IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

IN RE: SYNGENTA AG MIR162 CORN LITIGATION This Document Relates to All Cases Except: *Louis Dreyfus Co. Grains Merchandising LLC v. Syngenta AG*, No. 16-2788 *Trans Coastal Supply Co., Inc. v. Syngenta AG*, No. 14-2637 *The Delong Co., Inc. v. Syngenta AG*, No. 17-2614 *Agribase Int'l Inc. v. Syngenta AG*, No. 15-2279	MDL No. 2591 Case No. 14-md-02591-JWL-JPO

STATE OF MINNESOTA COUNTY OF HENNEPIN	DISTRICT COURT FOURTH JUDICIAL DISTRICT
In re: Syngenta Litigation	Case Type: Civil Other Hon. Laurie J. Miller
This Document Relates to: ALL ACTIONS	FILE NO. 27-CV-15-12625 and FILE NO. 27-CV-15-3785

OMNIBUS RESPONSE OF WATTS GUERRA LLP
IN PARTIAL OPPOSITION TO FEE & EXPENSE APPLICATIONS
FILED BY OTHER COMMON BENEFIT AND RETAINED COUNSEL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTRODUCTION

Certain things are not—and should not be—in serious dispute. *First*, Watts Guerra agrees with Kansas Co-Lead Counsel ("Kansas CLC"), the Clark/Phipps Group,[1] and Minnesota Class Counsel (together, "the PNC Subgroup") that one-third of the settlement fund is an appropriate amount for fee and expense awards in this case. *Second*, Watts Guerra agrees with the PNC Subgroup, Bassford Remele, P.A. (Minnesota Co-Lead Counsel), and this Court that ***all*** class members should pay the same percentage of recovery for attorney fees, whether they have individually retained counsel or not. *Third*, the prior agreements entered by counsel and clients are meaningful and should be respected. Those three goals can be achieved only if the fees of retained counsel—and their contributions to the recovery—are considered alongside fees for common-benefit work.

With few exceptions, none of the other applications makes any effort to address those imperatives. Many retained counsel simply ask the Courts to enforce the contingent-fee contracts they entered with their clients. But they do not provide for any assessment against their fees to pay for the substantial common-benefit work from which they and their clients benefited.

Other applicants—most notably the PNC Subgroup—seek the precise opposite result. They seek to allocate the ***entire*** fee award—a proposed one-third of all recoveries under the Settlement—to common-benefit work, leaving nothing for individually retained counsel. What is more, they are pressing the Courts to award hundreds of millions of dollars based on a subjective assessment of contributions and lodestar submissions (even though all agree that the percentage approach governs), without taking into account the actual recoveries by each attorney's clients or constituents under the Settlement. This disregard for what all agree is the most important *John-*

[1] Phipps Anderson Deacon, LLP, Clark Love Hutson, GP, and Meyers & Flowers, LLC—a group of retained counsel with cases in Illinois.

son factor—actual client recovery—is untenable. Even more problematic, these attorneys in effect ask the Courts to endorse their breach of the Joint Prosecution Agreement ("JPA") (publicly filed at ECF No. 3611-1), which both court-appointed leadership groups, including Watts Guerra, entered into early in this litigation to govern the division of attorney fees between common-benefit efforts and individual efforts. Under that agreement, Watts Guerra was to pay common-benefit assessments of no more than 27.5% of the fees it received from its clients' recoveries. That agreement has governed throughout the litigation: Counsel have accepted benefits, and made payments, under it. But the PNC Subgroup would summarily cast aside the JPA ***without even acknowledging that result***.

Those attorneys urge the Courts to follow a distribution they ***privately*** agreed to ***among themselves***, codified in their own February 23, 2018 fee-sharing agreement, made in breach of the JPA with Watts Guerra. Their own private agreement purports to allocate ***all*** the attorney fees so that Kansas CLC and Settlement Class Counsel receive 50% of all fees awarded, Minnesota Class Counsel receive 12.5%, and the Clark/Phipps Group receives 17.5%. The remaining 20% would be distributed to other common-benefit counsel at the Courts' discretion and pursuant to the *Johnson* factors. This private allocation can hardly guide, much less govern, the Courts' decision-making processes. Even apart from its arbitrariness (for example, why is Watts Guerra relegated to the "leftover" category, instead of being grouped with other Minnesota Leaders with whom it worked shoulder to shoulder for years?), such a fee-sharing agreement cannot supersede Watts Guerra's rights because Watts Guerra was not a party to it. That new fee-sharing agreement may affect the ***PNC Subgroup***, who entered it with respect to each other. But it cannot impair or abrogate the rights of ***Watts Guerra Group attorneys*** under the JPA, the *Johnson* factors, or their fully performed fee agreements with their clients.

Further, the PNC Subgroup's proposal ignores Watts Guerra's enormous contributions to this litigation—contributions matching and even dwarfing those of individual parties to the fee-sharing agreement. For example: The mass-action component of this case—led by Watts Guerra—was a significant factor in forcing Syngenta to settle. The presence of over 57,000 individual plaintiffs in Minnesota, actively pursuing their claims against Syngenta and positioned to litigate even if class efforts failed, including via compliance with the Plaintiff Fact Sheet order and bellwether discovery, placed pressure on Syngenta to make sure class settlement discussions succeeded.[2] Moreover, the threat of punitive damages—a direct product of Watts Guerra's efforts in those individual cases and in the Minnesota Class trial—was critical to successful settlement. Watts Guerra led two of the three trials in this case. In both, the threat of punitive damages loomed large.[3] In the Minnesota Class trial, Watts Guerra's cross-examination of Syngenta executives all but guaranteed a substantial punitive damages award. Indeed, it was Watts Guerra's strategy of bringing suit in a jurisdiction where Syngenta executives could be compelled to testify live that made that possible, and its work with the other Minnesota Leaders that brought settlement to fruition. Further, Watts Guerra's extensive efforts to communicate with and assist its clients have caused its clients' participation rate in this settlement to dwarf that of all other

[2] Even Minnesota Class Counsel, although joining the untenable allocation proposal pressed by Kansas CLC and the Clark/Phipps Group, acknowledge the value added by Watts Guerra in this regard (among others): "Because of these individual cases—and the inability to get them dismissed for failure to file PFSs or comply with the Bellwether discovery—Syngenta could not dramatically decrease the level of its exposure—even if the class motions were denied. In other words, because of the work done to comply with the PFS' order, ***the Minnesota litigation posed a threat of never-ending trial after trial to Syngenta no matter what happened with the Minnesota or Kansas class motions or trials***." Minnesota Co-Lead [sic: Class] Counsel's Joint Motion for Approval of Common Benefit Awards at 44, *In re Syngenta Litig. & Syngenta Class Action Litig.*, Nos. 27-CV-15-3785, 27-CV-15-12625 (Minn. Dist. Ct. filed July 10, 2018) ("MN Class Counsel Mem.") (emphasis added).

[3] We reserve further discussion of the *Mensik* bellwether trial and its confidential settlement pending resolution of Watts Guerra's Sealed Motion for Leave To File Confidential Settlement Amount Under Seal, filed contemporaneously herewith. That Motion seeks leave to make a limited disclosure of the *Mensik* settlement amount.

segments of the class, most significantly absent class members (those unrepresented by retained counsel) who appear to be participating at a strikingly lower rate than those represented by Watts Guerra and other retained counsel.[4]

Kansas CLC and the Clark/Phipps Group completely ignore these achievements, as well as the enormous investments necessary to secure them. The PNC Subgroup's allocation would leave these efforts uncompensated—or, at most, ***under***compensated, as Watts Guerra is left to fight with all other counsel seeking fees in this case for some portion of the 20% that would be left if the PNC Subgroup receive the sums they claim.

Only one set of proposals addresses ***all*** the equities and legal requirements before the Courts—the relative contributions to success, degree of success, interests of clients, and binding contracts. The Watts Guerra proposal provides the Courts with a workable framework that satisfies all those considerations (as, in large part, does the proposal of Watts Guerra's Co-Lead Counsel in Minnesota, Bassford Remele). The Watts Guerra proposal ensures that all class members pay the same relative share in attorney fees; honors the JPA and other contractual agreements of the parties; minimizes appeal issues; and ensures common-benefit work is fairly compensated alongside the efforts of individual counsel. As Watts Guerra proposed, and as the JPA contemplates, the Courts should enforce the contingent fee contracts to which individual plaintiffs agreed. They should then impose fair and equitable common-benefit assessments against payments under those contracts so as to ensure that common-benefit counsel are fairly compensated for any benefit they conferred on the individual plaintiffs. The other proposals before the Courts, by contrast, largely reflect efforts to compensate some groups of lawyers more richly at the expense of others.

[4] *E.g.*, ECF No. 3611 ("WG Mem.") 23-24, 54-55 (as of July 2, more than 50% of Watts Guerra's clients had made claims—***compared to roughly 6% of non-Watts Guerra clients***).

ARGUMENT

I. The Proposal Of Kansas CLC, Minnesota Class Counsel, And The Clark/Phipps Group Cannot Be Reconciled With Principles Of Contract Or Basic Fairness.

In class actions and mass actions, courts must "ensure fair treatment to all parties and counsel regarding fees and expenses." *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006); *see, e.g.*, ECF No. 3580-31 (Ex. 14 to WG Fee App.), Order & Reasons Setting Common Benefit Fees at 20, *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, Dkt. 21168, MDL 2047 (E.D. La. Jan. 31, 2018) ("*Drywall*"). Consistent with that, courts cannot simply brush aside otherwise binding contracts.

As shown below and in the supporting expert reports filed herewith—the Response Report of Professors Arthur R. Miller, Geoffrey P. Miller, Charles Silver, Brian T. Fitzpatrick, & Alexandra Lahav ("Miller Response Report") and the Response Report of Professors Andrew Kull & Charles Silver ("Kull-Silver Response Report")—the PNC Subgroup's proposal is contrary to those principles. That proposal unilaterally rewrites contracts that counsel relied upon throughout this case, largely by pretending those contracts do not exist. In their place, the PNC Subgroup seek to impose an agreement that purports to supersede their obligations without the consent of the attorneys to whom those obligations are owed. They also threaten to require some class members to pay a disproportionate share of fees. And the "support" they offer for the fairness of their purported allocation is so devoid of substance, and so obviously disingenuous in its omissions, as to offer no support at all.

A. The PNC Subgroup cannot rely on their own February 23 fee agreement to justify their proposed allocation of all fees for all counsel.

At the outset of this litigation, the attorneys in both Court-appointed leadership groups agreed they would pay as a common-benefit fee no more than 27.5% of their own fees for recoveries by their individual clients. They negotiated a Joint Prosecution Agreement (the "JPA") to

that effect. That assessment, they contemplated, would be paid from the contingency fee that individual clients had negotiated with their attorneys. The Kansas CLC, Minnesota Class Counsel, and the Clark/Phipps Group all received substantial benefits under that agreement, including years of cooperative, coordinated, and efficiently prosecuted litigation in the Kansas and Minnesota forums. They accepted the benefit of Watts Guerra's assistance through discovery, trials, and settlement. *See, e.g.*, ECF No. 3580-5 ("Watts Decl.") ¶¶ 80, 88-89, 108-112, 207, 254-327; ECF No. 3580-6 ("Guerra Decl.") ¶¶ 42-43; *compare* ECF No. 3587 ("Kansas CLC Mem.") 28-30 (discussing shared discovery database, shared work product, coordination on depositions—without mentioning that all of this was provided for by the JPA). When Watts Guerra recovered money for its clients, Kansas CLC and Minnesota Class Counsel received and accepted payments into the common-benefit funds from Watts Guerra. *See, e.g.*, Watts Decl. ¶¶ 80, 223; Guerra Decl. ¶ 26. Now, having benefited from the cooperation among counsel that the JPA fostered—which they anticipated and touted to both Judge Sipkins and Judge Lungstrum, thereby obtaining judicial support for the JPA (*see* WG Mem. 12-14)—the PNC Subgroup propose something different.

Departing from the JPA, the PNC Subgroup now argue that the ***entire*** attorney fee—one-third of any recovery—be allocated to common-benefit counsel: 50% to Kansas CLC, 12.5% to Minnesota Class Counsel, 17.5% to the Clark/Phipps Group, with the remaining 20% to be distributed at the Courts' discretion to subclass counsel and other attorneys contributing to the common benefit. In support of that allocation, the PNC Subgroup invoke a ***different*** and ***later*** February 23, 2018 fee-sharing agreement to which they (and they alone) agreed. *See, e.g.*, Kansas CLC Mem. 8, 87; ECF No. 3598 ("Clark/Phipps Mem.") 43-44; MN Class Counsel Mem. 46. But that agreement is among a few parties, not including Watts Guerra, much less ***all*** re-

tained counsel. It thus cannot alter the terms of the JPA or counsel's promises to Watts Guerra, much less justify their breach.

1. As an initial matter, the February 23 fee agreement does not, as Kansas CLC suggest, have the imprimatur of the special master. Kansas CLC Mem. 32. To the contrary, the parties ***declined*** the special master's proposal. Watts Decl. ¶¶ 304-305; MN Class Counsel Mem. 45. Instead, they negotiated a proposed allocation of 20% to the Watts Guerra Group. *See* ECF No. 3580-28 (Ex. 11 to WG Fee App.) (proposed fee-share agreement dated February 23, 2018). Although Watts Guerra dutifully considered that proposed allocation in February—as a potential compromise at that time, to avoid the disputes now before the Courts—that proposed 20% was not rooted in the facts or law that must guide the Courts now. Rather, that allocation reflected undue skepticism by certain attorneys over the number of Watts Guerra Plaintiffs, and conversely undue optimism over the number of Clark/Phipps Group plaintiffs, the size of their respective claims, and how the claims process would play out. It was, moreover, the result of a private settlement process—not a contested litigation. Given facts now of record, it is clear that 20% for the Watts Guerra Group was indeed too low.[5]

In any event, Watts Guerra could not assent to that agreement without the consent of its associate counsel. *See* Watts Decl. ¶ 330; ECF No. 3580-29 (Ex. 12 to WG Fee App.). Without waiting for Watts Guerra to solicit views, the PNC Subgroup cut Watts Guerra out of the negotiation; cut out any award for its efforts; and executed a different agreement converting the 20% formerly allocated to Watts Guerra into a catch-all allocation for which disfavored counsel (and

[5] *See* WG Mem. 23-24 (citing reports and factual data showing that Watts Guerra Plaintiffs have above-average size claims, represent 23.1% of the U.S. corn harvest, and 50.66% of the claims against the Settlement as of July 2); *id.* at A-1 (math appendix showing that, on the conservative assumption that Watts Guerra Plaintiffs recover only 40% of the Settlement Fund, the Watts Guerra Group should be awarded a minimum of $145 million, plus common-benefit expenses, if the Courts give effect to its voluntary reduction in its fee agreements and the JPA); Miller Resp. Report 5 (table comparing allocations).

the PNC Subgroup themselves) are free to contend. *See* Watts Decl. ¶ 333; ECF No. 3587-8 (Ex. 8 to Kansas CLC Mem.) ("February 23 Agreement"); Kansas CLC Mem. 94 (Kansas CLC pitching for an additional award for themselves from the remaining 20%).

None of the submissions by the PNC Subgroup disclose that history. Nor do they make any effort to explain how an allocation that excludes Watts Guerra is reasonable. The steps leading to that eleventh-hour fee agreement preclude the agreement from being a basis for a reasonable fee allocation.

2. More fundamentally, the February 23 fee-sharing agreement is contrary to the JPA and represents a breach of that prior agreement. The JPA—negotiated in light of remand orders opening up Minnesota state court as a front in the battle against Syngenta (WG Mem. 8-9)—anticipated the complexity of allocating attorney fees in a case where litigation would proceed in two different courts. It also anticipated that, without an up-front agreement on common-benefit fees, the lawyers working in each forum would have a financial incentive to compete with each other, rather than cooperate.[6]

To resolve these concerns and compensate the Kansas Leadership for the benefit conferred in individual cases in Minnesota, Watts Guerra and other Minnesota Leaders agreed to pay an assessment of their fees on their clients' recoveries to each of the Kansas and the Minnesota common-benefit funds. WG Mem. 9-10; JPA § 2(a)(i) (publicly filed at ECF No. 3611-1). For their part, the leaders of the Kansas MDL agreed to exclude Watts Guerra and other mass-action clients from any proposed class. JPA § 2(g)(iii). Those provisions together ensured that both common-benefit and retained counsel would be compensated fairly. Miller Resp. Report 4-5.

[6] *See* WG Mem. 9, 10-14, 45-47; *see also, e.g.*, ECF No. 3570-1 (Ex. A to Remele Decl.) (Kansas CLC's July 2015 statement of support for Minnesota leadership appointments); ECF No. 3570-2 (Ex. B to Remele Decl.) (Judge Sipkins' July 2015 appointment order).

The PNC Subgroup's proposed allocation does not merely ignore those goals. It breaches the underlying agreement. The JPA limited the common-benefit payments from Watts Guerra to 27.5% of the fees (11% of its clients' recoveries on a 40% contingent fee, or 9.17% of Watts Guerra's reduced 33.33% contingency). It also barred Kansas CLC from "seek[ing] to interfere with or alter the terms and conditions of any fee agreement" between Watts Guerra and its clients, "e.g., reduce or cap the fee." *See* JPA §2(g)(iii). Reneging on that agreement, the Kansas CLC and Minnesota Class Counsel would now take ***33.33%*** of Watts Guerra's clients' recoveries and allocate that ***entire*** amount to common-benefit fees—obliging those Watts Guerra clients to pay at least ***26.67%*** (80% x 33.33%) of their recoveries ***not*** to the Watts Guerra Group—the attorneys they hired, who worked on their cases for years, advanced tens of millions of dollars in expenses on their collective behalf, and fully performed under private fee agreements—but to the PNC Subgroup, including retained counsel for entirely different plaintiffs, in a different forum, who made minimal contributions to the common benefit. Kull-Silver Resp. Report 4-6.

This effort by Kansas CLC and Minnesota Class Counsel to evade their agreement, moreover, comes ***after*** those attorneys received the benefits of that agreement. *See, e.g.*, WG Mem. 19, 45-46. Having benefited from the JPA already, they cannot justify the dramatic departure they propose—tripling the amount allocated to common-benefit fees, leaving next to nothing for Watts Guerra from its own clients. Indeed, the JPA could not be more clear: It may be amended or supplemented ***only*** "by mutual agreement" and in a writing signed ***by the parties***. JPA §3(d). Of course, the fee-sharing agreement purports to do that. *See* February 23 Agreement at 3. But it lacks Watts Guerra's agreement (and signature); it thus cannot bind Watts Guerra. "As every first-year law student knows, '[a]n agreement or mutual assent is of course essential to a valid contract.'" *Jacks v. CMH Homes, Inc.*, 856 F.3d 1301, 1304 (10th Cir. 2017);

Veerkamp v. Farmers Co-op. Creamery of Foreston, Minn., 573 N.W.2d 715, 717-18 (Minn. Ct. App. 1998) (non-party to contract cannot be bound by its terms); Miller Resp. Report 2. Watts Guerra never assented to the February 23 fee-sharing agreement.[7]

That does not mean that the February 23 fee-sharing agreement is wholly irrelevant. Those who signed it can divide up any amount collectively awarded to them according to its terms. Miller Resp. Report 6-7. In fact, insofar as those three groups speak for the other common-benefit counsel in this litigation,[8] what the Courts should do is follow the Watts Guerra/Bassford Remele framework for dividing the overall fee award between common-benefit and contract fees, and then apply the February 23 fee-sharing agreement to divide the common benefit portion. *See* WG Mem. 29-39; ECF No. 3568 ("Bassford Remele Mem.") 28-33.

But the PNC Subgroup ask for something different. They ask that their agreement govern the allocation of ***all attorney fees*** in the case. However, other firms, like Watts Guerra, have rights under private fee agreements. *See* WG Mem. 31-36; Miller Report 10-24, ECF No. 3580-2; Kull-Silver Report 2-8, ECF No. 3580-3. Despite relying on those agreements to justify an overall one-third fee (Kansas CLC Mem. 72-73), and participating in settlement negotiations premised on all class members receiving an equal recovery in terms of bushels net of fees (WG Mem. 35), the PNC Subgroup have not even tried to account for those agreements in their alloca-

[7] The Clark/Phipps Group was not a party to the JPA. Mr. Clark was appointed to Minnesota Leadership, but quit rather than sign the JPA.

[8] It appears that, other than the PNC Subgroup, only two other firms—Heninger Garrison Davis, LLC and Chep R. Gauntt—have made independent requests for common-benefit fees. *See* ECF No. 3562; Fee and Expense Application of Heninger Garrison Davis, LLC and Its Co-Counsel, *In re Syngenta Mass Tort Actions*, No. 3:15-cv-1221 (S.D. Ill. filed July 10, 2018) (ECF No. 349)). Mr. Gauntt, however, seeks common-benefit fees based upon a "me too" class complaint that was not filed until July 17, 2017, in which he invested fewer than 50 hours of attorney time.

tion—not in their February 23 agreement, and not in their July 10 applications.[9] Further, other firms, like Watts Guerra, contributed to the common benefit, are entitled to attorney fees for that effort, and may not be relegated to whatever might be left after the PNC Subgroup pay themselves. *See infra* 21-24.

Fee and expense awards should be based on contractual rights and the *Johnson* factors, yet the PNC Subgroup's agreement takes neither into account, and thus cannot guide the Courts' inquiry. Nor can that agreement govern the rights of non-signatories, much less bargain away their contractual or equitable rights. *See Perry v. Butterfield*, No. A04-1845, 2005 WL 1620238, at *4 (Minn. Ct. App. July 12, 2005) (purchase agreement "cannot bind [a party's] interest in the property" where the party's "name is absent from the purchase agreement").[10]

3. Finally, the February 23 fee-sharing agreement bears no resemblance to the firms' actual contributions to the results in the case, or the work invested to produce these results. Indeed, even the counsel groupings are incoherent. If the PNC Subgroup expect the Courts to make awards based on work performed in each forum, then why is Watts Guerra not included in the Minnesota group—where it filed 57,000 individual claims, worked shoulder to shoulder with the other Minnesota Leaders, and led the work on two trials? The PNC Subgroup do not say. They propose an award for the entire Minnesota Leadership and all attorneys who contributed in that forum—including the other Co-Lead Counsel for the individual plaintiffs in Minnesota

[9] This is worth underscoring: Kansas CLC invoke the private retainer agreements entered by Watts Guerra and other retained counsel—and argue that the benefit of the negotiated percentage should go to them, rather than the lawyers who actually obtained those agreements. Miller Resp. Report 2, 6-7.

[10] Notably, these are the very reasons Mr. Watts was unable to agree to the proposal to allocate 20% to the Watts Guerra Group: First, the private agreement was just that—a private agreement, negotiated to avoid disputes as to private rights; it was not, and never purported to be, based on application of the law (such as the *Johnson* factors) to the facts (such as the 23.1% of the corn harvest represented by the Watts Guerra Plaintiffs, or a claims rate that could be 50% or higher). Second, as he explained in writing at the time (ECF No. 3580-29 (Ex. 12 to WG Fee App.)), Mr. Watts would have had no right to—and did not—abrogate the rights of Watts Guerra's associate counsel without their consent.

(Bassford Remele), who did not sign and does not support the allocation—everyone in Minnesota ***except*** the Watts Guerra Group. *See* February 23 Agreement at 1 n.3 (listing Minnesota counsel). Apart from their private side agreement, and pique at Watts Guerra for not signing same, there is no factual or legal reason why Watts Guerra should be grouped with subclass counsel, or with any of the other attorneys relegated by the PNC Subgroup to the leftover 20%. Nor, tellingly, does anyone even try to provide one.[11]

More fundamentally, as explained below (*infra* 19-21), Watts Guerra invested at least as much as any other counsel—and often more—in producing the result here. Indeed, Watts Guerra's contributions to the common benefit were so substantial that, even if the Courts adopt the approach advocated by the PNC Subgroup and award all attorney fees for common-benefit activity, Watts Guerra would still be entitled to at least as much as it would receive if the Courts were to enforce its contingency fee contracts—roughly $150 million. *See* WG Mem. 4, 56-59. Its actions, including taking two cases to trial and exposing Syngenta to grave peril of a punitive damages award, broke the settlement logjam. *See infra* 21-23. And its prosecution of mass-action claims brought by 57,000 individual plaintiffs insured that any defenses Syngenta might have to a class action did not undermine plaintiffs' position in settlement negotiations. *See infra* 23-25.

[11] Kansas CLC go so far as to define "Minnesota Lead Counsel" as Messrs. Sieben and Gustafson, who are Minnesota ***Class*** Counsel. *See* Kansas CLC Mem. 3; *see also* Clark/Phipps Mem. 2 n.2. This renders much of Kansas CLC's limited discussion of the Minnesota side of this litigation misleading. *E.g.*, Kansas CLC Mem. 87, 88. Minnesota Co-Lead Counsel (Lew Remele and Frank Guerra) did ***not*** sign the fee-sharing agreement, do ***not*** support the allocation proposed, and are ***not*** present or fairly accounted-for in the Kansas CLC's discussion of the course of proceedings. Adversarial presentation is one thing, but this effort to ignore Watts Guerra goes too far. It is remarkable: These attorneys advocated for Watts Guerra to lead the Minnesota proceeding, spent years litigating with Watts Guerra, months negotiating with it to achieve a settlement Term Sheet, months negotiating with it over the terms of the Settlement, and months negotiating with it over a proposed fee-sharing agreement. They know well that Watts Guerra made major contributions at every stage of this litigation, that it has private contracts both with its clients and with them, and that the hundreds of firms that comprise the Watts Guerra Group are together entitled to a nine-figure fee and expense award. Yet, Kansas CLC and the Clark/Phipps Group can no longer even bring themselves to utter the name, "Watts Guerra."

The February 23 Agreement ignores those contributions, allocating larger sums to counsel who contributed far less. For that reason, too, it is entitled to no consideration whatsoever.

B. Prof. Klonoff's expert report is fatally deficient with respect to the allocation of fees among counsel.

The PNC Subgroup, moreover, offer virtually no support for the reasonableness of their proposed allocation except for their proposed agreement among themselves. To paper over that lack of support, Kansas CLC provides an expert declaration from Prof. Klonoff. Klonoff's analysis with respect to the allocation of attorney fees, however, is so conclusory and devoid of methodology as to be wholly unreliable. That aspect of his report is entitled to no weight. *Cf. Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) (expert testimony must be reliable).[12]

An expert in litigation must employ the "same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152. Thus, reliability is gauged "not . . . upon the precise conclusions reached by the expert, but on the methodology employed in reaching those conclusions." *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1233 (10th Cir. 2005). Here, Prof. Klonoff's methodology involves little more than his own say-so: "Given the arms-length bargaining and the involvement of the special masters, ***I have no basis to second-guess*** the 50/12.5/17.5 allocation among common benefit counsel." ECF No. 3587-6 ¶ 131 (emphasis added). Of course, Prof. Klonoff does not appear to know what led to this proposed allocation. He does not identify, much less apply, the relevant test or standards. He makes no attempt to justify the allocation using the *Johnson* factors. He entirely ignores the relative contributions and investments of counsel. Reliability "'requires more than simply taking the ex-

[12] Even if *Daubert*'s requirements do not strictly apply in this context, the *Daubert* standard should inform the weight that the Courts accord Prof. Klonoff's opinion concerning the horizontal allocation of attorneys' fees. Watts Guerra does not challenge Prof. Klonoff's opinion that one-third of the settlement fund constitutes a fair and reasonable aggregate attorneys' fee in this case, which is also supported by the Miller Report 13-16.

pert's word for it.'" *United States v. Nacchio*, 555 F.3d 1234, 1258 (10th Cir. 2009) (en banc) (quotation marks omitted). Yet that is what Kansas CLC ask the Courts to do.

Prof. Klonoff thus overlooks—or was never made aware of—critical facts that bear on his allocation opinion. "Ignoring relevant data is not a scientifically valid method." *Cates v. Whirlpool Corp.*, No. 15-cv-5980, 2017 WL 1862640, at *15 (N.D. Ill. May 9, 2017). An "'expert is not permitted to simply ignore evidence that is contrary to her opinion in implementing an accepted methodology.'" *Id.*; *see also* Kull-Silver Resp. Report 3-5; Miller Resp. Report 3-4. Yet Prof. Klonoff does just that. He relies entirely on the February 23 Agreement among some to justify the proposed allocation as to all. But he ignores earlier drafts of that Agreement, which would have allocated 20% to Watts Guerra. *See supra* 7-8. He ignores the reason Watts Guerra was, at the eleventh hour, cut out of the allocation. *See supra* 8-9. Prof. Klonoff thus never explains why it is reasonable to allocate 20% of a proposed attorney fee award—over $100 million—at one moment but then, hours later, to suggest the firm should get nothing (or be left to fight it out among others for a lesser share). Prof. Klonoff's reliance on the special masters' involvement is also misplaced. The special master proposal was rejected by the parties, *see supra* 7, nor is there any basis in the record to conclude they were involved in the eleventh-hour course change.

More important, Prof. Klonoff completely ignores both the JPA and Watts Guerra's significant contributions toward securing the Settlement. He does not account for Watts Guerra's work as Minnesota Co-Lead Counsel, trial counsel, and on the Plaintiffs' Negotiating Committee. He does not account for Watts Guerra's 57,000 plaintiff army, or its private fee agreements (which, notably, the JPA says Kansas CLC may not challenge). He purports to have "no basis to second-guess" the allocation in the February 2018 fee-sharing agreement. But he likewise offers

no reason to second-guess the JPA. He nowhere explains how a few of the signatories to the JPA can unilaterally jettison their obligations to Watts Guerra under the JPA. He nowhere explains how they can demand, in breach of the JPA, that Watts Guerra pay over its entire fee for common-benefit work—almost four times the 27.5% contemplated by the JPA. And he makes no attempt to reconcile the PNC Subgroup's proposed allocation with the JPA's express terms. For that reason, too, the Courts should disregard Prof. Klonoff's opinion concerning the allocation of attorney fees. *See Miller v. Pfizer, Inc.*, 196 F. Supp. 2d 1062, 1085-87 (D. Kan. 2002) (rejecting expert opinion that "ignore[d] undisputed evidence" in favor of "pre-selected evidence from interested parties"), *aff'd*, 356 F.3d 1326 (10th Cir. 2004); *see also* Kull-Silver Resp. Report 3, 4-5; Miller Resp. Report 3-4.

C. The Courts' fee and expense awards can and should respect the parties' contractual arrangements while ensuring both retained counsel and common-benefit counsel are fairly compensated.

Unlike the PNC Subgroup, Watts Guerra has proposed a solution that honors the JPA and other relevant agreements; fairly compensates all counsel in accordance with their relevant contributions; and ensures that each class member pays the same total share of attorney fees. Watts Guerra agrees with the PNC Subgroup that one-third of the settlement agreement is an appropriate total attorney fee in this case. WG Mem. 29-31. That amount, however, should compensate ***all*** counsel—common-benefit and retained counsel alike. *Id.* at 35-36; *see also Drywall* at 21-22; Kull-Silver Resp. Report 1-3. Dividing that aggregate fee award between retained counsel and common-benefit counsel, rather than imposing a cap on retained counsel's fees, will insure an equitable distribution of fees while remaining faithful to the standard principles of contract law that govern clients' contracts with their counsel. *See* WG Mem. 31-36; Miller Report 10-24. It also will ensure that some members of the class—those who advanced the litigation by hiring their own lawyers—do not pay more in fees than others who did not.

As described in the Watts Guerra application, the Courts should allocate attorney fees using a two-step process. First, the Courts should apply the individually retained attorneys' contingent-fee contracts with their clients, setting aside a portion of each client's recovery for fees. WG Mem. 36-37; *see also* Miller Report 10-23. Second, some of that fee award should be allocated to common-benefit counsel—using calibrated common-benefit assessments, which should be higher for retained counsel who did little more than free-ride on the efforts of others. Those common-benefit assessments, along with one-third of the recovery from class members who did not have private counsel, would be used to compensate counsel for their contributions toward the common benefit. *See* Kull-Silver Resp. Report 1-2; Miller Resp. Report 4, 10-11; WG Mem. 38-39; Miller Report 33-36.

That approach makes good sense. It allocates attorney fees in a manner that ties a lawyer's fees to the amount recovered by the lawyer's clients. Indeed, all agree that the most important factor in evaluating the reasonableness of an attorney fee award is the attorney's degree of success and the amount recovered by the client. *E.g.*, Miller Resp. Report 7-10; Kull-Silver Resp. Report 6; Clark/Phipps Mem. 24; Kansas CLC Mem. 69; MN Class Counsel Mem. 5-6. By allocating fees as a percentage of client recovery, the Watts Guerra proposal ensures that the attorneys who delivered for their clients, like Watts Guerra, receive compensation for that effort. *See* Bassford Remele Mem. 41-45; *see also id.* at 34-36.

Unlike Watts Guerra, however, many retained counsel, did not make substantial common-benefit contributions. It is well-established that "as between a common benefit attorney who expended considerable time, resources, and took significant economic risks to produce the fee, and the primary attorney who did not, it is appropriate and equitable that the former receive some economic recognition from the beneficiary of this work." *In re Vioxx Prod. Liab. Litig.*,

760 F. Supp. 2d 640, 653 (E.D. La. 2010). The second step of the Watts Guerra proposal—imposing a common-benefit assessment—ensures those attorneys who contributed to the common benefit are not unfairly compensated for the efforts of others.

To effectuate the second step, the Courts need only impose a common-benefit assessment on the fees collected by retained counsel. WG Mem. 36-37; Silver-Kull Report 4; Bassford Remele Mem. 29-33. Where an individually retained attorney has previously agreed on a common-benefit assessment with common-benefit counsel, as did Watts Guerra and others in Minnesota when they signed the JPA, the Courts should simply enforce those agreements. *See* WG Mem. 39-55; Silver-Kull Report 6-7; Bassford Remele Mem. 26-29. Where no such agreement exists, the Courts are free to establish a fair and reasonable assessment, just as they did when entering the common-benefit orders early in this case. *See, e.g.*, Federal Common Benefit Order, ECF No. 936; *see also* Duke Law Center for Judicial Studies, *MDL Standards and Best Practices* 55-60, 70 (Sept. 11, 2014).

Using this two-step process, the Courts thus can ensure that every class member pays the same amount in attorney fees; it can ensure that individually retained counsel receive reasonable compensation for their efforts, taking account of their recoveries for their clients and any contributions to the common benefit; it can ensure there are no appeals over private fee agreements; and it can ensure that common-benefit counsel are appropriately compensated for their efforts on behalf of the class. Thus, the Watts Guerra proposal squarely confronts—and addresses—the main issues that the PNC Subgroup ignore. *See also* Miller Resp. Report 6-10; Kull-Silver Resp. Report 1-3.

II. Kansas CLC And The Clark/Phipps Group Overstate Their Contributions And Ignore The Importance Of Watts Guerra In Creating The Settlement Fund.

Contractual rights aside, the touchstone for common-fund fee awards—like the awards the PNC Subgroup seek—is the degree to which counsel's efforts "contribute[d] to the creation of the fund." *Gottlieb v. Barry*, 43 F.3d 474, 488 (10th Cir. 1994). When Syngenta settled for $1.51 billion, it was to resolve not only the cases prosecuted by Kansas CLC and Minnesota Class Counsel, but also the mass actions vigorously prosecuted by Watts Guerra—whose partners acted as Minnesota Co-Lead Counsel, trial counsel in two of the three Corn trials, and served on the PNC. Further, based on raw numbers, the Watts Guerra Group alone represents more than 23% of the relevant corn harvest, and more than 50% of settlement claims as of July 2, 2018[13]—far exceeding the participation by other class members, which is the direct result of Watts Guerra's continuing efforts for its clients. WG Mem. 23. The notion that 80% credit goes to another group of lawyers, and that Watts Guerra should be entitled only to litigate over the remaining scraps defies credulity. *See* Kull-Silver Resp. Report 1, 3, 5-6.

Watts Guerra was not only one of the heaviest players in the fight, it also landed some of the most devastating blows against Syngenta, maximizing settlement pressure and ensuring a more lucrative deal for the class. For example, Watts Guerra was the *sine qua non* for the punitive damages case against Syngenta—punitive awards that Kansas CLC were unsuccessful in obtaining in their own trial. Credit must be shared with other Minnesota Leaders, of course (*see* Bassford Remele Mem. 12-14; MN Class Counsel Mem. 18-19)—which further shows the arbitrariness of the allocation pressed by the PNC Subgroup, as discussed above. But by filing ac-

[13] This number would include only those selecting "Watts Guerra LLP" from the bottom of a drop-down menu containing hundreds of law firm choices. The participation rate of Watts Guerra Group clients is thus likely higher, as many would have selected from the drop-down menu their own local attorneys, working as associate counsel with Watts Guerra.

tions in Minnesota, Watts Guerra opened up a litigation front in a forum where Syngenta's executives could be forced to testify at trial, with the jury watching live action by accomplished trial counsel rather than stale video clips. That testimony showed Syngenta executives' knowledge and reckless disregard for the risks of commercializing GMO corn strains before obtaining the necessary regulatory approvals in China.[14]

The Watts Guerra-led mass action put settlement pressure on Syngenta in other ways. Class certification, for example, is often a make-or-break moment in a class case, and defendants often leverage certification risk to justify a lower settlement amount. But whatever might have happened with class certification in this case, Syngenta still would face over 70,000 individual plaintiffs in Minnesota—the vast majority represented by Watts Guerra. Those direct cases applied settlement pressure and minimized the effect of class-action-specific defenses (like appeal risk over class certification) on the final settlement amount.

A. By any metric, Watts Guerra's role in this case was substantial.

By any objective measure, Watts Guerra was one of the primary contributors in this case. Watts Guerra served as Co-Lead Counsel in the Minnesota mass action—leading bellwether discovery and the bellwether trial effort. WG Mem. 8-9, 18. The Minnesota mass actions were critical based on their size alone, comprising the bulk of individual plaintiffs actively litigating against Syngenta. Watts Guerra represented more than ***57,000*** individual plaintiffs comprising the majority of filed cases and roughly 10% of the entire class by number. *Id.* at 26-27 & n.10. Collectively, those plaintiffs account for 23% of the U.S. corn harvest, amounting to almost a quarter of Syngenta's total liability exposure. *Id.* at 23.

[14] Indeed, Watts Guerra's contributions to the settlement effort and the benefits it delivered to the class and to other individual plaintiffs are so significant that two leading scholars have opined that, in equity, Watts Guerra should not have to pay a common-benefit assessment at all. Kull-Silver Report 8-13; *see also* Kull-Silver Resp. Report 6-7.

The mass action prosecuted by Watts Guerra thus accounts for a large fraction of the collective work in this litigation. And, while much work was technically performed on behalf of individual clients, the benefits of the mass-action component of this case unquestionably inured to the benefit of the class cases and other individual litigants as well. *See infra* 21-25; *see also* Bassford Remele Mem. 11-12 (explaining that Minnesota Leadership "determined from the outset … no distinction would be made between the work done on individual claims versus class claims"). To that end, Watts Guerra and its associate counsel invested approximately $124.4 million in time and expenses in this litigation. ECF No. 3686 ("WG Corr. Supplement") at 5. That exceeds the $97.4 million in time and expenses of Kansas CLC and their associates. ECF No. 3641-1 at 8-9; *see also* Kansas CLC Mem. 68-69.

The mass-action plaintiffs, and Watts Guerra clients in particular, also stand to recover more compensation under the settlement than any other single group of plaintiffs in this case. The settlement compensates class members in proportion to the number of bushels of corn harvested. WG Mem. 23. Because Watts Guerra clients represent almost a quarter of the total U.S. corn harvest, and because Watts Guerra is pouring time and money into helping its clients make claims, they stand to recover ***at least*** a quarter of the total compensation awarded in this case—and very likely they will recover much, much more. *See id.* (as of July 2, more than 50% of Watts Guerra's clients had made claims—compared to roughly ***6% of non-Watts Guerra clients***) (number of claimants, not bushels of corn); ECF No. 3661-4 ("Supp. Watts Decl.") ¶ 9 (addressing continuing efforts by Watts Guerra to assist its clients with making claims).

Ultimately, Watts Guerra represented more individual clients than any other counsel in this case, including Kansas CLC. Their clients produced more corn than the clients of any other counsel in this case, including Kansas CLC. In fact, their clients produce more corn than all the

farmers in Minnesota and Kansas ***combined***. *See* Watts Decl. ¶ 25 n.1 (Minnesota represents 10.19% of U.S. corn production; Kansas, 4.61%). The members of the Watts Guerra Group invested more in time and expenses than any other counsel in prosecuting this case. And Watts Guerra's successful post-settlement communication outreach efforts are resulting in an extraordinarily high rate of participation in the settlement by Watts Guerra Plaintiffs compared to other class members. Given all that, it is hard to see how a reasonable fee allocation could completely ignore Watts Guerra as the PNC Subgroup's allocation does. Kull-Silver Resp. Report 5-6.

B. Watts Guerra was instrumental in bringing punitive damages to the table.

Watts Guerra did not simply represent a large number of clients. It leveraged its leadership position in Minnesota to deliver major victories for ***all*** Corn plaintiffs and absent class members. Indeed, Watts Guerra's contributions were among the most significant factors placing pressure on Syngenta to settle. Chief among those factors—which again goes unmentioned by Kansas CLC and the Clark/Phipps Group—was the role it played in maximizing Syngenta's potential liability in the Minnesota cases through a damages model that yielded higher compensatory damages than that used by the class attorneys (*see* Bassford Remele Mem. 16-17; MN Class Counsel Mem. 16-17) and through evidence that made punitive damages an inevitability.

To begin, it was Watts Guerra that established Minnesota as a front for the litigation. WG Mem. 8-9. Watts Guerra knew that in Minnesota, Syngenta's executives could be subpoenaed to testify at trial about what they know and what risks they deliberately took. *Id.*; *see also* Declaration of Daniel E. Gustafson ¶ 37, *In re Syngenta Litig. & Syngenta Class Action Litig.*, Nos. 27-CV-15-3785, 27-CV-15-12625 (Minn. Dist. Ct. filed July 10, 2018). If there had not been litigation in Minnesota, testimony from Syngenta's executives would only have been delivered in the far less effective form of deposition excerpts. *See* WG Mem. 8-9. After Syngenta

removed the Minnesota actions, Watts Guerra defended that Minnesota beachhead, and, together with counsel for Cargill, Bassford Remele, and others, secured remand. *Id.*

That Minnesota strategy paid off. After Minnesota Class Counsel asked Watts Guerra to assist in the Minnesota Class trial (Watts Decl. ¶ 225), Watts Guerra delivered. In the first week of the trial, Mikal Watts rose to cross-examine Syngenta's executives in open court, a process devastating to Syngenta. Where the Kansas CLC damage model assumed market "chatter" occurred months before China's November 18, 2013 rejection of corn from the United States, Watts Guerra's cross-examination of Syngenta executive Chuck Lee yielded crucial admissions showing that market chatter in fact occurred as early as September of 2013, causing a corn price reduction that preceded China's rejection of U.S. corn in November, and thereby fit plaintiffs' damages model, not Syngenta's. WG Mem. 20; Watts Decl. ¶¶ 246-247. As a result, the Minnesota Class was cruising toward a compensatory damages verdict—as much as $500 million, WG Mem. 19-20—that would likely dwarf the verdict in Kansas.

But compensatory damages were the smallest of Syngenta's problems in Minnesota. Watts Guerra also elicited testimony from Syngenta executives demonstrating they knew the risks of commercializing Syngenta's GMO corn strains, especially with respect to lack of Chinese approval for those strains, and did so anyway, resulting in huge losses to U.S. farmers. *Id.* at 20. That information was critical to the punitive damages case, and Watts Guerra—not Kansas CLC—got that information in front of a jury in a way that made an award of punitive damages obvious. Even more significantly, that testimony made clear to all that Syngenta knew the risks of commercializing GMO corn without Chinese regulatory approval but did it anyway. WG Mem. 20, 52-53; Watts Decl. ¶¶ 239-253. In Minnesota, punitive damages were now all

but assured. Then, Syngenta halted the trial. Confronting a potentially massive punitive damages verdict, Syngenta agreed to a global settlement just days later. WG Mem. 20, 52-53.[15]

In the end, the enhanced compensatory damages that Syngenta faced in Minnesota, combined with a likely award of devastating punitive damages, played a critical role in securing the settlement in this case. With the Minnesota trial team, Watts Guerra shares credit for that. Kansas CLC and the Clark/Phipps Group cannot simply ignore that fact.

C. The procedural benefits of the Minnesota mass action were instrumental in convincing Syngenta to settle.

Even beyond Watts Guerra's successes in the Minnesota trials, the Minnesota mass action placed settlement pressure on Syngenta in other ways. The mass action was strategically critical because its procedural advantages also protected the class actions.

In every class case, class certification is a major hurdle and a major risk for plaintiffs. *See Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999) (describing importance of class certification and noting that "denial of class status can doom the plaintiff"). For that reason, the risk that the class will not be certified is a common reason for discounting class settlement amounts. *See, e.g.*, *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 322 (3d Cir. 2011). Here, except for the rejected Lanham Act claim, no nationwide class was certified prior to the settlement. WG Mem. 17. Further, as Kansas CLC themselves acknowledge, the class-certification theory advanced here was the same one that ***failed*** in the GMO Rice Litigation. Kansas CLC Mem. 52; *see also id.* at 54 (identifying other "cutting-edge legal issues" raised on class certification).

[15] The *Mensik* settlement further supports these points. Watts Guerra is seeking leave to show as much. *See supra* n.3.

Thus, contested class-certification proceedings and appeals would have presented real risk and, in the ordinary case, could have been leveraged by Syngenta to avoid settlement or drive down the settlement amount. *Cf. In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d 679, 703 (9th Cir.) (vacating certification of nationwide class based on concerns with variations in state law), *rehearing en banc granted*, 2018 WL 3597310 (9th Cir. 2018). But here the risks presented by class certification were minimized by the mass-action component of this case: Almost a quarter of Syngenta's total possible liability was from non-class-action suits in the Minnesota mass action engineered by Watts Guerra. Even if Syngenta were to successfully oppose class certification, it would have faced significant liability from this cadre of mass-action plaintiffs, as the *Mensik* settlement makes clear. *See supra* n.3. Accordingly, Syngenta had limited ability to leverage the risks of class certification during settlement negotiations. The existence of the mass action thus gave Syngenta strong incentives to settle globally.

No matter how viewed, the mass action in Minnesota was a central piece of this litigation and a driving factor in the settlement. Kansas CLC and the Clark/Phipps Group simply cannot pretend, as they appear to do, that the mass action in Minnesota does not exist. Even ignoring the private fee agreements and the indisputable fact that Watts Guerra championed its clients' interests through litigation and settlement against not only Syngenta but also class counsel—that is, even if this litigation could be viewed purely through a common-benefit lens—Watts Guerra's efforts on behalf of individual plaintiffs in the mass action contributed to the common benefit no less than class counsel's efforts on behalf of the class. The fee allocation should reflect that fact.

III. The Fees Sought By Other Counsel Are Not Reasonable.

A. The Clark/Phipps Group has not justified a fee award consisting of 17.5% of the court-awarded fees.

The Clark/Phipps Group seeks 17.5%, as much as $88 million, of the total aggregated attorney fees in this case. Clark/Phipps Mem. 2. These are retained counsel who filed their cases in Illinois, but the Illinois forum was not opened by them—it was opened by Heninger Garrison Davis, LLC. What is more (and in marked contrast to Heninger Garrison), the reason Mr. Clark went to Illinois was to ***avoid*** participating in common-benefit work in Minnesota and Kansas. He was appointed by Judge Sipkins to Minnesota Leadership, yet quit rather than sign the JPA. Thereafter, Mr. Clark and his Group largely excluded themselves from common-benefit work in an apparent effort to avoid paying a common-benefit fee. *See also* Bassford Remele Mem. 9-10, 35-36.

Further, the most important contribution from the Illinois forum was not made by the Clark/Phipps Group; it was made by Judge Herndon, who played a critical role in the settlement effort. As for the Clark/Phipps Group, their most notable accomplishment is convincing the rest of the PNC Subgroup that they merited a 17.5% share of the fees in this action, presumably by representations as to the number of their individual clients and their ability to prevent a settlement if they opted out. The 17.5% share agreed to by the PNC Subgroup had nothing to do with contributions to the common benefit. Yet ***that*** is how the Courts should pay the Clark/Phipps Group now—not based on this fiction that they made massive contributions to the common benefit (above and beyond Minnesota Class Counsel, Watts Guerra, and nearly every other attorney in the entire Corn Litigation), but rather based on their private contingent fee agreements and their clients' actual recoveries. Miller Resp. Report 7-10; Kull-Silver Resp. Report 2. Then, that fee award should be reduced by a ***heavy*** common-benefit assessment. *See* WG Mem. 33-38.

Yet, despite having abandoned the common-benefit efforts in Minnesota and Kansas, these attorneys ask for 17.5% of the overall fee award in this litigation as a common-benefit fee. To justify that request, they assert that they "provided three critical contributions to the $1.51 billion settlement." Clark/Phipps Mem. 24. But Watts Guerra made each of those three contributions as well—and far more. It succeeded where these attorneys largely declined to participate—in the actual work of litigating these cases and forcing Syngenta's surrender.

First, the Clark/Phipps Group asserts that it "expanded the litigation into state courts and against different defendants," allowing for a "truly global resolution to the Syngenta litigation." Clark/Phipps Mem. 25. But Watts Guerra brought cases in state court as well—indeed, far more than the Clark/Phipps Group. And Watts Guerra's claims had ***impact***. Minnesota, where Watts Guerra served as Co-Lead Counsel and trial counsel, was the principal forum for state claims against Syngenta—and where the litigation was ultimately won. Watts Guerra's contributions and accomplishments have been summarized above. In short, its Minnesota strategy paid off.

The Clark/Phipps Group can cite no similar achievements. Unlike Watts Guerra, they took no case to trial, bellwether or otherwise. *Compare* WG Mem. 17-20. Unlike Watts Guerra, they secured no significant admissions or testimony that supported an increased compensatory damages award and put punitive damages in play. *Compare id.* at 20. And, unlike Watts Guerra, they secured no settlement for any of their clients (other than the class settlement), much less the significant individual settlement in *Mensik*. *See supra* 3 n.3.

In fact, beyond its participation on the negotiating committee with Watts Guerra (discussed below), the Clark/Phipps Group's efforts reflect nothing more than common litigation tasks, such as pre-suit investigation (Clark/Phipps Mem. 10-11); briefing on a motion to dismiss and other routine motions (*id.* at 11); discovery (*id.* at 13-14); and retention of experts (*id.* at 14).

The rest of the Clark/Phipps Group's efforts focused on coordination with attorneys from the other cases against the "ABCD Group" (*i.e.*, non-producers, including elevators and exporters) as well as Syngenta (*id.* at 11-12), and communications and management of the Clark/Phipps Group's own clients (*id.* at 12-13). That sort of work does not merit the fee that the Clark/Phipps Group seeks.

Common-fund fee awards—like the award the Clark/Phipps Group now seeks—turn on the degree to which counsel's efforts "contribute[d] to the creation of the fund." *Gottlieb*, 43 F.3d at 488. Yet ***none*** of the Clark/Phipps work in Illinois made any difference to the trials in Minnesota or Kansas, nor did the work of Clark/Phipps against "the ABCD Defendants"—their main preoccupation in this litigation, despite repeated failures (*e.g.*, Mem. & Order, ECF No. 2426 (Aug. 17, 2016))—produce one settlement dollar. Consistent with Mr. Clark's decision to abandon a leadership position in Minnesota and take an isolationist approach to protect his fees, so far as we are aware the Clark/Phipps Group did ***not***:

- develop the lay or expert testimony used in any trial;
- obtain any documents used in any trial;
- develop the demonstrative evidence used in any trial;
- develop any theory of damages or liability;
- expand plaintiffs' claims or admissible evidence;
- limit Syngenta's defenses; or
- otherwise contribute to any trial or notable settlement.

Second, the Clark/Phipps Group cites Mr. Clark's service on the PNC, the settlement negotiation committee. Clark/Phipps Mem. 24. But Watts Guerra partner Mikal Watts served on that committee too. He participated in the negotiations that resulted in the initial term sheet,

even while preparing for the Minnesota Class trial and trying that case. *See* Watts Decl. ¶¶ 262-292, 303-327. If Clark's service on the plaintiffs' negotiating committee entitles the Clark/Phipps Group to a substantial attorney fee award, then Watts's service on that committee and as trial counsel entitles Watts Guerra to more.

Third, the Clark/Phipps Group claims credit for certain settlement provisions for the benefit of class members who had also sued individually. *See* Clark/Phipps Mem. 25. Again touting Clark's service on the plaintiffs' negotiating committee, they claim credit for provisions that avoided mass opt-outs that could have jeopardize the settlement. *Id.* They are correct that "Syngenta was unwilling to settle the litigation without the participation of the individual claimants." *Id.* But the Clark/Phipps Group's argument does not distinguish them from Watts Guerra. To the contrary, Watts Guerra represented far more individual plaintiffs and played a far larger role in securing settlement provisions that increased the settlement's fairness and ensured widespread buy-in among individual plaintiffs and absentee class members alike.

In particular, during negotiations, class counsel advocated for direct-pay settlement terms. Relying entirely on data from USDA Farm Service Agency 578 Reports, which describe a farmer's number of and interest in corn acres for a given year, the settlement administrator would pay each class member based upon the data contained in the farmer's FSA Form 578s. *See* Letter from Patrick J. Stueve to the Hon. John W. Lungstrum, at 4 (Jan. 4, 2018). But this presented serious problems. *See* Watts Decl. ¶ 316. For example, the Form 578s did not accurately reflect the extent of injury, because they did not reflect the amount of corn sold at market (at suppressed prices).[16] In addition, Syngenta took the position that farmers who bought and

[16] As the Courts are aware, many farmers do not sell all of their corn, but instead use some portion (or all) of their corn harvest as feed for livestock. Such corn should not have been compensated under the settlement; because the farmers never sold it, there was no injury. *See* Settlement Agreement §2,15.1.1 (requir-

planted the offending corn seed were contractually limited in their ability to sue Syngenta. *See* Bassford Remele Mem. 15. While those farmers were a subclass, the Form 578s did not reveal their identity; the reports do not reveal the source of a farmer's seed. *See* Settlement Agreement § 3.7.2.1(b)(i).

On behalf of the largest group of individual plaintiffs, Watts Guerra (joined by the Clark/Phipps Group) therefor advocated for and secured ***claims-based*** payment terms to make the settlement more fair for ***all*** class members. *See* Settlement Agreement §§ 3.7.2-3.7.3. The claims process required class members to submit a settlement claim only for the corn they sold, thereby excluding corn used to feed livestock. *See* Producer Claim Form, pt. VI, https://www.cornseedsettlement.com/Docs/Producer%20Claim%20Form.pdf. That made the settlement more fair—and more likely to be approved under Rule 23(e)—by ensuring that settlement payments correlated more closely with each farmer's actual injury. And the claims-made system also helped mitigate any intra-class conflicts that, under *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), could have jeopardized settlement approval.

Clark/Phipps insists that the claims process will result in higher recoveries by individual plaintiffs than would a direct-pay settlement. But to the extent it is a win for Clark/Phipps, it is an even bigger win for Watts Guerra. Watts Guerra advocated for a claims process, too. Watts Decl. ¶¶ 316, 322. In doing so, Watts Guerra delivered for its clients. *Cf. Fager v. CenturyLink Commc'ns, LLC*, 854 F.3d 1167, 1177 (10th Cir. 2016) (finding "merit in an approach that ties attorney recovery to the amount actually paid to the class"); Manual for Complex Litigation § 14.121 (4th ed. 2004) (most important factor in assessing reasonableness of attorney fee award is the size of the common fund, in other words, the benefit the attorney brought to his or her cli-

---

ing "fed on the farm" amounts be deducted from compensable bushels). Form 578s, however, do not identify the amount of corn that farmers self-consumed.

ents). The claims process prevented Class Counsel from imposing a framework that would have benefited absent class members at the expense of individual plaintiffs, like the Watts Guerra clients. This is another reason why Kansas CLC and other common-benefit counsel may not reasonably claim a full one-third fee for the Watts Guerra Plaintiffs; those attorneys ***opposed*** the best interests of those plaintiffs, which were championed by Watts Guerra.

The Clark/Phipps Group maintains that it "provided the most leverage" to secure those benefits for the class because their clients will file "an exceedingly high percentage" of the claims. Clark/Phipps Mem. 25. But they do not say how many clients they represent; what percentage of the crop those clients grew; or what percentage of the settlement claims actually have come from their clients.[17] By contrast, Watts Guerra represents over 57,000 individual plaintiffs accounting for more than 23% of the U.S. corn harvest. Watts Decl. ¶ 45; WG Mem. 23. And, as of July 2, 2018, ***over half of all claims filed*** were filed by Watts Guerra clients. WG Mem. 54-55. Thus, if ***any*** group of individual plaintiffs in this case exercised the leverage that brought the benefits of a claims process to the class, it was Watts Guerra. Indeed, but for the settlement, the next cases going to trial likely would have been additional bellwether plaintiffs in Minnesota, represented by Watts Guerra—and the *Mensik* settlement demonstrates how Syngenta felt about that. *See supra* 3 n.3; *see also* Watts Decl. ¶¶ 132-138, D1-20 (detailing the work performed for and by bellwether plaintiffs represented by Watts Guerra).

Further, at bottom, this argument does not support a 17.5% fee to the Clark/Phipps Group now so much as it counsels for waiting until the claims process is complete, and making awards based not on pre-settlement puffery and backroom deals, but rather on the ***actual*** recoveries of each counsel's clients, with counsel-specific common-benefit assessments to ensure overall fair-

[17] Clark/Phipps state only that they represent "tens of thousands of individual claimants." Clark/Phipps Mem. 25.

ness with respect to the common-benefit work from which Mr. Clark and his Group largely opted out. The proof is in the pudding: If the Clark/Phipps Group's "tens of thousands" of clients file settlement claims, those attorneys' private fee contracts should be enforced, and they will receive a large fee (even net of common-benefit assessments) based upon actual client recoveries—which is how lawyers usually, and should, get paid. Miller Resp. Report 7-10.

Ultimately, the Clark/Phipps Group's contributions were quite limited. These attorneys were nearly irrelevant to the war against Syngenta, and any contribution they did make toward the peace, Watts Guerra made too. And Watts Guerra did much, much more. No reasonable fee proposal could allocate 17.5% of the aggregate fee to the Clark/Phipps Group with anything short of 35% to Watts Guerra.

B. Kansas CLC have not justified their request for 50% of the fees.

Kansas CLC seek half of all attorney fees in this case—as much as $250 million, or 16% of the settlement fund. Even if we, again, set aside the contract rights Kansas CLC so carefully ignore, they have not justified an award of that magnitude. As a threshold matter, the 16% uses the wrong denominator; absent class members represented by Kansas CLC will ***not*** be recovering the entire $1.51 billion Settlement Fund. Based on counsel information and claims data, it is certain that the gross recoveries by absent class members (including those represented by Minnesota Class Counsel) will be well below 100%, and likely less than 50%. A $250 million fee request is sophistry. Further, the requested award would exceed the percentage awarded in nearly any other comparable settlement. *See* Miller Report 33-36 & tbl. 2. Nothing in Kansas CLC's application suggests performance on behalf of the class that was so outstanding compared to all other counsel, as to warrant an award of fees so far above the norm in these types of cases, and so disproportionate to what other counsel in this litigation receive. *See also* Miller Resp. Report 5, 8; Kull-Silver Resp. Report 4-5.

For example, while Kansas CLC describe their efforts at length, much of that reflects the ordinary work of complex civil litigation. *E.g.*, Kansas CLC Mem. 53-54 (explaining that Syngenta challenged Kansas CLC's theories of recovery and argued that their cited cases were distinguishable, obliging Kansas CLC to file briefs citing case law and other authority). Watts Guerra undertook those same activities on behalf of the Minnesota mass-action plaintiffs. *Compare id.* at 90 (Kansas CLC), *with* WG Mem. 5-9, 14-26. What is more, to the extent Kansas CLC led the litigation effort, that is exactly the right they sought and received under the JPA—as part of a bargain that included receiving ***4.58%*** of the Watts Guerra Plaintiffs' recoveries (5.5 percentage points out of Watts Guerra's 40% contingent fee) (*see* WG Mem. 45-46)—not the ***16%*** Kansas CLC now demand. Miller Resp. Report 1, 10.[18]

Among all the work that Kansas CLC performed leading up to this settlement, Kansas CLC touts as its signature achievement the Kansas Class trial that resulted in a $217.7 million judgment. But that judgment provided only compensatory damages (WG Mem. 19) and, as a result, created insufficient pressure to settle this case. Watts Decl. ¶¶ 261, 268 (until August 8, 2017, Syngenta had not offered any money to settle the case, and as of September 5, 2017, just prior to the Minnesota Class trial, its "final settlement offer" was $600 million); *see supra* 21-23. By contrast, in the two cases Watts Guerra took to trial, it proved that Syngenta faced serious exposure to punitive damages. The *Mensik* trial effort ended with a settlement payment discussed in Watts Guerra's sealed memorandum. *See supra* 3 n.3. As for the Minnesota Class trial, it was after Mr. Watts extracted damaging admissions from Syngenta executives in live testi-

[18] At various points, Kansas CLC tout their willingness to cooperate with the Minnesota plaintiffs and provide them with information. *See, e.g.*, Kansas CLC Mem. 92 (noting Kansas experts were made available to Minnesota plaintiffs). Of course, the Minnesota plaintiffs ***paid*** for that information under the JPA that Kansas CLC now seek to renounce. And Watts Guerra shared information and work product with Kansas CLC, too. *See, e.g.*, WG Mem. 19 (Watts Guerra provided Kansas CLC with full *Mensik* trial package for use in preparing for Kansas Class trial).

mony that Syngenta agreed to the present settlement. WG Mem. 20. If Kansas CLC's $217.7 million jury verdict entitles Kansas CLC to 16% of the settlement fund, then Watts Guerra's successful effort to put punitive damages in play entitles Watts Guerra to at least as much.

Again, the numbers make that clear. The Watts Guerra Group invested 572,291 hours of professional time in this litigation, including 142,834 hours of common-benefit time (*see* ECF No. 3661 at 4; Corr. WG Supplement 5), while Kansas CLC invested only 166,000 hours of professional time (ECF No. 3641-1 at 8). The Watts Guerra Group's total investment (time and expenses) amounts to more than $124.4 million (*see* Corr. WG Supplement 5), while Kansas CLC's is only $97.4 million (ECF No. 3641-1 at 8-9). And Watts Guerra represents 57,000 individual plaintiffs, comprising a quarter of the entire U.S. corn harvest and over half of all claims as of July 2. *See supra* 18-19. By contrast, Kansas CLC claim nowhere near that many individual clients. *See* ECF No. 3587-1 ¶ 144 (noting just 4,409 individual plaintiffs in the Federal MDL—236 of which are represented by Watts Guerra). Given these comparators, if Kansas CLC is entitled to 50% of any awarded attorney fees (which they are not), Watts Guerra is entitled to at least that much.

C. Other counsel are not entitled to the full fees they seek.

The bulk of the common-benefit work in this case—whether undertaken on behalf of the class or on behalf of individual clients—was performed by firms making or joining in some fashion the applications of the Kansas CLC, Minnesota Class Counsel, and Watts Guerra. Other firms, however, now seek fees based off the settlement's success. Many of those firms request more than they are entitled to.

A number of firms have submitted attorney fees applications that simply ask the Courts to enforce the contingent fee arrangements they entered with their clients. Some have agreed, like

Watts Guerra, to reduce their contingent fee award.[19] Those attorneys are entitled to be compensated for the efforts they undertook on behalf of their individual clients. As a result, the Courts should ***begin*** their attorney fee analysis by enforcing any contingency fee arrangement that those attorneys entered into with their clients which has been performed. *See* WG Mem. 31-35. But those firms should be required to pay from those fees a common-benefit assessment, lest those firms profit from the hard work of Watts Guerra and other common-benefit counsel who carried the heavy load of prosecuting the bellwether and class trials and negotiating the class settlement. The Courts should not allow that. Kull-Silver Report 8-13; *see also, e.g.*, *Vioxx*, 760 F. Supp. 2d at 653 ("[A]s between a common benefit attorney who expended considerable time, resources, and took significant economic risks to produce the fee, and the primary attorney who did not, it is appropriate and equitable that the former receive some economic recognition from the beneficiary of this work.").

Indeed, many firms have done little more than file "me too" complaints, communicate the status of the case to their clients and, hopefully, shepherd their clients through the claims process. *See, e.g.*, ECF No. 3571 at 4-6 (Pavlack); ECF No. 3577 at 2 (Beasley Allen); ECF No. 3601-1 ¶¶ 9-12 (Brad Morris); ECF No. 3605 at 1 (Hossley Embry). These firms provide no concrete discussion (if any discussion at all) of the contributions they made to the litigation and settlement effort—to the discovery process, to motions practice, to the bellwether trials, or to set-

[19] *See* ECF No. 3550 at 9 (Wright & Schulte); ECF No. 3567 at 6 (Weller Green Toups & Terrell; The Coffman Law Firm); ECF No. 3571 at 9 (Pavlack Law LLC); ECF No. 3576 at 14-15 & n.8 (Johnson Becker); ECF No. 3577 at 3 & n.5 (Beasley Allen); ECF No. 3581 at 7 (Paul LLP); ECF No. 3586 at 4 (Paul Byrd LLP); ECF No. 3584 at 38 (Shields Law Group, LLC); ECF No. 3588-1 ¶ 3 (Dunk Law Firm); ECF No. 3593 at 1 (Eiland Law Firm); ECF No. 3594 at 5 (Wagstaff & Cartmell); ECF No. 3595-1 at 7 (Pendley, Baudin & Coffin, L.L.P.); ECF No. 3601 at 6 (Brad Morris Law Firm PLLC); ECF No. 3605 at 2 (Hossley Embry, LLP). A number of these firms are seeking compensation on the basis of their individual retainer agreements in addition to their requested common-benefit fees. *See, e.g.*, ECF No. 3581 (Paul LLP); ECF No. 3584 (Shields Law Group, LLC); ECF No. 3593 (Eiland Law Firm); ECF No. 3596 (Wagstaff & Cartmell). This is also true of some members of the Watts Guerra Group, though not of Watts Guerra itself. *See* WG Mem. 28 n.11, 57; ECF No. 3580 ("WG Fee App.") at 4.

tlement negotiations. A few firms do not even describe their efforts on behalf of their own clients. *See* ECF No. 3593-1. Rewarding such firms with a full one-third (or more) contingency fee and no contribution to the common-benefit fund would overcompensate these counsel who incurred little risk, contributed little to the war, and did nothing to bring about the peace. Instead, these firms should be assessed substantial common-benefit assessments. *Cf.* Bassford Remele Mem. 35-36.

CONCLUSION

Ultimately, there is only one way to ensure that all class members pay the same amount in attorney fees. There is only one way to ensure that private contracts are respected and given their intended effect. There is only one way to ensure that attorneys receiving contingent-fee payments based upon the settlement recovery are not unfairly profiting from the work of class counsel and MDL leadership who contributed much to the common benefit. To ensure all that, the Courts should accept the Watts Guerra fee proposal, enforce private contingent fee contracts, and allocate attorneys' fees in the first instance according to the settlement recovery of each lawyer's clients. Then, the Courts should impose common-benefit assessments (enforcing any contractual agreements governing such assessments, like the JPA or other fee-sharing arrangements) to ensure that common-benefit counsel are fairly compensated for their efforts and to prevent free-riding individual counsel from being unfairly enriched.

Dated: August 17, 2018

Respectfully submitted,

/s/ Mikal C. Watts

Mikal C. Watts
Texas State Bar No. 20981820
Francisco Guerra, IV
Texas State Bar No. 00796682
WATTS GUERRA LLP
Four Dominion Drive
Building Three, Suite 100
San Antonio, Texas 78257
Telephone: (210) 447-0500
Facsimile: (210) 447-0501
mcwatts@wattsguerra.com
fguerra@wattsguerra.com

Counsel for the Watts Guerra Plaintiffs

Jeffrey A. Lamken
Michael G. Pattillo, Jr.
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 556-2000 (telephone)
(202) 556-2001 (facsimile)
jlamken@mololamken.com
mpattillo@mololamken.com

Thomas J. Wiegand
MOLOLAMKEN LLP
300 North LaSalle Street
Chicago, Illinois 60654
(312) 450-6700 (telephone)
(312) 450-6701 (facsimile)
twiegand@mololamken.com

William P. Ferranti
THE FERRANTI FIRM LLC
1819 SW 5th Ave. #403
Portland, Oregon 97202
Telephone: (503) 877-9220
Facsimile: (503) 473-8519
wpf@ferrantiappeals.com

Counsel for Watts Guerra LLP

CERTIFICATE OF SERVICE

I certify that on August 17, 2018, I caused the foregoing Omnibus Response of Watts Guerra, to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record in the Federal proceeding.

I also caused this same filing to be made electronically with Minnesota state trial court using the eFS System which will serve all counsel of record in the Minnesota proceeding.

/s/ Mikal C. Watts
Mikal C. Watts

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

IN RE: SYNGENTA AG MIR162 CORN LITIGATION This Document Relates to All Cases Except: *Louis Dreyfus Co. Grains Merchandising LLC v. Syngenta AG*, No. 16-2788 *Trans Coastal Supply Co., Inc. v. Syngenta AG*, No. 14-2637 *The Delong Co., Inc. v. Syngenta AG*, No. 17-2614 *Agribase Int'l Inc. v. Syngenta AG*, No. 15-2279	MDL No. 2591 Case No. 14-md-02591-JWL-JPO

STATE OF MINNESOTA COUNTY OF HENNEPIN	DISTRICT COURT FOURTH JUDICIAL DISTRICT
In re: Syngenta Litigation	Case Type: Civil Other Hon. Laurie J. Miller
This Document Relates to: ALL ACTIONS	FILE NO. 27-CV-15-12625 and FILE NO. 27-CV-15-3785

REPORT OF PROFESSORS ANDREW KULL AND CHARLES SILVER IN SUPPORT OF WATTS GUERRA LLP'S OMNIBUS RESPONSE TO OTHER FEE & EXPENSE APPLICATIONS

INTRODUCTION & SUMMARY OF RESPONSE

As described in our original submission[1]—and as this Court clearly understands—the problem of fee awards in this case requires a two-step application of established common-fund principles. The Court must determine "(a) what portion of the Settlement Amount should be allocated to attorney fees and expenses and (b) the appropriate allocation of that amount among plaintiffs' counsel." Order Regarding Attorney Fee Submissions at 2, ECF No. 3613 (MDL 2591) (July 18, 2018). In both phases of that determination—the initial, "vertical" allocation between members of the Settlement Class and their attorneys, followed by the "horizontal" allocation between attorneys—the principles justifying the award are drawn from the law of restitution and unjust enrichment. RESTATEMENT THIRD, RESTITUTION AND UNJUST ENRICHMENT § 29 (2011); Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions,* 76 Cornell L. Rev. 656 (1991). The Court correctly identified the equitable basis of all such common-fund awards at the outset of its Order Establishing Protocols for Common Benefit Work, ECF No. 936 (MDL 2591) (July 27, 2015) (citing *Trustees v. Greenough*, 105 U.S. 527 (1881), and subsequent cases).

The interesting feature of the fee awards to be made in the present case—as compared with a more typical class-action settlement—is the fact that the overall Settlement Class encompasses two major categories of plaintiffs: absent class members (whose legal representation derives solely from the certification procedures of Rule 23) and individual plaintiffs (whose representation derives from their individual contingent-fee contracts). Because they now form a single settlement class, absent class members and individual plaintiffs will be treated identically for settlement purposes, including the portion of their recoveries to be deducted for attorney fees and expenses.

[1] Report of Professors Andrew Kull and Charles Silver on Issues of Restitution and Unjust Enrichment in Support of the Fee & Expense Application by Watts Guerra LLP ("Kull-Silver Report"), ECF No. 3580-3 (filed July 10, 2018).

The subsequent "allocation of that amount among plaintiffs' counsel"—including both "class counsel" and "retained counsel"—is the distinctive question to be addressed.

Our original submission described what we believe is the obvious framework of such an allocation, insofar as fee awards in this case are justified by the law of restitution rather than by private contracts.[2] It proceeds as follows: (1) The Court will determine the percentage of the Settlement Fund to be awarded as attorney fees. (2) The Court will apply that percentage to the eventual recoveries of the clients of class counsel and retained counsel, respectively, constituting a preliminary allocation between them. (3) Finally, this preliminary allocation—as a uniform percentage of client recoveries—will be adjusted by "horizontal" awards between counsel, to compensate net contributions of common-benefit work. To the extent that the amount of these common-benefit contributions has previously been fixed by agreement of the interested parties, such as through the Joint Prosecution Agreement between Watts Guerra and other Lead Counsel in the Kansas and Minnesota MDLs or the Fee-Sharing Agreement among leading class counsel dated February 23, 2018, the law of restitution will normally accept such contract valuation as the best measure of the benefit conferred.

Because claimants' recoveries cannot be known until the claims process is complete, the equitable allocation of the aggregate fee among the many attorneys whose efforts helped secure the recovery cannot be decided until that time either. There is solid precedent for waiting. As the American Law Institute's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010) observes, "[a] court may defer full fee determinations until the amounts actually paid to the class (directly or indirectly through cy pres) are ascertained." *Id.* § 3.13 *Cmt. a*.

[2] For the contract analysis, *see generally* Report of Professors Arthur R. Miller, Geoffrey P. Miller, Charles Silver, Brian T. Fitzpatrick, & Alexandra Lahav on Issues of Economics, Procedure, & Policy ("Miller Report"), ECF No. 3580-2 (filed July 18, 2018).

Our suggested framework is not only simple and equitable; it is the only coherent proposal before the Court. The most striking fact about the lengthy submissions on behalf of Kansas MDL Co-Lead Counsel ("Kansas CLC"),[3] supported by Professor Klonoff's Declaration,[4] is that they manage to avoid making any proposal at all about the central question to be addressed, namely, the proper allocation of attorney fees between class counsel and retained counsel.

ANALYSIS

I. The Kansas CLC Memorandum And Klonoff Declaration Fail To Offer A Coherent Proposal For Fee Allocation.

As this Court is well aware, the complex litigation leading to the Settlement in this case involved major efforts by numerous groups of plaintiffs' counsel—including both class counsel and retained counsel. Among retained counsel, the predominant contributions were made by the Watts Guerra Group, representing more than 57,000 individual plaintiffs in Minnesota state court. Earlier stages of this litigation were marked by a high degree of cooperation between those counsel most significantly engaged on different fronts, as noted and approved both by this Court and by Judge Sipkins in Minnesota. *See* Order Establishing Protocols for Common Benefit Work, ECF No. 936 (MDL 2591) (July 27, 2015); Common Benefit Order (MDL 3785) (December 7, 2015) (submitted to the MDL 2591 record at ECF No. 3570-3). Cooperation continued through discovery, bellwether and class trials in Kansas and Minnesota, and settlement negotiations. It is precisely because of the significant roles played by class counsel and retained counsel in

[3] Memorandum in Support of Kansas MDL Co-Lead Counsel and Settlement Class Counsel Christopher Seeger's Petition for Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards to Class Representatives/Bellwether Plaintiffs and Allocation of Attorneys' Fee Award, ECF No. 3587 (MDL 2591) (filed July 10, 2018).

[4] Declaration of Professor Robert H. Klonoff Relating to Attorneys' Fees, Costs, and Incentive Payments, ECF No. 3587-6 (MDL 2591) (filed July 10, 2018).

conjunction with each other, and the extensive sharing of work between them, that this case presents an important issue of common-fund fee allocation.

Given this background—known to everyone concerned—Kansas CLC and Professor Klonoff have chosen to do something extraordinary. Their descriptions of the facts underlying the Kansas CLC fee application describe the history of this litigation *as if Watts Guerra and its 57,000-plus contingent-fee contracts simply did not exist.* If these submissions had been filed with a court that was not thoroughly familiar with the underlying circumstances, their tortured version of the facts would be viewed as dishonest and misleading.

The result is that the Kansas CLC Memorandum and the Klonoff Declaration discuss a fee allocation for an alternative reality:

- The Watts Guerra Group's 57,000 individual plaintiffs are described as if they were indistinguishable from absent class members—in other words, as if their legal representation was exclusively the result of class certification.
- The Fee-Sharing Agreement entered into by certain class counsel on February 23, 2018 (ECF No. 3587-8, Kansas CLC Ex. 8) is described as if it were the product of "arm's length bargaining" between *all* interested parties, leaving "no basis to second-guess the 50/12.5/17.5 allocation." Klonoff Declaration at 60.

Combining these two notions leads to what seems to be Kansas CLC's allocation proposal. (Their proposal is only implicit. If it had been stated in so many words, it would have been hard to defend.) First, Kansas CLC request that the Watts Guerra Plaintiffs be assessed one-third of their recoveries to pay common-fund attorney fees. Next, Kansas CLC request that at least 80% of the common-fund fee award be allocated to class counsel as specified in their February 23 Fee Sharing Agreement. On this approach, the Watts Guerra clients would be obliged to pay at least 26.66%

(80% x 33.33%) of their recoveries for legal services that were primarily performed, not by the lawyers they had retained, but by counsel for putative classes that excluded them; while class counsel (parties to the Fee-Sharing Agreement) would be paid that sum for legal services that were primarily performed, not by them, but by the Watts Guerra Group.

The Kansas CLC allocation would be coherent and justifiable if there were no individual plaintiffs in this case, and if Watts Guerra had never taken part in this litigation. For the allocation problem actually before this Court, it is not a serious proposal.

II. The Kansas CLC Approach Cannot Be Justified By Common-Fund Doctrine.

So long as attorney fees are being charged to members of the settlement class on a common-fund basis, we think it is clear—without the need for argument—that all class members will be assessed the same percentage of their recoveries. The Kansas CLC Memorandum does not say otherwise. What makes their (implicit) proposal inequitable and unjustifiable is the suggestion that 80% of the overall common-fund award be allocated to class counsel as provided in their February 23 Fee Sharing Agreement.

To see the incongruity of any such allocation, it is enough to recall a basic fact that the Kansas CLC Memorandum and the Klonoff Declaration take some pains to disguise. From the outset of this litigation in 2014 until April 10, 2018—with this Court's tentative approval of a Settlement Class—the Watts Guerra Plaintiffs were exclusively and actively represented by the Watts Guerra Group, and not by class counsel. *See* Watts Guerra Fee Mem. at 14-20, 21-22, 24, ECF No. 3611 (publicly filed July 16, 2018) (summarizing Watts Guerra's work, including, for example, on mandatory "Plaintiff Fact Sheets," bellwether discovery, and the bellwether *Mensik* trial). Class counsel, all this while, were working for putative class members—not for the Watts Guerra Plaintiffs. If 80% of the individual plaintiffs' eventual recovery is allocated to class

counsel, and not to the counsel they actually employed, the result would be a grossly unjust enrichment of class counsel at the expense of Watts Guerra, whereby

- class counsel are being compensated by individual plaintiffs for work that was actually performed for absent class members, and
- class counsel are being compensated for work that was actually performed by Watts Guerra and its associate counsel.

The principles of equity that underlie the law of restitution and the doctrine of common fund could never tolerate such an outcome.

A fee allocation that takes simple reality as a starting point avoids these indefensible consequences. The present settlement combines two broad groups of plaintiffs—we have called them "absent class members" and "individual plaintiffs"—who were separately represented, over years of litigation, up to the moment of settlement. Where separate counsel have represented identifiable groups of plaintiffs, common sense requires that all counsel be awarded, in the first instance, a uniform percentage of their respective clients' recoveries. This is the solution achieved by the common-fund award in a typical class-action settlement, granting fees to class counsel by a uniform assessment against a uniform plaintiff class. The critical difference in the present case is that identifiable plaintiff groups have been separately represented, on separate terms, up to the moment of settlement.

Following the initial allocation of fees based on client recoveries, the present case will require a supplemental, "horizontal" allocation between counsel—to take account of unequal contributions of common-benefit work during the period in which plaintiffs' counsel were cooperating. For the reasons set forth in our previous Report, this further allocation is best understood in terms of unjust enrichment, as a second-order common-fund award. Between active

contributors to a common enterprise, a restitutionary accounting of net benefits conferred will frequently be difficult or impossible. The necessary valuation is facilitated in the present case because all interested parties had previously agreed—in the arm's-length negotiations that produced the Joint Prosecution Agreement—on the price Watts Guerra would pay (in addition to its own contributions in kind) for access to common-benefit work. That price equaled 27.5% of Watts Guerra's 40% contingent fees. However, as we previously explained, because Watts Guerra will now collect only 33.33% contingent fees, its payment for access to common-benefit work should equal 27.5% of the smaller amount.

* * * *

I declare under penalty of perjury of the laws of the United States that everything we have stated in the foregoing Report is true and correct.

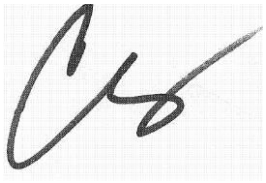
Executed this 6th day of August, 2018

in Travis County, Texas

Andrew Kull

I declare under penalty of perjury under the laws of the United States that everything we have stated in the foregoing Report is true and correct.

Executed this 17th day of August, 2018 in Leelanau County, Michigan.



_____

Charles Silver

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

IN RE: SYNGENTA AG MIR162 CORN LITIGATION This Document Relates to All Cases Except: *Louis Dreyfus Co. Grains Merchandising LLC v. Syngenta AG*, No. 16-2788 *Trans Coastal Supply Co., Inc. v. Syngenta AG*, No. 14-2637 *The Delong Co., Inc. v. Syngenta AG*, No. 17-2614 *Agribase Int'l Inc. v. Syngenta AG*, No. 15-2279	MDL No. 2591 Case No. 14-md-02591-JWL-JPO

STATE OF MINNESOTA COUNTY OF HENNEPIN	DISTRICT COURT FOURTH JUDICIAL DISTRICT
In re: Syngenta Litigation	Case Type: Civil Other Hon. Laurie J. Miller
This Document Relates to: ALL ACTIONS	FILE NO. 27-CV-15-12625 and FILE NO. 27-CV-15-3785

REPORT OF PROFESSORS ARTHUR R. MILLER, GEOFFREY P. MILLER, CHARLES SILVER, BRIAN T. FITZPATRICK, AND ALEXANDRA LAHAV IN SUPPORT OF WATTS GUERRA LLP'S OMNIBUS RESPONSE TO OTHER FEE & EXPENSE APPLICATIONS

OVERVIEW AND SUMMARY OF RESPONSES

As described in our original submission,[1] Watts Guerra has proposed an approach to allocating fees that gives effect to the terms of valid contracts (between counsel and their clients, and among counsel), aligns the incentives of counsel in a manner that will serve the interests of class members and this Court faithfully, and minimizes opportunities for self-serving behavior.

The litigation against Syngenta is a hybrid. For years, it was conducted as a combination of tens of thousands of individual lawsuits and a number of putative class actions proceeding in parallel in separate courts. The collaboration across the cases, made possible by Watts Guerra's contracts with its clients, the Joint Prosecution Agreement (JPA), and Rule 23, benefited both the farmers (not to mention the grain and ethanol facilities) and the Court—the former by enhancing the value of their claims; the latter by conserving resources and time. To facilitate a global resolution of all corn cases, the separate proceedings were ultimately merged into a single nationwide settlement class.

For hybrid litigations like this one to succeed, plaintiffs' lawyers who are expected to collaborate must have secure financial expectations. They must know that judges will respect the contracts they enter into with their clients and with other attorneys. Consequently, judges should not treat hybrid litigations like simple class actions, in which lawyers do not have direct contractual relationships with absent class members. They should issue orders governing fee awards that recognize the lawyers' differing positions and that treat all lawyers fairly.

The good news is that the submission by Kansas MDL Co-Lead Counsel ("Kansas CLC")[2]

[1] Report of Professors Arthur R. Miller, Geoffrey P. Miller, Charles Silver, Brian T. Fitzpatrick, & Alexandra Lahav on Issues of Economics, Procedure, & Policy, ECF No. 3580-2 (filed July 10, 2018).

[2] Memorandum in Support of Kansas MDL Co-Lead Counsel and Settlement Class Counsel Christopher Seeger's Petition for Award of Attorneys' Fees, Reimbursement of Expenses, and Service Awards to Class

and the accompanying Declaration by Professor Klonoff[3] start from the same premise that we did in our initial report: when valid arm's-length agreements exist, they should be respected. Thus, both Kansas CLC and Professor Klonoff cite the willingness of Watts Guerra's signed clients to pay 40 percent fees as evidence that the 33.33% common fund fee award sought by Kansas CLC is reasonable. *See* Kansas CLC Mem. 74 ("In this unique case, thousands of producers were willing to pay lawyers at least 40% of their total recovery, so one-third is clearly reasonable for the work described herein."); Klonoff Decl. 15 ("The fact that thousands of individual plaintiffs agreed to 40 percent contingency arrangements confirms the reasonableness of the [33⅓ percent] requested [common fund] fee.").

When it comes to how to allocate the fee award between Watts Guerra and Kansas CLC, however, Kansas CLC rely on a different contract than Watts Guerra does. Watts Guerra relies on the JPA—the fee- and common benefit cost-sharing agreement with Kansas CLC that it signed years ago, at the outset of the litigation. By contrast, Kansas CLC rely on a February 23, 2018, Fee-Sharing Agreement—an agreement, after the litigation was won, that Watts Guerra refused to sign. *See* ECF No. 3587-8 (Ex. 8 to Kansas CLC Mem.) ("Fee-Sharing Agreement") (discussed at Kansas CLC Mem. 32-33, 87-88, 94; Klonoff Decl. 60). It should be obvious that, as between an agreement that Watts Guerra did sign and one that it did not, only the former—the JPA—can govern the allocation of fees between it and Kansas CLC. The Fee-Sharing Agreement can only govern the allocation among the lawyers who actually signed it.

Representatives/Bellwether Plaintiffs and Allocation of Attorneys' Fee Award, ECF No. 3587 (MDL 2591) (filed July 10, 2018) (hereinafter "Kansas CLC Mem.").

[3] Declaration of Professor Robert H. Klonoff Relating to Attorneys' Fees, Costs, and Incentive Payments, ECF No. 3587-6 (MDL 2591) (filed July 10, 2018) (hereinafter "Klonoff Decl.").

Oddly, neither Kansas CLC nor Professor Klonoff discuss the JPA;[4] nor do they tell the Court that Watts Guerra was not a party to the Fee-Sharing Agreement. Indeed, after reading their filings, a person unfamiliar with the history of the corn litigation against Syngenta would not know many other important pieces of information:

- From the start of litigation until its conclusion, Watts Guerra represented more than 57,000 individual plaintiffs pursuant to signed retainer contracts;
- For the entire duration of the litigation, Watts Guerra's 57,000+ contract plaintiffs were represented solely by Watts Guerra and its associate counsel; pursuant to the JPA entered by Watts Guerra, other Minnesota leaders, and Kansas CLC—and with approval by both Kansas and Minnesota Courts—those plaintiffs were explicitly excluded from any class action, they were not represented by any class action attorneys, and their ability to participate in the litigation did not depend on class certification;
- Watts Guerra's contract plaintiffs were included in the settlement class at the last minute by Mr. Watts—and had they not been the global settlement would have collapsed;

[4] Professor Klonoff does not mention the JPA at all. The CLC mention the JPA twice: a vague reference to shared work product in their Memorandum, and a characterization in the Stueve Declaration of that agreement as inapplicable in the event of class settlement—which characterization is contradicted by the JPA (which includes no such caveat) and the February 23 Fee-Sharing Agreement (which, tellingly, provides that it supersedes the JPA). *See* Fee-Sharing Agreement at 3; Kansas CLC Mem. 91 ("Pursuant to the Coordination Order and agreements between the Kansas attorneys and Minnesota attorneys, the Kansas Common Benefit Group's work product was made available to attorneys in the Minnesota jurisdiction."); Declaration of Patrick J. Stueve at ¶¶ 183-184, ECF No. 3587-1 (July 10, 2018) ("As part of our efforts to ensure and promote the efficient and rapid prosecution of these cases, Don Downing and I spent a considerable amount of time negotiating with some of the plaintiffs' counsel who had filed cases in Minnesota, Illinois and Louisiana regarding agreements that addressed, among other things: the joint depository of the millions of pages of documents produced in the matter by Syngenta and third parties; confirmed that the Kansas Co-Leads would take the lead on all fact discovery; established cost-sharing agreements, including for any shared experts, common benefit assessments in the event any individual case was settled outside of a class settlement; and the timing of trials."; "These agreements were important to our successful efforts in meeting the short fact and expert discovery deadlines established by the Court.").

- Judges Lungstrum and Sipkins both took note of the JPA and incorporated its terms into signed orders; and
- Watts Guerra and Kansas CLC cooperated for years believing that the JPA would govern their financial relationship in the event of a recovery.

These undisputed facts of record are crucial to understanding the law and equities of the fee issues in this case. Without knowing these facts, it is impossible to do what the Court's Order Regarding Attorney Fee Submissions requires: explain "the appropriate allocation of [the funds available to pay fees and reimburse expenses] among plaintiffs' counsel." *Id.* at 2, ECF No. 3613.

We explained in our initial report why valid arm's-length agreements should be the basis of the fee allocation, and, in light of Kansas CLC's and Professor Klonoff's agreement with that premise, we will not repeat all that we said here. Respect for such agreements leads to two conclusions. First, the Watts Guerra Group should receive a "vertical" transfer from its clients of 33.33% of their recoveries, voluntarily reduced from the 40% its clients agreed to pay. (Subject to the Court's approval, Kansas CLC and other common benefit counsel should receive the same 33.33% from their own individual clients and from absent class members.) Second, the Watts Guerra Group should pay the 27.5% of its fees promised in the JPA to Kansas CLC and the other common benefit counsel in Minnesota as compensation for access to common benefit work products—the "horizontal" transfer running between attorneys.

The Watts Guerra approach is preferable to Kansas CLC's approach—which, again, is based on a Fee-Sharing Agreement that Watts Guerra did not even sign—not only because it honors actual contractual commitments. It is also preferable because it ties the lawyers' recoveries to the recoveries of their clients. This is consistent with longstanding norms of lawyers—including class action lawyers—who work on contingency. This norm exists because it leads to good

incentives: lawyers whose fees are tied to their clients' recoveries have an incentive to maximize the recoveries that their clients receive. Thus, if Watts Guerra and its associate counsel receive 33.33% of the amounts recovered by their contract clients and Kansas CLC receive 33.33% of the recoveries of absent class members, both groups of lawyers will have the incentive to bring the largest possible number of the people they represent forward to make claims on this settlement. Maximizing class member participation is, of course, an important goal of class action litigation.

Kansas CLC's approach, by contrast, makes claims rates irrelevant. The difference is stark. Consider a realistic example based on preliminary claims rate data for WG clients to which we have been made privy: Watts Guerra's clients file claims worth 40% of the settlement fund, clients of the Clark/Phipps Group file 10% worth, other represented class members file 10% worth, and absent class members file 40% worth.[5] In that case, Table 1 provides the allocation differences.

Table 1: Example WG and Kansas CLC fee allocations

	Kansas CLC Proposal	Watts Guerra Proposal[6]	Claims on Settlement
Kansas CLC + Minnesota CC + Other Common Benefit Counsel	$312.5-412.5M	$282M	40%
Clark/Phipps Group[7]	$87.5M	$36.25M	10%
Watts Guerra Group	$0-100M	$145M	40%
Other Retained Counsel	$0-100M	$36.25M	10%

[5] *See also* Declaration of Mikal C. Watts at ¶ 340, ECF No. 3580-5 (filed July 10, 2018) (hereinafter "Watts Decl.") (as of July 2, 2018, 32,788 out of 64,700 completed claims received by the settlement claims administrator are from class members identifying themselves as represented by Watts Guerra).

[6] Notwithstanding the assumption by Watts Guerra that certain retained counsel should be subject to a higher assessment (*see* Mem. in Support of Fee & Expense App. by Watts Guerra LLP at 37-38, ECF No. 3611 (publicly filed July 16, 2018); *id.* at A-1 (math appendix)), our example assumes that all retained counsel will pay the same 27.5% common benefit assessment that Watts Guerra agreed to pay. If the Court orders other retained counsel to pay more than that, the allocation to other retained counsel would decrease and the allocation to Kansas CLC, Minnesota Class Counsel, and other common benefit counsel, would increase.

[7] We understand Watts Guerra cannot obtain any data on the claims rates by clients of Illinois or other retained counsel because of directions by Settlement Class Counsel to the settlement claims administrator. *See also* Watts Decl. ¶ 340 n.5.

It is true that, under the Watts Guerra proposal, the Court must know whose clients filed claims and whose did not. But we believe there are two straightforward ways the Court could incorporate that information into its fee order. One option is to award fees after all claims are processed and the recoveries flowing to contract clients and class members are known. Another option is to adopt a formula governing both vertical and horizontal transfers now, with payments to be made over time as claims are processed. The Court has discretion to choose either approach.

ANALYSIS

I. Existing Contracts Should Be Respected

Although the recommendations submitted by Kansas CLC and Watts Guerra differ greatly, they agree that when valid arm's-length agreements exist, they must be respected. Thus, as we noted, both Kansas CLC and Professor Klonoff want the Court to honor the Fee-Sharing Agreement entered into by some of the class's attorneys. Both also cite the willingness of Watts Guerra's signed clients to pay 40% fees as evidence that the 33.33% overall common fund fee award sought by Kansas CLC is reasonable.

We agree with these points. For example, we have no concern with the Fee-Sharing Agreement, so long as it is used only to allocate fees among the parties who signed it. Thus, if three groups of lawyers have agreed to a 50-12.5-17.5 split amongst themselves, we see no reason why the fees awarded to them should not be allocated in that ratio. But it goes without saying that the Fee-Sharing Agreement cannot speak to how those three groups of lawyers should split fees with lawyers like Watts Guerra who did not sign the Agreement.[8] As to the allocation between Watts Guerra and these three groups, there is another agreement that Watts Guerra actually did

[8] *See* Fee Sharing Agreement at 1 ("This Fee-Sharing Agreement ("Agreement") governs the division of attorney's fees and expenses *between the Parties* . . . ." (emphasis added)).

sign: the JPA. That is the agreement that sets Watts Guerra's allocation, and it says that Watts Guerra should transfer to the others 27.5% of whatever it receives from its contract clients.

We also agree that Watts Guerra's contracts with its clients provide valuable information about the fees that other class members should pay. Indeed, it is incredible to us that Kansas CLC cite Watts Guerra's fee contracts in support of their own application, but then ignore them when it comes to allocating fees with Watts Guerra. Kansas CLC's position seems to be that it should benefit from Watts Guerra's fee contracts but that Watts Guerra should not. Again, needless to say, the attorneys who should benefit from the fee contracts, first and foremost, are Watts Guerra and its associate counsel—the lawyers who took the time and spent the dollars that were needed to identify, educate, contract with, and bring suit for almost 58,000 clients. Yet, Kansas CLC give no weight to Watts Guerra's contracts in its allocation proposal.

As far as we are aware, there is no real dispute that Watts Guerra's fee contracts with its clients are valid or that the JPA is valid. These contracts should continue to govern Watts Guerra's fee rights and responsibilities.

II. The Value Of Encouraging Zealous Advocacy

In addition to honoring contractual commitments, Watts Guerra's approach also links the lawyers' fees to their clients' recoveries. This incentivizes lawyers to provide zealous representation, which matters at least as much in class actions as it does in conventional lawsuits. Indeed, when a settlement requires class members to file claims, as it does here, the need for zealous representation continues all the way until the claims process is complete.

A big advantage of the Watts Guerra approach is that it motivates all the lawyers—Watts Guerra and Kansas CLC alike—to ensure that class members participate in the settlement to the greatest possible extent. That is, if Watts Guerra receives 33.33% of the amounts recovered by its contract clients and Kansas CLC receive 33.33% of the recoveries of absent class members, both

groups will have the incentive to bring the maximum number of clients forward to make claims on this settlement.

By contrast, Kansas CLC's approach makes class member participation completely irrelevant. For example, Kansas CLC would reserve 62.5% of the overall fee awarded—$312.5 million—for themselves and Minnesota Class Counsel. Yet, there is no reason to think that absent class members will recover anywhere near that percentage of the Settlement Fund. Indeed, as we noted in Table 1, it is quite possible that absent class members will collect as little as 40% of the net Settlement Fund (or $400 million). If this happens, then the fees collected by Kansas CLC and Minnesota Class Counsel would come to 44% of their class members' recoveries ($312.5M/($400M +$312.5M) = .44)! In the many decades that we have studied class actions, none of us has *ever* seen a fee award that generous in a class action of this size.

The PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010), an American Law Institute project on which Professor Klonoff worked as an Associate Reporter,[9] emphasizes the importance of ensuring zealous representation by taking guidance from the traditional contingent fee model:

> Because fees have significant potential to harmonize the interests of lawyers and represented persons, judges can help ensure adequate representation by choosing fee formulas wisely. In this endeavor, judges should take guidance from the private market; they should attempt to employ the same fee and cost arrangements represented persons would use if they could hire lawyers directly. This requires the use of contingent-percentage compensation in claimant representations.

Id. §1.05 *Cmt.* h.[10]

[9] Professor Charles Silver was also a Co-Reporter on the Principles of the Law of Aggregate Litigation and Professors Arthur Miller and Geoff Miller served on its advisory board. Arthur Miller was also the Reporter for the ALI's forerunner to the Principles: the 1994 work entitled "Complex Litigation: Statutory Recommendations and Analysis." Professors Brian Fitzpatrick, Arthur Miller, and Geoff Miller are ALI members.

[10] *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*,962 F. Supp. 572 (D.N.J. 1997), *vacated on other grounds sub nom. In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283 (3d

Lawyers' efforts to separate fees from recoveries raise ethical concerns, too. For example, when plaintiffs enter into structured settlements that provide for payouts over time, some lawyers have asked to be paid their fees upfront based on the present value of the income stream. The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000) found such requests unethical, stating that, absent an agreement to the contrary, "the lawyer is entitled to receive the stated share of each such payment if and when it is made to the client." *Id.* §35 *Cmt.* e. Similarly, in *Johnson v. Nextel Communications, Inc.*, 660 F.3d 131 (2d Cir. 2011), the Second Circuit found that a breach of the fiduciary duty occurred and an unwaivable conflict of interest arose when Leeds, Morelli & Brown, P.C., the plaintiffs' law firm, entered into an agreement with the defendant, Nextel, according to which the latter would pay the lawyers up to $7.5 million without any guarantee that the plaintiffs would receive anything.

In both of the examples just discussed, the concern is that the lawyers engaged in self-serving behavior: they sought to make themselves better off by severing the connection between their fee payments and their clients' recoveries. Kansas CLC's fee allocation proposal raises this concern too. It is based on the Fee-Sharing Agreement that was negotiated by only some of the relevant lawyers and seeks to benefit them by disconnecting their payments from the amounts received by their class members. There could be a good reason for this, but Kansas CLC have not offered one.

By contrast, Watts Guerra's proposal enables the Court to preserve the connection between fees and recoveries in either of two ways. The Court can delay the consideration of fees until all

---

Cir. 1998), for an example in which a court motivated class action lawyers to help class members through the claims process by linking their fees to class members' participation. Prudential was not a hybrid litigation like this one. The justification for linking fees to participation was simply that the claims process was difficult and the value of the settlement could not be known until it was completed.

claims are processed and can then award Kansas CLC a fraction of their class members' actual recoveries. The PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION recognizes that judges have discretion to do this. *Id.* §3.13 *Cmt.* a ("A court may defer full fee determinations until the amounts actually paid to the class (directly or indirectly through cy pres) are ascertained."). Alternatively, the Court can adopt a formula based on claimants' actual recoveries now but time the payment of fees to correspond with the payment of claims. For example, the Court could order that Watts Guerra receive one-third of its signed clients' recoveries, that the class action lawyers receive one-third of their class members' recoveries, and that both fee payments be made when and as claims are processed. The Court could order Watts Guerra to make the payments required by the JPA over time, too. Once an appropriate order was entered, fees and common benefit transfers would occur automatically as claims were paid.

CONCLUSION

As we noted, for hybrid litigations like this one to succeed, judges should not treat them like simple class actions in which there are no lawyers with large numbers of signed clients. They must develop rules to govern fee awards that recognize the lawyers' differing positions and that treat all lawyers fairly.

Fair rules are especially important when, as here, lawsuits are pending in multiple fora. Then, the need for cooperation among lawyers is at its greatest while, at the same time, judges' powers are stretched to their limits. The likelihood that lawyers with cases in different courts will cooperate thus depends heavily on whether they want to do so, and their desire will be strongest when cooperation is based on financial terms that all lawyers accept.

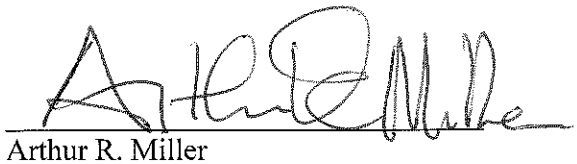
Watts Guerra's allocation proposal is eminently fair. It compensates the class action lawyers by awarding them a reasonable, court-determined percentage of absent class members' recoveries. It compensates Watts Guerra and its associate counsel by awarding them a (reduced)

percentage of their clients' recoveries, in keeping with their clients' signed contingent fee agreements. And it requires the Watts Guerra Group to pay for access to common benefit work product in the amount that was agreed to by Kansas CLC and Minnesota Class Counsel early in the litigation and that was later incorporated into judicial orders by both the Kansas and Minnesota Courts. The proposal respects all lawyers' rights and settled expectations while also preserving lawyers' incentives to represent claimants zealously and to cooperate with other lawyers on mutually advantageous terms.

* * * *

I declare under penalty of perjury under the laws of the United States that everything we have stated in the foregoing Report is true and correct.

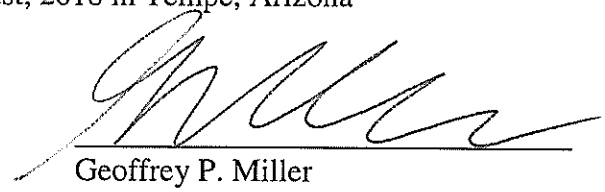
Executed this 17th day of August, 2018 in New York County, New York



Arthur R. Miller

I declare under penalty of perjury under the laws of the United States that everything we have stated in the foregoing Report is true and correct.

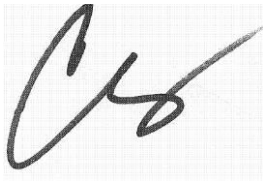
Executed this 17th day of August, 2018 in Tempe, Arizona



Geoffrey P. Miller

I declare under penalty of perjury under the laws of the United States that everything we have stated in the foregoing Report is true and correct.

Executed this 17th day of August, 2018 in Leelanau County, Michigan.



_____

Charles Silver

I declare under penalty of perjury under the laws of the United States that everything we have stated in the foregoing Report is true and correct.

Executed this 17th day of August, 2018, in Summit County, Utah

Brian T. Fitzpatrick

I declare under penalty of perjury of the laws of the United States that everything we have stated in the foregoing Report is true and correct.

Executed this 17th day of August, 2018 in Hartford County, Connecticut

Alexandra D. Lahav