agreed to recover those costs out of the contingent fee. This factual difference further supports a high contingency award. For all of these reasons, the Court should utilize a higher percentage in awarding contingent fees, particularly to those lawyers in Minnesota who completed substantial work that advanced the case.

The *Vioxx* decision supports the basic framework set forth in the *NFL* case, while also providing an insightful and useful background of the common fund doctrine. In that case, the court noted that the "modern trend" was for "class actions [to] morph into multidistrict litigation." *Vioxx*, 760 F. Supp. 2d at 647. The Syngenta litigation represents the most fulsome iteration of that trend: class actions in a multidistrict litigation proceeding parallel to a consolidated state court mass tort/class action hybrid. Ultimately, the *Vioxx* court set the contingent fee at 40% and offset that amount by the 8% it awarded as a common benefit fee.

B. The Court Should Award Attorneys in Minnesota the Highest Level of Contingent Fee.

The threat of 70,000 individual lawsuits no doubt influenced Syngenta's decision to settle this case. This is the strategic purpose of mass tort litigation: to overwhelm the defendant with the volume of claims, thus applying pressure in a way that class actions cannot. In this case, that was particularly true where the plaintiffs were Syngenta's pool of potential customers, creating a substantial business issue for the defendants. Ultimately, the presence of the individual plaintiffs and the work performed by them or on their behalf maximized the settlement value for *all* claims. But beyond that, there are additional reasons that counsel representing Minnesota claimants who filed cases before the settlement deserve enforcement of their contingent fee agreements.

First, the majority of contingent fee contracts entered into by Minnesota counsel are not solely between members of the leadership group and individual plaintiffs. Rather, the fee agreements in the Minnesota case often involve large networks of local referring lawyers who are likely not going to be compensated by the allocation of common benefit funds. In other words, the contingent fees under a majority of the Minnesota contingent fee contracts are being split among multiple law firms, the majority of which are not members of the Minnesota leadership.

Second, in January of 2016, Judge Sipkins granted Syngenta's motion seeking that each individual plaintiff making a claim in Minnesota complete and file a PFS. The Minnesota PFS required the IRPAs to gather a great deal of information from and on behalf of their clients and then work with their clients to accurately and completely fill

out that document. Voiding or greatly reducing the contingent fee agreements in this case will result in substantial inequity, whereby large numbers of local referring lawyers will be left without any form of compensation despite investing substantial time and resources into the case.

We anticipate that some may argue that the individual lawyers that are not members of the Minnesota leadership should *not* be awarded a contingent fee in this case. That argument disregards the inescapable fact the Minnesota litigation required a substantial amount of work from all lawyers representing individual Minnesota claimants—referral and lead counsel alike. When the claims data becomes available, we anticipate that those numbers will reflect that the efforts of the individually retained lawyers in Minnesota served to dramatically increase the likelihood of their clients obtaining a recovery. Any contingent fee cap should recognize that work and value by awarding the highest level of contingent fees on individual claims filed in Minnesota.

Utilizing the same logic, the contingent fee percentage awarded to the lawyers that filed claims in Illinois should be substantially less than the percentage allowed in Minnesota. The Illinois attorneys were not required to engage in the same volume of discovery, did not prepare for or prosecute any trials, and most significantly, were not required to complete and submit PFSs, as was required in Minnesota. Furthermore, the Illinois group, led by Clayton Clark and Martin Phipps, intentionally refused to cooperate with either Minnesota or Kansas leadership because they did not want to pay the common benefit assessment established by the JPA, choosing to "go it alone" rather than participate in the work that ultimately led to the favorable settlement. That type of

conduct should not be rewarded. As such, the contingent fee percentage awarded to Illinois attorneys should be substantially lower than those awarded in Minnesota. In that same vein, attorneys that did not file their claims until after the announcement of the settlement should receive a very small contingent percentage. Those lawyers intentionally chose to not file their cases in *any* court in an attempt to minimize the costs and work necessary to serve their clients and to avoid paying common benefit assessments.

V. RECENT CASE LAW PROVIDES A FRAMEWORK FOR STRUCTURING THE AWARD OF COMMON BENEFIT FEES THAT RECOGNIZES BOTH THE JPA AND THE CONTINGENT FEE CONTRACTS.

Historically there have been two methods commonly used by courts to compute common benefit fees in common fund cases such as this—the lodestar method and the percentage of the fund method. *See Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994) (applying the lodestar method); *In re Copley Pharm., Inc.*, 1 F. Supp. 2d 1407 (D. Wyo. 1998) (applying the percentage of the fund method). Over the last forty years, courts "have increasingly recognized that the Lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation" and that use of the percentage of the fund method presents numerous advantages. *Manual* § 14.121; *In re Copley Pharm., Inc.*, 1 F. Supp. 2d at 410–12 (providing a history of the shift towards use of the percentage of the fund method). Several circuits have entirely repudiated the use of the lodestar method, and the vast majority of modern cases on the issue of distribution of common fund awards have applied the percentage of the fund method. *See, e.g.*, *Gottlieb v. Barry*, 43 F.3d 474, 488 (10th Cir. 1994); *NFL*, 2018 WL 1635648

at *3; *Vioxx*, 760 F. Supp. 2d at 652. In this case, use of the percentage of the fund method would be consistent with the JPA and the Common Benefit Orders.

Once the Court determines to use the percentage of the fund method, the next step is to select a benchmark percentage. Many Courts have held that 25% represents a typical benchmark percentage in common fund cases. *See, e.g.*, *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993). The *Manual* notes that in "mega fund" cases such as this, benchmark percentages have ranged from 4.1% to 17.92%. *Manual* § 14.121 (*citing In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 339 (3d Cir. 1998)). In *NFL*, the court established a benchmark percentage of 11% on a total settlement of $1.5 billion. *NFL*, 2018 WL 1635648 at *5. In *Vioxx*, the court established a benchmark percentage of 8% on a total settlement of $4.85 billion. *Vioxx*, 760 F. Supp. 2d at 645.

Once the benchmark percentage has been selected, the next step is to determine if use of a multiplier to adjust the benchmark percentage is warranted based on the application of various factors. Many courts apply 12 so-called *Johnson* factors,[11] as articulated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974). *See, e.g.*, *Vioxx*, 760 F. Supp. at 650; *Evans*, 2013 WL

[11] The *Johnson* factors are: (1) the time and labor involved; (2) the novelty and difficulty of the legal and factual questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other work by the attorneys; (5) the customary fee; (6) any prearranged fee; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.*

4501061 at *4–11. Other courts consider the similar factors articulated in *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n.1 (3d Cir. 2000).[12] *See, e.g.*, *NFL*, 2018 WL 1635648 at *3–4. Section 14.121 of the *Manual* states that "the court should identify relevant factors" and that "[t]he factors used in making the award will vary." The *Manual* goes on to provide a list of possible factors, including:

- the size of the fund and the number of persons who actually receive monetary benefits;
- any understandings reached with counsel at the time of appointment concerning the amount or rate for calculating fees; any budget set for the litigation; or other terms proposed by counsel or ordered by the court;
- any agreements or understandings, including side agreements, between attorneys and their clients or other counsel involved in the litigation.

Id. Here, the Court should determine which factors are relevant in *this* case, and apply those factors to determine whether the Minnesota and Kansas leadership groups are entitled to a multiplier on the benchmark percentage. Whether applying the *Johnson* or *Gunter* factors, or some other set of factors identified by the Court, much of the relevant analysis will require claims data to determine an appropriate multiplier.

[12] The factors articulated in *Gunter* include: (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; (7) the awards in similar cases; (8) the value of benefits attributable to the efforts of Class Counsel relative to the efforts of other groups, such as government agencies conducting investigations; (9) the percentage fee that would have been negotiated had the case been subject to a private contingent fee arrangement at the time counsel was retained; and (10) any innovative terms of settlement. *See, e.g.*, *NFL*, 2018 WL 1635648, at *3.

Finally, in recent analogous cases, courts have performed a lodestar cross-check in order to determine the reasonableness of the overall fee award determined by the percentage of the fund method. *See, e.g.*, *NFL*, 2018 WL 1635648 at *8; *Vioxx*, 760 F. Supp. 2d at 658-59; *Evans*, 2013 WL 4501061 at *1. As stated by the Court in *NFL*, "[s]ince the lodestar cross-check is 'not a full-blown lodestar inquiry' the evaluation can be based on summaries and less precise formulations." *NFL*, 2018 WL 1635648 at *8 (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307n.16 (3d. Cir. 2005)). A lodestar cross-check consists of taking the hours logged by the attorneys requesting common benefit fees, applying a reasonable rate, and comparing the amount produced with the amount determined under the percentage of the fund method. *See id.*; *Vioxx*, 760 F. Supp. 2d at 659.

Applying the framework set out in the *NFL*, *Vioxx*, and *Evans* decisions, or some modification of that analysis, results in an equitable fee division between the Minnesota and Kansas leadership in this case.

1. Setting the Benchmark Percentage.

As has been done in many, if not most, of the recent analogous cases involving this issue, this Court should apply the percentage of the fund method to calculate the amount of common benefit attorneys' fees to be awarded. Given the provisions of the JPA, this Court should utilize an 11% benchmark percentage, split evenly between Minnesota and Kansas, as the starting point of its analysis. The 11% common benefit assessment selected by the leadership groups in the JPA, and considered by the Courts in entering the Common Benefit Orders, is squarely within the 4.1% to 17.92% range

discussed in the *Manual* for "mega fund" cases and consistent with recent case law. *See Manual* § 14.121 (citing *In re Prudential Ins. Co.*, 148 F.3d at 339-40); *NFL*, 2018 WL 1635648 at *5; *Vioxx*, 760 F. Supp. 2d at 661.

Importantly, the Court faces an initial threshold question as to whether the 11% benchmark percentage is applied solely to recoveries by plaintiffs with individual lawsuits, or whether it should be applied to the entire settlement. If the 11% assessment is applied only to the recovery of plaintiffs with individual claims, there is little question that the amount will be insufficient to fully compensate Minnesota and Kansas counsel for their common benefit work in this case. Conversely, if the 11% benchmark is applied to the *entire* settlement, it still may not provide for fair and adequate compensation, but the multiplier required to remedy the shortfall will be lower. Regardless of which calculation method is chosen, the Court can utilize the lodestar cross-check and multiplier process to remedy the shortfall.

2. Establishing the Multiplier in Minnesota and Kansas.

Once the Court sets a benchmark percentage, it should develop a list of factors that are relevant to determining the multiplier in Minnesota and Kansas respectively. In effect, these factors will be used to determine the relative allocation of common benefit fees between Minnesota and Kansas by analyzing the work completed by each group and the relative effect of that work on obtaining settlement and driving actual recovery by plaintiffs in this case.

As discussed above, case law has established various lists of factors that may be relevant to determining the proper multiplier. *Gunter*, 223 F.3d at 195 n.1; *Johnson*, 488

F.2d, at 717–19. The 10th Circuit has endorsed the use of the *Johnson* factors, but as stated by the *Manual,* "[t]he factors used in making the award will vary" from case to case. *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 453 (10th Cir. 1988); *Manual* § 14.121. Here, there are a number of factors uniquely important to this case that should be considered when determining the multiplier that should be applied in Minnesota and Kansas.

a. The Total Recovery By Farmers Who Pursued Claims in Minnesota vs. Total Recovery By Absentee Class Members

Pursuant to both the *Johnson* factors and the *Manual*, this Court should consider the total recovery by claimants from the respective cases in determining the multiplier. This will permit the Court to analyze the total amount and number of recoveries by individually represented plaintiffs with cases in the Minnesota action, and compare that number with the number and amount of recoveries by absentee class members. *See Johnson*, 488 F.2d at 718 (providing that courts should consider "the amount involved and the results obtained"); *Manual* § 14.121 (providing that courts should consider "the number of persons who actually receive monetary benefits"). Said another way, the Court should look at the claims data to determine whether the Minnesota attorneys were more successful than their Kansas counterparts in terms of obtaining an *actual recovery* for the farmers they represent.

There is no disputing that the Minnesota and Kansas leadership groups coordinated their efforts, and the work completed by both groups served to benefit all U.S. corn farmers who ultimately file a claim. It is also undoubtedly true that the two

leadership groups will disagree about who did what percentage of the work, and the relative impact of that work. Nonetheless, the claims data in this case is the *only* metric by which the Court will be able to determine who actually succeeded in obtaining recoveries on behalf of their clients.

We suspect that final claims data will show that a large percentage of the overall recovery will be received by farmers who pursued their claims in the Minnesota consolidated action rather than by absentee class members. It is generally understood that the average response rate for consumer class actions is extremely low because a high percentage of absentee class members either fail to read the class notice or ignore it based on an assumption that the recovery will not be worth the time it takes to fill out the claim form and return it. *See e.g.*, Consumer Financial Protection Bureau, Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a), pp. 16–17 (2015) (finding an average claim rate of 21% for all consumer class actions between 2008 and 2012). There is no reason to think this case is any different, and we suspect that the claims data is likely to show that many absentee class members will not obtain any relief. The relatively low participation rate of class members was exactly why the Minnesota leadership chose to pursue this case as a mass tort in which tens of thousands of individual farmers were educated, mobilized, and guided through the process of obtaining a recovery. The assertion of individual claims ensured that the plaintiffs were engaged in the prosecution of the claims against Syngenta and increased the litigation pressure on Syngenta that ultimately increased the overall recovery in this case.

The purpose of this case was to obtain compensation for U.S. corn farmers for the losses they incurred as a result of Syngenta's negligent commercialization of Viptera and Duracade. That is the ultimate goal that leadership in the Minnesota and Kansas actions worked tirelessly to obtain. As such, it is incongruous that this Court would allocate fees without knowing which clients actually recovered and the rate at which the attorneys succeeded in achieving the ultimate purpose of the case. To be clear, this is *not* intended to diminish the work done in Kansas, which was essential to the result in this litigation. The Minnesota leadership was consistently impressed with the work completed in the Kansas case, and there is no disputing the excellent results they obtained there. Rather, the purpose is to stress that the ultimate value of the work performed in this case must consider the actual recoveries obtained on behalf of clients. For this reason, the Court should delay its determination regarding the appropriate multiplier for the respective leadership groups until claims data is available.

b. The Work Completed By Attorneys Seeking Common Benefit Fees

Both the *Johnson* factors and the *Manual* recognize that common benefit fees should be awarded based on the work completed, including the time and labor involved, the novelty and difficulty of the legal and factual questions involved, and the skill requisite to perform the legal service properly. *See Johnson*, 488 F.2d at 717–19; *Manual* § 14.121.

It is beyond dispute that the novelty and difficulty of the legal and factual questions involved, and the skill required to perform the legal work, was extremely high

in this case. As discussed above, despite the complex issues and a vigorous and well-funded defense effort by Syngenta, the Minnesota and Kansas leadership groups coordinated efforts in order to obtain an excellent result for U.S. corn farmers. Therefore, the issue that is likely to be at dispute is not whether this was a complex case or whether the successful prosecution of the case required a high level of skill, but rather the relative value of the work done in Minnesota as compared to the work done in Kansas.

After the success in obtaining actual recoveries on behalf of their clients, the second most important factor in how much each group is entitled to as a common benefit fee is the amount of legal work completed by the groups respectively. On this issue, we anticipate a disagreement with our colleagues in Kansas. Nonetheless, the Minnesota leadership recognizes that the Kansas leadership likely performed slightly more legal work in this case simply because the Kansas leadership was appointed first, and was engaged in the early stages of litigation at the time the Minnesota litigation became active. However, while we recognize this difference, we respectfully submit that the actual variance between the work of the Minnesota and Kansas leadership groups is relatively minor.

The Kansas and Minnesota leadership groups were both required to complete substantially similar legal work due to the parallel nature of the two cases, the differences in the laws of the various jurisdictions at issue, and the different strategic and tactical choices made by the leadership in each case. Both groups drafted and opposed numerous dispositive motions, both engaged in substantial jury research and focus groups, both participated in offensive discovery against Syngenta and third-parties, both completed

defensive discovery on behalf of a large number of clients, both retained and prepared expert witnesses for their cases, and both prepared cases for trial and prosecuted those cases at trial against the same Syngenta counsel. In sum, both leadership groups successfully completed all of the various legal tasks that are necessary to prosecute and try a piece of complex commercial litigation. To be sure, the Kansas leadership obtained the only trial verdict in this case and should be recognized for the excellent result obtained in that trial. But the fact remains that due to the parallel nature of this case, neither the Kansas nor the Minnesota leadership groups could simply ride the coattails of their colleagues in the other venue. Some of the unique results obtained in the Minnesota litigation are described in detail in the background section of this submission, all of which demonstrate the critical legal work performed in the Minnesota case.

While there will likely be plenty of post hoc arguments from attorneys in both Minnesota and Kansas that their work was primarily responsible for the favorable outcome in this case, those arguments all disregard the reality that the Minnesota and Kansas leadership coordinated their work in such a manner that rendered the differences in work performed minimal. This factor, while important, is secondary to the consideration of the rate at which the respective leadership groups were successful in obtaining an *actual recovery* on behalf of their clients in this case.

3. The Lodestar Cross-Check.

The final step in the framework established by *NFL*, *Vioxx*, and *Evans* is a lodestar cross-check to confirm the reasonableness of the common benefit fee award determined by the percentage of the fund method. *NFL*, 2018 WL 1635648 at *8; *Vioxx*, 760 F. Supp.

2d at 650-51; *Evans*, 2013 WL 4501061 at *1. Here, given the volume of work performed in this case, we think it is highly likely that the lodestar cross check will reveal that whatever common benefit fee benchmark percentage is selected by the Court, and whatever portion of the recovery it applies to, the total will be insufficient to cover the fees incurred for the common benefit of all plaintiffs. Therefore, once the Court has claims data available, its award of a multiplier should be consistent with actual recoveries, the lodestar cross check, and the additional factors discussed above.

VI. PLAINTIFF FACT SHEET COMPLIANCE AND THE ALLOCATION OF COMMON BENEFIT FEES.

As part of its lodestar submission, the Minnesota leadership group included hundreds of hours submitted by attorneys who spent time complying with Judge Sipkins' Order compelling the production of PFSs. Minnesota leadership requests guidance from the Court on how it should handle these submissions.

Work on PFS compliance arose in two independent forms. First, the individually retained attorneys assisted their own clients in collecting the required data and completing the PFS. Second, the members of the Minnesota PEC spent time assisting with the completion of PFSs for individual clients that were represented by other lawyers. Minnesota leadership has concluded that the time spent by lawyers or firms assisting the completion of PFSs for clients represented by other lawyers or firms is common benefit time because it was completed not to ensure the recovery of a contingency fee but rather to advance the overall litigation. The more difficult question is whether the time spent by

individual lawyers to assist their own individual contingency clients in completing PFSs should be considered common benefit time.

To be sure, a valid argument exists that the completion of PFSs by lawyers on behalf of their own individual clients benefitted the overall litigation by ensuring that a large pool of individual claims existed to apply pressure on Syngenta to settle the litigation. On the other hand, individual lawyers that receive a contingent fee for representing their individual clients are already being compensated for their work on PFSs via their contingent fee, rendering an award of a common benefit fee potentially duplicative. Further complicating this issue is the fact that we do not yet have the benefit of this Court's decision on how it will proceed regarding the award of contingent and common benefit fees. Accordingly, as part of the Court's global plan to allocate fees and expenses, we request that the Court provide Minnesota leadership with guidance as to how to handle the time incurred by individually retained attorneys in compiling information and completing PFSs.[13]

VII. ALLOCATION OF COMMON BENEFIT FEES WITHIN THE MINNESOTA LEADERSHIP GROUP.

Once this Court determines the overall allocation of common benefit fees to the Minnesota litigation, Minnesota Co-Lead Counsel and Co-Lead Class Counsel should prepare a recommended allocation for submission to the Minnesota Court recommending

[13] Minnesota is the only venue where this arises since it is the only venue that has a majority of individual filings along with a class action. It is also the only venue where a significant PFS project was undertaken.

the allocation of those fees. The ultimate decision regarding the final allocation of fees in the Minnesota case would, of course, rest with Judge Miller.

CONCLUSION

For all the foregoing reasons, we respectfully request that this Court award an appropriate contingent fee, and apply the common benefit allocation framework summarized above. By doing so, this Court will incentivize cooperation and coordination in future actions, decrease the likelihood of fee disputes in this case, and equitably compensate the counsel responsible for this historic settlement.

BASSFORD REMELE
A Professional Association

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