

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

IN RE SYNGENTA AG MIR162 CORN
LITIGATION

Master File No. 2:14-MD-02591-JWL-JPO

THIS DOCUMENT RELATES TO
ALL CASES EXCEPT:

MDL No. 2591

*Louis Dreyfus Company Grains
Merchandising LLC v. Syngenta AG, et al.,
No. 16-2788-JWL-JPO*

*Trans Coastal Supply Company, Inc. v.
Syngenta AG, et al., No. 2:14-cv-02637-
JWL-JPO*

*The Delong Co., Inc. v. Syngenta AG, et al.,
No. 2:17-cv-02614-JWL-JPO*

*Agribase International Inc. v. Syngenta AG,
et al., No. 2:15-cv-02279-JWL-JPO*

**CONSOLIDATED RESPONSE OF KANSAS MDL CO-LEAD COUNSEL AND
SETTLEMENT CLASS COUNSEL CHRISTOPHER SEEGER TO THE
VARIOUS PETITIONS FOR ATTORNEYS' FEES AN EXPENSES**

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INTRODUCTION

In addition to Kansas, Minnesota, and Illinois Leadership, more than 25 law firms (the latter collectively “Movants”) seek attorneys’ fees and expenses from the common fund created by the Settlement. Kansas MDL Co-Lead Counsel and Settlement Class Counsel Christopher Seeger (“Kansas Lead Counsel”) now submit this consolidated response on behalf of Kansas Common Benefit Attorneys (sometimes referred to as “Kansas attorneys”).

Tremendous effort was expended by many talented lawyers in multiple venues prosecuting the claims against the Syngenta entities (collectively, “Syngenta”). At the beginning of this case, the Court established certain protocols for distinguishing work that benefited all plaintiffs, and work that only benefitted individual plaintiffs. *See* Order Establishing Protocols For Common Benefit Work And Expenses And Establishing The Common Benefit Fee And Expense Funds (“CBO”), ECF No. 936 at 7-11. That order defined common-benefit work as “services performed for the benefit of all producer and/or all non-producer plaintiffs,” including but not limited to:

investigation, discovery (whether documents, interrogatories, depositions or otherwise), coding or other analytical work relating to documents or evidence, research, motions and responses to motions, exhibits, bellwether trials and transcripts, all other work performed under the direction of Lead Counsel for the benefit of all producer and/or all non-producer plaintiffs, and orders on substantive matters involving Common Benefit Work. Authorization to perform Common Benefit Work shall be obtained from Lead Counsel under a procedure that they will determine.

Id. at 7-8. The CBO also expressly excluded certain work as not being for the common benefit: “Unless specifically and explicitly authorized in writing, no time spent on developing or processing individual issues in any case for an individual client, no time spent on the solicitation of potential clients and no time spent on any unauthorized work, will be considered or should be submitted.” *Id.* at 8. The Court made clear that the claims against Syngenta would be

prosecuted by the claims of “bellwether” plaintiffs and putative “class representatives,” and that “[n]o [other] client-related time” would be “considered Common Benefit Work.” *Id.* Numerous other examples of non-common benefit work were provided: “[c]alls and meetings to impart status information generally;” “mere attendance” at status conferences and hearings; “services and expenses related to experts retained without authorization by Lead Counsel;” attendance at seminars; unauthorized document review; and, “mere review” of filings and orders. *Id.* at 8-11. The Minnesota Court entered a similar order.

After a thorough, multi-step review of time records, over 140,000 hours of compliant common-benefit work occurred in the MDL. Additional such work occurred in Minnesota, under a similar CBO, and in Illinois. The work in Minnesota and Illinois, and related expenses, has been submitted by Lead Counsel in support of their joint request that 80 percent of the aggregate attorneys’ fees (equal to 33 ⅓ percent of the Settlement Fund net of expenses) be allocated to Lead Counsel for further distribution to the firms who performed this approved CBO work. This would leave up to 20 percent of the aggregate fee request net of expenses (approximately \$100.6 million)¹ to award to any other Movant entitled to attorneys’ fees or to redistribute to one or more of the Lead Counsel.

Movants’ requests put two central questions before the Court: *first*, should the Court adopt the proposed framework reached between Lead Counsel (50/12.5/17.5% allocation to Kansas, Minnesota, and Illinois Lead Counsel) with the assistance of the Special Masters that reserves up to 20% of the fee for other, deserving Movants (“Unallocated Fee”)?; and, *second*, if

¹ Once expenses are awarded, this number will be \$1-2 million lower because the percentages will be calculated off the net fund. Interest earned, however, on the settlement fund amounts in escrow should offset some of the expenses. In addition, this 20% will also be reduced if the Court awards the \$388,005 to Subclass Counsel from this allocation, as requested by Kansas attorneys (ECF No. 3587 at 94-85). Despite this, for simplicity Kansas attorneys will use the \$100.6 million calculation (20% x 503.3 million).

so, what if any fees should be allocated and awarded to the Movants and/or Lead Counsel from this Unallocated Fee? The answer to the first question is “yes.” The Court’s authority to award fees in a class action stems from Rule 23(h), which permits an award of “reasonable” fees “authorized by law,” where the law authorizes compensation to counsel who contributed to the creation or enhancement of a common fund (the “common-benefit doctrine”).

It cannot be seriously debated that the work described in Lead Counsel’s applications was the direct and material cause for the creation of the Settlement Fund. The CBO-compliant work of Kansas attorneys, in particular, includes all substantive and material work in the federal bellwether and class cases, as described in the Kansas Fee Application. In allocating an award of fees among counsel, the Court should be guided by prior jurisprudence, applying the same standards it utilizes in awarding fees under the common-fund doctrine: that is, it should apply the *Johnson* factors and weigh the relative benefits of the applicants in contributing to the creation or enhancement of the fund. Under this controlling framework, Kansas attorneys are entitled to the \$250 million fee they have requested because they, *first*, paved the road for all who followed by: defeating Syngenta’s motion to dismiss; leading fact and expert discovery; obtaining key admissions from Syngenta’s witnesses; securing class certification; and acquiring the only judgment—\$217.7 million on behalf of over 7,000 producers; and, *second*, presented Syngenta with the Hobson’s choice of accepting the \$1.51 billion deal or face a year of class-wide jury trials in a Kansas venue where it had already lost against lawyers who had already successfully tried one case to verdict with potential exposure well in excess of the \$1.5 billion settlement. There can be no doubt that their contributions to the creation of the Fund were at least half the reason Syngenta agreed to the settlement, justifying the Kansas Allocation of 50% of the aggregate fee.

Beyond the work described in Lead Counsel's applications, which encompasses all class and bellwether work, and for which Movants performing common-benefit work will be entitled to share, Movants cannot demonstrate that they meet the standards for an award of fees under the common-benefit doctrine. They concede that most of the work they describe in their applications and in their supplemental filings in response to the Court's July 18 Order is work performed for individual clients, not work that the Court described as common-benefit work in its CBO. Nor does it fit the parallel definition of work that created or enhanced the Settlement Fund, as required by the common-benefit doctrine. Nearly all the work identified in applications other than Lead Counsel is encompassed in the following categories; keeping clients updated about the status of the litigation, filing new cases, maintaining those cases by completing the required Plaintiff Fact Sheets ("PFS"), and assisting clients with their Claim Forms under the Settlement. Excepting certain uniquely situated Movants, PFS work, for example, accounts for 63.12% of their total hours and client communications accounts for 10.10% of total hours; together, these categories alone make up over 73% of the submitted hours. Beyond that, with one exception, Movants' cases did not proceed into discovery, pretrial, or trial; and, they performed no substantive work that might have been for the benefit of all plaintiffs.

The only serious argument they raise to justify how their efforts contributed to the creation or enhancement of the Fund is to assert that each case filed against Syngenta put incremental pressure on it to settle. There is little to recommend this argument, given that it was only the individual plaintiffs and their attorneys who had to expend resources to keep those cases alive. Syngenta itself had to do nothing with those cases, which were effectively stayed for the duration of the litigation. And even if such incremental pressure existed, it paled in comparison to the potential, immediate liability Syngenta faced from the Kansas judgment, the ongoing

Minnesota class trial, the *seven* additional MDL class trials it faced in 2018, and the many more MDL class trials it would likely face in 2019. It would have taken Movants years of substantial additional work just to replicate the liability the \$217.7 million Kansas judgment placed on Syngenta by Kansas attorneys, and even then any successes would be partially due to the groundwork done ahead of them.

If Movants' work contributed to the settlement at all, it was *de minimis*, and Courts do not award fees from a common fund for *de minimis* contributions. Even if the Court concludes the aggregation of these individual cases—work Movants created for themselves by excluding their clients from the certified class actions—contributed a more than *de minimis* amount to the settlement, that contribution does not exceed (and is likely much less than) 20% of the reason the Fund exists; thus, limiting any award to a portion of the Unallocated Fees is eminently reasonable. That Movants purport to have expended considerable labor maintaining their inventories does not, by itself, justify a fee under the *Johnson* factors, which gives greater weight to the results each lawyer obtained for the Class. Here, Kansas attorneys contributed the most, obtained the greatest results, and should receive the requested fee and, at least, a portion of any amount not awarded to Movants from the Unallocated Fee.

Implicitly acknowledging that their arguments under the common-fund doctrine are weak, many Movants, particularly Watts Guerra LLP (“Watts”), strongly urge that fees be awarded based on what Movants “could” try to collect on their private fee contracts with individual plaintiffs and that reasonableness is not required, but assumed by the contract. Rule 23(h) permits no such award and, in any event, requires this Court’s award to be reasonable, which Tenth Circuit precedent demands be evaluated under the *Johnson* factors. Any way you slice it, the question before the Court is how to allocate the aggregate fee, and that allocation

demands the determinations described above. After all, Kansas attorneys were not parties to Watts' private fee contracts with their clients, and those contracts say nothing about allocation of a class fee.

Watts and Bassford Remele LLP ("Bassford") vociferously argue that they and Kansas attorneys already agreed on how any fees should be allocated in their Joint Prosecution Agreements ("JPAs"). But the first such JPA did not address how any fees would be allocated in a class action; it only covered common-benefit fee and expense assessments described in the CBO, which makes expressly clear those assessments do not apply to a class settlement. If there was any doubt about this fact, the First Addendum to the JPA, where an agreement was made on how to allocate fees from one class action (a Minnesota state class), confirms that the agreement in the original JPA dealt with "assessments on individual cases." This was by design because Watts, Bassford and others intended for their clients to stay out of any class. Now, they want to participate in the class because it is in their client's best interest and, as Watts admits, will save them at least \$100 million in administrative costs.

It was always understood that, in such an outcome, which was made possible by Kansas attorneys' significant investment and success prosecution of the class litigation, the Court would decide fees pursuant to common-fund jurisprudence. Under such jurisprudence, it makes no sense to allocate fees based on the number of claims filed. While that may benefit individual clients, it does nothing to enhance or preserve the Fund. Syngenta paid \$1.51 billion for a release from every Class Member, not just those who submitted claims or hired a lawyer. In allocating fees, it should be acknowledged that the vast majority of those releases were purchased by Syngenta from the clients of class counsel, who remained in the litigation class.

That Watts now seeks an award of as much as \$180-200 million of the class fee, having delivered a minority of the releases and having performed a substantial minority of the common-benefit work, is simply not reasonable. Watts and Bassford are entitled to fees on their common-benefit work from the amount allocated to Minnesota Lead Counsel, and they fail to justify why they should be treated any differently than the other many lawyers who performed such work. To the extent they are entitled to additional fees for having filed a mass of individual cases, they stand in the same position as every other Movant in attempting to persuade the Court that this work contributed to the creation or enhancement of the Fund.

Other arguments are raised and responded to below, including discrete arguments as to each Movant with regard to both the fee and expense requests. If the Court agrees that some Movants performed compensable work under the common-benefit doctrine, it may be useful for the Court to identify that work, establish the framework for valuing it out of the Unallocated Fee (*e.g.*, a lodestar-based allocation, a percentage based allocation, or perhaps an allocation based on the number of cases filed), and refer the applications to the Special Masters for the specific findings necessary to determine each firm's award. The current applications certainly raise issues with regard to the requested expenses. Even if the Court finds that some expenses should be reimbursed from the Fund, the applications do not presently permit the Court to determine if the requested expenses fall within the requirements of the CBO. For example, many Movants appear to have included advertising costs, staff labor, equipment purchases, and other expenses that are appropriately characterized as overhead, not the types of reasonable expenses that a client would pay. These requests should either be denied, or submitted to the Special Masters for additional findings and information. In stark contrast, the record before the Court in support of

Kansas Lead Counsel’s request for fees and expenses is more than sufficient to grant their requested fees and expenses.

FACTUAL BACKGROUND

I. THE CLASS ACTIONS—PARTICULARLY THE EIGHT FEDERAL CLASS ACTIONS—PLACED ENORMOUS POTENTIAL LIABILITY ON SYNGENTA.

Kansas Lead Counsel incorporate by reference the facts and argument laid out in their July 10, 2018 Memorandum in Support of their Petition, including the supporting declarations and evidence submitted (collectively, “Kansas Fee Application”). ECF No. 3587. The Kansas Fee Application establishes the work of the Kansas attorneys,² including that they took the lead in virtually every key aspect of the litigation. ECF No. 3587 at 17-41. Their efforts—in, *inter alia*, defeating the motion to dismiss, securing key admissions in leading discovery, developing the liability and damages experts, preparing the cross examination of Syngenta’s experts, obtaining class certification, and securing a \$217.7 million judgment against Syngenta—paved the road for other litigants in who were just beginning to achieve victories in Minnesota, Illinois, and elsewhere. *Id.*

Through the efforts of these Kansas attorneys, the Kansas MDL was the only venue where Syngenta faced potentially crippling liability in an immediate timeframe. The eight certified state classes would have presented juries with the opportunity to award producers actual damages of approximately \$3 billion. Ex. 75 at ¶ 6. Kansas Lead Counsel confirmed to Syngenta that this liability was not merely hypothetical when they secured full damages on behalf of over 7,000 Kansas producers in the first and only case to reach a verdict. *Id.* at ¶ 222. The remaining trials were set to begin January 22, 2018, and all seven would have been concluded by the end of October 2018. See ECF No. 3319 at 8-9. In addition, having cleared

² Unless otherwise noted, all defined terms have the meaning ascribed to them in the Kansas Fee Application.

summary judgment in the Kansas case, Kansas attorneys would have sought punitive damages in six of the remaining trials. Ex. 75 at ¶ 6. Prior to settlement, they had already extensively planned—based on the learnings of the Kansas trial—how they would adjust their presentation and arguments to increase the odds of securing such damages in 2018. *Id.* at ¶ 7. Moreover, on September 15, 2017, Kansas attorneys moved to certify twelve additional state classes based on the same record that had previously proven successful. ECF No. 3431, 3436. These classes would have covered producers in the entire corn belt, and exposed Syngenta to even further potential liability. Kansas attorneys’ expectation was that several of these cases would be ready for trial in 2019, following and if certified. Ex. 75 at ¶ 8. The Kansas MDL was the only venue where Syngenta faced such potential liability and in the immediate and intermediate future. *Id.*

The Minnesota class trial also presented jurors an opportunity to award \$493 million in actual damages against Syngenta, along with potential punitive damages. Kansas attorneys provided material support to the Minnesota class trial. They prepared the experts for class certification and handled the evidentiary hearing, and much of their briefing was used in Minnesota. *Id.* at ¶ 13. They also provided trial support, providing, at Minnesota’s request: Kansas attorneys’ exhibit list, drafts of their *Daubert* briefing, their response to Syngenta’s pre-verdict motion for judgment, admitted trial exhibits, juror feedback, and their regulatory timeline. *Id.* at ¶ 14.³ Minnesota attorneys also had the benefit of the complete trial transcript, which they requested and Kansas attorneys provided, and all public filings in Kansas. *Id.* Further, Co-Lead Counsel Don M. Downing personally prepared both of the Minnesota damages experts, Drs. Carter and Babcock, for trial, traveling to meet with them and Minnesota counsel

³ In addition, Kansas attorneys previously initiated and spearheaded the strategy that led Syngenta to withdraw its standard of care expert, J. Thomas Carrato, from the *Mensik*, Kansas, and Minnesota class trials. See ECF No. 3587 at 36.

on several occasions, including to Minnesota for the final prep session. Ex. 77 (Supplemental Declaration of Don Downing) at ¶¶ 15-18. The Minnesota class trial did not reach a verdict prior to settlement and the Minnesota damages expert never testified at the trial. Ex. 75 at ¶ 16; Ex. 77 at ¶ 19.

After the Kansas judgment, the Court moved the start of the next MDL trial to January 2018, so that the parties could engage in serious settlement discussions. ECF No. 3311, Hr'g Tr. at 2423-24. The acquisition of Syngenta by ChemChina, and delays through the summer of 2017 in the closing of that acquisition, delayed Syngenta's ability to put a settlement offer on the table, prior to the fall of 2017. Ex. 75 at ¶ 17. Prior to the start of the Minnesota class trial, the parties had begun exchanging settlement figures. The Kansas verdict and the series of class trials scheduled for 2018 in the MDL played a significant role in convincing Syngenta to get serious about global resolution. Ex. 76 at ¶ 5 (Seeger Decl.). By the time the Minnesota class trial started, it appeared almost inevitable to Kansas Lead Counsel that Syngenta would offer \$1.5 billion. *Id.* at ¶ 18. The suggestion that Mikal Watts' cross examinations of two Syngenta employees was a material factor in reaching this settlement amount is unfounded.⁴ To the contrary, after those events, Plaintiffs' demand dropped by more than Syngenta's rose. *Id.* at ¶¶ 19-20. One cannot draw causality between the settlement and any particular event in the Minnesota class trial because the settlement was the culmination of months of negotiations, during which the parties tested each other's resolve. Ex. 76 at ¶¶ 5-7.

The overall benefits of the Minnesota litigation are recited in the Kansas Fee Application. See ECF No. 3587 at 42-44. Much is made in the Movants' papers of the threat of the over 70,000 individual cases purportedly filed there. Only one case, a single plaintiff in the *Mensik*

⁴ See Ex. 78 (Supplemental Declaration of Professor Robert H. Klonoff) at ¶ 68 n.82.

case, reached trial. It settled, but only for that plaintiff, and perhaps only to give Syngenta's lawyers—just off the Kansas trial—the opportunity to regroup and recharge before the Minnesota class trial started. Ex. 75 at ¶ 35. There was little probability that the *Mensik* result could be repeated *ad infinitum*. As this Court previously noted, the “amounts at stake per farm are small enough that separate suits may be impracticable for many class members.” ECF No. 2547 at 28. The prospect and attendant costs of preparing each individual case for trial to achieve a case-by-case settlement was unrealistic. Ex. 75 at ¶ 37. Furthermore, it would have taken success in achieving *full damages* in as many as 7,000 individual trials to repeat the outcome of the Kansas class trial, and expose Syngenta to the same liability that the one Kansas trial brought to bear on it. Even if those plaintiffs secured a punitive damages award of ten-fold actual damages, it would have taken as many as 700 individual plaintiff trials.⁵ *Id.* at ¶ 38. There were nowhere near this many cases ready for trial. *Id.* at ¶ 39. And, even if there had been, potential liability in the additional MDL class trials would have been rising exponentially at the same time. Consequently, the individual cases likely put little, if any, added pressure on Syngenta, as it was facing multi-billion dollar exposure due to Kansas attorneys' efforts in securing class certification and winning the Kansas class trial. *Id.*⁶

Syngenta made clear that its primary motivation in settlement discussions was to secure a class-wide release from all U.S. corn farmers who may have priced corn during the relevant time period. Ex. 76 at ¶ 6. Although it hoped that plaintiffs who filed individual cases, like Watts',

⁵ Minnesota individual plaintiffs represent that their damages expert put per-bushel damages at a higher amount than Dr. Babcock. ECF No. 3568 at 17 n.7. Tellingly, however, Minnesota attorneys elected to use Dr. Babcock in the Minnesota class trial. Moreover, that expert's damages were only higher in one marketing year. *Id.*

⁶ See Ex. 78 at ¶¶ 51-73.

would participate, it “was willing to proceed with a settlement without them—if necessary—as long as the settlement included a class-wide release.” *Id.* at ¶ 7.

Under the settlement, all Class Members release their claims, regardless of whether the Class Member filed a claim to secure a portion for the Settlement Fund. *Id.* at ¶ 40. Importantly, by definition, all Class Members suffered the same injury. Consequently, throughout negotiations, Kansas attorneys advocated for the least burdensome, longest, and simplest claims process to which it could persuade Syngenta and other members of the PNC to consent. For nearly all producers, the current Claims Form requires only two substantive answers: the percentage of corn fed on farm in the relevant marketing years and whether they purchased and planted Agrisure Viptera and Duracade. Ex. 75 at ¶ 41.

If the Settlement Fund had been divided between separate “class” and “individual” settlements, as set out in the term sheet,⁷ based on a *pro rata* allocation of corn bushels produced by each respective group, around 74 percent would have been allocated to a settlement of the certified, federal class. *Id.* at ¶¶ 42, 45. This would not have included the certified Minnesota class, which represented eight percent of total bushels.⁸ Allocation between the initially proposed two-settlements caused an impasse in the negotiations. Only once the Courts and Special Masters made clear they wanted a single, nationwide settlement class did it become possible for the parties to agree to treat all similarly-situated producers equally in allocating the total Settlement Fund. It also meant that the determination and allocation of attorneys’ fees

⁷ The initial term sheet left the matter of allocation between class and individual settlement open.

⁸ Watts produced an analysis purporting that their clients represented 23% of potential bushels. ECF No. 3508-4 at 9. As Dr. Babcock explains, that analysis is unreliable because of sampling bias and unfounded assumptions. A more reliable estimate is that Watts’ clients produced 12.2% of corn bushels over the relevant time period. Ex. 80 at 5.

would be decided by the Court, in consultation and with the approval of the Minnesota and Illinois Federal Courts. *Id.* at ¶ 46.

Consistently, the Settlement Agreement provides that the Settlement Fund shall be “under the direction and jurisdiction of [this] Court.” ECF No. 3507-2 at § 2.20; *accord id.* at 4.1. It required that “Settlement Class Counsel and other counsel representing Class Members who performed work for the benefit of Class Members shall make Fee and Expense Applications to” one of the Courts and that this Court shall issue any Fee and Expense Award. *Id.* at §§ 7.2.1 & 7.2.2. Any “disputes arising from the Fee and Expense Award shall be subject to the jurisdiction of the Court,” with certain exceptions. *Id.* at §§ 2.20, 4.1.1, 7.23. The Settlement Agreement, signed by Settlement Class Counsel, Co-Lead Counsel and Watts, “supersedes all prior ... agreements ... relating to the subject matter of this Agreement.” *Id.* at § 9.24.1.

II. THE JOINT PROSECUTION AGREEMENTS COVERED INDIVIDUAL COMMON-BENEFIT ASSESSMENTS UNDER THE CBO, NOT CLASS FEES.

On February 20, 2015, the Kansas Co-Lead Counsel submitted a proposed Order Establishing Protocols for Common Benefit Work and Expense Funds (“proposed CBO”). Ex. 75 at ¶ 99; Ex. 81. Many of the Movants were copied on the email, including but not limited to Mikal Watts. Ex. 81 at 1-2. The proposed CBO laid out a proposed schedule of “assessments” that Syngenta would be required to “holdback” from any state or federal, filed or unfilled, recovery or settlement, and pay into a Common Benefit Fund. *Id.* at 19-22. It further stated that “no assessment[s]” would apply “to the portion of any class recovery distributed to [an] individual class member if the class member remains in the class (i.e., does not opt-out of the class). Instead all fees and expenses for that class member will come out of the overall class recovery funds provided by defendants, as approved by the Court.” *Id.* at 19.

On March 20, 2015, Watts (and others) jointly filed with Co-Lead Counsel an extension of the former's deadline to respond to the proposed CBO, representing that "negotiations concerning [the CBO] may yield an agreement concerning [it]." ECF No. 303 at 1. That agreement was necessitated because the parties anticipated correctly that the Court would hold "that it lacks jurisdiction to subject [attorneys and plaintiffs without cases in the federal MDL] to the obligations of a common benefit order." Ex. 75 at ¶ 103 (quoting ECF No. 403 at 3). At the time, Watts was in the early stages of seeking consolidation of their individual cases in Minnesota and seeking leadership. Ultimately, those negotiations yielded an agreement. *Id.* at ¶ 103-04. And, on April 15, 2015, Co-Lead Counsel e-mailed the Court a revised proposed CBO consistent with that agreement, proposing agreed-upon assessments applicable to individual cases filed by Watts Guerra LLP. *Id.* at 104. The revised proposed CBO continued to contain the paragraph stating that these assessments were inapplicable in the event of a class recovery. *Id.* The agreement reached, however, called for the Court to approve it, and the Court declined to do so, concluding that it could not or should not "interject itself ... into a private contractual relationship." ECF No. 403 at 16.

On May 8, 2015, however, the Court issued a Memorandum and Order that otherwise overruled all objections lodged against an amended version of the proposed CBO, except for the requirement that assessments be applied to cases outside the Court's jurisdiction. *See* ECF No. 403. The Court concluded, as expected, that it lacked jurisdiction to require assessments on cases outside of the MDL unless the parties agreed to it. *Id.* The Court's Memorandum and Order instructed Co-Lead Counsel to submit a revised version of the CBO in compliance with the Court's holdings. *Id.*

Watts and Co-Lead Counsel reconfirmed their desire to effectuate their agreement, notwithstanding the Court's refusal to approval it. Ex. 75 at ¶ 110. Thus, on June 18, 2015, Co-Lead Counsel and prospective Minnesota Lead Counsel, including Watts, executed an Amended and Restated Joint Prosecution Agreement in the Syngenta Litigation ("JPA"). *Id.* at ¶ 111. The JPA was intended to "resolve all potential, future disputes in connection with Common Benefit Assessments." *Id.* (quoting JPA at 4). But the agreement defined such "Common Benefit Assessment[s]" to mean "a common benefit fee and expense assessment ordered by a state or federal MDL court in connection with a state or federal MDL." *Id.* (quoting JPA at § 1.b.). The ordered assessments referred to the Court's May 8, 2015 Memorandum and Order setting the "Benchmark Common Benefit Assessment." *Id.* (citing JPA at §§ 1.a, 1.d).

On June 22, 2015, a final revised CBO, incorporating the JPA, was submitted to the Court. *Id.* at ¶ 112; Ex. 83. Mikal Watts, among others, were copied on the submission. Ex. 83. Neither Watts, nor anyone else, objected to the content of this final version, which expressly referenced the Remele/Sieben Group's, including Watts', rights and obligations under the JPA. *Id.* at ¶ 112. On July 27, 2015, the Court entered this version of the CBO. *Id.* at ¶ 113 (citing ECF No. 936). It summarized the JPA, in relevant part, as follows: "[Members of the Remele/Sieben Group] shall pay fee and cost assessments of fifty percent (50%) of the level ordered by this Court for MDL Counsel for all [non-MDL] clients." *Id.* (quoting ECF No. 936 at 5). The effective CBO continued to contain, in relevant part, the same language as the initially proposed CBO; to wit, the inapplicability of any "assessments" to a class settlement:

In the event that there is a class settlement, recovery or judgment in favor of the class, no assessment pursuant to this Section will be made, either for attorneys' fees or for expenses, individually from any class member or his/her/its individual attorney as to the portion of any class recovery distributed to that individual class member if the class member remains in the class (i.e., does not opt-out of the class). Instead, all fees and expenses for that class member will come out of the

overall class recovery funds provided by defendants, as approved by the Court, or as otherwise Ordered by the Court. The relationship between class counsel fees and costs obtained through any class settlement or judgment and the Common Benefit Fund will be addressed, if necessary, by later order of the court.

Id. (quoting ECF No. 936 at 20).

It was always intended that this paragraph operate to make clear that “assessments” only applied to individual recoveries; that they would not apply to a class recovery; and in the event of a class recovery, Kansas attorneys would be entitled to seek attorneys’ fees and expenses from the overall class fund for anyone who remains in the class, unencumbered by the CBO or JPA assessments. Ex. 75 at ¶ 114. During negotiations over the CBO and JPA, revised versions of the CBO were submitted to the Court several times. No one, neither Watts nor any other Movant, ever objected to this understanding or raised an issue with the language quoted above. If anyone had raised an issue or suggested that individual-case assessments set out in the CBO or JPA would limit, govern, or be a benchmark for the attorneys’ fees available from a class settlement, Co-Lead Counsel would not have agreed to either the JPA or to the proposed CBO. *Id.* at ¶ 115.

This understanding is fully consistent with the JPA, which governs only Common Benefit Assessments, and not any award of attorneys’ fees in a class settlement. *Id.* at ¶ 116. In January 2016, the parties executed a First Addendum to the JPA (“Addendum to JPA” or “Addendum”) where, for the first time, they specifically reached a fee-sharing agreement regarding a class action. Ex. 84 (Addendum to JPA). But that was in a very limited circumstance, where Minnesota counsel agreed to pay a flat fee to Co-Lead Counsel of “33⅓ percent of the attorneys’ fees awarded in all MN MDL Class Actions.” *Id.* at § 2.a.iv. The “MN MDL Class Actions” were defined to mean “any action pursued in the MN MDL Court.” on behalf of a class of Producers or Non-Producers whether or not such class has been certified.” *Id.* at § 1.d. It does

not cover any federal class action. *Id.* at § 1.c. (“Federal MDL Class Action means any action pursued in the Federal MDL Court on behalf of a class of Producers or Non-Producers....”).

Importantly, the Addendum confirms the understanding that the JPA-assessments applied only to individual cases. Specifically, in a provision addressing what would happen if the Minnesota class was not certified and one of the JPA parties⁹ prosecuted a putative class members’ claims in “one or more individual actions,” the agreement stated that the party would be “subject to all of the same rights and obligations of the Remele/Sieben Group including, but not limited to, *the assessments on individual cases set forth therein* [in the JPA]”. *Id.* at § 3.b (emphasis added). This Addendum was signed by, *inter alia*, Mikal Watts, Francisco Guerra IV, and Lewis A. Remele, Jr. *Id.* at 8-16.

Kansas attorneys have consistently taken the position that the JPA and its Addendum are inapplicable to a federal class settlement because the fee-sharing agreements reached therein do not apply to a class settlement. Ex. 75 at ¶ 119. From inception of the litigation, they have always expected that if they were successful in certifying a litigation class, many of the producers who filed individual cases would want to participate in a class settlement. *Id.* at ¶ 120. They invested heavily in that strategy, working hard over a sustained period of time. The strategy was, ultimately, successful. *Id.* at ¶ 120.

III. MOVANTS CLAIM A LODESTAR OF OVER \$175 MILLION, WHICH IS PREDOMINANTLY ADMINISTRATIVE WORK.

On July 18, 2018, the Court entered an order requiring everyone who filed a motion and petition for an award of attorney fees and expenses to categorize their time, fees and expenses pursuant to a Court-supplied schedule. ECF No. 3613. The categorization required counsel to

⁹ Some of the attorneys appointed to leadership in Minnesota were not originally parties to the JPA. The Addendum added them as parties. Ex. 84 at 2. This paragraph did not modify any existing rights or obligations under the JPA, but extended those rights and obligations to these new parties. *Id.*

place time and lodestar in one of two sets of columns: “Approved Common Benefit Work” and “Other Work.” ECF No. 3613-1. For Kansas attorneys, “Approved Common Benefit Work” was strictly limited to the work approved by Co-Lead Counsel. Ex. 75 at ¶ 58. Thus, the categorizations of “Approved Common Benefit Work” matched what was submitted in the Kansas Fee Application. See ECF No. 3641.¹⁰ For Minnesota attorneys, Minnesota Lead Counsel attached a consolidated set of charts for most of the firms listed on Exhibit 13 (ECF No. 3662-1 at 529) of Daniel E. Gustafson’s declaration attached to the Minnesota Fee Application. See ECF No. 3662-2 at ¶ 4 (Gustafson Supp. Decl.). However, additional Minnesota attorneys listed on an amended Exhibit 14 to Gustafson’s original declaration (ECF No. 3662-2 at 53) were then instructed to prepare separate supplemental filings and to include time spent on individual PFS and non-lead counsel’s bellwether work as “Approved Common Benefit Work.” ECF No. 3662-2 at ¶ 18 (Gustafson Supp. Decl.). Thus, it appears Minnesota Movants applied two definitions of “Approved Common Benefit Work,” one for Lead Counsel’s submission and another for their own. In contrast, all Kansas bellwether work submitted under the CBO was included in both the initial Kansas Fee Application and supplemental filings, but individual PFS work by contracted attorneys (for non-bellwether cases) was not identified as “Approved Common Benefit Work.” Ex. 75 at ¶¶ 60-61. Other Movants, such as Heninger Garrison Davis LLC and associated counsel (“Heninger”), placed nearly all of their time in “Approved Common Benefit Work” even though most of it did not fall within the definition of approved work subject to the CBO applicable in the *Poletti* case. *Id.* at 62.

¹⁰ One filer, the Speer Law Firm, included “Approved Common Benefit Work” as part of a supplemental fee application that was not included in the Kansas Fee Application due to extenuating circumstances. Kansas attorneys have agreed to review and accept this common-benefit work. See ECF No. 3663. See *infra*, Argument § XXIV.

These points are noted to assist the Court in the interpretation of the filings. The chart on the next page summarizes the submissions for all Movants, exclusive of what was included in the filings of Lead Counsel. Thus, for example, the work reported in Exhibit 13 to Gustafson's declaration, which is part of Minnesota Lead Counsel's application, is not included in this chart. Because some firms included Exhibit 13 "Approved Common Benefit Work" in their individual filings (such as the Watts firm), amounts on the chart may be lower than what is reflected in the associated filing. Ex. 75 at ¶ 60.

[CONTINUED ON NEXT PAGE]

Firm	Approved Common Benefit Hours	Other Hours	Total Hours	Approved Common Benefit Lodestar	Other Lodestar	Total Lodestar
Bassford Remele, P.A. (#3640)		1,997.7	1,997.7		\$932,638.50	\$932,638.50
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C (#3658)		489.3	489.3		\$192,744.00	\$192,744.00
Borgess Law, LLC (#3638)	72.0	202.0	274.0	\$28,057.50	\$80,780.00	\$108,837.50
Brad Morris Law Firm, PLLC (#3652)		3,385.2	3,385.2		\$519,805.50	\$519,805.50
Conmy Feste Ltd. (#3631)	210.9		210.9	\$49,173.00		\$49,173.00
Coxwell & Associates, PLLC (#3637)	880.0		880.0	\$179,424.00		\$179,424.00
Doyle LLP (MN)	622.1		622.1	\$153,940.00		\$153,940.00
Dunk Law Firm (#3630)		1,630.0	1,630.0		\$362,900.00	\$362,900.00
Heninger Garrison Davis, LLC & Ass'd Counsel (IL #354)	16,843.4	5,953.0	22,796.4	\$8,274,749.39	\$3,074,908.17	\$11,349,657.56
Hodge Law Firm (#3636)		1,380.8	1,380.8		\$587,237.50	\$587,237.50
Hossley-Embry, LLP (##3622, 3623)	221.0	10,279.0	10,500.0	\$76,200.00	\$2,608,575.00	\$2,684,775.00
Johnson Becker PLLC (#3650)	912.7	43,043.0	43,955.7	\$394,147.50	\$6,067,830.00	\$6,461,977.50
Kemp, Jones & Coulthard, LLP (MN)		3,161.8	3,161.8		\$916,777.50	\$916,777.50
Law Offices of A. Craig Eiland (#3647)		13,254.0	13,254.0		\$5,160,250.00	\$5,160,250.00
'Maggio Thompson, LLP (#3649)	250.0	202.7	452.7	\$68,750.00	\$27,475.50	\$96,225.50
Meshbesher & Spence, Ltd. (#3634)	792.5	687.0	1,479.5	\$396,250.00	\$184,300.00	\$580,550.00
Nolan Law Group (#3645)	637.6	543.1	1,180.7	\$250,855.00	\$213,552.50	\$464,407.50
O'Hanlon, Demerath & Castillo/Demerath Law Office (#3656)		9,505.5	9,505.5		\$3,902,494.31	\$3,902,494.31
Paul Byrd Law Firm, PLLC (#3660)		21,984.8	21,984.8		\$5,079,780.00	\$5,079,780.00
Paul Byrd's Associated Firms (#3660)	669.7	5,522.7	6,192.3	\$371,812.50	\$2,611,342.50	\$2,983,155.00
Paul LLP (#3635)		3,703.9	3,703.9		\$1,360,118.75	\$1,360,118.75
Pavlack Law, LLC and Wagner Reese, LLP (#3625)	108.9	185.1	294.0	\$32,424.00	\$60,045.00	\$92,469.00

Firm	Approved Common Benefit Hours	Other Hours	Total Hours	Approved Common Benefit Lodestar	Other Lodestar	Total Lodestar
Pendley, Baudin & Coffin, L.L.P. (#3653)	251.9		251.9	\$70,033.00		\$70,033.00
Shields Law Group, LLC (#3654)	8,336.6	7,840.0	16,176.6	\$5,280,683.25	\$4,571,000.00	\$9,851,683.25
Sunde Olson Kircher and Zender, PLC (MN)	25.7	47.1	72.8	\$6,425.00	\$11,775.00	\$18,200.00
The Lyon Firm, A Law Corp. (#3632)	130.1	66.0	196.1	\$20,352.50	\$26,415.00	\$46,767.50
Toups/Coffman Referral Counsel (#3646)		11,022.3	11,022.3		\$5,589,666.57	\$5,589,666.57
Toups/Coffman/Richardson (#3646)		58,535.5	58,535.5		\$19,379,019.37	\$19,379,019.37
Wagstaff & Cartmell, LLP (#3651)		3,300.6	3,300.6		\$1,257,451.00	\$1,257,451.00
Watts Guerra LLP (#3661)		373,217.0	373,217.0		\$38,127,193.00	\$38,127,193.00
Watts Guerra's Associate Counsel (#3661)	126,039.1	54,021.9	180,061.0	\$40,418,304.33	\$14,497,330.77	\$54,915,635.10
Westervelt, Johnson, Micoll & Keller, LLC (#3655)		1,663.0	1,663.0		\$316,350.00	\$316,350.00
Wilcox & Williams, LLC (#3648)	74.6		74.6	\$9,325.00		\$9,325.00
Wright & Schulte, LLC (#3628)	2,854.2	2,958.1	5,812.3	\$636,065.00	\$1,279,905.00	\$1,915,970.00
Grand Total	159,932.8	639,781.9	799,714.7	\$56,716,970.97	\$118,999,660.44	\$175,716,631.41

In short, Movants claim **799,714.7** hours of work and approximately **\$175,716,613.41** in lodestar. See Ex. 75 at ¶ 72.

Heninger stands apart from many of the Movants because they conducted substantive discovery and managed a bellwether pool, similar to—although also subsequent to—the bellwether discovery pools in Kansas and Minnesota. *Id.* at ¶ 74. Thus, Heninger is excluded from the next summary below and is discussed individually *infra* at Argument § IV. In addition, Johnson Becker PLLC (“Johnson Becker”) and the Law Offices of Craig A. Eiland (“Eiland”) are excluded because they purport to have performed substantive work in the Williamson County, Illinois court and are listed as referral counsel by Martin J. Phipps and Clayton Clark (“Illinois Lead Counsel”) and, therefore, fall under the Clark Allocation of the Fee-Sharing Agreement. Ex. 75 at ¶ 75.

Excluding Heninger, Johnson Becker, and Eiland, the chart on the next page shows a summary by task of the work Movants purport to have performed. Over 82% of their work falls into just three categories: PFS compliance (63% of total hours); assisting clients with Claim Forms (10%); and pre-settlement communications with clients (9%). None of these Movants reported work on: *Daubert* briefing; defense experts; motions in limine; trial briefing / jury instructions; or, post-trial briefing. Ex. 75 at ¶ 76.¹¹

¹¹ Some of the work appears clearly misclassified. For example, 66.60 hours was reported on trial work, when no individual cases were tried. In addition, 1,015 hours were reported as administrative work as court-appointed leadership.

Task	Total Hours	% of Total Hours	Total Claimed Lodestar	% of Total Claimed Lodestar	Blended Rate
PFS	454,305.08	63.12%	\$70,569,035.55	46.20%	\$155.33
Assisting clients in perfecting claims in settlement	72,663.95	10.10%	\$19,177,497.67	12.56%	\$263.92
Pre-settlement communications with clients	64,702.79	8.99%	\$23,606,067.52	15.45%	\$364.84
Other (describe)	57,248.16	7.95%	\$23,762,001.37	15.56%	\$415.07
Paper discovery (plaintiffs)	47,880.90	6.65%	\$5,968,046.25	3.91%	\$124.64
Discovery file management	8,904.60	1.24%	\$4,657,271.90	3.05%	\$523.02
Complaint Drafting	5,654.23	0.79%	\$2,208,621.91	1.45%	\$390.61
Preparation of fee petition	3,300.30	0.46%	\$936,569.18	0.61%	\$283.78
Paper discovery (Syngenta/3d parties)	2,259.25	0.31%	\$426,534.25	0.28%	\$188.79
Administrative work as court-appointed leadership	1,015.10	0.14%	\$372,621.25	0.24%	\$367.08
Defend fact depositions (plaintiffs)	859.30	0.12%	\$638,900.00	0.42%	\$743.51
Settlement negotiations	269.80	0.04%	\$99,115.00	0.06%	\$367.36
Plaintiffs' expert witness work	199.90	0.03%	\$127,972.50	0.08%	\$640.18
Other pretrial motion practice	153.10	0.02%	\$63,365.00	0.04%	\$413.88
Dispositive motion briefing/argument	120.70	0.02%	\$62,499.50	0.04%	\$517.81
Trial (presenting witnesses & argument)	66.60	0.01%	\$32,130.00	0.02%	\$482.43
Fact depositions (Syngenta/3d parties)	52.70	0.01%	\$20,600.00	0.01%	\$390.89
Class Certification	30.60	0.00%	\$3,512.50	0.00%	\$114.79
Discovery motion practice & communications	21.50	0.00%	\$12,385.00	0.01%	\$576.05
Grand Total	719,708.56	100.00%	\$152,744,746.35	100.00%	\$212.23

This work was largely administrative. For example, unlike Lead Counsel, Movants did not have to conduct substantial factual and legal investigation to draft complaints because they were able to take advantage of federal and Minnesota Master Complaints, where the process for filing a notice to conform required the lawyer only to collect demographic and corn-harvesting acreage information about the producer. These lawyers could also rely on the substantial work product publicly available reflected in the Master Complaints. Perfecting claim forms also required only

administrative assistance given the simplicity of the Claim Form. Ex. 75 at ¶ 78. Pre-settlement communications with clients (at least those that would not have fallen into one of the substantive categories, like preparing for a fact deposition) would have entailed little more than answering questions and providing clients with updates about the progress that Lead Counsel were making. This was, thus, largely administrative, particularly since bellwether plaintiff activities were considered common-benefit and predominantly handled by Lead Counsel. *Id.* at ¶ 79. Other administrative categories, like discovery file management, contain significant amounts of time (8,904 hours) at high rates (\$523 per hour). *Id.* at ¶ 80.

By far, the largest category of hours claimed was PFS compliance: 454,305.08 hours. Most of that time (397,978 hours) was claimed by Watts and Watts' referral firms (collectively, "Watts"). *Id.* at ¶ 81. Although they purport to represent 57,385 clients, they never disclose the number PFSs completed and served. But even assuming the completion rate was 100%, this would mean they spent 6.9 hours on average, per PFS. *Id.* at ¶ 82. In contrast, Paul LLP ("Paul"), who unlike Watts recorded time on their individual cases contemporaneously, expended 1,452 hours on PFS compliance (ECF Nos. 3581 at 1, 3581-1 at 4 (¶ 8)); their co-counsel expended an additional 619 hours (ECF No. 3637), for a total of 2,071 hours. Because Paul disclosed that they completed and served 1,084 PFSs, a reliable estimate of their average time spent per PFS was only 1.9 hours. ECF No. 3581-1 at 4 (¶ 9). Watts was, thus, more than three-and-a-half times less efficient than Paul. Given the scale of Watts' inventory, however, one would expect Watts to be *more* efficient not less efficient than other firms. Ex. 75 at ¶ 83. If 1.9 hours per FS was a more reasonable estimate of the amount of firm time necessary to complete a PFS, Watt's total PFS hours would fall to 109,031 (more than \$10 million in claimed lodestar). *Id.* at ¶ 84.

Because most Movants fail to disclose the number of PFSs they completed, it is impossible, at this time, to determine the per-PFS time spent by each firm, or to evaluate its reasonableness. For Watts, however, it cannot be *less* than 6.9 hours per PFS, given that they disclose their total number of clients. Other firms with significant PFS-related hours include: Mitchel A. Toups and the Coffman Law Firm and affiliated counsel (“Toups/Coffman”), who spent 21,468 hours on PFS work; the Paul Byrd Law Firm PLLC and affiliated counsel (“Paul Byrd”), who spent 20,717 on PFS work. Ex. 75 at ¶ 85. Neither discloses the number of PFSs served. Toups/Coffman do not even disclose the number of their clients who filed cases. Paul Byrd, however, purports to have filed approximately 2,500 cases, which would mean they spent no less than about 8 hours per PFS on average. *Id.*

Rates used to calculate the claimed lodestar for PFS work vary significantly. Watts recognized the largely administrative nature of this work, using a blended rate of \$103.2 an hour. But Watts’ affiliated counsel did not, using double that rate at \$262.18 an hour. *Id.* at ¶ 87. The next chart shows those rates on a per-firm basis. The highest rate was the Shields Law Firm (“Shields”) who determined a lodestar for PFS work using \$633.43 per hour. *Id.* at ¶ 88. Similarly, Meshbesh & Spence, Ltd. (“Meshbesh”) used \$500 per hour; Borgess Law, LLC used \$389.69 per hour; and, Toups/Coffman’s referral counsel used \$295.38 per hour. *Id.*¹²

ARGUMENT

I. THE COURT SHOULD ALLOCATE ATTORNEYS’ FEES IN ACCORDANCE WITH THE *JOHNSON* FACTORS—BASED ON EACH FIRMS’ RELATIVE CONTRIBUTION TO THE CREATION OF THE SETTLEMENT FUND.

This section sets out the appropriate legal standard for awarding and allocating attorneys’ fees from the Settlement Fund, a \$1.51 billion common fund established by the Settlement

¹² Not listed on these charts, Heninger’s PFS-related work was billed at \$591.98 per hour and Eiland’s was billed at \$625 per hour.

Agreement. It then addresses several of the common reasons that Movants argue their efforts contributed to the settlement, concluding that none had more than a *de minimis* impact. But, even if the Court disagrees, there is no evidence that the relative value of this impact is collectively greater than the efforts of Kansas attorneys, who request 50% of the Fee Award, and, thus, Movants can fairly be allocated a portion not to exceed the Unallocated Fee. Finally, this section concludes with some possible recommendations for how any such work can be valued by the Court or Special Masters to determine what portion of the Unallocated Fee should be awarded to Movants.

A. Movants Fail to Justify their Requests Under the Common-Fund Doctrine.

Under the common-fund doctrine, the Court may only award reasonable fees and expenses for “specific services [that] benefited the fund—whether they tended to create, increase, protect or preserve the fund.” *Class Plaintiffs v. Jaffe & Schlesinger, P.A.*, 19 F.3d 1306, 1308 (9th Cir. 1994) (quoting *Lindy Bros. Builders, Inc., v. American Radiator, Etc.*, 540 F.2d 102, 112 (3d Cir. 1976)).¹³ Movants do not appear to oppose the aggregate request for attorneys’ fees equal to 33⅓ percent of the Fund. Rather, they seek a portion of that award. Thus, the question presented is: how should the Court allocate that award? Fortunately, the answer is straightforward: the Court applies much the same standard in allocating a fee as it does in determining when to award the fee.

¹³ *Accord Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole”); *Aguinaga v. United Food & Commercial Workers Int’l Union*, 993 F.2d 1480, 1482 (10th Cir. 1993) (common fund applies where “the plaintiff’s successful litigation confers ‘a substantial benefit on the members of an ascertainable class, and where the court’s jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.’”) (quoting *Hall v. Cole*, 412 U.S. 1, 5 (1973)); *Law v. Nat’l Collegiate Athletic Ass’n*, 4 F. App’x 749, 751 (10th Cir. 2001) (unpublished) (“To recovery fees from a common fund, attorneys must demonstrate that their services were of some benefit to the fund or enhanced the adversarial process.”).

“[I]nherent in the authority to assess the fee is the authority to determine who gets the fee.” See 5 Newberg on Class Actions § 15:23.¹⁴ The “goal” of an allocation is the same as of an award: to determine a “reasonable” fee for each firm. *Law*, 4 F. App’x at 751-52 (affirming appeal from allocation where appellant has “not demonstrated that the fee awarded him was unreasonable”). Recommendations of lead counsel should carry “substantial deference.” *In re Copley Pharm., Inc., “Albuterol” Prods. Liab. Litig.*, 50 F. Supp. 2d 1141, 1149 (D. Wyo. 1999), *aff’d and remanded sub nom. In re Copley Pharm. Inc.*, 232 F.3d 900. But, as with formal joint venture agreements, such agreements are not binding on the Court.¹⁵ A reasonable fee to each firm is one that comports with application of the *Johnson* factors to each firm’s contribution.¹⁶ Thus, it is the “relative efforts of, and benefits conferred upon the class by, co-

¹⁴ *Accord In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 227 (5th Cir. 2008) (“In a class action settlement, the district court has an independent duty under Federal Rule of Civil Procedure 23 to the class and the public to ensure that attorneys’ fees are reasonable and divided up fairly among plaintiffs’ counsel.”). The Court has the same substantial discretion in *allocating* attorneys’ fees that it possesses in awarding those fees. *Law*, 4 F. App’x at 751 (denying appeal that appellant’s “fee award was too small in comparison with that given to appellees” under standard that “[i]n class actions, the district court has broad authority over awards of attorneys’ fees”) (quoting *In re FPI/Agretech Sec. Litig.*, 105 F.3d 469, 472 (9th Cir. 1997)); *In re Copley Pharm., Inc.*, 232 F.3d 900 (10th Cir. 2000) (unpublished) (“Our review of the district court’s fee allocation is limited.”).

¹⁵ *In re FPI/Agretech Sec. Litig.*, 105 F.3d at 474 (finding no abuse of discretion where district court deviated from fee allocation proposal because the issue “involved attorneys’ fees in a class action, and such fees derive from principles of equity, not contract”); *Smiley v. Sincoff*, 958 F.2d 498, 501 (2d Cir. 1992) (“Whenever a court finds ‘good reason to do so, it may reject an agreement as to attorneys’ fees just as it may reject an agreement as to the substantive claim.”) (quoting *Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 884 (2d Cir. 1983)); *accord* 5 Newberg on Class Actions § 15:23 (“It is typical in such cases that the lawyers can decide among themselves how to split the aggregate fee. If so, courts will tend to defer to that self-allocation and there is no need for formal judicial involvement. That said, it is implicit in such deference that it is the court that has the final authority on how the fee is allocated among counsel.”).

¹⁶ *Law*, 4 F.App’x at 752 (rejecting argument that district court failed to “properly consider[] the [*Johnson*] factors” because the “transcript demonstrates that it considered fully the nature, extent, and value of appellant’s contributions to the underlying lawsuits, matters which include and define many of the *Johnson* factors”); *accord In re Copley Pharm., Inc.*, 50 F. Supp. 2d at 1150 (*Johnson* “factors are relevant to the extent they provide a useful framework for assessing the ‘quality and quantity’ of counsels’ work”); *In re High Sulfur Content Gasoline Prod. Liab. Litig.*, 517 F.3d at 230 (“This circuit, as will be discussed *infra*, does not forbid a district court to rely on fee allocation proposals submitted by

counsel” that is of primary importance. *In re FPI/Agretech Sec. Litig.*, 105 F.3d at 474; *In re Copley Pharm.*, 50 F. Supp. 2d at 1150 (“any fee award must bear some relationship to the effort expended”). Quality, not quantity, is the most important factor, where the “measuring stick of counsel’s *entitlement to a fee* comes back to the single question of whether their efforts did in fact create, enhance, preserve, or protect the fund under the court’s supervision.” 5 Newberg on Class Actions § 15:60 (emphasis original); *accord In re Copley Pharm.*, 50 F. Supp. 2d at 1151-52 (awarding largest fee to lead counsel because they “played a significant part in obtaining a favorable settlement,” took a “leadership role,” took 35 of “the 125 depositions” in the case, “succeeded in creating the only national products liability personal injury class ever certified for trial,” and tried the case, emphasizing that “[a] great deal of credit must go to the trial team and its preparation for accomplishing this feat”); Ex. 78 at ¶ 69.

The district court in the recent *Volkswagen MDL* faced a circumstance similar to the one this Court must now confront. In *In re Volkswagen*, No. MDL No. 2672 CRB (JSC), 2017 WL 1474312 (N.D. Cal. Apr. 24, 2017) (appeal pending, filed June 6, 2017), 244 non-class counsel firms sought an award of fees for the filing and maintenance of individual lawsuits, where a settlement agreement provided \$175 million for attorneys’ fees. *Id.* at * 1-3. Denying all of those motions, the district court held that in “‘common fund’ cases, a court may award non-class counsel a reasonable attorney’s fee only if counsel’s work conferred a benefit on the *class*, as opposed to on an individual client.” *Id.* at * 3 (emphasis in original) (citing *Gottlieb v. Barry*, 43 F.3d 474, 482 (10th Cir. 1994)). There is “no authority which mandates an award of fees to attorneys not formally representing the class, whose activities in representing others incidentally benefit the class.” *Class Plaintiffs*, 19 F.3d at 1309.

attorneys. The proposals must, however, be factually supportable and consistent with the *Johnson* factors.”); *see also* Ex. 78 at ¶ 97.

Many Movants rely on *Gottlieb*, but the Tenth Circuit stated no contrary principle. In *Gottlieb*, 43 F.3d at 488, the district court refused to award fees to lawyers not designated as class counsel “holding that their efforts did not contribute to the creation of the fund and that their failure to be designated as class counsel deprived them of any right to fees from the common fund.” Reversing, the Tenth Circuit found that the “record refutes the factual finding that [they] conferred no benefit on the class,” *id.* at 488, disagreeing with the district court’s “broad statement” that failure to be designated as class counsel precluded an award of fees, *id.* at 489. “If they have indeed conferred a benefit on the class, ... they should receive some compensation.” *Id.*; see also Ex. 78 at ¶ 55 n.64. As the Third Circuit subsequently recognized, “even under [*Gottlieb*], mere diligent and competent work is not sufficient to earn compensation: the work must actually benefit the class in order to be rewarded out of the common fund.” *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 190 (3d Cir. 2005).

When the district court rejected contracted counsel’s request for fees in *Volkswagen*, 2017 WL 1474312, it was, in part, because there was “little to any pretrial activity” in the individual cases giving the Court no reason to find that those “filings alone . . . materially dr[o]ve settlement negotiations.” *Id.* at * 4. It did not disagree with but distinguished *Gottlieb*, where non-class counsel “vigorously pursued [numerous] cases for *sixteen months* before class counsel was designated.” *Id.* (emphasis in original). In instructing the court to award fees in *Gottlieb*, the Tenth Circuit found that it was on non-designated counsel “whose shoulders class counsel admittedly stood.” *Gottlieb*, 43 F.3d at 489. In contrast, no one can plausibly argue that Kansas attorneys stood on anyone else’s shoulders. The reverse is true. See Kansas Fee Application, ECF No. 3587 at 4-32.

Movants' requests are much more similar to *Volkswagen* than *Gottlieb* because there was little pre-trial activity in their client's individual lawsuits. Movants emphasize the amount of time their cases were pending, but do not acknowledge the limited progress of those cases. Only bellwether cases (work included in common-benefit submissions of Lead Counsel) were required to do more than submit a PFS.¹⁷ Although dispositive motion practice under (or, in Minnesota and Illinois, equivalent to) Rule 12(b)(6) and 12(c) occurred in all, or most, individual cases, because those motions were aimed at the master complaints, the extensive work opposing those motions was performed by Lead Counsel, not by contracted counsel.¹⁸ Contracted counsel merely road the coattails of those successes (as reflected in the absence of dispositive-motion work in their categorizations). Further as reflected in Movants categorizations (*see supra* Factual Background § III), virtually all pre-trial discovery undertaken with respect to Syngenta and to the dozens of third parties—document review, depositions, experts, and trial preparation—was performed exclusively by Lead Counsel, not the contracted lawyers.¹⁹ And, certainly, Kansas and Minnesota attorneys performed all work in connection with certification and trial of the class actions, which were the predominant drivers of the settlement. Like *Volkswagen*, then, the individual cases and the contracted attorney work for which Movants seek compensation did not form the basis of the settlement because those cases did not advance much beyond the filing

¹⁷ To the extent Movants performed such bellwether work, that work should be properly subsumed in the submitted and approved common-benefit time of Lead Counsel's applications. *See* Fee-Sharing Agreement, ECF No. 3587-8 2-3 n.2-3 (stating that Minnesota and Kansas groups are each responsible for distributing their allocation to "all firms that provided common-benefit work.") The Kansas Fee Application includes such work. The only Movant outside of these two groups to have performed bellwether work is the Heninger group in the Illinois *Poletti* case. Their request is addressed *infra* at § IV.

¹⁸ Pursuant to the Order Relating to Consolidated Pleadings, Syngenta's motions aimed at the master complaints applied in individual cases where the individual plaintiff filed a Notice to Conform. *See* ECF No. 287; ECF No. 5387-53 (Minn. Order Approving Notices to Conform). It is understood similar master complaints were used in Illinois State Court.

¹⁹ Heninger took a small subset of depositions in the Illinois Federal Court action. Co-Lead Counsel offered to treat that time as common-benefit time in the MDL, but Heninger declined.

stage, as reflected by the fact that nearly 20% of Movants' work was spent in general client communications and perfecting Claim Forms, with little time spent in substantive-work categories. *Supra* Factual Background § III.

The *only* potentially distinguishing facts between this litigation and *Volksagen* was the requirement that individual plaintiffs were required to complete a PFS and a larger percentage (but still a substantial minority) of the settlement Class Members did file individual lawsuits. *Volkswagen* and *Gottlieb* do not hold, however, that these facts standing alone would be sufficient to prove that work benefited the Class as a whole. *See Volkswagen*, 2017 WL 1474312 at *4 (“That such a small percentage of class members actually retained Non-Class Counsel makes it *even less likely* that Non-Class Counsel’s services benefited the class as a whole”) (emphasis added). “Neither the case law nor equity requires compensation where the benefit contributed is incidental, or of a minimal or *de minimis* value to the class.” *In re Prudential Sec. Inc. Ltd. P’ships Litig.*, 911 F. Supp. 135, 141 (S.D.N.Y. 1996). These particular issues, thus, bare closer examination in the context of Movants’ arguments.²⁰

Although not all Movants make the same arguments, there is sufficient similarity to address a number of arguments in a generalized fashion, and to then subsequently apply these teachings to each Movants’ individual application in the subsequent sections of this response.

1. Unfiled cases did not contribute to the creation of the fund.

Movants’ applications do not readily permit the Court to determine if they are seeking fees for filed or unfiled claims, but it does appear a significant number of Movants seek fees for claims that were never filed. For example, Toups/Coffman purport to represent over 9,400 plaintiffs (ECF No. 3567), but never disclose how many have pending cases; in the MDL, at

²⁰ Not all Movants seek a fee based on the common-fund doctrine. Some simply ask for enforcement of their private fee agreements. But these arguments fail for the reason stated *infra* § II.A.

least, they filed less than 1,500 plaintiffs (and then dismissed 499). Ex. 75 at ¶ 94. It appears they filed for 7,238 plaintiffs in Williamson County, Illinois, but this still leaves around 1,000 purported plaintiffs with no case filed. *Id.* Similarly, the Hodge Law Firm PLLC (“Hodge”) does not appear to have filed any cases, (ECF No. 3590-1 (identifying no work preparing or filing complaints)). Johnson Becker appears to have filed cases for only 1,800 of its 3,257 plaintiffs (ECF No. 3576 at 3, 6); Pendly Baudin appears to have filed only 19 of their 59 cases (ECF No. 3595-5 at 1, ¶ 4). Many others simply do not disclose enough information to make a reasonable estimation. Representation of clients without even a filed case does not fit Movants’ primary argument that they put settlement pressure on Syngenta. If any fees are awarded from the common fund, it should necessary exclude work on unfilled cases. See Ex. 78 at ¶ 54 n.63.

2. Filing and maintaining individual cases did not materially contribute to the creation of the fund.

“While it is possible that lawyers may create bargaining leverage over a defendant by refusing to join an MDL and litigating in multiple fora, the district court was not automatically required to accept [such an assertion].” *In re Genetically Modified Rice Litig.* (“Rice”), 764 F.3d 864, 873 (8th Cir. 2014) (affirming denial of award from common-benefit assessment fund based on such argument); *Volkswagen*, 2017 WL 1474312, at *4 (“filings alone did not materially drive settlement negotiations with Volkswagen.”). Such work does not necessarily result in a benefit to the Class, and may actually create a detriment. Ex. 78 at ¶¶ 54-65.

In assessing what led Syngenta to offer \$1.51 billion, the Court need not speculate. Syngenta insisted on a *class-wide* release. Ex. 76 at ¶ 6. Even aggregating all of Movants’ clients together, class counsel brought the vast majority of the approximately 643,780 producers to the bargaining table. Kansas attorneys also brought around 74% of the corn bushels marketed during the class period, while an additional 8% were produced by members of the Minnesota

state class. In contrast, Watts and the other Movants represent no more than 18% of the corn bushels impacted by Syngenta's conduct and an even a smaller share of the number of releases (see ECF No. 3568 at 5 (claiming over 70,000 claims filed in Minnesota)). *See, supra, Factual Background § I.* In any event, it is undisputed that the individual cases, even collectively, could not deliver the 643,780 releases demanded by Syngenta for the \$1.51 billion.²¹ That Syngenta was willing to go forward with the settlement without Watts, and their 57,385 clients, but not without the Class, is telling proof of who contributed to the settlement. Ex. 76 at ¶ 7.

The empirical facts are that the class claims posed the greatest and only immediate threat to Syngenta. Without considering the value of *any* individual case, Syngenta's potential liability in the certified class cases going to trial in 2017-18 exceeded the settlement amount. *See, supra, Factual Background § I* (identifying Syngenta's \$3.2 billion potential liability in federal trials that would have occurred through October 2018, of which Kansas attorneys had already secured \$217.7 million with the Kansas judgment). And this does not include the potential liability of the Minnesota class trial or the 12 classes for which certification was pending. *Id.* In contrast, other

²¹ Even the term sheet, lacking all material terms and unenforceable, shows a class-wide release was a precondition of the dollar amount. ECF No. 3514-1 at 6 (§2.uu). Some Movants point to Syngenta's "Walk Away Right" as proof that individual cases mattered. But such a term is standard in *all* class action settlements (even ones without individual cases filed) and does not reflect that the individual cases were a substantial reason for the settlement. Ex. 75 at ¶ 25. In addition, the thresholds filed under seal with the Court reflected that a substantial number of Class Members could opt out before triggering the threshold; even together, it is not clear that any Movants represent enough plaintiffs who would have wanted to opt out to even put the \$1.51 billion jeopardy (given that many now acknowledge the class settlement was in their clients' best interest). *See* ECF No. 3509 at ¶¶ 1, 2. Lastly, the "Most Favored Nations" ("MFN") clause, cited by some, is only evidence that Settlement Class Counsel desired an assurance from Syngenta that they were, in fact, getting all the money the company had to settle, a benefit to the Class. Moreover, that clause does not prevent a Movant from opting out and securing their own settlement; it simply prevents a settlement "more favorable" from being agreed to by Syngenta until a year after this settlement is approved (unless Settlement Class Counsel consents otherwise). ECF No. 3507-2 at § 3.81 (S.A.). Nothing was stopping Movants from settling their own cases on terms identical to class settlement made available to them. They have not done so because they lack the certainty they now exude that Syngenta would, in fact, settle with them on terms as favorable as the Class Settlement. This is proof enough that the Movants understood that it was the class-action pressure that got these terms for Syngenta.

than the bellwether cases (work included in Lead Counsel’s applications), no Movant even identifies a case that was close to ready for trial, much less a case or set of cases that would expose Syngenta to the immediate liability it faced in Kansas. In fact, the amount at stake in an average individual case was modest, below the costs of prosecution. ECF No. 2164 at 97-98. To even approach the liability made possible by the single, Kansas class judgment, Movants would have been required to obtain full damages for over 7,000 individual producers. That would have taken years and at a cost to Movants that exceeded their likely recovery. *See, supra, Factual Background § I.* As Professor Klonoff states, based on his expert analysis and his years of experience as a Jones Day partner in more than 100 class actions: “My worry as a class action defense lawyer was always about class certification—and especially about an adverse verdict in a classwide trial. Except for cases involving massive individual damages (such as mass tort personal injury cases, which are not normally suitable for class certification), I felt little or no pressure by the filing of numerous individual lawsuits, since I knew my client could always out-litigate (and outspend) plaintiffs one trial at a time.” Ex. 78 at ¶ 65; *see also id.* at 64 n.76.

Some suggest, and one argues, that the “mass tort” model is to overwhelm a defendant with individual lawsuits to exert settlement pressure. Bassford Remele Fee Appl., ECF No. 3568 at 34. To the extent that strategy is ever successful, it was not here. The individual cases posed no immediate, or even intermediate, threat to Syngenta. While plaintiffs had to prepare and file a complaint, serve process on that complaint, and complete a PFS, Syngenta had no corresponding discovery obligation related to those cases; this was unlike, for example, a typical pharmaceutical mass tort, where the defendant must produce an individualized Defendant Fact Sheet for each plaintiff and gather documents from sales representatives who interacted with the plaintiff’s physician. Ex. 75 at ¶ 11. Syngenta had no such obligation here. It was not even

required to file an answer for each individual case or conduct any sort of investigation into those claims because its response to the corresponding master complaint was deemed a sufficient assertion of its denials and defenses. ECF No. 287 at 5 (¶ 2) (“Any responsive pleading filed by the Defendant to the Master Complaint, whether filed before or after a Notice to Conform by the Plaintiff is filed, shall apply.”); ECF No. 5387-53 at 6 (¶ 2) (Minn. Notice to Conform) (same). The reality is that filing a case imposed nearly **zero** cost on Syngenta, while if Movants’ time submissions are to be believed, was apparently very expensive for each plaintiff and his or her attorney. Critically, it would be years before even these cases would have made it to trial. For example, in the Kansas MDL only class trials had been set through 2019, four years after the MDL was formed. It is telling that although Syngenta settled the one individual case to get to trial (*Mensik*), that was an individual settlement, not a settlement of Watts’ entire inventory. Ex. 75 at ¶ 9; *see also* Ex. 78 at ¶ 64. Syngenta could have played that strategy for a long time, obtaining appellate review of key legal rulings, before its exposure added up to anywhere close to \$1.51 billion.

Moreover, unlike a typical mass tort, these cases did not involve personal injuries: while both federal and Minnesota plaintiffs cleared the procedural hurdles necessary to submit such damages, the probability was very low of recovering such damages in an individual case of an amount that could both satisfy Due Process limitations and bring Syngenta to the bargaining table. Certainly, any such threat paled in comparison to the *proven* threat and exposure of the class trials. Ex. 78 at ¶ 65.

Movants also claim that that the presence of individual suits may have factored into Syngenta’s decision to settle before it could obtain appellate review of the Courts’ class-certification rulings. But even that argument falls apart on examination. Interlocutory review

was denied. Before it would have had an appellate ruling, Syngenta would have been required to complete the Minnesota trial and expose itself to liability in likely *all* of the remaining certified MDL class cases. Moreover, it was uncertain if Syngenta *could* even appeal from the Kansas judgment immediately. *See* ECF Nos. 3439, 3449. And, in any event, reversal was unlikely: the Tenth Circuit had already described the Court’s opinion as “well-researched and reasoned,” ECF No. 2741; and, the jury’s award of full damages in the Kansas trial effectively made unreviewable Syngenta’s primary objection to class certification that Plaintiffs could not prove class-wide injury. Any hesitation by Syngenta to settle was likely based on its desire to have the appellate courts review the substantive basis of Plaintiffs’ claims (*e.g.*, duty, economic loss, causation, preemption). But an adverse ruling there would have dogged the individual cases too, and Syngenta could have obtained an appellate ruling long before any non-bellwether plaintiffs’ case was called up for trial, proving that it was the Kansas judgment and potential liability in the remaining class trials that brought Syngenta to reason. *See* Ex. 76 at ¶ 6.

It requires sheer speculation and leaps of logic to conclude, under these circumstances, that uncertain risk of individual judgments far in the future drove the settlement now; thus, the mere existence and maintenance of the individual lawsuits, including the PFS obligations that form much of the work alleged by Movants, added little or nothing to Syngenta’s risk, and there is scant reason to conclude it contributed towards the creation (or the enhancement) of the Settlement Fund. *See In re Marine Midland Motor Vehicle Leasing Litig.*, 155 F.R.D. 416, 423 (W.D.N.Y. 1994) (“In the absence of any specific evidence linking . . . counsel’s efforts more directly to the settlement achieved between class counsel and defendants, the court cannot infer that the mere timing of events in the Pennsylvania action affected the events in this action, or increased the settlement fund, in any way.”). Rather, if Movant’s time submissions are to be

believed, the mass filing of cases unnecessarily burdened those plaintiffs and created hundreds of thousands of hours of unnecessary law-firm labor, while imposing little or no cost on Syngenta and failing to advance the overall objectives of the class.²²

Nonetheless, even if the Court accepts that filing and maintaining a large number of individual cases had a more than *de minimis* effect on creating the fund, that pressure obviously pales in comparison to the efforts and results achieved in the litigation by the Kansas attorneys. *See infra* § I.B. This case, thus, presents the opposite of *Gottlieb*, 43 F.3d at 489, where the Tenth Circuit found that class counsel stood on the shoulders of the work performed in the individual cases. Here, no one stood on Movants’ shoulders, who did little more than perform administrative work while waiting for Lead Counsel’s efforts to force a settlement. Any benefits attributed to the mere filing and maintenance of individual cases—producers who could have obtained the same benefits, for less effort, as part of the class—does not undermine the Fee Request made by Kansas attorneys.

3. Time spent on PFS compliance did not benefit the Class.

Movants submitted nearly 800,000 hours and claimed lodestar of \$175.7 million in response to the Court’s order. Ex. 75 at ¶ 72. That is exclusive of Lead Counsel. Those figures are astonishing because only a tiny fraction of the filed plaintiffs (approximately, 48 plaintiffs in Kansas, 40 plaintiffs in Minnesota, and 47 plaintiffs in Illinois *Poletti*) moved into the bellwether discovery phase. *Id.* Most of the claimed labor was purportedly spent on assisting clients with

²² For this reason, although Co-Lead Counsel represented several thousand plaintiffs, they did *not* file them as a “mass action.” They filed cases strategically (to fill out the bellwether trial pool in the event class certification was denied) and where necessary to avoid a statute-of-limitations argument. After all, why expose those plaintiffs to unnecessary—and unhelpful—PFS discovery obligations, when there was a potential (and then actual) class? For that matter, why give Syngenta ammunition for its opposition to class certification? Ex. 75 at ¶ 27. *See also* Ex. 78 at ¶ 62. Even without the class actions, the point of proving to Syngenta that they would lose a trial could have been communicated by filing many fewer individual cases in a strategic fashion without incurring all the work that Movants created for themselves.

their PFS obligation (work that did not benefit the Class). Ex. 78 at ¶ 66. This work was purely defensive, necessary to prevent a dismissal. *See, e.g.*, Watts Fee Appl., ECF No. 3611 at 20-21 (PFS necessary “to preserve each plaintiff’s claim per Judge Sipkins’ order”). Some have claimed these PFSs were also “important to establish[] the extent of Syngenta’s liability” and could “be used for settlement.” *Id.* But none of this information was used to determine Syngenta’s liability because Syngenta demanded a class-wide release and only a fraction of the class submitted PFSs. Rather, aggregate damages models, such as those prepared and presented in the Kansas class trial, were used to determine what Syngenta should pay for the class-wide release. Ex. 75 at ¶ 30. Moreover, the actual interrogatories on the PFS were simple to complete; the bulk of the time spent on compliance was collecting sales contracts, seed receipts, and crop-insurance materials. *Id.* at ¶ 69. These documents specifically played no role in securing the settlement. *Id.* at ¶ 70.

Movants’ work was surely worsened by Movants’ own solicitations. At least some lawyers told farmers it would require little effort to sue Syngenta. Syngenta itself points this out in opposing Co-Lead Counsel’s efforts to stay PFS discovery (on behalf of these Movants); it specifically cited attorney advertising telling producers “[i]t takes only minutes” and a “few documents” to file a case.²³ Undoubtedly, once asked to complete the PFS, this created client resistance, contributing to the amount of work Movants had to do to motivate compliance. But that was a problem of Movants’ own making.

If anything, the sheer number of PFSs was a detriment to the Class. Ex. 78 at ¶ 66. It gave Syngenta purely offensive ammunition, and, despite filing a large numbers of cases, firms

²³ *See* ECF No. 1218 at 3 (citing www.syngentacorncase.com/faq (Q: “[H]ow much time and effort will this take on my part?” A: “It takes only minutes to complete the client agreement form. Once you have signed up, we will send you a packet that will ask you for copies of only a few documents providing us the information we need about your business.”)).

then fell down on their obligation, casting Plaintiffs' overall credibility with the Courts in a bad light. *See, e.g.*, Aug. 21, 2015 Hr'g Tr. 102:9-11 (Court: "I would hope or let's say anticipate that when [we] get back here on October 19th this fact sheet issue would be ancient history...."); Oct. 19, 2015 Hr'g Tr. 85:25-86:1 ("we're still missing a large number of fact sheets"). To prevent these issues from souring their credibility, Co-Lead Counsel had to offer their own services to assist firms in complying with their PFS obligations. Aug. 21, 2015 Hr'g Tr. 101 ("all four co-lead firms have offered assistance with them to get this process done in a more expedited fashion"). This necessarily drew time away from work that actually could benefit the class.

This work was not complex. For Movants, it should have been largely administrative in collecting the information necessary to complete the PFS. It provided no benefit to the Class, and may well have been a detriment. It does not deserve compensation.

4. Assisting clients in filing claims did not contribute to creation of the fund.

Movants have also expended a large number of hours assisting their clients in filing Claim Forms. *See, supra*, Factual Background § III.

As an initial matter, it is not unexpected that Class Members willing to file a complaint may also submit a Claim Form. They have already demonstrated awareness of the litigation and a willingness to seek recovery. The Settlement goes out of its way to ensure that Class Members do not *need* an attorney to file a claim. Other than basic contact information and the signature, the Claim Form requires producers to answer only two substantive questions. For nearly all producers, completing the Claim Form takes minutes, not hours, and requires little to complete. Ex. 75 at ¶ 78.

Movants nonetheless want credit for their clients' claim submissions because those clients have called; the attorneys have answered questions; and, in some cases, the attorneys have filled out the form for their clients. These may all be benefits *to that client*, but they present no benefit to the Class. Tens of thousands of Class Members have filed claims without a lawyer's help, and, most importantly, the number of Claim Forms submitted has no effect on Syngenta's obligation to pay the \$1.51 billion settlement. No one can argue this work creates or enhances the Fund.

5. Pre-settlement communications with clients did not benefit the Class.

Pre-settlement communications with clients is another large category of work cited by Movants. See Factual Background § III. But "time spent monitoring class proceedings [and] keeping class members informed" is not a Class benefit. *Volkswagen*, 2017 WL 1474312 at *4. Again, possibly beneficial to the client, but any communications of substantive benefit would have been related to the actual prosecution of an un-stayed case, which would only include the bellwether and class cases. Such work would have been captured in Lead Counsel's applications. Movants' efforts telling their clients of the litigation success obtained by Lead Counsel is not something that contributed to the settlement in any way.

6. Paper discovery (Plaintiffs) was not a benefit.

Movants report that they spent 6.65% of their work on "paper discovery (plaintiffs)." *Supra*, Factual Background § III. It is not clear what this entailed. Other than the bellwethers, no written discovery was issued to the plaintiffs, except the PFS. To the extent Movants were collecting documents for preservation purposes, that had no benefit towards the settlement.

B. If Any of This Work Was Compensable, a Reasonable Fee Should be Limited to the Unallocated Fee under the Fee-Sharing Agreement.

The Court may desire to compensate contracted lawyers who have requested fees and expenses from the Fund to avoid the threat—suggested by some—that those lawyers will attempt to assert liens or otherwise bring collections against Class Members. As explained *infra*, those are empty, toothless threats. Nonetheless, courts have taken various approaches to prevent class members in similar circumstances from paying an unreasonable aggregate fee to both class and contracted lawyers. The *Volkswagen* and *NFL* litigation exemplify two such approaches.²⁴ Ex. 78 at ¶¶ 93-96.

In two separate orders issued in the *NFL* case, the district court took an active, preemptive approach. It awarded attorneys’ fees and expenses to class counsel and other qualifying common-benefit firms from an amount the defendant agreed to pay. *In re National Football League Players’ Concussion Injury Litigation* (“*NFL*”), MDL No. 2323, 2018 WL 1635648 (E.D. Penn. Apr. 5, 2018), *appeals pending*, No. 18-202 *et al.* (3d Cir. Filed May 3, 2018). Then, “to safeguard the public’s perception of the courts and the legitimacy of the legal system’s handling of massive MDLs and class actions,” it presumptively limited the collection of contract fees to 22% of the client’s gross recovery. *NFL*, 2018 WL 1658808, at *2 (E.D. Pa.

²⁴ No Movant has asserted an attorneys’ lien on any Class Members’ recovery. Such a lien would have to be supported by a contract. The Court would have to look to the terms of that contract and *first* determine whether it is enforceable. See *In re Marriage of Johnston*, 275 P.3d 931 (Kan. Ct. App. 2012) (unpublished) (affirming denial of attorneys’ fees on assertion of lien in divorce case where trial court found the contract violated rules of professional conduct because it was a contingent-fee agreement in a divorce case); *Matter of Marriage of Wageman*, 25 Kan. App. 2d 682, 687, 968 P.2d 1114, 1118 (1998) (affirming finding that fee was reasonable after lien was asserted). *Second*, the court would have to determine how to apply the contract; specifically, it would have construe how to treat the amount of attorneys’ fees and expenses awarded from the common fund in calculating what the contracted lawyer would be entitled to, *e.g.*, whether those fees and/or expenses should be deducted from the attorneys’ or clients’ share of the gross recovery. Notably, the contracts attached by Movants are silent on this point, so the court would have to determine the parties’ intent, possibly on an individualized basis.

Apr. 5, 2018). Contracted lawyers had the opportunity to petition for relief from the cap based on individualized circumstances, providing due process. *Id.* at *4.

In *Volkswagen*, 2017 WL 1474312, in conjunction with concluding contracted lawyers conferred no benefit on the Class, the district court vacated an earlier injunction preventing any contract lawyer from seeking to enforce their private fee agreements. *Id.* at *5 (finding that private fee agreements are “a matter of contract law, subject to the codes of professional conduct, and such disputes should be resolved in the appropriate forum.”). It ordered the defendant, however, to pay all monies due under the settlement agreement directly to class members. To deter contracted attorneys, the court required any attorney seeking to enforce their contract to “first provide his or her client with a copy of [the Court’s order finding they conferred no benefit on the class], and to file a certificate of service with this Court.” *Id.* Thus, although there was no “cap” in *Volkswagen*, the Court expected contracted attorneys to disclose all the facts prior to enforcing their contracts.

Certain Movants criticize the *NFL* approach, objecting to the Court’s authority to “cap” attorneys’ fees purportedly authorized by contract. *See, e.g.*, *Toups/Coffman Fee Appl.*, ECF No. 3567 at 7 (“There is no law justifying the abrogation of these contracts.”). Other applicants, including Bassford Remele, advocate capping contracted fees. *See, e.g.*, *Bassford Remele Fee Appl.*, ECF No. 3568 at 30-33. As Professor Klonoff explains, the Court undoubtedly has the inherent authority exercised in the *NFL* case. Ex. 78 at ¶¶ 16-31. Nonetheless, the approach in *Volkswagen* may be preferable because it avoids a prophylactic order on private fee contracts (which Watts and Toups/Coffman object to, but Bassford Remele adopts).

Moreover, as explained *infra* § II, having sought an award of fees from this Court, it is not clear that any Movant will seek to enforce their contracts outside of these applications; nor is

it clear that those contracts authorize fees in a class action; and, even if they do, it is not clear that this will result in any Class Member actually paying an unreasonable high fee (where, for instance, the contract would require that common-fund fees be deducted from the attorneys' share of any contract fee). Given these open questions and the absence of any attorneys lien, it seems unnecessary for the Court to enter a prophylactic "cap" on contract fees.

The Court could readily conclude that none of the work surveyed above benefitted the Class and contributed or enhanced the settlement, and that only the common-benefit work already encompassed in the applications of Lead Counsel (and possibly Heninger) meets the qualifications for a common-fund fee. However, to the extent the Court does find there was work that had a more than *de minimis* impact, it may be beneficial to follow a process for determining how to value that work.

Specifically, Kansas Lead Counsel recommends the following. *First*, the Court should determine what work, if any, justify an award of attorneys' fees under the common-fund doctrine and out of the Unallocated Fee. If, for example, the Court determines that each case filed against Syngenta (prior to the settlement announcement), where a PFS was served, contributed to "settlement pressure" *then* the Court could determine how that benefit should be measured. Options might include: a division based on lodestar for work necessary to file and maintain that case; or, by determining a value on each qualifying case filed and then dividing a portion of the Unallocated Fee based on the number of such cases each firm filed. A lodestar allocation may be unnecessarily time consuming and reward inefficient firms or firms who overbilled, particularly where much of the time submitted was reconstructed. In contrast, dividing any fee among Movants based on the number of qualifying cases filed might more directly align the allocation with the proposed benefit since Movants claim each case put incremental settlement pressure on

Syngenta. Once the Court has determined these issues, the Special Masters could make individual findings and recommendations required to implement the Court's framework, such as determining the appropriate lodestar or number of qualifying cases by firm.

Regardless of the methodology used, Movants' work collectively justifies no more, and possibly less, than 20% of the aggregate fee. The common-benefit work that demonstratively led to this settlement is encompassed in the existing Lead Counsel applications and supports the allocation laid out in the Fee-Sharing Agreement. This is undoubtedly so given that the vast majority of Movants' time (as compared to Lead Counsel's) was spent on work that was not complex (Notice to Conform, PFS); work that was not risky (perfecting claims); work that at best had minimal benefit (if any) compared to the pressures that the Kansas judgment and other class trials levered on Syngenta; and, work that was arguably unnecessary and of Movants' own making by electing to file individual cases when there was an option of class-wide adjudication.

II. WATTS GUERRA'S REQUEST TO APPLY A FRAMEWORK THAT WOULD NET IT BETWEEN \$180-200 MILLION IN ATTORNEYS' FEES WOULD BE UNREASONABLE.

Watts asks the Court to adopt a framework that would award it attorneys' fees between \$180-200 million or more depending on the claims rate of their clients (Ex. 75 at ¶ 98), but that framework is untethered to the controlling common-fund principle that attorneys' fees should be awarded for work that benefitted the class as a whole and is a disproportionate allocation under the *Johnson* factors. Rather, their framework would divide attorneys' fees by giving precedence to Watts' fee contracts—without regard for the actual value of Kansas attorneys' contributions to Watts' clients' recoveries—and to the amount Watts' clients might ultimately receive from the Settlement Fund, funds made available to them through the efforts of Common Benefit Attorneys. There is no legal support for such an allocation; no contract controls; it would be inequitable; and, it is unsupported by the *Johnson* factors.

A. Watts Cites No Legal Authority to Award it Fees Based on what it Could Earn from its Private Fee Contracts.

1. Rule 23(h) permits an award of attorneys' fees authorized by law and the only such award authorized here is one under the common-fund doctrine.

Rule 23(h) of the Federal Rules of Civil Procedure provides the relevant procedure for an award of attorneys' fees and expenses in a class action. *See* 5 Newberg on Class Actions § 15:10 (“Rule 23(h) governs fee petitions in class action lawsuits and that Rule, in turn, adopts the procedures of Rule 54(d)(2), as applicable.”). It states: “In a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.” Fed. R. Civ. P. 23(h). A request for fees must be made by motion, pursuant to Rule 54(d). *Id.* The motion must “specify the judgment and the statute, rule, or other grounds entitling the movant to the award.” Fed. R. Civ. P. 54(d)(2)(B)(ii).

Most Movants acknowledge and *rely* on Rule 23(h) as the source of the Court’s authority to award them attorneys’ fees under their private fee contracts (*infra*), thus, expressly or implicitly recognizing that an award can only permit “reasonable” fees. *See, e.g.,* Bassford Remele Fee Appl., ECF No. 3568 at 25 (citing Rule 23(h)). Watts, however, does not mention Rule 23(h) at all. Nor do they expressly identify, as required under Rule 54, the “state, rule, or other grounds” on which they seek relief.

Rule 23(h), by its terms, permits an award of reasonable attorneys’ fees that is “authorized by law or by the parties’ agreement.” Because Syngenta (the counter-party to the plaintiffs) did not agree to pay attorneys’ fees, the latter provision is inapplicable. *See, e.g., In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.* (“Volkswagen”), No. MDL 2672 CRB (JSC), 2017 WL 1474312, at *3 (N.D. Cal. Apr. 24, 2017) (“The second of these two avenues [under Rule 23(h)] clearly does not apply here, because Volkswagen did not

agree to pay the fees at issue as part of the Settlement Agreement.”). Thus, Rule 23(h), if it permits any award to Watts at all, requires the Court to find that the fees are both “authorized by law” and “reasonable.”²⁵ [A]uthorized by law” is most commonly applied to fees authorized by the common-fund doctrine or by a fee-shifting statute.²⁶ No statute applies here, so the common-fund doctrine is the only potential basis for an award of fees under Rule 23(h).

But Watts seeks fees under the common-fund doctrine only in the alternative. Their primary argument is that the Court should award fees based on what they “would have” a “clear right to” if their private fee contracts were enforced. ECF No. 3611 at 39. They insist they are not seeking to “direct[ly] enforce[]” those contracts (*id.* at 36), acknowledging that they would need to assert individual attorney’s liens to do so, *id.* at 63. Instead, they want their contract rights assumed valid, construed entirely in their favor, and “liquidated through a Fee & Expense Award.” *Id.* at 35. But they fail to cite a legal basis for the Court to award fees in a class action based on contracts they believe they *could* enforce through an attorney lien.

The undersigned has identified no case suggesting that a private fee contract authorizes an award of class action fees under Rule 23(h). Neither Watts nor any other Movant identifies such a case.²⁷ And, *Volkswagen*, 2017 WL 1474312, rejected such an argument. *Id.* at * 2, 3.

²⁵ See Fed. R. Civ. P. 23 2003 advisory committee’s note (“This subdivision authorizes an award of ‘reasonable’ attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the ‘common fund’ theory that applies in many class actions, and is used in many fee-shifting statutes.”). Nor can Watts argue that their contracts or the JPA fall within the “parties’ agreement.” Watts and Co-Lead Counsel were not “parties” in the litigation.

²⁶ *Volkswagen*, 2017 WL 1474312, at *3; *accord Smithson v. Amerada Hess Corp.*, No. CIV-06-00624 MCA/RLP, 2010 WL 11508004, at *1 (D.N.M. Mar. 24, 2010) (“Pursuant to Fed.R.Civ.P. 23(h) the Court has jurisdiction to award Class Counsel attorneys’ fees and expenses and other expenses, including distribution of funds to the Class from the common fund.”); *In re Life Time Fitness, Inc., Tel. Consumer Prot. Act (TCPA) Litig.*, 847 F.3d 619, 622-24 (8th Cir. 2017) (affirming fee award from common fund under Rule 23(h)).

²⁷ Watts cites the 52/48 division of fees between common-benefit and contract lawyers in *In re Chinese-Manufactured Drywall Prods. Liability Litigation*, ECF No. 3611 at 42. There, however, the

Even if Rule 23(h) applied to fees that “could be” awarded based on a private fee contract, Watts disclaims that it seeks to directly enforce their contracts. ECF No. 3611 at 36 (“our framework does *not* depend on direct enforcement of private fee agreements”). Enforcement of each contract would require individualized inquiries into each agreement to determine its: enforceability, interpretation, and application to the facts here. *See infra*, Arguments § II.A.4. Rule 23(h) provides no mechanism to short circuit what would be, for Watts, 57,385 potential inquiries.

Watts’ proposed framework also is inconsistent with the Settlement Agreement, which provides that the enforceability of private contracts will be decided by giving notice of attorney’s liens. ECF No. 3507-2 at § 9.21.1 (providing that “an amount sufficient for the satisfaction of such liens may be withheld from such Class Member’s payments, until each such lien has been finally and completely satisfied.”); *id.* (“The Court [or one of the other two Courts in relevant circumstances] shall have exclusive jurisdiction to decide the enforceability of any lien”). Watts may not find that process desirable, but it was the process to which Mr. Watts agreed when he signed the Settlement Agreement.

2. Even if Rule 23(h) authorized an award of attorneys’ fees based on a private fee contract with a Class Member, those fees must be reasonable, necessitating the *Johnson* factor inquiry.

Even if Watts could rely on Rule 23(h) for an award of fees based on private fee contracts, such fees would still have to be reasonable because Rule 23(h) only permits an award of “reasonable” fees and expenses. Fed. R. Civ. P. 23(h). This limitation is applicable beyond just common common-fund fees, and includes all fees awarded under Rule 23(h). *Id.* 2003

defendant “agreed to pay ... an additional amount for attorneys’ fees, *which includes both the fees for contract counsel and those for common benefit counsel.*” ECF No. 3580-31 at 5 (emphasis added). Thus, the provision of Rule 23(h) permitting an award of fees “authorized by ... the parties’ agreement” was being applied.

advisory committee's note ("In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund *or are otherwise paid*." (emphasis added)).²⁸ Whether a litigant "agreed to pay [a] fee and in what amount is not decisive.... [H]e might agree to pay his lawyer a percentage contingent fee that would be greater than the fee the court might ultimately set. Such arrangements should not determine the court's decision. The criterion for the court is not what the parties agreed but what is reasonable." *In re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, No. MDL 05-1708 DWF/AJB, 2008 WL 682174, at *9 (D. Minn. Mar. 7, 2008), *amended in part*, No. MDL

²⁸ Watts' experts argue that Rule 23(h) "may" violate the Rules Enabling Act by abrogating or modifying a lawyers' substantive, contractual right to fees. ECF No. 3580-2 at 26. This argument was not raised in the brief and is, therefore, waived. It also fails on the merits. The Rules Enabling Act is not violated if the rule is consistent with substantive law because only those rules that "abridge, enlarge or modify any substantive right" exceeds the rule-making authority. 28 U.S.C. § 2072. As Professor Klonoff explains, a federal court has inherent authority, derived from federal law, to determine the reasonableness of fees. Ex. 78 at § 2.a. Rule 23(h)'s reasonableness requirement is, therefore, consistent with substantive law. In any event, even under Texas law, Rule 23(h) would not violate the abrogation provision of the Act because Watts is not seeking to enforce their contractual rights; they ask for an "award" of fees in a class action. The procedure for providing for such awards, if it even permits Watts' request at all, limits the court to an award of reasonable fees in a class action. That does not require the Court to abrogate or modify a substantive right, it is simply a procedural limitation on the type of award the Court can grant under Rule 23(h). Watts fails to show that if they are denied all the fees they might be entitled to under their contracts, they lack another procedure for enforcing those rights, such as by filing a lien or a breach-of-contract lawsuit. Moreover, even if the Court makes a finding under Rule 23(h) that Watts' requested fee is "unreasonable" and that finding has an incidental effect (*e.g.*, collateral estoppel) on Watts' ability to enforce a lien or bring a contract claim, "Rules which *incidentally* affect litigants' substantive rights" do not clear the "large hurdle" necessary to show a violation of the act when those rules are "reasonably necessary to maintain the integrity of that system of rules." *Bus. Guides, Inc. v. Chromatic Commc'ns Enterprises, Inc.*, 498 U.S. 533, 552 (1991) (quoting *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 5 (1987)). Rule 23(h) is merely a claim processing rule for awarding fees in a class action. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality op.) ("Such rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights; they alter only how the claims are processed."). Having invoked the rule, Watts can hardly claim it violates their rights.

Next, Watts' experts make the argument that Rule 23(h) is only applicable to class counsel. By its terms, however, Rule 23(h) is not limited to class counsel but to any fees "authorized by law or by the parties' agreement." That plain reading is amply supported by its drafting history. See Fed. R. Civ. P. 23 2003 advisory committee's note ("Against that background, [subdivision (h)] provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel."). It has long been applied to fee requests by "other counsel whose work produced a beneficial result for the class..." *Id.*

05-1708 DWF/AJB, 2008 WL 3896006 (D. Minn. Aug. 21, 2008) (quoting *Johnson v. Highway Exp., Inc.*, 488 F.2d 714, 718 (5th Cir. 1974)).

Watts appears to recognize that the Court has only the authority to award a reasonable fee under the *Johnson* factors, acknowledging that the Court must determine if the 33⅓ percent is reasonable, in the aggregate, to both common-benefit and contract lawyers. ECF No. 3611 at 34. But their actual analysis of the *Johnson* factors is cursory. *Id.* at 63-64. And they insist the Court has no authority to inquire into the reasonableness of their fee contracts (which they do not seek to enforce). They, nonetheless, ask the Court to order an award of fees equivalent to what they would recover if those contracts were reduced to 33⅓ percent and if they paid “an appropriate common benefit assessment.” *Id.* at 39.

But the case they cite, *In re Polybutylene Plumbing Litig.*, 23 S.W.3d 428, 437 (Tex. App. 2000), did not involve an *award* of fees in a class action. ECF No. 3611 at 37. The attorneys in that case did not seek a judicial *award* of attorneys’ fees at all. Rather the trial court “*sua sponte* set hearings on the reasonableness of the attorneys’ fees and expenses.” *Id.* at 38. As Watts describes it, the trial court acted on its “impression that retained counsel were being overpaid under contingent fee agreements.” *Id.* The intermediate Texas appellate court reversed, as Watts quoted, “based on the ‘general rule’ that fee contracts ‘will be enforced as written if they have been fully performed.’” ECF No. 3611 at 37 (quoting *In re Polybutylene Plumbing Litig.*, 23 S.W.3d at 437 (emphasis added)). The “general rule” applicable in *Polybutylene* is irrelevant because Watts does not seek to enforce their contracts and any award of fees in a class action must be made pursuant to Rule 23(h) (“reasonable”).

Moreover, not only was *Polybutylene* a series of individual actions, it distinguished itself on that basis. *In re Polybutylene Plumbing Litig.*, 23 S.W.3d at 437-48 (the court went to great

lengths to distinguish “class action/common fund doctrine cases” stating that “none are applicable here” and noting that attorneys were “not seeking an award of attorneys’ fees out of a ‘common fund.’”); *see also* Ex. 78 at ¶ 26. In contrast, this case is a class action from which Watts seeks a judicial award of fees. Watts even concedes that if their clients are required to pay their contract fee and the 33⅓ percent common-fund fee, it could cause the overall fee to be unreasonable. ECF No. 3611 at 36-37 (arguing that the Court should use the 33⅓ percent to pay both “common benefit and contract fees—lest the combination of the two consume an unreasonable portion of the \$1.51 billion Settlement Fund”). Thus, if the Court awards and allocates the fee as Kansas attorneys suggest, it is not clear how Watts can then ask their clients to pay another fee that they admitted was unreasonable.

The fee dispute here is very simple and not something addressed in *Polybutylene*: it is a dispute about *allocating* the 33⅓ percent or the other overall fee awarded by the Court. As explained above, the Court’s only authority in determining the appropriate allocation is the one described *supra* in Argument § I.A.

3. Watts’ private fee contracts do not dictate how the Court allocates the common-fund fee.

Watts acknowledges that the *Johnson* factors controls the award of fees, but expends little space to justify the exorbitant share of the fee they seek (ECF No. 3611 at 63-64) under those factors. Instead, Watts contends the “contracts establish its entitlement to the proportion of the Court’s overall fee award.” ECF No. 3611 at 37. But (absent invocation of the inapplicable JPAs, *see infra* § II.B) Watts cannot give a justifiable explanation why contracts between Watts and their clients should control how the fee is allocated between Watts and Kansas attorneys. Ex. 78 at ¶ 97.

Kansas attorneys were not parties to those fee contracts. The general rule is that a contract does not bind non-parties. *See, e.g., E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (“It goes without saying that a contract cannot bind a nonparty.”). And, Watts invokes no exception.

Even if Kansas attorneys were parties to those contracts, those contracts do not address how any fee would be allocated in a class settlement. In fact, they do not even reference the *possibility* of the clients’ claims resolving in a class action. ECF No. 3580-9 at 2-7. Nor did Watts disclose in those contracts that they will be relying on the common-benefit work of other lawyers, where those lawyers might seek a common-fund fee. The silence is deafening, given that Watts now contends their clients may pay higher fees if the Court awards 33⅓ percent from the fund because Watts may assert liens to reach the \$180-200 million threshold fee they expect.

Watts fails to justify why they did not include specific provisions relating to this eventuality. It was always a possibility. At the leadership hearing in January 2015 – as the Court heard argument from one “mass tort” lawyer after another, including Watts – Co-Lead Counsel advanced *precisely* the possibility that has occurred here, hypothesizing that eventually all of the “mass tort” lawyers clients’ would ultimately want to participate in a class settlement, where the recovery met or exceeded what they could reasonably expect from individual lawsuits. *See* ECF No. 143 at 109:3-13 (Mr. Stueve: “If we secure ... as a hypothetical ... we’re able to secure in a class action Syngenta gives us \$0.20 a bushel for all of the ... plaintiffs who want to participate in the class. What are ... the folks that are right now dead set on individual cases going to do? I mean, why would they recommend to their clients to now go off and try individual cases....”). Yet, Watts executed over 57,385 fee contracts without accounting for the possibility his clients choose a class settlement.

Watts is as sophisticated a “mass tort” lawyer as there is. They were aware, at least as early as the leadership hearing, of the risks of investing in a “mass tort” model while class actions proceeded on a simultaneous track. But, at the end of the day, as Co-Lead Counsel predicted *in January 2015*, Watts recommended that their clients participate in a class settlement.²⁹ By failing to address this possibility, in the tens of thousands of fee contracts upon which their arguments now turn, Watts cannot now point to and rely on those agreements in allocation of the attorneys’ fees, where the contracts are intentionally silent on the issue.

Watts suggests that common-fund principles do not apply because their clients were not “free-riders,” having contracted with Watts and filed a case. ECF No. 3611 at 43-44. But none of the cases they filed, except the tiny fraction selected as bellwether cases, were actually litigated (beyond preparing and serving a PFS, *see supra* Argument § I.A.3). Moreover, most of Watts’ non-common benefit time was non-attorney time spent on PFS compliance. *E.g.*, ECF No. 3661. Those efforts had a *de minimis*, if any, impact on the settlement. Ex. 78 at ¶¶ 51-73. Watts and their clients did not establish Syngenta’s liability, obtain any trial judgments, or secure their own recovery, except in the individual *Mensik* case. But *Mensik* settled outside of this settlement, and Watts enforced their fee contract. The Class, including Watts’ clients, are recovering because they have elected to participate in the *class* settlement. The parents of that settlement – the Common Benefit Attorneys – created the fund that those clients want to participate in. That much is indisputable, entitling Kansas attorneys to a fee under common-fund principles. *See, supra*, Argument § I.A.

²⁹ Watts cannot claim they relied on the JPA to preserve their clients’ individual-case status. Consistent with Co-Lead Counsel’s representations at the leadership hearing, they never abandoned the expectation that, ultimately, all of the individual plaintiffs might want to participate in a class settlement. That is why the JPA gave Watts the right to put their clients on a list that Co-Lead Counsel would advocate for exclusion from any federal class *only if* Watts could represent it was in their client’s best interests to be excluded. ECF No. 3611-1 at 11; Ex. 75 at ¶ 124.

Moreover, although Watts does not want their fee measured by their common-benefit work, Watts performed such work and should be compensated from the Minnesota Allocation for that work (like other Minnesota Common Benefit Attorneys, sometimes “Minnesota attorneys”). The fact that Watts’ did some such work does not, however, transform *all* of Watts’ clients from “free riders” to “active” participants because only Watts’ bellwether clients were truly active. Most of their 57,385 clients were, in fact, “free riders” in having merely filed a case and potentially served a PFS. They all get to reap the benefits of the class settlement. Moreover, Watts’ work on its bellwether cases was a small portion (6.8%) of the aggregate common-benefit work performed in Kansas and Minnesota (\$8.3 million of the total \$122.8 million lodestar). Ex. 75 at ¶ 136. Watts did *no work* to secure the Kansas trial judgment, which was the litigation result most responsible for the settlement, and had no responsibility for the additional seven certified classes set for trial in 2018. *Id.* at ¶ 140. Even Watts contribution to the Minnesota class case derives, in part, from the efforts of the other attorneys who got the class certified, took the depositions, and prepared the experts. If Watts and their clients are not required to contribute the same fee amount from their share of the common fund as all other class members, Watts’ clients and Watts will, in fact, be “free-riding” on the efforts of other lawyers who did a vast majority of the relevant work and upon whose work the recovery was secured.

4. Watts controls whether their clients “pay more” than other class members.

Watts seeks to present the Court with a Hobson’s choice. Watts and Watts alone will decide if their clients must pay an “unreasonable portion of [their] recoveries” in attorneys’ fees by electing to seek enforcement of thousands of attorneys’ liens if unhappy with an award of reasonable fees here. ECF No. 3611 at 36-37. Given their concession that it would indeed be

unreasonable for the clients to pay twice, the threat itself is empty.³⁰ Tellingly, they stop short of threatening to actually file the liens, despite suggesting it numerous times. *Id.* at 39-40. Instead, they only contend “it would put immense pressure on all retained counsel to resort to attorney liens.” *Id.* at 63. They admit that only “[i]n that event” – *i.e.*, where Watts does not get their \$180-200 million from the Court – could “represented class members ... be left paying more.” *Id.*

Moreover, it is speculative that any attempt by Watts to file liens would result in their clients paying additional, unreasonable fees. Filing liens would put at issue the meaning of each fee contract, including why the contracts are silent about the calculation of fees in a class settlement, and would likely require Watts to come forward with individualized proof of what each of their 57,385 clients understood. *See, e.g., Celmer v. McGarry*, 412 S.W.3d 691, 700 (Tex. App. 2013) (“The party seeking to enforce the contract bears the burden of proving the existence of the contract and its terms.”). If liens were filed, Watts’ clients may assert that the contracts are unenforceable on these bases or even that Watts’ solicitations were “misleading, deceptive, or unfair,” TX ST RPC Rule 7.03, which make the contract voidable by the client. Tex. Gov’t Code Ann. § 82.065 (“Any contract for legal services is voidable by the client if it is procured as a result of conduct violating ... Rule 7.03 of the Texas Disciplinary Rules of Professional Conduct”). Similar allegations about Watts’ solicitations have been already been raised in a case recently transferred to this MDL, allegations that may need to be resolved prior

³⁰ In light of the concession, it is not clear how Watts, or any other Movant, would justify filing attorney’ liens. *See, e.g.,* TX ST RPC Rule 1.04 (“A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.”); 3 Tex. Prac. Guide Torts § 11:173 (“The Texas Disciplinary Rules of Professional Conduct prohibit attorneys from charging or collecting an illegal or unconscionable fee.”).

to enforcing Watts' private fee contracts (if Watts asks for those contracts to be enforced).³¹ See Ex. 78 at ¶¶ 32-40.

Liens would not necessarily result in Watts' clients paying more either. Under the Settlement Agreement, liens arising from Watts' Minnesota cases would be resolved by the Minnesota Court. ECF No. 3507-2 at § 9.21. Under Minnesota law, that court has the inherent authority to supervise lawyers appearing before it, including the "inherent power to oversee attorneys by [acting as the] final, independent review of attorney fees."³² *Irwin*, 599 N.W.2d at 141-42.³³ Thus, filing liens would put at issue directly what Watts insists no court should do: weigh in on whether their fees are excessive or unreasonable.

Moreover, aside from whether the contract percentages could be reduced, it is also not certain that they would need to be. In enforcing a lien on a contingency contract (under Texas law as Watts insists), a court would have to "construe a contract between client and lawyer as a

³¹ See ECF No. 3665 (JPML Transfer Order of the *Kellogg* lawsuit to this District); August 13, 2018 Docket Annotation reflecting "Receipt of original record from the District of Minnesota" of *Kellogg v. Watts Guerra, LLP*, Case No. 18-2408-JWL-JPO. The undersigned are aware of the *Kellogg* allegations, but they had no involvement in the assertion or filing of those claims. They take no position on their merits, but merely point out that one or more of Watts' clients may in fact raise these issues if Watts files a lien. Remarkably, none of the Watts' experts acknowledge or attempt to address *Kellogg* and the serious allegations asserted in *Kellogg*.

³² Watts' experts seek to use this case to show that Minnesota courts have only intervened to raise attorneys' fees, but the case stands for the broader proposition quoted above that the courts retain plenary power to determine the reasonableness of fees. Indeed, in *Irwin v. Surdyk's Liquor*, 599 N.W.2d 132, 141-42 (Minn. 1999), the Minnesota Supreme Court struck down as an unconstitutional violation of separation of powers a state statute that sought to declare the appropriate attorney fees available.

³³ "We have previously said that contingent fees are condemned 'only where an attorney has taken advantage of a client's circumstances to exact an unreasonable or unconscionable proportion of the client's claim.'" *David v. Bartel Enterprises (Nitro Green)*, 856 N.W.2d 271, 277 (Minn. 2014) (quoting *Holt v. Swenson*, 90 N.W.2d 724, 727-28 (1958)). Other courts have recognized that a fee may be unreasonable where the client is led to assume "individual counsel would perform all work associated with the case and that the agreed-upon fee would constitute the only fee for this work." *Walitalo v. Iacocca*, 968 F.2d 741, 749 (8th Cir. 1992) ("A problem does arise, however, if individual counsel entered a contingency agreement with his or her client on the assumption that individual counsel would perform all work associated with the case and that the agreed-upon fee would constitute the only fee for this work. Given that the appointment of lead and liaison counsel decreased the amount of work required of individual counsel, and that lead and liaison counsel are being separately compensated for this work, these contingency fee arrangements may no longer be reasonable.").

reasonable person in the circumstances of the client would have construed it.” *Anglo-Dutch Petroleum Int’l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 451 (Tex. 2011) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18(2)). Any ambiguity would be construed against the attorney since “[p]art of the lawyer’s duty is to inform the client of all material facts.” *Id.* at 450 (“this responsibility is not a mere and meaningless formality, the lawyer must be clear”). Watts’ contracts strongly suggest that the client’s obligation for fees would *never* exceed 40% of the gross recovery. For example, it states that Watts will advance “expenses associated with the prosecution of [their] client’s claims” and then “repay [those] expenses advanced out of its forty percent (40%) fee.” ECF No. 3580-9 at 2, 4, 6. Consistent thereto, Watts acknowledges, throughout their brief, that fees awarded by the Court pursuant to common-benefit assessments would come out of *their* share of any contracted recovery, not the client’s. And they assert that they “supported a single nationwide settlement class based on[.]” in part, “that a single-settlement framework would provide *all* class members with the same per-bushel recovery net of fees.” ECF No. 3611 at 27. Separately or together, these facts could be taken as an implicit concession that Watts understood their fee – along with the fees awarded to Common Benefit Attorneys – would be decided by this Court in the Fee & Expense Award, and that, at minimum, any common-fund award, like any common-benefit assessment, would be applied against Watts’ contracted share of the client’s recovery, not the client’s share. This would be the only means of ensuring the client does not pay fees in excess of the 40% agreed to by the contract. This is also supported by the fact that the contract was silent on how fees would be calculated even though Watts was certainly aware that it was possible the case might resolve in a class settlement.

Watts trots out a parade of horrors to make the lien process seem unwieldy, including the assertion that “absent class members could be pulled into the fray” and that liens would result in litigation “in multiple forums.” ECF No. 3611 at 63. Those assertions are unfounded. The Settlement Agreement provides “exclusive jurisdiction to decide the enforceability of any lien” to one of the three courts (ECF No. 3507-2 at § 9.21.1), so the specter of collateral litigation is illusory. More offensive is the suggestion that Watts might sue class members who did not hire an individual lawyer for being unjustly enriched by filing a claim. But those class members had lawyers and were pursuing their own claims. See Mem. & Order Approving Class Notice, ECF No. 2703-1 at 8 (“If you decide to stay in the class, you do not need to hire your own lawyer but you are welcome to do so. Class Counsel, who was appointed by the Court, is working on your behalf.”). It is, frankly, frivolous to contend that by following the Court’s notice, class members were free-riders: they pursued their claims; their lawyers did the bulk of the work that resulted in making the settlement available to everyone; and, they will pay their fair share of the fee through this Court’s Fee and Expense Award. Any attempt to seek more would be factually and legally meritless, and precluded by *res judicata* or collateral estoppel when this Court issues a final judgment entering the Fee and Expense Award.

The foundation to Watts’ argument that the Court should “liquidate” their supposed contractual entitlements is that if they assert liens, their clients will unreasonably pay more, despite being active participants in the litigation. But some of the work Watts points to may make it *reasonable* for those Class Members to “pay more” through a separately enforced private fee contract. They arguably benefitted, individually, from having an individual attorney provide them case updates, advise them on whether to accept the settlement, and to assist them in filing claims. Ex. 75 at ¶ 149. These same services were *not* available in the same manner to Class

Members who chose not to hire a contracted lawyer. Ex. 75 at ¶ 150. Indeed, Watts strongly touts that their clients are completing more Claim Forms than other class members. ECF No. 3611 at 43 (“Watts Guerra Plaintiffs are *far* outperforming their numbers compared to the class as a whole”). They would purport to be accomplishing this because Watts is assisting them in this endeavor. Ex. 75 at ¶ 150. It does not seem inherently unreasonable for these clients to pay a premium for a service that other Class Members are not receiving, since that service is at least arguably making their individual recovery possible. *Id.*; Ex. 78 at ¶ 41-50. But that premium should not come at the expense of the overall Class or the overall fee from the common fund. Thus, Watts could collect fees for this service by seeking (for example) a lien for the difference between the Fee & Expense Award (e.g., 33⅓ percent) and his contractual fee entitlement (40%). If Watts’ clients end up with 50% of the Settlement Fund, that would net Watts \$50.25 million *in addition* to any fee award here. It also gives effect to the very terms of the private contracts Watts finds sacrosanct.³⁴

Watts argues that this would be “inequitable because [their clients] are the ones who cared enough to retain counsel [and] actively participate[.]” contending “the mass of individual claims played an important role in extracting the \$1.51 billion settlement from Syngenta.” ECF No. 3611 at 41. He then gives “one example” pointing to the “ten-figure adverse verdict in Minnesota” that Syngenta was facing when it signed the term sheet. *Id.* But, that was a *class* trial: the “Watts Guerra Plaintiffs” and the “mass of individual claims” had nothing to do with that trial or the pressure it may have put on Syngenta. And Watts’ own contributions to that trial

³⁴ Watts does point out that the Settlement was intended to ensure every Class Member was treated the same. That is true, as far as the allocation of the Fund was concerned, but Watts controls whether they seek to enforce their 40% contingency contracts. They obviously believe they *should* reduce those contracts so their clients benefit from the lower-cost class-settlement structure, but that decision should not prejudice the rest of the Common Benefit Attorneys or class members who chose not to hire a contracted lawyer. See Ex. 78 at ¶¶ 41-46.

are reflected in their Minnesota common-benefit work, not in the work they performed for their individual plaintiffs. Watts’ “one example,” then, proves precisely the opposite of the point they seek to make: it was not the “mass of individual claims” that created the Settlement Fund, but exposure of the class claims. *See, supra*, Factual Background § I.

In light of the foregoing,³⁵ it would be inappropriate to permit Watts (and other Movants) to use Rule 23(h) to shortcut the attorney lien process contemplated by Section 9.21 of the Settlement Agreement by simply *assuming* that: those contracts “could be” enforced; a common-fund fee would be deducted from the client’s share (and not the attorneys’); the percentage would not be reduced by a reviewing court; and, it would be unreasonable for clients who hired contract lawyers and received added services to pay more than the other class members. Even if Rule 23(h) permitted it, fees should not be allocated based on what Watts would have expected to receive if they enforced contracts where such questions persist.

B. The Common Benefit Order (“CBO”), and Related Agreements Adopting that Order, including the JPA, Do Not Govern the Fee Award to MDL Kansas Common Benefit Attorneys because this is a Class Action Settlement.

Central to the arguments raised by multiple Movants, including Watts, Bassford, and Wagstaff Cartmell (“Wagstaff”), is the contention that the “common-benefit fee and expense assessments” in the CBO and JPA control or should be used as the benchmark proxy for how fees should be allocated. But those arguments rest on the faulty – and demonstrably mistaken –

³⁵ Kansas attorneys do not seek to interfere in these contracts, to modify or alter their terms, or to cap or reduce what Watts would be owed under these contracts. Indeed, Watts does not seek to enforce those contracts. The foregoing simply identifies reasons to doubt Watts’ self-serving assertions that they may make their clients “pay more” if Watts is not awarded \$180-200 million. Extracting an agreement from their clients to pay 40% of their recovery without disclosing to them that their case might resolve as part of a class settlement, in which the Court would decide reasonable fees from the overall common fund, is simply not a grounds to award more in attorneys’ fees to Watts, under Rule 23(h) than they are entitled under the law. Watts will be free to decide what to do about their contracts without any interference from Kansas attorneys.

premise that “assessments,” and the limits placed on them in the JPA, govern allocation of attorneys’ fees from a class fund when, in fact, they do not.

1. The CBO provides that attorneys’ fees in a class action be awarded from the “overall class recovery,” not from common-benefit assessments.

As set out in the Factual Background, *supra* § II, the CBO makes expressly clear that “common-benefit fee and expense assessments” apply only to individual recoveries; they were never intended to and do **not** govern the amount of any “attorneys’ fees or expenses” sought or awarded pursuant to a class settlement:

In the event that there is a class settlement, recovery or judgment in favor of the class, ***no assessment pursuant to this Section will be made***, either for attorneys’ fees or for expenses, individually from any class member or his/her/its individual attorney as to the portion of any class recovery distributed to that individual class member if the class member remains in the class (i.e., does not opt-out of the class). Instead, ***all fees and expenses for that class member will come out of the overall class recovery funds provided by defendants***, as approved by the Court, or as otherwise Ordered by the Court. The relationship between class counsel fees and costs obtained through any class settlement or judgment and the Common Benefit Fund will be addressed, if necessary, by later order of the court.

ECF No. 936 at 20 (emphasis added).³⁶ This Settlement is a class settlement; therefore, “no assessments pursuant to” the CBO are to be levied on any individual class member’s recovery. Kansas attorneys’ necessarily seek a fee from the common fund (“the overall class recovery

³⁶ The “common fund doctrine” under which attorneys’ fees are awarded from an overall classwide recovery is distinct from the levy of common-benefit fee assessments on individual recoveries. See 5 Newberg on Class Actions wberg § 15:112 (“Similarly, courts sometimes confuse the basic ‘common fund doctrine’—by which attorneys who recover a common fund for a class of beneficiaries are entitled to a fee from that fund—with the common benefit doctrine described here. The law would be clearer if the term ‘common benefit fees’ was reserved for its special use as a fee allocation mechanism in MDL cases.”). The CBO adheres to this distinction. In stating that, in a class recovery, fees and expenses “would come out of the overall class recovery,” the CBO expressly mirrored the traditional definition of a common fund fee, as articulated in many cases, including *Boeing*, 444 U.S. at 478 (“[T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee **from the fund as a whole**.” The common-fund doctrine reflects the traditional practice in courts of equity...” (emphasis added) (internal citations omitted)).

funds”) based on their efforts in bringing that fund into creation. Since Kansas attorneys do not seek to apply an assessment, their 16 ⅔ percent Fee Request is consistent with the CBO.

Indeed, Co-Lead Counsel always understood that they could make an appropriate fee request if they succeeded in: (1) certifying the class and (2) extracting a class recovery from Syngenta. Ex. 75 at ¶ 113. The “common benefit fee and expense assessments,” in contrast, would have applied in the absence of these two victories, or to parties who elected not to participate in a class settlement.

Co-Lead Counsel always believed this was a class case, as proven by the manner in which they pursued the case. They committed substantial resources and took substantial risk based on that belief, and they were successful. No contracted attorney, including Watts, can claim surprise that Kansas attorneys seek a fee from the overall class recovery, including Watts’ clients who choose to participate in the class settlement. See ECF No. 143 at 109:3-13 (Leadership Hr’g Tr.). Watts makes much of their “reliance” on the JPA, but at each turn in the road that led to the JPA and then the CBO, Co-Lead Counsel relied on the CBO that they were entitled to seek a fee from the class recovery, as expressly permitted by Section IV.B.3. Indeed, Co-Lead Counsel would not have agreed to and proposed this CBO if it had been drafted otherwise. Ex. 75 at ¶ 115.

2. The JPA is consistent with the CBO and only applies to assessments in individual recoveries.

Movants, including Watts, cannot avoid the CBO’s clear language by relying on ancillary agreements incorporated into the CBO, such as the JPA.

a) Parties to the original JPA reached no agreement on how class fees would be divided.

The JPA and the CBO are consistent. In the JPA, the parties agreed to “assessments” but not to an allocation of fees in a class recovery. Indeed, Watts points to nothing in the JPA that

limits the attorneys' fees that Co-Lead Counsel may seek from the overall class recovery, whether that recovery includes or does not include Watts' (or another JPA parties') Minnesota clients. Nor does it dictate how such fees will be allocated in the event – as here – that Watts' (or another parties') clients choose to participate in a *class* settlement subject to this Court's jurisdiction. Rather, the JPA contains only an agreement as to the size of a “common benefit fee and expense assessment” applicable to a clients' individual recovery. *See* ECF No. 3611-1 at 8 § 2.a.ii.2 (limiting the “collective exposure of” the signatories in connection with such client for payment of a “Common Benefit Assessment”). The CBO confirms as much, making clear that “assessments” only apply to individual-case recoveries, and are inapplicable to a class settlement. ECF No. 936 at 20.

Furthermore, as explained *supra*, Factual Background § II, any doubt that this was true was removed when the parties, including Watts, signed the Addendum to the JPA, which was the only agreement to address allocation in a class settlement (albeit one not applicable here). There, they described specifically the original JPA's assessment provisions as applicable to “individual cases.” ECF No. 3611-2 at 6.

No one, including Watts, argues that the parties to the JPA intended the phrase “common benefit fee and expense assessment” or “Common Benefit Assessment” to apply beyond the terms of the CBO (*i.e.*, exclusive of class recoveries). To the contrary, several Movants expressly acknowledge that the JPA and CBO are entirely consistent with one another and intended to be read together. *See* Watts Fee Appl., ECF No. 3611 at 48; Bassford Fee Appl., ECF No. 3568 at 3, 10-11. Watts points to language in the JPA that the “Parties desire[d] ... to resolve all potential, future disputes in connection with Common Benefit Assessments” (ECF No. 3611 at 45 (emphasis omitted) (citing ECF No. 3611-1 at 4)). But this is consistent with the

understanding that the parties agreed to resolve all disputes in connection with the *assessments* and does not foreclose the absence of an agreement on how to allocate fees in a *class action*.

Indeed, the JPA provisions related to assessments were *only* necessary because the Court lacked jurisdiction to assess individual cases not pending in the federal MDL. See ECF No. 403 at 4. This is why Co-Lead Counsel agreed to reduced assessments for Watts’ (and other JPA parties’) state cases, but not their federal cases. See ECF No. 3611-1 at 7. It is also why they never agreed on how fees would be allocated in a class settlement – they did not need to do so: if Watts excluded their clients from the class, the JPA assessments applied; and, if they did not, the Court would decide the allocation as part of awarding reasonable attorneys’ fees from the overall class recovery. Ex. 75 at ¶ 107.

These agreements fully fulfilled the JPA’s intention to prevent collateral litigation like the lawsuits that occurred in *Rice*. Those lawsuits were only occasioned because the MDL court lacked jurisdiction to decide a just allocation in the first instance. See, e.g., *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811 CDP, 2010 WL 716190, at *1 (E.D. Mo. Feb. 24, 2010) (“reluctantly” refusing to order assessments for state cases even though “it is abundantly clear that the plaintiffs in the related state-court cases have derived substantial benefit from the work of the leadership counsel in these federal cases”), *aff’d*, 764 F.3d 864 (8th Cir. 2014). *Rice* was not a class settlement.

In their papers, Watts merely assumes that the JPA’s limitations on the “assessments” apply in this context, when they clearly do not. Watts cannot argue, on reply, that the JPA deviated from the CBO. The history of how the JPA was negotiated proves that they were intended to be entirely consistent with one another.³⁷ The provision limiting assessments to class

³⁷ The Court may consider the JPA in light of the attendant circumstances, including the CBO. See, e.g., *Anda Const. Co. v. First Fed. Sav. & Loan Ass’n, Duluth*, 349 N.W.2d 275, 278 (Minn. Ct. App.

settlements was in the originally proposed CBO that Watts received at the time it was submitted to the Court. Watts negotiated the JPA from that proposed CBO. And Watts did not object when the operative CBO—which incorporated the JPA—was proposed to the Court still containing the language that the assessments would not apply to a class settlement. *See, supra, Factual Background § II.* Watts (or any other Movant) ever filed an objection or opposition to (or motion to reconsider) the CBO, and never argued that awarding fees from the *overall* class recovery was inconsistent with the JPA. *See, e.g.,* L.R. 7.3(b) (“Parties seeking reconsideration of non-dispositive orders must file a motion within 14 days after the order is filed unless the court extends the time.”). Nor – in the intervening *three* years – has Watts (or anyone else) served Co-Lead Counsel with prompt notice, as the JPA requires (ECF No. 3611-1 at 19 § 3.a.iii.f), that Co-Lead Counsel breached its obligations under the JPA by reserving the right to seek a class fee unencumbered by the assessments. Ex. 75 at ¶ 121. The language and evidence is, therefore, unequivocal that the assessment cap in the JPA does not and was never intended to limit a request for fees from a class fund in the event Watts’ (and other JPA parties’) clients participated in a class recovery.

Tellingly, the Minnesota CBO that Watts proposed to the Minnesota Court contains the same language as the federal MDL CBO. Watts quotes additional language from the Minnesota order: “Nothing in this section is intended to be inconsistent with the JPA or the Federal Common Benefit Order....” ECF No. 3611 at 53. But this proves the point: even when Watts had a second opportunity to propose that the JPA’s “assessment” provisions apply to a class recovery, they did not make such a proposal. Rather, they confirmed that not applying these

1984) (“It is well settled that where several instruments are executed as part of one transaction, and they are all consistent with each other, they will be read and construed together even if their terms do not refer to each other.”)

assessments in the event a class recovery was “[c]onsistent” with the JPA. Of course, what was proposed in Minnesota does not bind Co-Lead Counsel (who did not appear in Minnesota); but, it certainly binds Watts and evidences what was intended by the JPA *before* they agreed to let his clients participate in the class settlement.

Bassford Remele candidly acknowledges this fact, stating the JPA does “not foreclose [Kansas attorneys] ability to also seek a class-attorney fee award.” ECF No. 3568 at 5 & n.2 (“To be sure, the JPA does not preclude such an action.”). Watts points to the Fee-Sharing Agreement, claiming that its statement that it supersedes and cancels the JPA proves the JPA otherwise applied. ECF No. 3587-8 at 4 (“No party that signed a JPA may receive any fee or expense reimbursement from the monies awarded by the Court without signing this separate agreement.”). But that was merely protective to ensure that monies would not be paid out under the Fee-Sharing Agreement to firms who simultaneously sought to make baseless arguments that the JPA should control how the fees would be allocated because by that point Watts had started contending the JPA would apply in a class settlement. Ex. 75 at ¶ 119. If the JPA contained an agreement on how to divide class fees, there would have been no need to attempt to negotiate the Fee-Sharing Agreement in the first place. *Id.* The Fee-Sharing Agreement proves the JPA did not govern.

b) The Settlement Agreement is consistent with this Court’s authority to allocate fees without reference to the inapplicable JPA.

Contrary to Watts’ assertion, allocating fees in accordance with the JPA does not give effect to the parties’ intent when they executed the Settlement. Nor did Co-Lead Counsel ever expect that “vis-à-vis Watts Guerra” that it “has *always* been the assessments set by the JPA” that would apply. ECF No. 3611 at 49. As the Court is aware, there were substantial disagreements regarding how the two-settlement structure of the September 2017 Term Sheet

would be implemented, including, *inter alia*, disputes over how much of the Settlement Fund would be subject to this Court’s jurisdiction as part of the class settlement; how the settlement payments would be allocated and distributed; what type of claims process would be required; and, who would be eligible to participate in the individual settlement.

Co-Lead Counsel did not sign, authorize, or agree to the September 2017 Term Sheet, which would have deprived this Court of jurisdiction over attorneys’ fees related to Watts’ clients, and took the position that the term sheet was unenforceable, in part, because there was no agreement on how the funds would be allocated between the two settlements. Ex. 75 at ¶ 21; *accord* Mem. & Order, ECF No. 3531 at 9-10 (“The preliminary and non-binding nature of the term sheet is further demonstrated by the absence of many material terms, including the fundamental matter of the allocation of the settlement amount among the different kinds of plaintiffs.”). Moreover, there was never an agreement on how attorneys’ fees would be allocated, which is why the parties engaged in numerous negotiations with the Special Master (as Watts acknowledges) on these topics. ECF No. 3611 at 26. Ultimately, consolidating all of the plaintiffs into a single, class settlement allowed the parties to complete negotiations on the settlement terms *because* it created a jurisdiction and mechanism to resolve all these issues before this Court. The mechanism for allocating and awarding fees under Rule 23(h), pursuant to the Court’s provisions in the CBO, is exactly what the parties’ intended. Ex. 75 at ¶ 54.

The Settlement Agreement clearly vests *this* Court with jurisdiction over the Settlement Fund (ECF No. 3507-2 at § 2.20), which includes “any attorneys’ fees or expenses awarded.” *Id.* at § 2.32. It further vests this Court with “exclusive jurisdiction over the Parties *and their counsel*.” *Id.* at § 9.18 (emphasis added). It requires “[a]s part of the Settlement” that any counsel seeking attorneys’ fees “make [a] Fee and Expense Application” to one of the courts, where this

Court will issue an order in consultation and with approval of the other two courts for all fees to “be paid from the Settlement Fund.” *Id.* at § 7.2.1-7.2.2. This is entirely consistent with the CBO that any attorneys’ fees and expenses will be awarded from the common fund out of the overall class recovery, pursuant to an order of this Court, and that **no** common-benefit assessments shall apply. *Cf.* ECF No. 936 at 20.

Because the JPA does not preclude a request for fees from a common fund, the Settlement Agreement did not need to supersede the JPA. In contrast, if Watts’ contrary interpretation of the JPA is accepted, the Settlement Agreement necessarily *had* to supersede the JPA because the two agreements are inconsistent.

The Settlement Agreement includes an integration clause. “This Agreement . . . contains an entire, complete, and integrated statement of the terms agreed to by and between the Parties, and *supersedes all prior . . . agreements . . . and understandings relating to the subject matter of this Agreement.*” ECF No. 3507-2 at § 9.24.1 (emphasis added). Watts argues that the Settlement Agreement involves a different “subject matter,” but the integration clause is broader, superseding even prior agreements “*relating to the subject of this Agreement.*” *Id.* (emphasis added).³⁸ Attorneys’ fees awarded by the Court, and how it allocates those fees, are obviously related to the settlement, as those funds are to be paid directly from the Settlement Fund pursuant to the exclusive jurisdiction of and by an order of award from this Court. In contrast, the JPA required Watts (and other signatories) to “instruct Syngenta to hold back and pay to the Federal MDL Funds” the relevant assessments from any individual recovery. ECF No. 3611-1 at 7 § 2.a.i.1, 8 § 2.a.ii.2. Further, the Settlement Agreement is inconsistent with the JPA’s arbitration provision, *id.* at 16-18 § 3.a, requiring disputes to be submitted in arbitration, because this Court

³⁸ See *Chelsea Family Pharmacy, PLLC v. Medco Health Sols., Inc.*, 567 F.3d 1191, 1199 (10th Cir. 2009) (“The ordinary meaning of the phrase ‘relating to’ is broad.”) (citing cases; footnote omitted).

has exclusive jurisdiction over disputes related to its Fee & Expense Award. ECF No. 3507-2 at § 2.32.³⁹ Thus, to give the Settlement Agreement effect, the JPA is necessarily superseded and it plainly relates to the Settlement.

Watts argues that the Settlement Agreement's release of liability to Syngenta for disputes that arise out of the JPA indicates that the JPA was not superseded. ECF No. 3611 at 48 (citing ECF No. 3507-2 at § 7.1.2). But Syngenta was released from all "disputes among plaintiffs' counsel relating to" attorneys' fees. *Id.* at § 7.1.2. It did not want to be involved in the event there was any dispute about whether the JPA applied, even a meritless one.

Finally, Watts argues that the Settlement Agreement cannot supersede the JPA because it "does not even purport to address how much Watts Guerra should pay for common benefit work." But that was the point. In negotiating the Settlement Agreement, the parties could not agree on how to allocate and divide the Fee and Expense Award, and the Settlement Agreement vests the Court with the discretion to make that determination, unencumbered by the JPA. *See* ECF No. 3580-5 at 83-84 (attesting that he understood the Court's would "allocate" the fees among the attorneys).

c) Co-Lead Counsel did not breach the JPA by including Watts' clients in the Class.

Watts suggests that Co-Lead Counsel "might be in breach" of the JPA by including their clients in the proposed class. ECF No. 3611 at 49. It is true that JPA parties, including Watts, had the right under the JPA to place their clients on an "Excluded Client List," requiring Co-Lead Counsel to advocate for those clients' exclusion from any federal MDL class. ECF No. 3611-1 at 15 § 2.g. Watts admits, however, that they "allowed [their clients] to be included in a

³⁹ Watts further contends that the Settlement Agreement was entered into between different parties. ECF No. 3611 at 43. But the Settlement Agreement defines Parties to include "Settlement Class Counsel" and "Plaintiffs' Negotiating Committee" which includes both Watts and Stueve. In addition, Co-Lead Counsel were added as signatories to the agreement.

single nationwide class—a decision made for their benefit.” ECF No. 3611 at 48. That admission dooms the accusation because the JPA prohibited Watts from placing a client on the Excluded Client List if it was in the “client’s best interest” to participate in the class:

By including a client on its Excluded Client List, the applicable member of the Remele/Sieben Group represents and warrants that (1) it believes that it is in their client’s best interest to be excluded from the proposed class and (2) would recommend to such client that he/she/it opt out of the proposed class, if such client was included in the applicable class definition

ECF No. 3611-1 at 11 § 2.b.v.

Co-Lead Counsel insisted on this provision, at least in part, because they always anticipated that if they were able to certify a class that created a settlement, the clients of contracted attorneys might want to participate in that settlement. *See* ECF No. 143 at 109:3-13. This provision ensured that those attorneys, including Watts, could not hold their clients hostage from a class settlement by including them on an Excluded Client List solely to insist the JPA-assessments applied. Ex. 75 at ¶ 125. The provision worked as intended. Although many JPA parties, including Watts, invoked the exclusion with respect to the litigation classes, *none* have invoked it with respect to the settlement class.⁴⁰ *Id.*

Faced with a good result for their clients and the knowledge that exempting his clients would cost him \$100 million in administrative costs, Watts admits that they were forced to allow them to participate in the class settlement, stating now that the “single nationwide settlement class” was in “[their] clients’ best interests.” ECF No. 3611 at 27. In his declaration, Mr. Watts confirms that he “could not in good faith tell my clients that *they* would be better off not participating in this settlement.” ECF No. 3580-5 at 86 ¶ 334. In fact, he concedes that *not* participating in the class would place his clients in a worse position. *Id.* at 82-83 ¶ 321

⁴⁰ Only two groups of attorneys even opposed certification of the settlement class. Neither was a party to the JPA. *See* ECF No. 3519, 3521.

(contending that implementing the term sheet would have cost \$100 million of additional administrative expenses).

In accordance with the JPA, Co-Lead Counsel had no obligation to exclude Watts' clients from the class settlement.⁴¹ Because there was no agreement limiting what class counsel could seek from a common fund, even if it included Watts' clients, and "assessments" do not apply in that circumstance, the JPA's assessment limitation is inapplicable.

d) Estoppel, equity and reliance do not justify applying the JPA to a class-wide recovery that the parties did not agree it would apply to.

Although the Court is not obligated to follow *any* fee-allocation agreement, including the JPA, *supra* Argument § 1, the inapplicability of the JPA to a class settlement undermines all of Watts' arguments that Co-Lead Counsel seek to "abrogate," "set aside," or "void" the JPA. Perhaps implicitly acknowledging this, Watts resorts to broad notions of "estoppel," "equity," and "reliance" to argue that the Court should adopt the JPA as a reflection of "how sophisticated parties decided amongst themselves to allocate fees at a time when not infected with hindsight bias." ECF No. 3611 at 50-55. But Co-Lead Counsel's position is not infected with hindsight bias because the parties did *not* agree on how fees would be allocated in a class settlement. Applying the JPA's assessments to a circumstance to which it expressly did *not* apply would alter the agreement reached by the parties, not give it effect. Watts' arguments to the contrary are all without merit.

First, Watts argues that it relied on the JPA and the "Common Benefit Orders;" performed thereunder; and, "other common benefit counsel benefit[t]ed." ECF No. 3611 at 50. "Accordingly, Watts Guerra's expectations should be honored." *Id.* But equity only protects a

⁴¹ Moreover, even if there were a breach, Watts waived it by signing the Settlement Agreement.

party's reasonable reliance. *Martin v. A'BULAE, LLC*, No. A15-1993, 2016 WL 3659293, at *2 (Minn. Ct. App. July 11, 2016) ("Before a court will examine the conduct of a party sought to be estopped, the party seeking the application of equitable estoppel must show that the party suffered some loss through reasonable reliance on the other party's conduct."), *review denied* (Sept. 28, 2016). Watts cannot show reasonable reliance when the very orders they cite make clear "no assessments" will apply to plaintiffs who participate in a class settlement.

Moreover, Co-Lead Counsel never broadly "represented that their work could be purchased for certain enumerated benefits" (ECF No. 3611 at 10 § 2.b); rather, the agreement was that Watts could use their work product to obtain individual recoveries and in exchange they would pay reduced assessments on cases outside the Court's jurisdiction.⁴² Co-Lead Counsel fully complied with that agreement: for example, they only demanded 5.5% of the *Mensik* recovery because it was an individual, state-court recovery; they excluded Watts' clients from the litigation classes, as requested; and, they provided all of the work-product requested.

It is, however, inaccurate for Watts to claim they fully performed. The JPA required Watts to produce FSA 578s for each client and to supplement those documents during the litigation. ECF No. 3611-1 at 10 § 2.b. Watts now claims to represent 57,385 clients, but they produced FSA 578s for less than *half* of those clients. Ex. 75 at ¶ 133. Even as to the half for which FSA 578's were produced, Watts failed to supplement for subsequent crop years as required by the JPA. *Id.* at ¶ 134. Watts was given notice of this deficiency during settlement negotiations because it inhibited the parties from definitively estimating the number of bushels produced by Watts' clients. *Id.* at ¶ 135. Watts never cured the breach pursuant to the JPA (ECF

⁴² They never agreed, however, that this work could be purchased for "13.75% of Watts Guerra's fees." They agreed it could be purchased for use in individual cases for 5.5% of the client's gross recovery. It is ironic that Watts seeks to re-write the precise terms of the JPA while contending those terms are sacrosanct.

No. 3611-1 at 19 § 3.f). *Id.* Instead of expending the resources and costs of doing so, a precondition of the JPA’s rights, Watts elected to participate in the class settlement. By enjoying the benefits of a class recovery, it is not inequitable for Watts to be subject to its costs. *Id.*

Watts also argues that if they knew fees would be allocated based on the relative work performed, they “would have competed to do much more of the common work.” ECF No. 3611 at 51. Watts knew what they were doing. While Co-Lead Counsel took and completed discovery from Syngenta, Watts elected to invest their resources in touring the farm belt to build up their inventory of individual plaintiffs. Ex. 75 at ¶¶ 146, 148; ECF No. 3580-5 at 15-16 ¶¶ 39-42. Based on the denial of class certification in the *Rice* litigation, Watts may have been betting that class certification would be denied here, leading them to invest in building an inventory in anticipation of a non-class settlement. Or, perhaps they never believed they would be forced to accept a class settlement as in the “best interests” of their clients. If so, they miscalculated; Kansas attorneys were successful in: certifying the classes; obtaining a large judgment; and, exerting huge pressure on Syngenta. As a result, Syngenta insisted on a class-wide release that could only be delivered through a class settlement, and Watts had to accept those terms as in their client’s best interests. Watts is not equitably entitled a *post-hoc* revision of how they chose to litigate the case.

Watts “reliance” arguments are easily turned around: if Watts had told Co-Lead Counsel that the JPA assessments would apply to a class recovery, they might have more vigorously competed with Watts for clients. Instead, they did the hard work and won the case. If they had been unsuccessful, they might very well have been left with a common-benefit assessment on individual recoveries. But, that is not how it worked out. Both sides made their bets and both

sides got the benefit of their bargain. Most importantly, the Class Members prevailed, in that they are enjoying the benefits of a recovery, at a lower cost.

Watts complains that Co-Lead Counsel received all the benefits of the JPA. ECF No. 3611 at 51. But so did Watts. They were able to make an individual recovery in *Mensik*, using Kansas attorneys' work product, and pay only 5.5% to the Kansas attorneys. That they never secured additional individual recoveries does not justify re-writing the agreement.

Watts also cannot claim that "reliance" justifies the fee they now seek. The dynamics changed considerably – to Watts' benefit – once they placed their clients into the class settlement. By their own admission: the class settlement allowed them to avoid "\$100 million" in administrative fees and would have delayed their clients' recovery by "years." ECF No. 3580-5 at 82-83 ¶ 321 (Watts Decl.). Since Watts' contracts required costs to come out of their fee, this was a direct benefit to Watts. In addition, to satisfy the JPA and keep their clients out of the Class, Watts would have been required to obtain and provide the FSA 578 data for *all* 57,385 clients (when they had collected less than half that data). See ECF No. 3611-1 at 10 § 2.b. Thus, based on Mr. Watts' own admissions, *Watts saved themselves well in excess \$100 million by joining the class settlement*. It would not be equitable to give Watts the benefit of a class settlement without its costs.

Watts and Bassford also argue that if the JPA is not "enforced" it will deter attorneys from coordinating in the future. Bassford Fee Appl., ECF No. 3611 at 55; ECF No. 3568 at 4. That is unfounded, as there will always be incentives to coordinate. They recouped substantial cost savings under the JPA – including the costs of experts, third party discovery and document depository costs by 50% or more. JPAs are certainly not the only mechanism to ensure

coordination. In fact, this Court and those in the related cases entered coordination orders *requiring* coordination. *See, e.g.*, ECF No. 1099.

Finally, Watts’ “equitable estoppel,” “judicial estoppel,” and “waiver” arguments are without merit. ECF No. 3611 at 54-55. Co-Lead Counsel have not taken any inconsistent positions. They fully performed the JPAs. They have never represented that they would limit their fee request from a class recovery to the JPA assessment percentages. To the contrary, they have repeatedly communicated to Watts that the JPA did not apply in a class settlement. Ex. 75 at ¶ 132.

* * *

Even though the Court is plainly not bound by the JPA, there is no need to declare it void. It simply does not govern the allocation of fees here.

3. The JPA-assessments are not a rational or agreed-upon benchmark for allocating fees from the class settlement.

Watts and Bassford also argue that, even if the JPA is “unenforceable,” it is still the best evidence of how the parties intended to share attorneys’ fees. No legal argument is directly supplied; instead, they rely on their “experts” (ECF No. 3611 at 61-62), who cite the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (“RSTMT. OF REST.”) § 31 (2011). *See* ECF No. 3580-3 at 17-18. But, under the cited section, a contract price is not a valid restitutionary measure of damages “for a performance for which the [recipient] did not—at least implicitly—agree to pay....” RSTMT. OF REST § 31 cmt. d. Made even more plain, under § 49(3)(d), “[e]nrichment from the receipt of nonreturnable benefits may be measured by . . . a price the defendant has expressed a willingness to pay, *if the defendant’s assent may be treated as valid on the question of price.*” (emphasis added)).

A price fixed by agreement does not conclusively establish the value of benefits conferred if the parties’ contract is invalid or unenforceable under applicable law.

But even an unenforceable contract may serve to establish value for restitution purposes, *if the grounds of unenforceability do not draw into question the validity of the parties' agreement as to price.*

RSTM. OF REST. § 49 cmt g (emphasis added). But “if the reasons for unenforceability of the contract invalidate the parties’ agreement as to price, the presumptive identification of ‘value to the recipient’ with a price the recipient agreed to pay will no longer hold.” *Id.* Here, the JPA-assessments are inapplicable *because* they do not apply to a class settlement. Relying on them for that purpose would contravene, not advance, the parties’ intent. *See* Ex. 78 at ¶ 84 n.106.

Indeed, if an agreement had been proposed to share *class* fees, the acceptable terms to Co-Lead Counsel would have been very different than the JPA or the CBO-assessments. Ex. 75 at ¶ 127. They would not have agreed to perform nearly *all* of the work necessary to certify and obtain a class settlement, pressure Syngenta to a \$1.5 billion settlement, and then allocate to Watts 27.5% of their clients’ recoveries (***equivalent to 83% of the total fee***). *Id.*; *see also* ECF No. 3611 at 44. Rather, the terms would have reflected both the work and value of class certification and class trials and the substantial benefits of participating in a class settlement. Ex. 75 at ¶ 129. In short, Watts would have paid more than 5.5% and the fees would not have been split 50/50 with Minnesota since Minnesota had only one state class it could seek to certify. *Id.*

Moreover, in a hypothetical negotiation, Co-Lead Counsel would have been bargaining on different predicate facts because, in a class settlement, the Court would have had the jurisdiction it lacked to award fees on individual, state recoveries. Ex. 75 ¶ 131 (Stueve Decl.) (citing ECF No. 403 at 4). So, Co-Lead Counsel would have had no reason to agree to reductions, and would have had the option to simply not agree and let the Court decide (as is now occurring). Ex. 75 at ¶ 131.

Furthermore, the assessments reflect the fact that they apply to *individual* recoveries; as *Mensik* demonstrates, individual settlements or recoveries require greater attendant work. As a

result common-benefit assessments on individual cases are typically lower than common-fund fees in a class action. *In re Guidant*, 2008 WL 682174, at *10 (“Although many class action cases have awarded attorney fees between 25% and 35% of a common fund, other MDL cases that are not class actions awarded attorney fees based on a much lower assessment percentage.”).

Take Watts: they tout the extensive effort they undertook to prepare just the single-plaintiff *Mensik* case for trial, including hiring and preparing their own experts. The fee division between Watts and Kansas attorneys, for that individual recovery, reflected that additional work—Watts only paid the 5.5 percent to Kansas attorneys. In contrast, as Watts concedes, the class actions exerted huge leverage on Syngenta (ECF No. 3611 at 57) and participation in a class settlement conferred massive savings to Watts.

Lastly, any attempt to construct a hypothetical negotiation over the allocation of class fees would have to reflect the reality of Watts’ alternative, including the additional \$100 million it would have cost him to implement an individual settlement.⁴³ ECF No. 3580-5 at 82-83 ¶ 321. From a purely rational perspective, Watts would have paid at least that to avoid the “years” of delay. *See id.* Assuming Watts’ claim projections (that their clients will claim 50% of the total Fund), Watts could have expected a gross fee of \$251.67 million fee in their individual settlement, which would have been reduced to \$151.67 million by the admitted administrative costs.⁴⁴ And, that reduction would increase if the remaining class members claim a higher than projected rate, while Watts’ cost to process their own clients’ claims would have remained constant. Thus, Watts bore all the risk of the claims rate. Next, pursuant to the JPA- and CBO-

⁴³ In other words, in a rational negotiation, Watts would have recognized (at least) \$100 million as a sunk cost and would have paid at least that amount to participate in the class action.

⁴⁴ 50% of \$1.51 billion is \$755,000,000. A fee of 33⅓ percent (what Watts recognizes they have to reduce their fee to prevent his clients from defecting the class settlement) yields \$251.67 million to Watts.

assessments on individual cases, Watts would have been required to pay 11% of their clients' gross recovery into common-benefit assessment funds, reducing their fee by another \$83,050,000.⁴⁵ Thus, in a separate, non-class settlement where the JPA/CBO-agreed upon assessments were applicable, the most in net attorneys' fee Watts could have expected would have been \$68.62 million—a far cry from what they seek here.⁴⁶ In contrast, the cost to Kansas attorneys including Watts in the class settlement was zero.

This alone should be enough to show that the agreed-upon JPA-assessments for individual cases cannot be transplanted to a fee allocation determination here. But there is another, devastating assumption built in to that \$68.62 million fee: it assumes Co-Lead Counsel would have agreed to allocate the \$1.51 billion to Watts' individual settlement (vis-à-vis the class settlement) based exclusively on claims filed. The \$1.51 billion was consideration by Syngenta for a *class-wide* release irrespective of who filed claims, including the approximately 643,780 producers. Watts could only deliver 8.9% of those required releases; thus, the true, *pro rata* value of the consideration Watts brought to the settlement was approximately \$134 million. The fee on that figure would be only \$44.67 million, which would have been reduced to \$29.93 million after determination of the JPA-assessment. In other words, once the \$100 million in

⁴⁵ Watts seeks to ignore that the JPA contained no promise to reduce their common-benefit assessments (determined as 11% of the clients' gross recovery) in the event Watts felt compelled to lower their contracted fee (40%) to prevent their clients from paying more than other class members. Their arguments to the contrary have no merit, as the JPA does not contain a reference to Watts' specific contract percentage. The assessment on individual cases was *static* relative to Watts' own fee *and* costs. Thus, as Watts began to realize the costs to implement their proposed separate settlement (\$100 million), the allure of the class settlement became irresistible.

⁴⁶ In a settlement governed by the JPA, Watts concedes they agreed not to seek any share of the MDL common-benefit assessment fund. ECF No. 3611 at 16 (“Watts Guerra ‘will not seek any common benefit fee awards or expense reimbursements’ from the *federal* common benefit fund”). Thus, Watts would not be able to offset their obligations with the claims they make here that their work benefitted all other class members or that all other class members were “free-riders” (even if those claims had merit, which they do not).

administrative costs to process their 57,385 claims was applied, it would have *cost Watts \$70 million* to implement the separate, non-class settlement.

It only became possible to rationally treat Watts' clients on par with all other class members, where there was a purely claims-driven allocation of the Settlement Fund, once they agreed to actually *become* members of the nationwide class. The benefits to Watts and to their clients were—in Mr. Watts own admission—immense, saving them \$100 million and years of delay. Ultimately, a nationwide class became the only means of consummating the \$1.51 billion deal. It makes no sense, now, to award Watts fees based predominantly on the amount their clients claim since the perfection of such claims bears no relation to the reason Syngenta was willing to pay \$1.51 billion. See Ex. 46 at ¶ 6. In contrast, in a non-reversionary settlement, fees awarded from an overall class recovery are awarded from the fund as a whole, in recognition of the fact that all “members of the class, whether or not they assert their rights, are at least the equitable owners of their respective shares in the recovery.” *Boeing Co.*, 444 U.S. at 481–82. The entire construct of allocating fees based on an individual's recovery—sensible outside the class context as the JPA was intended to apply—makes no sense here.

Nor is the claims-participation rate an appropriate basis to allocate attorneys' fees under the *Johnson* factors. *First*, it rewards post-settlement work that is inherently the least risky in the case. *Second*, it rewards the least complex work in the case: the Claims Form requires no legal assistance and is quite simple. Certainly, it is not nearly as complex as the legal and factual issues faced by Kansas attorneys during the litigation. *Third*, and most importantly, it rewards work that had no role in creating or enhancing the Settlement Fund. Watts' framework for allocating the fee is neither consistent with the JPA nor equitable.

C. Watts’ Fee under the *Johnson* Factors is Substantially Less than \$180 – 200 million from the Common Fund.

Although Watts played a role in achieving this historic settlement, the role they give themselves is overstated, and the fee they seek as an award under the common-benefit doctrine is excessive under the *Johnson* factors. Their role is appropriately reflected in the \$8.3 million of common-benefit work submitted in compliance with the Minnesota CBO and which was reviewed by Minnesota Lead Counsel and included in their submission. If Watts is compensated for that work from the Minnesota Allocation (with at least the average multiplier) as they should be, they would receive approximately \$12.7 million. Any additional fees awarded, under Argument § I, based on Watts’ individual claims, should be awarded from the \$100.67 million unallocated by the Fee-Sharing Agreement.

1. Watts’s overstated role to secure the settlement.

Success for Watts’ clients and “the entire settlement class” did not “beg[i]n from the well-conceived strategy to hang on Syngenta the weight of tens of thousands of individual claims.” ECF No. 3611 at 56. Like many mass-tort defendants, Syngenta could have litigated those claims for a decade or more before they would have felt concrete, bet-the-company exposure from those cases. See Ex. 78 at ¶ 64. As explained above (*supra*, Argument § I.A), those cases contributed little or nothing to the settlement. Even Watts, in attempting to credit themselves with the settlement, points predominantly to the Minnesota *class* trial. See ECF No. 3611 at 58.

Anticipating this argument, Watts claims that “class oriented counsel who have no clients might want to pretend that individual retentions were unnecessary.” *Id.* at 56. In fact, over 4,600 producers retained Co-Lead Counsel based on a fee agreement that fully advised and accommodated class participation. ECF No. 3587-3 at ¶ 72; Ex. 75 at ¶ 225 (“Client

acknowledges and understands that the Law Firms may seek to bring the Claims as a ‘class action.’ ... Client understands that if the Claims are certified for class treatment, any settlement and any award of attorneys’ fees or expenses would be subject to approval by the Court, and not Client.”⁴⁷ Those plaintiffs’ claims were filed only where necessary. Ex. 75 at ¶ 28. They stood ready to litigate if certification was denied. *Id.* at ¶ 29. But, that was unnecessary; these clients now get to participate in the settlement on the same terms as Watts’ clients, and they did not unnecessarily subject themselves to producing an unhelpful PFS because they participated in the class. It takes no crystal ball to see which option, if fully disclosed, would be more appealing to class members.

Watts next seeks to claim credit for Syngenta’s “exposure to punitive damages” because the Minnesota Court permitted amendment of the Minnesota complaint to assert such a claim. ECF No. 3611 at 57-58. But this exposure is merely theoretical since Watts never obtained a jury verdict. Ex. 78 at ¶¶ 68. Plaintiffs in the MDL did not need to amend their complaint; they had been asserting punitive damages (on a class basis) from the beginning. *See, e.g.*, ECF Nos. 296-97. And, they beat Syngenta’s efforts to have punitive damages tossed from the case. ECF No. 3051 at 17-20.

Watts also contends Judge Sipkins was no “rubber stamp” and issued lengthy, considered opinions of his own. ECF No. 3611 at 57. Of course he did: the undersigned would not suggest otherwise. All of the judges exercised independent judgment with great care and extensive work. The point is that Watts had a road to follow because Kansas attorneys blazed the trail on very nearly every significant issue. It is also true that Judge Sipkins sometimes took his own road,

⁴⁷ This provision in every fee contract of Kansas Co-Leads is further confirmation that the assessment provisions of the CBO and JPA would not apply in the event of a class action settlement.

issuing “even more favorable to plaintiffs” than the MDL Court. *Id.* But Watts fails to explain the practical benefit of those differences where Kansas attorneys nonetheless prevailed under this Court’s rulings in the only trial to go to verdict.

Moreover, in some respects, the MDL Court ruled more favorably to plaintiffs than the Minnesota Court: for example, Judge Sipkins ruled *in limine* that plaintiffs could not put forward evidence concerning the conduct of other biotech companies after the launch of Viptera. ECF No. 3587-62 at 2. This precluded evidence of at least five (of the six) instances where biotech companies waited or conducted a limited launch of their new GM traits while waiting on Chinese approvals. Ex. 75 at ¶ 151. Not only did this Court permit such evidence (May 12, 2017 Hr’g Tr. at 54-55), that evidence was central to: showing that Syngenta violated the standard of care and that other biotech companies did not have the same issues with China that Syngenta was claiming delayed its traits. Ex. 75 at ¶ 152; *see* Trial Tr. (Day 14) at 2317-18 (relying on this evidence in closing arguments); Ex. 86 (one of the demonstratives used in the closing argument of the Kansas trial). What effect this would have had in Minnesota—a defense verdict?—is ultimately unknown. It is known, however, that Kansas attorneys were able to obtain full actual damages in Kansas even without the rulings Watts cites as being more favorable in Minnesota.⁴⁸

Next, Watts argues that they planted the seed to subpoena live witnesses to trial by selecting the Minnesota forum. ECF No. 3611 at 57-58. But Minnesota was a natural forum for a plaintiff seeking to stay in state court, and Watts was far from the only firm to file cases there. In any event, one can debate whether calling the witnesses live was a benefit or a detriment. It is known, however, that the Plaintiffs could prevail using the admissions and video testimony

⁴⁸ Judge Sipkins also permitted Dr. Goodwin to introduce an alternative (and much reduced) damages model in Minnesota. ECF No. 3587-64 at 2. Kansas attorneys, however, succeeded in having those opinions stricken under *Daubert*. ECF No. 3134 at 2. Again, the effect this would have had on any damages awarded in Minnesota was unknown.

secured by Co-Lead Counsel in discovery. Notwithstanding Mr. Watts' self-evaluation of his cross examinations of Bernens and Lee, calling those witnesses live gave Syngenta an opportunity to put their defenses on display early in the plaintiffs' case. And, the witnesses scored some hits (as did Watts). But in the end, any attempt to predict how that would have played into the jury's verdict is speculative because the jury never reached a verdict. Moreover, there was a downside to keeping the Minnesota class in Minnesota state court: the class could not sue Syngenta Seeds' parent corporations (all of whom were sued in the MDL), risking that any judgment might be unrecoverable. These tradeoffs reflect that neither forum was inherently better for the Plaintiffs. Ex. 75 at ¶¶ 223-24.

Watts insists, however, that the "Minnesota Class trial settled this litigation." ECF No. 3611 at 58. They claim Syngenta increased its offer from \$600 million to \$1.5 billion after Watts' cross examinations. Tellingly, Watts only presents Syngenta's (confidential) offers in the settlement negotiations because if they disclosed Plaintiffs' demands and brackets, it would reveal that, after the Minnesota class trial began and following Watts' cross-examinations, Plaintiffs' demand dropped by substantially more than Syngenta's settlement offer rose. One cannot draw causality between the settlement and any particular event in the Minnesota class trial because the settlement was the culmination of months of negotiations, during which the parties tested each other's resolve. Ex. 75 at ¶¶ 19-20.

Watts' arguments beg the question: if it was certain Syngenta was facing a multi-billion verdict in Minnesota, on top of the \$217.7 million verdict in Kansas, why settle for \$1.5 billion? The answer is, of course, obvious: the Minnesota class trial was far from over and, it was speculative to predict how the jury was going to evaluate *any* of the evidence, including what it saw and heard from Mr. Watts. Ex. 78 at ¶ 69 n.82 ("nothing is inevitable in the world of jury

trials, especially an award of punitive damages.”). In contrast, the only known facts are that Kansas attorneys actually secured a \$217.7 million verdict and, win or lose in Minnesota, Syngenta was facing multi-billion dollar exposure in the MDL over the following 12 months. Ex. 75 at ¶ 39.

Watts’ assertion that the Minnesota class lawyers did not “request help from the Federal CLC” is also flat wrong. ECF No. 3611 at 58. For one thing, much of the work to get the Minnesota class certified depended on the expert preparation, evidentiary hearing, and briefing shared by Co-Lead Counsel. Moreover, Mr. Downing worked extensively (at Minnesota counsel’s request) to prepare both of the damages experts to testify in Minnesota, including preparing their outlines, traveling to Chicago to prepare them, and traveling to the Minnesota trial to run through their testimony for a final time. Ex. 77 at ¶¶ 15-17. In addition, the Minnesota lawyers requested and Co-Lead Counsel provided other trial materials, including outlines for key defense witnesses like David Morgan. And they had access to the depositions taken by Kansas attorneys of each of Syngenta’s experts. Ex. 75 at ¶ 14. They also provided as requested, their: exhibit list, Rule 50(a) motion and memorandum, and jury feedback. Even Watts had a roadmap for his examinations of Bernens through the deposition taken by Co-Lead Counsel that was successfully used in the Kansas trial. Watts also had the benefit of the entire Kansas trial transcript, a full-scale preview of Syngenta’s arguments and evidence and Plaintiffs responses. And, of course, this is to say nothing of the fact that most of the video depositions played to the Minnesota jury presented answers and evidenced elicited by Kansas attorneys. *Id.*

Syngenta fully understood that even if it won the Minnesota class trial, it faced huge exposure in a jurisdiction where it had already lost against counsel who had already beaten it. In contrast, Watts and their individual cases had no similar levers to exert against Syngenta: they

were stuck with thousands of individual claims, each or most worth less than the cost and effort of trial and few or none ready to be tried. Causality cannot be logically assigned to the settlement without giving substantial credit to the work and pressure placed on Syngenta in the MDL. That credit is no less than fifty percent.

Watching from the witness seats, Watts also seeks to claim some credit for the Kansas verdict, contending that the verdict benefitted from the *Mensik* pre-trial work they shared. ECF No. 3611 at 24. Respectfully, there were little, if any, benefits to that material. Co-Lead Counsel actually provided some, draft deposition designations to Minnesota for *Mensik*. And they did receive some deposition designations served in *Mensik*, but, after reviewing them, elected to go back to the original deposition transcripts and start again. This required *substantial* time and effort. Ex. 75 at ¶ 140. When, for the Kansas trial, they asked for an outline of Dr. Giroux's testimony in *Mensik* (days away from testifying before the mistrial), they received a short email with a list of eight topics (no documents). *Id.* at ¶ 141. Minnesota attorneys now claim (accurately) that he was as "critical expert during the Minnesota class trial." ECF No. 3662-1 at 140. Dr. Giroux's Minnesota examination was clearly based on his direct examination in Kansas. Kansas did not use any *Mensik* witness outlines, used none of the demonstratives shared, and cannot recall relying on anything else that may have been provided from *Mensik* materials for the Kansas trial. Ex. 75 at ¶ 144.

Finally, Watts asserts that "any amount taken from Watts Guerra should be limited to the value that other common benefit counsel provided to *these Plaintiffs*." ECF No. 3612-1 at 140. But Kansas attorneys are seeking a fee commensurate with their efforts bringing the *entire* fund in creation. Without that fund, Watts' clients would have nothing; thus, they provided value to Watts' clients. For Watts to claim that they "carried the water" on their cases is unbelievable:

aside from the administrative work necessary to complete PFS and Claim Forms, everything else Watts contributed was part of the shared common work pool: for example, Watts sat out discovery from Syngenta, attending no depositions, relying on the deposition testimony elicited largely by Kansas attorneys; and, the Minnesota class trial depended on Kansas attorneys' efforts in assisting Minnesota to obtain class certification. Ex. 75 at ¶ 137 n.3. The benefits are extensively documented in the Kansas Fee Application.

It is irrelevant that Watts' clients were excluded from the litigation classes because they are participating in the settlement class. Their recovery is part of the Fund created and by common efforts. Watts may have spent handily to build his inventory, but that inventory did not create the settlement.

2. The *Johnson* factors do not support a \$180-200 million fee.

A reasonable fee to Watts is one that comports with a relative analysis of the *Johnson* factors, and \$180-200 million is unreasonable to a group of lawyers who: obtained no trial judgments; sat out most of the key discovery; prepared to try a case that resulted in a mistrial before opening statements; and, performed no more than \$8.3 million in Court-compliant common-benefit work. In reality, Watts seeks to be paid for their successful marketing and solicitation. But work performed by one group of lawyers to encourage their individual clients to file cases and then file Claim Forms is not common-benefit work at all — it does not benefit the Class. Rather, it is work, at most, that provides a benefit only to their clients. Allocating common fund fees based on a result of work that does not create or enhance the common fund runs afoul of the common-benefit doctrine, as explained above. See Ex. 78 at ¶ 97 (“No doubt Watts has created an exception for itself because it understands that, under the *Johnson* factors, it would not fare nearly as well as it would under its ‘for this case only’ formula. But Watts cannot

legitimately abandon the universally endorsed *Johnson* factors merely because those factors do not yield an award as high as Watts would like.”).

An analysis of the relevant *Johnson* factors does not support their request for as much as 13.3% of the Fund.

Time and Labor Involved. Watts’ contributions to the results obtained are reflected in their 12,332 hours submitted, reviewed, and approved common-benefit time. ECF No. 3662-1 at 529.⁴⁹ This reflects work across primarily three categories: discovery (6,422 hours); pretrial and trial preparation (4,760 hours); and, settlement (1,197.9). Watts did not, however, invest the same, sustained effort as Co-Lead Counsel and Kansas attorneys, who invested significant, sustained time across all aspects of the case. For example, Watts contributed little to expert development (235 hours) or legal briefing (261.7 hours); and, nothing material to class certification (99.5 hours). Even Watts contributions to discovery were disproportionately aimed at less important work: PFS (1,537.1 hours) and discovery file management (1,016.1 hours). Watts did not attend a single Syngenta deposition cross noticed in the MDL. Ex. 75 at ¶ 137.

Watts and associated counsel also report enormous *administrative* time spent complying with PFS requirements (397,978 hours). But, as explained *supra* Factual Background § III, those numbers are suspect. Other, smaller firms were far more efficient. *Id.*

This factor does not support Watts’ request for such a disproportionate share of the fee when the Court considers that all four Co-Lead Counsel invested more common-benefit time than Watts (ECF No. 3587-1 at 130-31), and other Minnesota leadership firms performed the same or more such time than Watts. ECF No. 3662-1 at 529. In short, Watts is not entitled to

⁴⁹ Inexplicably, Watts’ supplemental categorization reflects 13,822.4 hours of common-benefit time, ECF No. 3661-1 at 6, but this revised figure was not endorsed or approved by Minnesota leadership, who reported 12,332 hours. Because of the discrepancy, the categorized numbers listed here will not add up to 12,332.

such a disproportionate fee, relative to others who did the same or more work that was at least or more beneficial than Watts.

Amount Involved and Results Obtained. The vast majority of Watts' effort was spent complying with the PFS, but as explained above that work had no, or *de minimis*, effect on the settlement. It does not bear any weight in evaluating this—the most important factor—the results obtained relative to Kansas attorneys. Watts also, as explained above, overstates their contributions to the settlement. Watts had little or no role in preventing the claims from being dismissed in the face of Syngenta's legal arguments. They obtained no verdict and were merely one of a team of attorneys at the Minnesota class trial—a case that itself owes much to the efforts of the Kansas attorneys who provided most of the relevant deposition admissions, assisted in securing class certification, prepared the shared experts, and shared materials from the successful Kansas trial. Watts fails to justify why they should be treated differently than the other Minnesota attorneys who participated in that trial. While Watts was on the PNC, relative to the Kansas attorneys, Mr. Seeger *led* the PNC. In short, other than an inventory of cases that gave Syngenta thousands of PFSs to complain about, Watts contributed no more than many and less than several. The fee they seek, based on their rate of claims filed, is disproportionate to the results obtained since that work did not contribute to the creation of the fund.

Novelty and difficulty of the questions. Watts did not involve themselves in any of the complex legal issues. Nor did they involve themselves directly in establishing the liability case against Syngenta through discovery, where much of the relevant evidence and themes had to be developed. The pretrial and trial work they performed was complex, but they had a road map for that work in terms of the Kansas trial, which had demonstrated how to secure a verdict and respond to Syngenta's defenses.

The skill requisite to perform the legal service properly / Experience, Reputation, and Ability of the Attorneys. Watts has demonstrated no more skill or ability than the Kansas attorneys who secured the Kansas judgment. Many of the attorneys involved here have excellent reputations and abilities, and this factor is neutral.

The customary fee and its contingent nature. Watts argues that their 40% contingency contracts demonstrate the reasonableness of their request (ECF No. 3611 at 63), but for the reasons already explained, those contracts have no bearing on how the Court allocates fees.

Preclusion from other employment. Watts does not argue this case precluded them from taking other employment. ECF No. 3611 at 63.

Any prearranged fee-this is helpful but not determinative. There is no prearranged fee because the JPA does not apply here. Watts was offered a portion of the 20% reflected in the Fee-Sharing Agreement, but that amount was to be shared with all Minnesota inventory lawyers, not just Watts. Ex. 75 at ¶ 211; Ex. 76 at ¶ 8.

In weighing the relative effort and benefits conferred, no set of Movants – including Watts – describes work greater than or of greater benefit to the Class than that of the Kansas attorneys who seek 16.67% of the Settlement Fund. The Court should note that the Kansas attorneys, and their combined fee request, reflects the **common-benefit** work of 44 separate law firms where all of such work was performed in conformance with the CBO, ECF No. 936. This massive investment in labor – 142,823 hours – was all work recorded and submitted under the CBO, performed at the direction of Co-Lead Counsel, and subsequently reviewed by Co-Lead Counsel. It is, thus, the largest collection of recorded work in the litigation bearing the greatest credibility and reliability, and should, therefore, bear the greatest weight in the fee-allocation process.

Watts is entitled to a fee commensurate with their contributions, as reflected in the \$8.3 million in common-benefit work they performed. That fee should be awarded from the Minnesota Allocation; Watts' portion of that allocation is to be determined by Gustafson and Remele, subject to the Minnesota Court's approval. If Watts believes their efforts justify a disproportionate share of that fee, they can petition the Minnesota Court for such relief. But Watts has failed to justify that they are entitled to additional fees for their PFS and claims-perfection work. None of it is complex, contributed materially or at all to the settlement, and the latter (claim perfection) is the least risky work in the case.

If the Court awards Watts fees for this work, however, it should be based on the process and methods suggested above and from the Unallocated Fee. *Supra*, Argument, § I.B

D. Much of Watts' Expenses Cannot be Reimbursed from the Fund.

In class action cases "courts have employed [the] same 'reasonable expenses normally charged to a fee paying client' formulation" to determine which costs are reimbursable. 5 Newberg on Class Actions § 16:5 (5th ed.). Watts has clearly gone beyond that formulation by including advertising and other overhead costs.

Watts originally sought reimbursement in the amount of \$12,846,863.41 for common benefit expenses. ECF No. 3580 at 4. It does not seek reimbursement for \$2,105,714.34 in unspecified, "[a]dditional non-common benefit costs and expenses." *Id.* at 6; ECF No. 3580-6 at 16. The veracity of the \$12,846,863.41 amount is questionable because the Declaration of Mikal Watts (ECF No. 3580-5), the unsigned Declaration of Francisco Guerra, IV (3580-6), and the detailed common-benefit expense records (ECF No. 3580-10) are each inconsistent. For instance, the expense records reflect a total of only \$12,794,514.09—a \$52,000 difference. ECF No. 3580-10 at 1626. In contrast, Mr. Watts identifies separate costs totaling more than \$18.3 million:

Town Hall Meetings (11/13/14-2/3/15)	\$438,607.65	ECF No. 3580-5 at 15
Filing Fees	\$1,130,000.00	ECF No. 3580-5 at 16
Minnesota Assessments	\$970,000.00	ECF No. 3580-5 at 26
Town Hall Meetings (2/4/15-10/6/15)	\$6,561,829.32	ECF No. 3580-5 at 34
Labor Costs (2/4/15-1/11/16)	\$1,445,402.88	ECF No. 3580-5 at 34
Labor Costs (PFS Order)	\$735,802.84	ECF No. 3580-5 at 35
Labor Costs (1/11/16-9/25/17)	\$3,493,532.73	ECF No. 3580-5 at 35
Office Rent	\$350,026.68	ECF No. 3580-5 at 35
Data Entry Firm (QTAT BPO)	\$803,565.92	ECF No. 3580-5 at 35
Town Hall Meetings (11/2017-12/2017)	\$251,072.49	ECF No. 3580-5 at 78
Client Update Letters (3/31/15-3/1/18)	\$1,439,949.90	ECF No. 3580-5 at 88
Settlement Communications (Est)	\$499,901.24	ECF No. 3580-5 at 91
Telephonic Town Hall Meetings (6/2018-7/2018)	\$191,996.61	ECF No. 3580-5 at 92

Mr. Watts admits that his firm seeks reimbursement of over \$7 million for town hall meetings that included client solicitations, referral fees, and other marketing costs. ECF No. 3580-5 at 15, 34, 78. Similarly, his firm seeks reimbursement of \$5.7 million in labor costs paid to Watts Guerra employees. *Id.* at 34-35. Based on these two categories alone, Watts Guerra's request for reimbursement should be reduced by \$12.7 million.

Only the unsigned Guerra declaration contains the \$12,846,863.41 figure that Watts Guerra originally sought. ECF No. 3580-6 at 19. However, that declaration concedes that the single biggest category of costs (\$6.45 million) includes costs for "Case Development," which should not be reimbursed as it appears to be code word for marketing and advertising. *Id.* And the second biggest category of costs (\$3.63 million) is categorized merely as "miscellaneous expense." *Id.*

A review of the detailed common-benefit expense records totaling \$12,794,514.09 further reveals that a vast portion of the expenses for which Watts Guerra seeks reimbursement are marketing expenses and referral payments. See ECF No. 3580-10 at 480-1626. It is impractical to include all of the marketing expenses included throughout the 1,150 pages of billing records, but they include: "Farmers Mailing List" \$24,585 (*id.* at 483); "Development in Iowa (Feb)"

\$87,500 (*id.*); Twitter, Facebook, and Google advertising (*e.g.*, *id.* at 483, 511, 606, 615, 620, 683, 728); “Case Acquisition Costs” \$10,000 (*id.* at 510); “Media Strategy, Web, Radio Dev” \$14,321 (*id.* at 511); “Media Purchased for ND & NE” \$11,950.93 (*id.*); “Marketing Infomercial” \$100,000 (*id.* at 522); “Acquisition Costs” \$100,000 (*id.* at 542); “Case Costs” \$23,772.92 (*id.*); “Case Cost Acquisition” \$15,000 (*id.*); “Town Hall & Marketing” \$270,400 (*id.* at 580); “Deposit-June & July Media & Exps” \$50,000 (*id.* at 606); “Town Hall Mailouts-IA/Link” \$66,054.19 (*id.*); “Jun & Jul Media & Exps Adverti” \$100,000 (*id.*); “Media & Town Hall Exps” \$100,000 (*id.* at 607); “Jun & Jul Media & Exps Adverti” \$100,000 (*id.* at 615); “July Advertising Media & Exps” \$96,000 (*id.* at 641); “Case Acquisition Costs-Aug01” \$15,000 (*id.* at 642); “Town Hall Expenses” \$236,251.14 (*id.*); “Town Hall Expenses” \$118,125.57 (*id.*); “Town Hall Expenses” \$118,125.57 (*id.*); “Postage for 8/25-8/28 Events” \$23,239.29 (*id.* at 654); “Aug Advertising Media & Exps” \$50,000 (*id.* at 671); “Homolka Marketing Exps-Aug” \$35,500 (*id.*); “Case Costs” \$8,000 (*id.* at 673); “Homolka Marketing Exps-Aug” \$65,000 (*id.*); “Case Acquisition Costs” \$10,000 (*id.*); “Marketing/Radio spots” \$10,800 (*id.* at 700); “Case Acquisition Costs - Sep15” \$15,000 (*id.* at 683); “Marketing” \$3,000 (*id.*); “Townhall Support/Media” \$50,000 (*id.* at 702); “Referral Expenses” \$40,250 (*id.*); “Case Costs” \$26,105.43 (*id.* at 704); “Case Acquisition Costs” \$15,000 (*id.*); “Marketing/TV Advertising” \$12,475 (*id.*); “Referral Expenses” \$80,500 (*id.*); “Referral Expenses” \$40,250 (*id.* at 714); “Town Hall Expenses” \$47,612.50 (*id.*); “Reimburse Case/Trvl Costs” \$55,468.62 (*id.* at 715); “Reimburse Town Hall Mtg Exp” \$10,000 (*id.* at 729). These examples are just the tip of the iceberg of obvious marketing and case acquisition costs, yet they total more than \$2.5 million. It appears that Watts Guerra simply accounted for all of its marketing and case

acquisition costs with an E19 expense code. The total for all E19 expenses in the Watts Guerra expense records is over \$8.9 million.

Watts has since filed supplemental declarations, which likewise inconsistent with its prior filings. While the July 10 Application identified \$14,952,577.75 in total costs expended by Watts Guerra (\$12,846,863.41 in common-benefit expenses and \$2,105,714.34 in unsought, non-common-benefit expenses), ECF No. 3580 at 6, its August 3 Supplement identifies costs in the amount of \$15,209,561.12, an increase of more than a quarter million dollars, ECF No. 3661-1 at 8. Yet Mr. Watts only identifies \$71,774 in additional telephone expenses, leaving the remainder of this increase unexplained. *See* ECF No. 3661-4 at ¶¶ 6-7. In its August 16 Correction, Watts admits that it double counted \$970,000 in common-benefit assessments in its previous submissions. ECF No. 3686 at 2. But Watts fails to subtract this million-dollar error from its request of \$12.85 million in common-benefit expenses. *Id.* at 2 n.1. Because Watts seeks reimbursement for only common-benefit expenses, ECF No. 3580 at 4, its request should be construed as for no more than \$11.88 million in expenses. As discussed above, these expenses are marketing and client acquisition costs that should not be reimbursed.

In its August 3 Supplement, Watts Guerra identifies additional non-common-benefit expenses incurred by its associated counsel, but reiterates that its request is for only the common-benefit expenses incurred by Watts Guerra. ECF No. 3661 at 2. The Supplement identifies expenses in the amount of \$10.48 million incurred by Watts Guerra associated firms, of which \$8.57 million is for “miscellaneous” expenses. ECF No. 3661-3 at 2. Much like Watts Guerra’s expenses, a significant portion of the “miscellaneous” expenses incurred by the associated firms relate to marketing costs. *See, e.g., id.* at 9 (\$2,952,111.10 for “3,500 Client Meeting invites, advertising, room rental”); *id.* at 17 (\$512.90 for “Advertising in Sept. & Oct. 2015”); *id.* at 28

(\$2,078,221.15 in miscellaneous expense, including “Advertising & Promotion, Townhall Meeting Costs”); *id.* at 64 (\$3,273.86 for “Advertising Fees and Supplies for Town Hall Meetings. Publication Fees”); *id.* at 66 (same); *id.* at 74 (\$182,124.55 for “supplies, promotions, advertisement, event space, employee training, call centers”); *id.* at 76 (\$46,956.30 for “Wifi, Supplies, Room Rentals, Advertising, Printing Fees, Etc.”); *id.* at 107 (\$33,939.61 for “Advertising Fees and Supplies for Town Hall Meetings. Publication Fees”). However, in its August 16 Correction, Watts Guerra notes that its associated counsel may have \$3.6 million in duplicative expenses. ECF No. 3686 at 3-4. Because Watts Guerra does not categorize this duplicative time, it is impossible to decipher what, if any, unreimbursed associate counsel expenses exist for any category. *See* ECF No. 3686-3 at 2 (reflecting a single block adjustment without amending category totals).

III. Bassford Remele P.C. (ECF No. 3568).

Lew Remele (“Remele”) from Bassford Remele (“Bassford”) was appointed as co-lead counsel in the Minnesota litigation. If adopted the Fee-Sharing Agreement signed by Minnesota co-lead class counsel and PNC member Daniel Gustafson (“Gustafson”), Bassford will be entitled to a portion of the 12.5% of the Fee & Expense Award under the agreement’s suggested allocation. Presumably that portion will be substantial since Bassford reports 17.2% of the total lodestar in Minnesota, and the Fee-Sharing Agreement provides that Remele and Gustafson will jointly allocate, subject to Minnesota Court approval, those attorneys’ fees. ECF No. 3587-8 at 3 n.3. Nonetheless, Bassford proposes a framework more similar to Watts’ proposal, possibly because Bassford is one of Watts’ many referral firms. ECF No. 3611 at 13; ECF No. 3580-5 at ¶¶ 57 & 99 (Watts Decl.) The Court should not adopt Bassford’s proposal, which (like Watts’) does not comport with the standards for awarding attorneys’ fees.

A. Remele Does Not Point to Facts That Justify Deviating From the Fee-Sharing Agreement Signed by His Co-lead Counsel.

Bassford's application mirrors Watts in urging the Court to use the JPA to allocate attorneys' fees. ECF No. 3568 at 26. Bassford's submission then deviates from Watts by contending the Court has the authority to determine and prevent excessive "contingent fee contracts." *Id.* at 25. Bassford urges the Court to limit contracted fees to 33⅓ percent and deduct the Common Benefit Fee and Expense Assessment of 11% from that amount, resulting in contracted attorneys receiving 22.3%, where one-half of the 11% is directed to Minnesota Lead Counsel for all Minnesota claimants per the JPA. *Id.* at 21.⁵⁰ In other words, Bassford argues that the Court award fees by disregarding that this is a class settlement; thus, Bassford's JPA-based arguments necessarily fail for the reasons already given at length above. Bassford appears to acknowledge this fact. *Id.* at 5, 11 ("The Common Benefit Orders, while not necessarily binding in the case of a class settlement...").

⁵⁰ Bassford argues "[a]lternatively" that the Court should "apply the same common benefit benchmark percentage to the total settlement amount (\$1,510,000,000), split that amount evenly between Minnesota and Kansas leadership, and use multipliers to adjust the common benefit fees so that they are fair to both ... consistent with the allocation under the JPA." ECF No. 3568 at 21. This would appear to suggest that claimants who did *not* retain individual counsel would see their fees split evenly between Minnesota and Kansas attorneys. But such an allocation is directly inconsistent with the JPA that Bassford insists their allocation should be "consistent with." Specifically, both the June 18, 2013 JPA and the subsequent Addendum made clear that Minnesota attorneys are entitled to no recovery from any fees awarded by the Kansas MDL court. ECF No. 3611-1 at 9 ("The Remele/Sieben Group will not seek any common benefit fee awards or expense reimbursements from the Federal MDL Funds."); ECF No. 3611-2 at 6 ("In no event shall the Remele/Sieben Group or any Additional Minnesota Counsel seek, nor shall any such person be entitled to, fees from any Federal MDL Class Action solely related to use of their Syngenta Work Product in the prosecution of a Federal MDL Class Action."). Moreover, the JPA's 50/50 allocation of common-benefit fee and expense assessments (not applicable here) was expressly limited to: (1) cases filed by clients of JPA parties; and, (2) those filed in Minnesota state court. See ECF No. 3611-1 at 7-9. Thus, even if the JPA applied to the recovery here, it would not justify the 50/50 division suggested by Bassford Remele. It is clear that, like Watts (who argues the 11% assessments should be reduced because they are reducing their contract fee percentage), Bassford Remele seeks to pick and to cobble together only those aspects of the JPA beneficial to them. In contrast, Kansas attorneys provide the only uniform position, which is that the JPA-assessments are inapplicable to a class recovery, which is why they reached a Fee-Sharing Agreement that more than doubles what Minnesota attorneys might otherwise have received for settling their only class case of Minnesota producers.

Bassford, therefore, pivots to claim that equity demands using the JPA-assessments in conjunction with the “final claims data” as the benchmark (*id.* at 5 n.2.), but this argument also fails for the reasons explained above: principally, that the JPA was never intended to govern an allocation of fees based on a class recovery, and certainly it was not intended to govern an allocation of a class fund in relation to claims data, which have no relevance to a non-reversionary settlement fund. Ex. 78 at ¶¶ 85-89. That approach rewards the relative “claims rate” of contracted lawyers above the Common Benefit Attorneys who actually made the result possible, which makes no sense.

Remele raises similar “reliance” arguments to Watts, but as explained above, those arguments fail because it would have been unreasonable to rely on an erroneous interpretation of the JPA. *See, supra*, Argument § II.B.2.d.

Bassford next points to the *NFL* and *Vioxx* cases to support their framework.⁵¹ As an initial matter, that argument depends on the faulty premise that “individually retained attorneys in Minnesota did substantial work that advanced the litigation as a whole” as compared to similar attorneys in the *NFL* and *Vioxx* litigation. ECF No. 3568 at 29.⁵² Actually, the reverse is true.

The *NFL* case settled early “while the NFL’s motion to dismiss was pending.” *NFL*, 821 F.3d 410, 422 (3d Cir.), *as amended* (May 2, 2018). The district court awarded class counsel *exactly what they requested*: about “11% of the value of the Settlement Agreement,” which the defendant paid separately from class members’ recoveries. *NFL*, 2018 WL 1635648, at *3 (E.D.

⁵¹ Bassford points to the fact that some courts have applied reduced percentages in “mega fund” cases. ECF No. 3568 at 37. That jurisprudence should not apply here for the reasons stated in the Kansas Fee Application. In any event, an award to Kansas attorneys of 16.7%, for their substantial efforts in bringing the settlement about, would be consistent with mega-fund jurisprudence. Only the addition of the lawyers from other jurisdictions pushes the request upward.

⁵² Bassford points to work that contracted counsel did “in completing discovery in the bellwether discovery process,” ECF No. 3568 at 30, but it was Minnesota leaderships’ decision not to include that in their common-benefit time. Kansas attorneys are including and paying such work out of their Kansas Allocation and nothing prevents Minnesota from acting accordingly.

Pa. Apr. 5, 2018).⁵³ The district court evaluated that fee under the *Gunter/Prudential* factors (the Third Circuit’s analogue to the *Johnson* factors). *Id.* at *3-4. In a separate order, it then determined that permitting contracted lawyers to recover more than 22% of their clients’ gross recovery would be unreasonable. *NFL*, 2018 WL 1635648, at *3. Thus, the district court did not necessarily determine that an 11/22 allocation was necessary, but adopted class counsel’s proposed fee request and then capped contract fees at 22%. *NFL* also does not support the allocation advanced by Bassford for several other reasons.

First, the fee awarded to class counsel, although 11% of the settlement value, compensated them for “50,000 hours,” *NFL*, 2018 WL 1635648, at *6, where the case settled prior to significant discovery or trial. Here, Kansas attorneys have invested nearly three times that labor, and secured both litigation class certification and a class-wide judgment before Syngenta settled. Not coincidentally, then, the multiplier awarded in *NFL* (2.96), *id.* at *9, is effectively the same as the one Kansas attorneys will receive under their request (after expenses are deducted). *Second*, the claims in *NFL* involved personal injuries, not merely economic losses. Given such claims, there was less certainty that the district court would have found a litigation class manageable under Rule 23(b)(3); and, since the case settled prior to class certification, contracted lawyers had a better argument that their “mass tort” filings exerted settlement pressure on the defendant. *Third*, contracted lawyers are contributing to the ultimate recovery (*results achieved*) in *NFL* because the settlement is an uncapped claims-made settlement; the *NFL* only pays claims, unlike here where Syngenta pays irrespective of claims filed. Moreover, the work necessary to file a valid claim justifies the contracted lawyers’ compensation. They

⁵³ The *NFL* settlement was an uncapped, claims-made settlement. The value was determined by projections based on the number of claimants who enrolled in the program. *Id.* at *1-2. In contrast, the value of the Settlement here does not depend on the number of claims filed. In, *NFL*, class counsel also sought a 5% hold back from all individual recoveries for future work administering the historically long claims process. The district court deferred ruling on that request. *Id.* at *10.

have to submit a medical opinion of a Qualifying Diagnosis. Indeed, evidentiary disputes over whether a Qualifying Diagnosis has been established and legal disputes over the applicability or interpretation of settlement agreement provisions to individual claims has required (and will require) individually-retained attorneys to perform substantially more work in *NFL* than is required under the claims process here. See *NFL*, 821 F.3d at 424. Thus, *NFL* is not a valid comparison as to a proper allocation here, where the contracted lawyers did little, if anything, to create the fund.

Bassford's reliance on *Vioxx* suffers similar problems. As a personal-injury case, *Vioxx* did not result in a class settlement, and there was no litigation class to exert settlement pressure on the defendant. *Vioxx*, 760 F. Supp. 2d at 653 ("The dynamic involved in the fee application in the present case is different. The Settlement Agreement was not a class action settlement, but was rather a complicated opt-in resolution of individual personal injury claims."). Defendant settled after six individual bellwether trials, where "[o]nly one of the trials resulted in a verdict for the plaintiff." *Vioxx*, 802 F. Supp. 2d 740, 760 (E.D. La. 2011). If less than 85% of eligible plaintiffs filed claims, the defendant had the right to terminate the settlement. *Id.* Thus, the claims rate had a direct relationship to creation of any fund. After consulting the *Johnson* factors, the district court determined that common-benefit counsel should receive 6.5% of the total settlement, *Vioxx*, 760 F. Supp. 2d at 658, and that "[n]o part of this [this 6% fee award] will come from the recovery of any *Vioxx* claimant; rather it will be assessed against the contingent fee recoveries of all *Vioxx* primary plaintiffs' attorneys." *Id.* at 655. The district court limited contracted attorneys from recovering more than 32% of any clients' recovery, unless it was shown that "circumstances [in any individual case] would warrant a departure, in either direction, upwards or downwards, from the universal fee cap." *In re Vioxx Prod. Liab.*

Litig., 650 F. Supp. 2d 549, 564 (E.D. La. 2009). This amounted to 25% of the total settlement value, *Vioxx*, 760 F. Supp. 2d at 655, “without [whose] contribution the [the district court found that] *Vioxx* Settlement Agreement would not have been possible,” *Vioxx*, 650 F. Supp. 2d at 564.

In contrast, this litigation was always prosecuted as a class action, and individual plaintiffs who opted out or were excluded from that action now want to participate in a class settlement. All of the work that contributed to the creation of the class-wide Settlement Fund was performed as common-benefit work, so allocation should be based on those relative contributions—*not* on the number of clients that contracted lawyers managed to solicit and for whom they file claims. Further, in *Vioxx*, contracted lawyers navigated a “complicated opt-in resolution” that required an 85% participation rate, while the Settlement Fund here was created without regard for who filed claims in exchange for a class-wide release.⁵⁴ That process, like *NFL*, required medical proof of injury and product use contemporaneous with that injury, necessitating meaningful work by the contract lawyers. See *Vioxx*, No. MDL 1657, 2008 WL 3285912, at *3 (E.D. La. Aug. 7, 2008), *aff’d sub nom. Avmed Inc. v. BrownGreer PLC*, 300 F. App’x 261 (5th Cir. 2008).

Perhaps recognizing that no analysis of the *Johnson* factors justifies the allocation-ratios found in *NFL* or *Vioxx*, Bassford suggests that “the factual differences in this case warrant higher fee percentages than were awarded in that case.” ECF No. 3568 at 32. *NFL* awarded the class attorneys exactly what they requested, resulting in a 2.96 multiplier. Here, in applying the *Johnson* factors, the Court should award Kansas counsel what they request, which will result in a

⁵⁴ Syngenta’s Walk-Away Right is not the same thing because it would require a substantial number of plaintiffs to affirmatively decide they do not like the settlement. In contrast, contracted counsel in *Vioxx* assisted in “creating” the fund by filing claims. Without claims, there was no Fund.

similar multiplier on their time despite the substantially greater risks incurred by the Kansas attorneys.

B. Bassford's Request That Any Court-Awarded Fees be Split 50/50 Between Kansas and Minnesota Common Benefit Attorneys is Unwarranted.

The Special Master's fee proposal, memorialized in the Fee-Sharing Agreement, was intended to avoid friendly-fire between Kansas and Minnesota attorneys. Ex. 75 at ¶ 209. Bassford's departure from that agreement, however, requires certain factual clarification to demonstrate how the parties reached the Fee-Sharing Agreement and why its allocation is more than reasonable.

To start, everyone recognized (*results obtained*) that only Kansas attorneys actually obtained an enforceable judgment, and that that judgment was a very significant factor in achieving the settlement. Ex. 76 at ¶ 5. While the Minnesota class trial no doubt helped push the process, self-serving predications as to the outcome of that trial are mere speculation. The Fee-Sharing Agreement also gave weight to the fact that Syngenta faced at least seven more class trials in the MDL (*supra* Factual Background § I), and that Kansas attorneys' (as class counsel) represented more than a majority of the corn producers and 74% or more of the corn bushels impacted by the *de facto* trade embargo (*amount involved*). And, while the Minnesota class represented 8% of all corn bushels, the Fee-Sharing Agreement recognized that even if Minnesota attorneys obtained a judgment or resolved that case in the Minnesota Court, Kansas attorneys were entitled to a third of their fee awarded under the First Addendum to the JPA. *Supra* Factual Background § II. In contrast, Minnesota attorneys were not entitled to any portion of the MDL class recoveries under the Addendum; thus, the greatest share of any nationwide class recovery Minnesota attorneys might have been entitled to was around 6% of any such

recovery. The 12.5% agreed to under the Fee-Sharing Agreement is more than double this amount. Ex. 75 at ¶ 216.

Both sides had significant (*time and labor*) in the case, but, as their respective applications reflect, Kansas attorneys started with nearly twice the common-benefit hours and lodestar as Minnesota. Moreover, hours alone do not reflect relative contribution for several reasons. First, it does not reflect the benefits that Minnesota attorneys obtained by following Kansas attorneys on many early, important issues. Thus, while Minnesota attorneys prevailed in defeating Syngenta's motion to dismiss, they did so after Kansas attorneys demonstrated the path forward. Similarly, they followed on other issues, such as preemption, class certification, and expert-admissibility briefing. Even where filings were simultaneous between the two jurisdictions, drafts of briefs (or final versions) of much, or all, were shared by Kansas attorneys with Minnesota attorneys, and comparison show Minnesota attorneys adopted many arguments in substantially the same form and language as those presented in Kansas. Kansas attorneys also led class certification, where they provided drafts of the brief; developed the expert reports and arguments; defended the experts and cross-examined all three of Syngenta's experts; and, handled the joint evidentiary hearing attended by Judge Sipkins. They also provided, on request, their presentation slides used at the oral argument for the Minnesota proceeding. Ex. 75 at ¶ 217.

Second, while Minnesota attorneys attended the same depositions as Kansas attorneys, the latter took a greater role in preparation and examination. Even though the coordination order (ECF No. 1099 at 4) gave both Minnesota and Kansas attorneys "one third of the total time available," the reality was much different. Across Syngenta's current and former employees, Kansas attorneys conducted **75%** of the plaintiffs' examination, whereas Minnesota attorneys handled only **21%** of those examinations. See Ex. 75 at ¶¶ 212-14. Minnesota attorneys took a

similar role in examining Syngenta's expert witnesses, but an even smaller role in examining the third-party witnesses, where they conducted only **12%** of the plaintiffs' examination (compared to Kansas attorneys' **60%**). *Id.* Kansas attorneys' took the largest role in building the case against Syngenta's regulatory witnesses. This was key trial evidence to establish both Syngenta's misrepresentations and its negligence with respect to the status of its Chinese import approvals because none of these witnesses, several of whom resided in China, could be compelled to either the Kansas or Minnesota trials. *Id.* Kansas attorneys conducted **83%** of the questioning (compared to **6%** by Minnesota attorneys). *Id.* From the several days of the Minnesota class trial observed by Kansas attorneys, they can confirm that Minnesota attorneys used much of their questioning from these depositions. *Id.*

Third, Kansas attorneys also predominantly led (*labor and results obtained*) the front for both the offensive and defensive experts that were common between the two jurisdictions⁵⁵—16 such witnesses in total. While both sides shared in the costs of these experts pursuant to an expert-sharing agreement, Kansas attorneys were predominantly responsible for retaining and developing the experts, and rebutting Syngenta's experts, which were significant aspects of the case.⁵⁶ All, or nearly all, of the testifying experts identified by Minnesota leadership for the class trial were identified, retained and developed by Kansas attorneys. Ex. 75 at ¶ 217-19, 221. Kansas attorneys were also central to Syngenta's withdrawal of Carrato, their only standard-of-care expert.

⁵⁵ Minnesota attorneys developed two experts on corporate governance (Black and Teece).

⁵⁶ Bassford represents that "[c]onsistent with the JPA, Minnesota leadership paid \$1,115,894 to the Kansas leadership for shared experts and discovery expenses." ECF No. 3568 at 3. But a substantial portion of the shared expenses reference by Bassford related to expert-cost sharing pursuant to a separate agreement, in which the parties agreed to share costs for experts. Ex. 75 at ¶ 221. Other shared costs include third-party subpoenas and document depository costs resulting in substantial savings to Minnesota leadership.

Lastly, in following the successful Kansas trial, Minnesota attorneys had a roadmap for what to do (and how to improve) for the Minnesota class trial, including the direct and cross examinations. Kansas attorneys also shared their trial experiences, mock-jury results, exhibit lists, deposition exhibits, trial transcripts, and trial and admitted deposition exhibits with Minnesota. On several occasions, they were asked (and answered) how a dispute was resolved in Kansas, or how an issue was handled in the Kansas trial. Ex. 75 at ¶ 217.

Bassford (like Watts) also points to certain (but different) favorable Minnesota rulings, such as: the threat of nationwide punitive damages under Minnesota law (ECF No. 3568 at 12-14); the viability of Viptera/Duracade purchaser claims (*id.* at 15-16); and obtainment of orders preventing the allocation of fault to third parties and to plaintiffs (*id.* at 17). As explained, *supra* Argument § II.C.1, there were mixed rulings between in each jurisdiction. None of these rulings undermines the Fee-Sharing Agreement. The punitive-damages ruling for Nebraska farmers might have incrementally exposed Syngenta to additional damages in individual Nebraska cases, but those cases would have added up slowly. *Supra* Argument § I. There was no Nebraska class in Minnesota, and it is uncertain that Syngenta would have been required to pay more in the aggregate.⁵⁷ Likewise, although Judge Sipkins' order in *Mensik* regarding purchaser claims benefitted *Mensik*, and possibly other individual purchaser plaintiffs, again there was no purchaser class that could aggregate these claims; so, its effect was muted. Moreover, the maximum value of this ruling is reflected in the \$22.6 million cap on such claims under the

⁵⁷ Minnesota's statute subjects such damages to review by the trial court, M.S.A. § 549.20(5), and those courts are authorized to consider information not presented to the jury, such as the amount of other settlements and judgments, in remitting such awards to amounts necessary to punish and deter. See *Mrozka v. Archdiocese of St. Paul & Minneapolis*, 482 N.W.2d 806, 813 (Minn. Ct. App. 1992). This Court previously acknowledged that "[t]his litigation does pose the risk of multiple punishments to Syngenta for the same conduct if in multiple class trials juries were to award punitive damages against Syngenta for the same conduct." May 12, 2017, Hr'g Tr. at 50:9-12. Thus, even if the pool of individual plaintiffs to whom such damages were available was expanded, the scope of aggregate punitive damages might nonetheless have been limited.

Settlement (ECF No. 3507-2 at § 3.7.2.1(b)(i)), which does not justify deviation from the Fee-Sharing Agreement. Finally, with respect to prevailing on fault allocation, briefing occurred simultaneously in *Mensik* and the MDL, and Kansas attorneys actually prevailed before Minnesota. Compare ECF No. 3051 (Apr. 5 Mem. & Order) with ECF No. 3570-6 (Apr. 11, 2017 Order) & 3570-7 (Aug. 17, 2017).⁵⁸ Moreover, Judge Sipkins' order relied, in part, on preemption under the Grain Standards Act (ECF No. 3570-7 at 25), which was a ruling and argument obtained by Kansas attorneys from which Minnesota attorneys' followed. Ex. 75 at ¶ 217.

While Bassford points to their substantial efforts on the Minnesota class trial, those efforts were necessarily considered when the Minnesota class counsel agreed to the Fee-Sharing Agreement, as were Co-Lead Counsel's substantial assistance in both getting the Minnesota class certified and in preparing the damages experts for trial.

Finally, Bassford argues completion and service of "over 67,000" PFSs showed "Syngenta that the plaintiffs were prepared to vigorously prosecute their claims and actively participate in the case." ECF No. 3568 at 18. Apparently, in March 2018, just a few weeks *after* Minnesota Lead Counsel signed the Fee-Sharing Agreement, they instructed Minnesota attorneys to supplemental their common-benefit time submissions with work spent on PFS compliance for these 67,000 plaintiffs.⁵⁹ As a result, Minnesota has now included an additional \$13.8 million in lodestar (49,086) hours on PFS compliance. ECF No. 3662-1 at 99. These facts do not justify deviation from the Fee-Sharing Agreement because Kansas attorneys have not included PFS-

⁵⁸ Bassford also argues that Minnesota developed experts with higher per-bushel damages than Drs. Babcock or Carter (ECF No. 3568 at 16-17), but those experts were unproven and it is telling that Minnesota attorneys, including Bassford, chose to use Babcock and Carter for the Minnesota class trial.

⁵⁹ See, e.g., *Borgess Fee Appl.*, at 6 (filed in Minn.) ("On 3/8/18 Movant was informed by Minnesota plaintiffs' leadership that time and expense complying with the Minnesota Plaintiff Fact Sheet ("PFS") Order would be considered Common Benefit Work and that said time should be submitted...").

compliance time from the MDL and the impact of these PFSs is vastly overstated. *Supra*, Argument § 1.A.2-3.

1. The rate of Claims Filed is not the actual result.

Bassford also argues that in awarding fees, the Court should rely heavily on who makes an “actual result” available to their clients, referring to the proportion of claims filed by Minnesota clients as compared to absent class members. ECF No. 3568 at 42. They urge that this “is the *only* metric by which the Court will be able to determine who actually succeeded in obtaining recoveries on behalf of their clients.” *Id.* No *Johnson* factor, however, even requires the Court to consider why a class member files a claim in awarding fees, much less to elevate that factor to preeminent importance. Ex. 78 at ¶ 87.

Even if claims numbers were relevant, it certainly is not the only relevant metric. They acknowledge that Kansas attorneys work was “essential to the result in this litigation.” *Id.* at 43. While individual lawyers might prod their clients to file a claim and get paid, that payment would not have been available but for the successful efforts of Kansas attorneys.

Moreover, since this rate has no impact on how fees should be allocated to Kansas attorneys, there is absolutely no reason to delay the Court’s consideration of their fee request until the claims process is over. *See* Ex. 78 at ¶¶ 85-89. It will not be until the spring of 2019 that all final claims are tallied. *Id.* at ¶ 86.

2. The Fee-Sharing Agreement will not deter future coordination.

Bassford finally argues that not allocating fees pursuant to the JPA-assessments on individual cases will deter coordination in the future. At its essence, Bassford is arguing that two groups of attorneys will forego coordination in the future to the detriment of their clients simply because the Court here awards fees consistent with the Court’s own CBO, consistent with the recommendation made by the Special Masters and consistent with the contributions by those

counsel as evaluated by the *Johnson* factors. This is pure tilting at windmills by Bassford and provides no real argument for why the Court should abandon the *Johnson* factors in favor of inserting the JPA into the class context in which it was never intended to apply.

IV. HENINGER GARRISON DAVIS, LLC (Case No. 15-CV-11221, ECF No. 349).

In contrast to many fee and expense applications, the ten law firms that are included in the submission by Heninger Garrison Davis, LLC (collectively, “Heninger”) contributed some common benefit work and incurred some common benefit expenses consistent with the CBO on behalf of the Settlement Class. Consistent with the Fee-Sharing Agreement, Heninger should be compensated for that work from the Unallocated Fee and certain expenses should be reimbursed.

Heninger, however, seeks \$46.4 million, inclusive of \$1,135,662.32 in expenses, whether that amount is awarded as a 3-fold multiplier on Heninger’s total lodestar or as a percentage of the fund (3% requested). Illinois ECF No. 349 at 7, 39. But those numbers do not add up. Heninger originally submitted \$11.2 million in time, Illinois ECF No. 349 at 18, meaning Heninger is actually requesting more than a 4x multiplier on this time, a higher multiplier than the Kansas attorneys seek. Yet Heninger concedes that only 7,097.50 hours,⁶⁰ totaling \$4,206,437.92 in lodestar, and less than half of its original \$1.135 million in expenses were for “work for the overall litigation effort, or common benefit work” as opposed to the one-third of Heninger’s time spent working solely for Heninger’s “individual farmers.” Illinois ECF No. 349 at 40. Heninger’s request for a 10+ multiplier on its purported common benefit time

⁶⁰ In their original Application, only the Heninger law firm—as opposed to all ten Heninger-related firms—claimed to have performed any common benefit work, totaling 7,097.50 hours and \$4.2 million in lodestar. See Illinois ECF No. 349 at 39; Illinois ECF No. 349-7 at 9 ¶ 14. In Heninger’s Supplement, however, these numbers increased dramatically. Now eight of the ten Heninger-related firms claim to have performed “Approved Common Benefit” work, totaling in excess of \$8.4 million. Illinois ECF No. 354; Ex. 75 at ¶ 185. Heninger alone now claims in excess of \$4.8 million in common benefit work, an increase of \$635,000. The Supplement provides no explanation why the common benefit lodestar more than doubled, which raises serious questions as to what methodology was used to determine purported common benefit time and the reliability of the amounts claimed by Heninger.

convincingly demonstrates why any fee award to Heninger should be a small fraction of its original \$46.4 million request.

Moreover, Heninger attempts to present its time and expenses as equivalent to the time and expenses submitted by Kansas and Minnesota Lead Counsel, which were extensively reviewed and edited to be consistent with the standards established in the CBO. But Heninger and the other firms that have submitted time wholly-untethered to the CBO are asking the Court to compare apples to zebras. Heninger could have—but did not—articulate any standards it used in initially capturing (or largely recreating) time and expenses, or any standards utilized in reviewing and finalizing the time and expenses from the ten firms under its umbrella. Heninger could have—but did not—then explain how it determined that more than 7,000+ hours should be included in the “Approved Common Benefit Work” column when none of this time was ever approved as consistent with the CBO. Heninger instead apparently intends for its submitted time and expense records to provide this explanation. But even a cursory review of these records confirms that Heninger was not guided or limited by the CBO and instead submitted time and expenses that are expressly excluded by the CBO (and excluded by Co-Lead Counsel) because they fail to provide any benefit to the Class.

When Heninger’s request is reviewed consistent with the *Johnson* factors⁶¹ and consistent with Heninger’s decision to sit on the sidelines of this litigation until after MDL Co-Lead

⁶¹ Heninger is seeking to be paid out of a common fund that is in control of a Court in the Tenth Circuit, but Heninger’s application seeks to avoid the *Johnson* analysis required in the Tenth Circuit. Even if the Seventh Circuit’s precedent governed an award in this case, it too requires looking beyond the percentage sought to determine the reasonableness of the fee, which can include an analysis of the *Johnson* factors. *See Sommerfield v. City of Chicago*, 863 F.3d 645, 650 (7th Cir. 2017) (in calculating the lodestar, the hours “should exclude work that was ‘excessive, redundant, or otherwise unnecessary’” and the reasonableness of the hours may be further evaluated using the *Johnson* factors discussed in *Hensley v. Eckerhart*, 461 U.S. 424 (1983)); *see also Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc.*, No. 17-2086, 2018 WL 3599164, at *6 (7th Cir. July 27, 2018) (reducing a requested fee award because “counsel’s requested fee of nearly a quarter million dollars for merely filing a complaint

Counsel obtained a favorable ruling on Syngenta’s motion to dismiss, the unreasonableness of this request is quickly revealed. Heninger should not be compensated—much less receive a three-time multiplier—for work and expenses that do not comply with the CBO’s Participation Agreement, which Heninger voluntarily signed, for time and expenses that provided no benefit to the Settlement Class as a whole and with a multiplier that is untethered to any actual risk to Heninger. Instead, the Special Masters, or the Court, should determine what portion of the time and expenses submitted by Heninger are properly considered common benefit work and expenses because they were for the benefit of the Class as a whole, rather than for Heninger or Heninger’s individual clients.

A. Heninger’s Fee Request Should Accurately Reflect Heninger’s Contribution To and Its Substantially-Reduced Risk in This Litigation.

Heninger seeks a three-time multiplier on its total lodestar, which includes time Heninger has not designated as common benefit work. But Heninger fails to justify the reasonableness of its request to be paid for time, as discussed below, that is specifically excluded by the CBO, and which was excluded from the Application made by Co-Lead Counsel. Moreover, Heninger has failed to justify its request to receive a multiplier on all of that time that is nearly identical to that sought by the attorneys who took on extraordinary risk of prosecuting this litigation from its inception through the successful Kansas trial verdict.⁶²

and negotiating a settlement bore little relationship to market reality”); *Sloop v. Ameritech Corp.*, No. EV 95-128-C H/L, 2003 WL 21989997, at *4 (S.D. Ind. Aug. 14, 2003) (relying on the *Johnson* factors to reduce in half a requested common benefit fee application because the applicants “have sought to attribute the greatest possible value” to their work, which “in the court’s view, substantially exaggerated that value.”).

⁶² Heninger cites to no authority in the Tenth Circuit holding that a “multiplier is mandatory” on Heninger’s time. In the Tenth Circuit, a multiplier is a subjective evaluation of the risks of litigation. *See, e.g., Been v. O.K. Indus., Inc.*, No. CIV-02-285-RAW, 2011 WL 4478766, at *10–11 (E.D. Okla. Aug. 16, 2011).

Heninger was intentionally and admittedly late to this litigation. It is surprisingly candid as to its motivations in creating a “third front” against Syngenta—Heninger did not receive assurances that it “might receive common benefit work if it elected to file its cases in the MDL. The individuals Heninger spoke with would not commit to give Heninger any common benefit work if it filed all its cases in the MDL.” Illinois ECF No. 349 at 9. Because “Heninger desperately wanted to actively participate in the litigation,” *id.*, Heninger “decided its best chance to become active in the litigation was to employ the rarely successful ‘mass action’ approach contained within CAFA.” *Id.* at 10.

A law firm’s “desperat[e]” personal desire to “actively participate in the litigation” on behalf of their individual clients does not equate to bringing actual value to the Class.⁶³ By waiting to file the first case until September 18, 2015, Illinois ECF No. 349 at 18, Heninger entered the litigation at the time Kansas MDL had already:

- Filed 100+ page comprehensive amended master complaints, which incorporated information MDL Counsel had learned from their review of Syngenta’s on-going document production and included causes of action based upon the laws of 22 states (ECF Nos. 450-52, filed on May 29, 2015);
- Fully researched and filed a comprehensive opposition to Syngenta’s extensive motion to dismiss, including on the issues of duty, proximate cause and economic loss under the laws of 22 states (ECF No. 927, filed on July 20, 2015);
- Obtained the motion to dismiss Order that largely denied Syngenta’s motion, including on the issues of duty, proximate cause and economic loss under 22 state

⁶³ “The cases are unanimous that simply *doing* work on behalf of the class does not create a right to compensation; the focus is on whether the work provided a benefit to the class.... No[n]-lead counsel will have to demonstrate that their work conferred a benefit on the class *beyond* that conferred by lead counsel. Work that is duplicative of the efforts of lead counsel—e.g., where non-lead counsel is merely monitoring appointed lead counsel’s representation of the class, or where multiple firms, in their efforts to become lead counsel, filed complaints and otherwise prosecuted the early stages of the litigation—will not normally be compensated.” *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 763 (S.D. Tex. 2008) (emphasis original) (quoting *Cendant II*, 404 F.3d 173, 191 (3d Cir. 2005)). Here, in light of Heninger’s extensive work opposing coordination and opting their clients out of the litigation classes, there is no evidence that Heninger ever intended to do work on behalf of the class, rather than work merely on behalf of their individual clients.

laws, all of which were state laws Heninger included in its complaint (ECF No. 1016, filed on September 11, 2015);

- Served Plaintiffs’ First Request for Production to all Defendants (on June 17, 2015) and briefed the disputed issue of which custodians Syngenta would have to search (ECF No. 844, filed on June 17, 2015); and
- Completed the review of hundreds of thousands of pages of documents already produced by Syngenta pursuant to a document review protocol created by MDL Counsel.

Heninger’s strategy allowed it to sit on the sidelines until *after* the MDL ruled on a motion to dismiss, a ruling that included the analysis of farmer claims arising under 22 states Heninger included in their Amended Complaint.⁶⁴ See Illinois ECF No. 59 (Heninger’s First Consolidated and Amended Complaint, including causes of action in these 22 states).

By waiting, the risk undertaken by Heninger was materially lessened from the outset because of the disproportionately higher risk undertaken by Kansas attorneys in prosecuting this litigation. Yes, Heninger filed a number of cases, but it filed cases only *after* similar cases prosecuted by Co-Lead Counsel had survived comprehensive motions to dismiss. Yes, Heninger responded to a motion to dismiss, but Heninger had the benefit of all of the public filings from the Kansas motion to dismiss briefing, giving Heninger a clear roadmap for successful arguments to overcome Syngenta’s duty, proximate cause and economic-loss doctrine arguments in Illinois and other states. Yes, Heninger faced a risk that the motion to dismiss could be granted, but that

⁶⁴ Heninger’s insinuation (at Illinois ECF No. 349 at 37) that its decision not to include the “losing Lanham Act claim” is somehow “proof” of the superior “skill” exercised by the Heninger lawyers is incorrect for two reasons. First, Heninger’s entire strategy was to evade MDL transfer, which meant Heninger could *not* allege a federal Lanham Act claim without being removed and transferred to the MDL. Second, the “main claims asserted in *Poletti*,” *id.*, never passed muster because Heninger never briefed a summary judgment motion, never tried a case and only responded to a motion to dismiss *after* MDL counsel did all of the work in obtaining a favorable ruling, an order that was cited with approval multiple times by Judge Herndon. See, e.g., *In re Syngenta Mass Tort Actions*, 272 F. Supp. 3d 1074, 1085 (S.D. Ill. 2017) (discussing Syngenta’s ELD arguments, reviewing Judge Lungstrum’s ruling and stating “[t]his Court agrees with the MDL court.”).

risk was materially lessened because this Court had already denied a motion to dismiss that encompassed issues identical to those filed in Illinois.

With regard to discovery, yes, Heninger participated in discovery of the plaintiff cases it filed, but that discovery was only necessary because Heninger filed individual cases to create a third front, rather than allowing those plaintiffs to remain as putative class members in the MDL or as actual class members once class certification was granted on September 26, 2016. ECF No. 2547. Yes, Heninger attended depositions, but the burden of that discovery against Syngenta fell on Co-Lead Counsel who took the lead in nearly every deposition of Syngenta's employees. Illinois ECF No. 121 at 2 ("In every deposition that undersigned counsel or his *Poletti* co-counsel has participated in thus far, MDL counsel goes first.").⁶⁵ Yes, Heninger produced PFSs for their clients. But despite Heninger's claim that it spent its year sitting on the sidelines to "get all the information from its clients in order," Illinois ECF No. 349 at 9, Heninger had failed to produce PFSs for half of their clients by the Court's March 31, 2016 deadline, which delayed the bellwether process in Illinois,⁶⁶ and failed to meet the Court's later October 19, 2016 deadline as well. Illinois ECF No. 180 at 1. And finally, Heninger knew that others were taking on the risk,

⁶⁵ See also Illinois ECF No. 91 (Text Entry Order) (S.D. Ill. Mar. 23, 2016) (in denying Heninger's motion seeking a certain amount of time in each Syngenta deposition for Heninger to ask questions, Judge Herndon stated: "plaintiffs' counsel either said in the depositions he asked all the questions he wanted to or didn't show up at all. . . . Had the transcript demonstrated an effort to inquire only to be stopped by other counsel (defendant or MDL plaintiff's counsel) because 'reasonable time' had expired plaintiffs' argument would have force behind it. That did not happen. Plaintiffs fail to make their case. Motion denied.").

⁶⁶ Illinois ECF No. 108 ("Pursuant to the Scheduling and Discovery Order entered February 26, 2016 (Dkt. No. 55), all plaintiffs were to serve Plaintiff Fact Sheets ('PFS') and supporting documentation by March 31, 2016. On March 31, approximately half of the plaintiffs served PFSs, and some of these plaintiffs did not serve supporting documentation. PFSs and supporting documentation of some additional plaintiffs were served on April 8. The remaining plaintiffs have yet to serve PFSs and supporting documentation, and up to approximately 200 plaintiffs who have served PFSs have yet to produce supporting documentation.").

time and expense to respond to summary judgment motions and try cases, which Heninger never did.

From the outset of this litigation, Heninger acknowledged that not all billed time is equal. In the Participation Agreement signed by Heninger, Heninger “understands, acknowledges, and agrees that all hours are not going to be viewed equally and awarded the same rate.” Illinois ECF No. 349-1 at 11. That language has particular resonance here, where much of the time expended by Heninger was well-protected because of the time, effort and risk expended by Co-Lead Counsel. To the extent Heninger is entitled to any award of attorneys’ fees and expenses for common benefit work performed on behalf of the entire Class, it and any multiplier, if any, should accurately reflect Heninger’s true risk in this litigation. Otherwise, a large fee award encompassing a high multiplier will only incentivize firms to sit on the sidelines and amass huge lodestar numbers based on marketing and other activities that do not benefit the class with an assurance that such actions will be rewarded with a lodestar multiplier.

B. Heninger Voluntarily Agreed to be Bound by the CBO and Accepted the Benefits of the CBO, But Seeks to Avoid Any Compliance with the CBO.

Heninger bases its entitlement to fees on two different types of work. First, after Heninger signed a “Common Benefit Participation Agreement” on March 15, 2016, MDL Co-Lead Counsel assigned three common benefit projects to Lew Garrison of Heninger: assist in analyzing Syngenta’s privilege logs and participate in related meet and confer conferences with Syngenta; assist in drafting certain records subpoenas; and take the lead in deposing Thomas Sleight of U.S. Grains Council.⁶⁷ Ex. 77 at ¶ 10. At most, these hours spent on projects assigned by Co-Lead Counsel should be a very small portion of just three categories of Heninger’s time: the privilege log review and the related meet and confer calls are a small portion of Heninger’s

⁶⁷ See, e.g., Illinois ECF No. 349-8 at 29 (“Team discussion re: USG depo assigned by MDL”).

432.3 hours and \$316,314.20 in the “Approved Common Benefit Work” column for discovery motion practice; the record subpoena work should be a small portion of the 969.5 hours and \$656,624.50 in the “Approved Common Benefit Work” column is for paper discovery against third parties; and a small portion of the 1,060.3 hours and \$837,424.80 in the “Approved Common Benefit Work” column for fact depositions of Syngenta. Illinois ECF No. 354-1 at 1. Second, Heninger claims that nearly all of its other work in the Illinois litigation should be considered common-benefit work because it was performed “for the benefit of Class Members.” Illinois ECF No. 349 at 7. Each type of work is addressed below.

1. By failing to comply with the CBO and the Participation Agreement, Heninger forfeited its entitlement to fees and expenses for Common Benefit work assigned by the MDL Co-Lead Counsel

Heninger’s submission and its Supplement provide no way of determining how much of Heninger’s time was actually spent on just the three projects assigned by the MDL. The hours for these projects are “included in the 7,097.50 common benefit hours reported by the firm.” Illinois ECF No. 354 at 1. But despite a requirement in the Participation Agreement that Heninger submit hours for these assigned projects to Co-Lead Counsel for review and approval and despite Heninger statement that some part of these 7,000+ hours were “formally approved by [Co-]Lead Counsel,”⁶⁸ Heninger never submitted this time for approval.

In the Participation Agreement Heninger signed, it states in relevant part:

The parties do anticipate that, from time to time, Common Benefit Work, as described further below and in various ordered entered by the MDL Court, may be performed by Participating Counsel consistent with instructions by MDL Lead Counsel, or other parties having the authority to designate such work. Such acceptance and performance of MDL designated work shall not impact the ability of Participating Counsel to seek reimbursement for Common Benefit expenses and fees **for other work** which was performed on behalf of the Southern District

⁶⁸ See Illinois ECF No. 354-2 at 1 (“All categories ‘Approved’ Common Benefit Work under the terms of Document 936—Order Establishing Protocols for Common Benefit Work and Expenses...’ is defined in part as having been formally approved by Lead Counsel.”).

of Illinois litigation, **which was not specifically designated as Common Benefit Work by the MDL**, nor shall such acceptance and performance of MDL designated work entitle Participating Counsel to reimbursement for expenses and fees for other work which was performed on behalf of the Southern District of Illinois Litigation, **which was not specifically designated as Common Benefit Work by the MDL**.

In order to be eligible for reimbursement as Common Benefit Work, time expended **must** be: (a) for the common benefit of all producer and/or non-producer plaintiffs; (b) appropriately authorized by Lead Counsel in writing; (c) **timely submitted using the monthly reports created by Lead Counsel**; (d) reasonable; (e) verified by a partner or shareholder in the submitting firm; and (f) in compliance with the MDL Order.

Illinois ECF No. 349-1 at 8-9 (emphasis added). A nearly identical provision exists for “Common Benefit Expenses” to be eligible for reimbursement, including that the expenses must be “timely submitted using the monthly reports created by Lead Counsel” and that such expenses must be “in compliance” with the CBO. *Id.* at 9.

While Heninger argues that it reserved the right to seek reimbursement for fees “for other work” not specifically assigned by Co-Lead Counsel, the plain language of the Participation Agreement did not extend that reservation to work “specifically designated as Common Benefit Work by the MDL,” such as the three projects assigned to Heninger by Co-Lead Counsel. For that work to be eligible for reimbursement, it “must” be timely submitted to Co-Lead Counsel, which Heninger never did. Ex. 75 at ¶¶ 168-69. The consequence for this failure was spelled out: “[f]ailure to provide submissions in a timely manner shall result in a waiver of attorneys’ fees and expenses claimed for the period that is the subject of the submission.” Illinois ECF No. 349-1 at 10-11. Even after being given the opportunity to submit an untimely report detailing the time and expenses spent on this assigned common benefit work, Heninger declined. Ex. 75 at ¶ 169. After soliciting and accepting work from Co-Lead Counsel, Heninger cannot refuse to

comply with the basic requirements of the CBO, yet still seek to be compensated for this time at a three-time multiplier.

And this is not some hyper-technical or non-substantive failure to comply on Heninger's part. Instead, it is a strategic gambit to evade the threshold requirements of the CBO for two reasons: Heninger's time and expense records do not satisfy the requirements of the CBO, as discussed in greater detail below, *see infra* § 3; and it ensured that unlike the 44 law firms that performed common-benefit work and incurred common-benefit expenses at the direction of Co-Lead Counsel, Heninger's time and expenses could not be scrutinized and revised by Co-Lead Counsel to ensure that the time and expenses were reasonable and fully compliant with the CBO. Heninger's refusal to comply with the CBO for the work directly assigned by Co-Lead Counsel pursuant to the CBO should eliminate Heninger's eligibility to receive compensation for this work and these expenses.

2. Heninger does not claim that any of its "other work" falls within the CBO's definition of "Common Benefit"

With regard to the second type of work performed by Heninger, work that was "not specifically designated as Common Benefit Work by the MDL," Illinois ECF No. 349 at 13 (quoting the Participation Agreement), Heninger argues that it reserved the right to "seek reimbursement for Common Benefit expenses and fees for other work which was performed on behalf of the Southern District of Illinois litigation" Illinois ECF No. 349 at 12. All this section acknowledged was the possibility that, while not directly assigned by Co-Lead Counsel, Heninger might end up performing work in Illinois that *could* constitute "Common Benefit" time and expense solely for the Illinois litigation, as that term is defined within the Participation Agreement and the CBO, and Heninger reserved the right to seek compensation for such work.

But that is not what Heninger has done in its Application. There is not a single representation in any of the 741 pages of documents filed by Heninger in support of its Application that the time and expenses submitted by Heninger meet the “Common Benefit” definition in the CBO. In its Supplement, Heninger states merely that 7,097.50 hours are properly included in the “Approved Common Benefit Work” column, but this is not work that was approved by Co-Lead Counsel and is not work that Heninger approved as in compliance with the CBO. Ex. 75 ¶ 187.

The Participation Agreement Heninger voluntarily signed and to which it “intend[ed] to be legally bound, “incorporate[s]” the CBO. Illinois ECF No. 349-1 at 3, 4. The CBO’s definition of “Common Benefit”⁶⁹ work lists the type of work that benefits all class members. Putting aside whether Heninger was required to submit this Common Benefit time and expense to Co-Lead Counsel, Heninger has provided no argument for why it—as a voluntary Participating Counsel—was not required to otherwise comply with the CBO.⁷⁰ The CBO states that “Participating Counsel must follow the guidelines set forth in the Court’s Order,” Illinois ECF No. 349-1 at 10, and here, as discussed below, Heninger plainly did not for the 7,000+ hours Heninger has included as “Approved Common Benefit Work.”⁷¹

⁶⁹ “Common Benefit Work includes, but is not limited to, investigation, discovery (whether documents, interrogatories, depositions or otherwise), coding or other analytical work relating to documents or evidence, research, motions and responses to motions, exhibits, bellwether trials and transcripts, all other work performed under the direction of Lead Counsel for the benefit of all producer and/or all non-producer plaintiffs, and orders on substantive matters involving Common Benefit Work. Authorization to perform Common Benefit Work shall be obtained from Lead Counsel under a procedure that they will determine.” ECF No. 936 at 7-8.

⁷⁰ In reply, Heninger may note that other firms are seeking common-benefit time and expenses that may fall outside of the CBO. While these firms should also be required to submit time and expenses in compliance with the CBO, what separates Heninger from many of these firms is its voluntary decision to bind itself to the CBO when it signed a Participation Agreement.

⁷¹ Even if Heninger is not bound by the definition of “Common Benefit” in the CBO, Heninger does not provide any argument for why work excluded by the CBO benefitted all class members in a manner similar to the work expressly allowed by the CBO.

Heninger does not claim that all of this work fits within the CBO's definition of "Common Benefit" because it cannot—the work and expenses are duplicative, were unreasonably re-created and include thousands of hours and hundreds of thousands of dollars of expenses that are expressly excluded by the CBO.

3. Heninger intentionally and unnecessarily duplicated time and expenses already incurred by MDL Counsel, which should not be compensated.

Heninger claims that its work "was not duplicative of other work, because the coordination order operated effectively to prevent duplication. That is not disputed." Illinois ECF No. 349 at 32. But the record does not support this assertion. Heninger's entire strategy in opening up a third front necessarily duplicated work already underway or fully completed in the MDL. But even if this could be viewed as putting additional pressure on Syngenta, it does not justify Heninger's unnecessary duplications of other tasks.

Heninger's decision to embark on their own document review is the one of the best examples of unnecessary duplicative time and expense by Heninger. Heninger received Syngenta's first document production in March 2016. Illinois ECF No. 349 at 20. But a full year earlier, in March 2015, Syngenta began its production of documents to Co-Lead Counsel and, by the end of February 2016, Syngenta had produced to Co-Lead Counsel more than 300,000 documents, totaling in excess of 1.35 million pages. Ex. 75 ¶¶ 175-76. By the time Heninger received its first page from Syngenta in March 2016, Co-Lead Counsel had already reviewed these hundreds of thousands of documents, conducted three in-person document review training sessions, and was on month three of depositions of Syngenta's witnesses. *Id.* at ¶ 177.

After signing the Participation Agreement, Heninger had full access to the entire Relativity database maintained by Co-Lead Counsel, including all coding of these documents. *Id.* at ¶ 181. At Heninger's request in March 2016, Co-Lead Counsel began paying the

\$90/month Relativity access fees for as many as eight attorneys at Heninger. *Id.* at 179. Despite this full access to the documents and coding and the ability to perform any searches across these documents, Heninger instead “secured its own document vendor” to house these identical documents. Heninger now seeks to be reimbursed for \$81,308.77 for “costs to Cicayda, the document vendor that managed documents produced by and to Syngenta,” Illinois ECF No. 349-7 at ¶ 6, costs which were wholly unnecessary.⁷²

But Heninger compounded these unnecessary expenses with unnecessary time. Heninger tasked “teams of lawyers for document review,” Illinois ECF No. 349-7 at ¶ 10, when such work was completed by the time Heninger would have started on this project. Even if Heninger “sometimes f[ound] documents that the MDL did not locate,” *id.* at ¶ 10, an assertion for which there is not a single example provided by Heninger, Heninger had full availability to search for and review documents within the Relativity database already established by MDL Counsel. Ex. 75 at ¶¶ 178-181.

Heninger relies heavily on their attendance at depositions of Syngenta’s witnesses as evidence of the value it brought to the class. Heninger states that they were “not ‘passive observers’ in the depositions” of Syngenta’s witnesses, claiming to have “participated in depositions of twenty-one Syngenta witnesses.” Illinois ECF No. 349 at 21. But in four of these depositions listed in Heninger’s chart, constituting 8 days of depositions, Heninger attorneys did not ask a single question of the Syngenta witness: Yongsheng Zhang’s four-day deposition; Andrew McConville’s two-day deposition;⁷³ Eddie Zhu’s one-day deposition; and David

⁷² Heninger additionally seeks reimbursement for the costs of “Computer equipment rental for document review,” totaling \$1,275.94, which are again unnecessary and duplicative costs. Illinois ECF No. 349-15 at 7.

⁷³ Heninger states that it sent two people to the “Andy McOnville [sic]” deposition, but they appeared by phone and asked no questions.

O'Reilly's one-day deposition. Ex. 75 at ¶¶ 173-74. Yet Heninger includes 8 full days of deposition attendance time and related travel that provided no demonstrative benefit to the class. Illinois ECF No. 349-7 at 8 ¶ 14 (describing Heninger's "hours that were devoted to common benefit work, i.e., work for the overall effort" to include "Syngenta depositions"). But it is not merely the time attending these depositions. Heninger additionally billed for extensive preparation time for the depositions. For example, in total, it appears Heninger spent 144.4 hours preparing for and attending just the deposition of Yongsheng Zhang.⁷⁴

This type of work underscores why the mere existence of a third front and the mere performance of duplicative work—no matter the quality of that duplicative work or the diligence or intention of the attorneys performing that work—may not confer any actual benefit on the class. "If a hundred lawyers each perform admirable but identical work on behalf of a class before the appointment of the lead plaintiff, the court should not award fees to each of the lawyers, as this would overincentivize duplicative work. Instead, while all of lead counsel's work will likely be compensable, . . . other attorneys who merely duplicated that work—however noble their intentions, and however diligent their efforts, and however outstanding their product—will not be entitled to compensation. Only those who confer an independent benefit upon the class will merit compensation." *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 763 n.27 (S.D. Tex. 2008) (quoting *Cendant II*, 404 F.3d 173, 197 (3d Cir. 2005)).

⁷⁴ See Illinois ECF No. 349-8 at 39 (Heninger partner Jim McDonough's entries from March 14-March 24, 2016, totaling 112.9 hours), 165 (8.8 hours of "Yongsheng Zhang Document Review"), 167 (11.2 hours across four days for "Yongshen [sic] Zhang Doc Review), 171 (2.5 hours for "Document review for Yongsheng Zhang Deposition, across two days), 173 (7.5 hours across three days for "Reviewing Documents from Yongsheng Zhang Custodial File"); Illinois ECF No. 349-9 at 16 (1.5 hours of "Document Review-Yongsheng Zhang").

By intentionally creating a third front, Heninger undoubtedly created plenty of work for itself, but not all of this work provided any actual benefit to the class. Again, no matter how thoroughly Heninger prepared for these depositions or how well they re-reviewed documents already reviewed and coded, at the end of the day, this work provided no benefit to the class and this time merely duplicating work done by Co-Lead Counsel should not be compensated.

4. Heninger's reconstructed time entries are not reasonable.

One reason Heninger likely did not submit any of its time records to Co-Lead Counsel on a monthly basis is because it did not contemporaneously track its time, as was required by the CBO and which was done by all Kansas Common Benefit law firms.⁷⁵ Instead, Heninger guesstimates how much time it spent on tasks through a hodgepodge of methods.⁷⁶ But these guesstimating methods are independently problematic because they further violate the CBO. For example, Heninger allocated individual time to the review of each and every email received in the litigation⁷⁷ and the review of each and every ECF entry, which again the CBO prohibited.⁷⁸

⁷⁵ Illinois ECF No. 349-1 at 10 (“[a]ll time must be accurately and contemporaneously maintained” and “Participating Counsel shall keep a daily record of time spent in connection with Common Benefit Work on this litigation, indicating with specificity the hours, location, and particular activity.”).

⁷⁶ For example, there is a single time entry for 645 hours that says: “Review of 1,290 Syngenta files-average time per file of 30 minutes.” Illinois ECF No. 349-8 at 35; *see also id.* (one entry for 161.2 hours estimating “15 minutes per file” for certain review and scanning of PFSs); Illinois ECF No. 349-9 at 8 (645 hours for “Set up and organization of 1,290 Syngenta files-average time per file of 30 minutes”); Illinois ECF No. 349-12 at 3 (all time is based on estimates), 29-32 (recreating all time for conference calls based upon “Outlook Calendar” entries and references in emails), 34-38 (estimates of all complaint-based work), 40-65 (estimates for each and every ECF filing); Illinois ECF No. 349-15 at 5 (“Case set up and review for 839 Syngenta Cases; 2 hours per case” for a total of 1,678 hours and \$328,880 in lodestar).

⁷⁷ *See, e.g.*, Illinois ECF No. 349-8 at 46-82 (listing multiple entries for a single day in which at least .1 is given to the review of each individual email), 86-164 (same), 175-179 (same); Illinois ECF No. 349-13 at 8-74 (billing at least .1 for each email received, including multiple emails on the same day that merely required the timekeeper to “monitor intake communications to identify procedural issues or concerns”); *accord* Illinois ECF No. 349-8 at 7 (2.1 hours spent on December 10, 2015 sending an email to the corn team re: “status/strategy”).

⁷⁸ ECF No. 936 at 10 (“Mere review of filings and orders generally does not qualify as Common Benefit Work. It is anticipated that there will be a large number of filings in this case and mere review of these filings will not be approved as Common Benefit Work”), 11 (“time recorded for reviewing emails

This type of aggregation leads to absurd results. *See, e.g.*, Illinois ECF No. 349-12 at 41 (listing 11 notices of appearance, assigning .2 to each entry, for a total lodestar of \$1,430 for reviewing 11 ECF notices of appearances in one day).

The point here is not that Heninger used post-settlement, reconstructed estimates of time, which many courts allow; instead, it is that the estimates are often wholly unreasonable.⁷⁹ For example, in estimating how much time was spent on review of a single ECF entry of appearance, Heninger billed \$1,300, estimating that a full 1 hour was required for this entry of appearance. Illinois ECF No. 349-12 at 40 (November 5, 2015 “EOA of WWB in SDIL” which lists 1 hour and \$1,300 for this single entry of appearance).

The additional problem with reconstructing time after a settlement is that there is a tendency to inflate the hourly rate to drive up the lodestar.⁸⁰ Heninger firms selected rates from the Laffey Matrix, generally at the highest end of the Matrix. But this process leads to unsupportable results—associates end up with rates that are \$147/hour more than partners at the same firm. *See* Illinois ECF No. 349-15 at 3 ¶ 7 (“Crumley Roberts time is billed at the following rates per hour using the Laffey Matrix: Partner Attorney: \$717.00, Associate Attorney: \$864.00”). It also allows Heninger to bill attorneys out at rates far higher than those allowed in the MDL. *Compare* Lew Garrison at \$955/hour, Illinois ECF No. 349-7 at 11, *with* Co-Lead

and other correspondence is not compensable as Common Benefit Work. For example, review of an email or other correspondence sent to dozens of attorneys to keep them informed on a matter on which they are not specifically working would not be compensable as Common Benefit Work.”).

⁷⁹ There are entries that are not possible. On January 8, 2015, work performed by “LAF” described as “final form and check references” apparently took “24 hours.” Illinois ECF No. 349-14 at 3. There are also entries that seem wholly unrelated to this litigation. Illinois ECF No. 349-18 at 4-6 (multiple entries regarding the receipt and/or review of employment contracts).

⁸⁰ In the MDL, because time records were required monthly, MDL Co-Lead Counsel had a record of the timekeepers’ usual hourly rates, often from multiple years. To avoid counsel inflating rates after the Kansas trial verdict and the announcement of the settlement, MDL Counsel standardized rates and generally submitted the 2017 billable hour rates for Kansas Common Benefit Counsel, which counsel had been submitting for six months prior to the Kansas verdict. ECF No. 3587-1 at 129 ¶ 642.

Counsel at \$865/hour, ECF No. 3587-1 at 137; *see also* Illinois ECF No. 349-7 (Heninger Of Counsel billing at \$864); ECF No. 3587-5 at 10 (highest Of Counsel rate in the Kansas MDL is \$39/hour lower).

All of these actions ensure that the lodestar submitted by Heninger is disproportionately higher than the lodestar submitted by Kansas Common Benefit firms, which tracked their time contemporaneously in compliance with the CBO.

5. Heninger includes thousands of hours that are expressly excluded by the CBO.

Even if Heninger's estimates and the hourly rates were reasonable and even if the time discussed above were not duplicative, Heninger includes thousands of hours that were expressly excluded by Co-Lead Counsel because such work falls outside of the CBO's definition of Common Benefit work because the work did not benefit the class. While Heninger says that "[a]ll the work done by Heninger was necessary," Illinois ECF No. 349-7 at 3, Heninger fails to explain *how* its work actually benefitted the class.

For example, Heninger admits it vigorously fought against coordination. Illinois ECF No. 349 at 11 ("Heninger understandably wanted nothing to do with MDL coordination."). But Heninger's objections to coordination were expressly rejected by Judge Herndon, who found that the "MDL Coordination Order will save substantial expense by eliminating unnecessary duplicative discovery and will conserve valuable judicial resources." Illinois ECF No. 41 at 3. Yet Heninger seeks to be compensated for time spent opposing a Coordination Order that Judge Herndon found would benefit class members.⁸¹ Similarly Heninger is seeking to be compensated

⁸¹ *See, e.g.*, Illinois ECF No. 349-8 at 2 (3.9 hours on January 14, 2016 "Conf w/co-counsel; discuss strategy on Syngenta coordination motion"), 7 (4.3 hours on January 22, 2016 "strategy re: MDL coordination; draft opposition"), 22 (2.0 hours on January 13, 2016 "Meet re: strategy on coordination"); Illinois ECF No. 349-9 at 10 (2.25 hours on February 19, 2016 "Prepare/Edit/File-Supplement to Motion to Reconsider Coordination Order").

for opting their clients out of the class,⁸² which cannot be characterized as benefiting the class as a whole.

Heninger's time records additionally include:

- enormous amounts of time spent on marketing activities and strategies to locate and retain clients,⁸³ time expressly excluded by the CBO, ECF No. 936 at 18;⁸⁴
- time spent preparing for and attending the MDL Leadership Hearing,⁸⁵ time excluded by the CBO;
- time for drafting their attorney retainer agreements,⁸⁶ time spent on behalf of clients who declined to pursue claims against Syngenta⁸⁷ and even time spent resolving issues related to clients who signed up with multiple attorneys;⁸⁸

⁸² See, e.g., Illinois ECF No. 349-8 at 14 (multiple entries in February 2017 "re opt-outs from national class"), 22 (2.2 hours on February 3, 2017 described as "Meet re: opt outs of national class; strategy"), 37 (1.2 hours on February 3, 2017 "Meet re: opt outs of national class; strategy"), 105 (1.5 hours on January 5, 2017 "Drafting opt-out letter and form"); Illinois ECF No. 349-12 at 3 (billing .2 for "Opt out call," .2 for "Opt Out form" and .2 for "Email Re: Opt Out Form"); Illinois ECF No. 349-20 at 32 (multiple entries regarding opt out forms); Illinois ECF No. 349-22 at 18 (1 hour spent "meeting with client, signed exclusion to Fed class action").

⁸³ For a small sample of these entries, see, e.g., Illinois ECF No. 349-8 at 2 (1.3 hours on January 20, 2015 with the description "Conf w/B. Gross re: idea to get more clients"), 4 (3.0 hours on April 6, 2015 on "Corn team meeting on filing strategy and client acquisition"), 6 (1.2 hours on May 12, 2015 on "Discussions on client acquisition"), 24 (4 hours on January 27, 2015 on "Meetings; strategy; conf calls re strategy; securing clients"), 30 (1.1 hours on March 10, 2015 on "Telecon w/Onder on client acquisition"), 35 (extensive time entries for the "design of client materials for meeting" and the client solicitation meetings); Illinois ECF No. 349-16 at 4 (9.5 hours to attend the Nebraska Farmers Union convention on December 6, 2014; 1.25 hours on January 2, 2015 to discuss "methods of identifying potential clients").

⁸⁴ ECF No. 936 at 18 n.3 ("Time and expense incurred in client solicitation, efforts to secure a leadership appointment, pre-appointment attendance at meetings of plaintiffs' counsel, attendance at the JPML hearing, attendance at the initial court hearing and similar tasks shall not be approved.").

⁸⁵ See, e.g., Illinois ECF No. 349-8 at 33 (multiple references to meetings in November and December 2014 with other leadership applicants); Illinois ECF No. 349-16 at 4 (8 hours for "Prepare for and attend initial MDL Status Conference 1/20/15-1/21/2015), for a total lodestar of \$6,912).

⁸⁶ See, e.g., Illinois ECF No. 349-16 at 4 (1.2 hours on December 4, 2014, .4 hours on December 15, 2014); Illinois ECF No. 349-20 at 5 ("Prepare templates for professional employment agreement"); Illinois ECF No. 349-22 at 13 ("draft letter to client with contract to review").

⁸⁷ See, e.g., Illinois ECF No. 349-20 at 31 ("Prepare Notation in Client Folder RE Decision Not to Participate in Claim", "Noting in File that Raymond Farms, Inc. Never Completed its Packet Because They Felt it was not Worth While"); Illinois ECF No. 349-21 at 15 (more than 30 emails, totaling more than \$1,600 in lodestar, about "declined" clients").

⁸⁸ See, e.g., Illinois ECF No. 349-20 at 30 ("Prepare Folder and Note that Client Signed with Different Attorney", "Prepare Note for Client Folder Regarding Signing with Another Firm"); Illinois ECF No. 349-22 at 11 ("draft and send ltr to client re terminating prior attorney").

- time by attorneys performing legal assistant work, which Co-Lead Counsel removed from the submissions from Kansas Common Benefit firms;⁸⁹
- time spent interviewing people to hire;⁹⁰ and
- time billed in increments above the CBO's mandate of .1 increments, ECF No. 936 at 18, which necessarily inflates the time spent on this litigation.⁹¹

Compensating Heninger for time incurred in these categories would be unfair to the 44 Kansas Common Benefit firms that submitted common benefit time, many of whom also had substantial time in some or all of these categories, but whose time was not submitted because it was not common benefit time under the CBO.

There are also categories where it is impossible to compare Heninger's time with the Co-Lead time. For example, Kansas attorneys excluded PFS time spent on individual clients who were not bellwether or class representative plaintiffs. Heninger in total has more than \$1.4 million in PFS lodestar time, which is nearly \$500,000 more than the lodestar allocated to "Other" PFS work. There is no way to determine whose PFSs fall into which category.

In its Supplement, Heninger acknowledges that much of its work is not "Approved Common Benefit Work." Heninger's original filing listed 24,668 hours on which Heninger bases its lodestar of \$11,231,222.41. In its Supplement, Heninger states that only 7,097.50 of those hours are "common benefit hours reported by the firm."⁹²

⁸⁹ Illinois ECF No. 349-8 at 83-97 (hundreds of attorney hours spent on descriptions similar to "PFS scanning, organization and upload").

⁹⁰ Illinois ECF No. 349-8 at 88 (5 hours on September 29, 2016 for "Interviewing candidates for working on PFS project; planning PFS project"), 89 (3 hours on September 30, 2016 for the same).

⁹¹ See, e.g., Illinois ECF No. 349-20 at 5 (billing in .25 increments).

⁹² In its Supplement, it is unclear whether Heninger intends for this number to represent just the common benefit hours for the Heninger firm alone, or whether it purports to represent the entire common benefit total from all ten firms included in the Heninger filing. In either event, the 7,097.50 does not match either the Heninger-alone total or an attempt to manually total the common benefit hours submitted by all Heninger-related firms. Heninger's Supplement also does not include a lodestar total for these common benefit hours. Adding up the lodestar for just the Heninger firm, the total Approved Common Benefit lodestar appears to be \$4,841,650.51 and the overall common benefit lodestar appears to be \$8,274,749.39 across all Heninger firms. Ex. 75 at ¶ 185.

Heninger provides no explanation for what method, if any, was used by its ten firms in placing hours into the Approved Common Benefit columns and the few notes provided by the individual firms are irreconcilable. For example, in its Supplement, Heninger firm Wendell Hoskins listed every hour and every penny spent in the “Approved Common Benefit” columns, but its entries do not support any such claim.⁹³ Instead, the time records are replete with unnecessarily, duplicative work. For example, this firm spent 2.3 hours researching, drafting and internally reviewing a “weekly status report for Syngenta corn litigation.”⁹⁴ This same 2.3 hours appears *158 separate times* between 2015 and 2018, totaling 363.40 hours, which means that this single Heninger firm spent nearly 20% of its total time in the litigation merely reviewing and summarizing to itself what others were actually accomplishing in the litigation. Other firms spent enormous amounts of time on similar work, Illinois ECF No. 354-2 at 2 (more than 700 hours collectively spent by attorneys and non-attorneys on “Litigation Tracking,” which archived “[a]ll filings” that were reviewed to understand “developments in several venues”), but at least that time was placed in the “Other” column. None of this summary work would benefit the class and all is expressly excluded by the CBO.⁹⁵ Heninger firm Sam C. Mitchell & Associates is another firm that claims to have performed only common-benefit work. See Illinois ECF No.

⁹³ The firm claims it spent 485.5 hours “Complaint drafting.” Illinois ECF No. 354-7 at 1 (total of the 177.7 and 307.8 in this category). But searching all of the time records for this firm for even the mere mention of the word “complaint” results in a total of 69.3 hours, not all of which was actually spent drafting complaints.

⁹⁴ See, e.g., Illinois ECF No. 349-19 at 9-56 (January 9, 2015, 1 hour for “Preparation of weekly status report for Syngenta corn litigation”, .8 for “Computer-assisted research . . . re status of ongoing litigation”, and another .5 for the review of this status report; totaling 2.3 hours each week for this status report).

⁹⁵ See, e.g., ECF No. 936 at 8 (“Calls and meetings solely to impart status information generally are not Common Benefit Work as to those listening.”), 9 (“Mere attendance at or listening to a status conference will not be considered Common Benefit Work”), 10 (“mere review of these filings will not be approved as Common Benefit Work”), 11 (“review of an email or other correspondence sent to dozens of attorneys to keep them informed on a matter on which they are not specifically working would not be compensable as Common Benefit Work.”).

354-10 at 1-3. Yet their time records cannot support such a claim because multiple entries disclose time spent on pure marketing activities. *See, e.g.*, Illinois ECF No. 349-22 at 6 (time descriptions stating “web consultant re possible campaign” and consulting “re Syngenta ad.”).

Ultimately, Heninger may well have performed some small amount of common-benefit work that directly benefitted the class. But from a review of Heninger’s original Application and its Supplement, it is not possible to determine what that number is because of the way that Heninger reconstructed its time, boosted its lodestar and included unnecessarily duplicative work and work that is expressly disallowed by the CBO.

6. Heninger seeks reimbursement for hundreds of thousands of dollars that are expressly excluded by the CBO.

Heninger incurred expenses that should be reimbursed as common-benefit expenses—such as the litigation fund contribution Heninger made to the MDL, reimbursement for which Co-Lead Counsel included in their own Application, and any Special Master fees paid by Heninger. These are undoubtedly the types of expenses that benefitted the class as a whole. But beyond these expenses, Heninger largely seeks reimbursement for expenses that are excluded by the CBO because they were either unreasonable or for the benefit of individual clients alone.

Just as with its time, it does not appear that Heninger contemporaneously tracked expenses. For example, Heninger has filed a chart that purports to assign an expense number to each ECF filing in the Illinois federal litigation. Despite there being no cost for filing a document, Heninger somehow has assigned \$17.50 or higher to all of the ECFs filed, including even those ECF entries filed by the Court. Illinois ECF No. 349-12 at 40. On March 24, 2016 alone, Heninger has listed 27 ECF entries, including 11 notices of appearance, all of which are assigned \$17.50 per ECF entry, for expenses totaling \$472.50 for that day alone for ECF entries. Illinois ECF No. 349-12 at 40-41.

Its Supplement makes no distinction between expenses incurred for the common benefit and other expenses. Instead, Heninger continues to seek reimbursement for all of its extensive marketing costs, which permeate the entirety of Heninger's Application, across multiple expense categories. Some marketing costs are obvious—one firm has a Miscellaneous category totaling \$228,411.51 for marketing expenses, including hiring a Cannes Film Festival award-winning film production company,⁹⁶ and “Sign Up Binders sent to 452 potential clients at \$250/each,” which must have been very nice binders indeed. Illinois ECF No. 349-14 at 9.⁹⁷

While those examples above are obvious, some marketing costs are far more subtle. Heninger has not allocated any of its postage or photocopying expenses to marketing. Instead, Heninger has “Client Correspondence/Fact Sheet Documents” listed next to many of its postage entries, despite the fact that some of these postage expenses predate the existence of any plaintiff fact sheet by nearly 3 months. ECF No. 123 at 11 (February 4, 2015 Order requiring plaintiff fact sheets). Other postage categories contain no description at all, but it is hard to imagine that a charge of \$1,568.88 on December 16, 2014 was for anything other than marketing. Illinois ECF No. 349-10 at 20. Out of the \$16,479.42 Heninger spent on postage, the \$33,781.81 on photocopying and the more than \$60,000 spent on travel expenses, not a single penny is allocated to marketing, which seems—at best—unlikely considering Heninger's self-described actions to persuade farmers to file individual suits. Illinois ECF No. 349 at 8 (“The American corn farmer is hardly a litigious individual, so many firms had to get creative and employ a ground game scenario and hold meetings with farmers all over the country.”).

⁹⁶ See <http://www.twopopes.com/about/>.

⁹⁷ See also Illinois ECF No. 354-1 at 4 (\$58,040.87 in “Client Development Costs,”). Included in that total are \$34,838.79 for their corn radio campaign, Illinois ECF No. 349-10 at 6-7 (November 14, 2014), and thousands of dollars in printing costs from Southern Engraving, Inc. for “Syngenta Corn Booklets.” *Id.* at 45-46.

Heninger has a section entitled “Mass Correspondence Projects,” which Heninger describes as: “Tracked expenses to prepare, review, and send on a per mass mailing basis.” Illinois ECF 349-13 at 2. Heninger then appears to treat as expenses the hourly or daily work performed by their staff on these mass mailing projects. *See id.* at 3-6 (providing estimates for the “amount of work week devoted to project” and then calculating the lodestar for this week, which is then listed as an expense).⁹⁸ Heninger firms even included costs for purchasing firm letterhead stationary into their expense requests. Illinois ECF No. 349-21 at 16 (“Stationary & Supplies”).

Heninger does not make any representation that its expenses comply with the CBO and there are multiple additional examples of expenses that are plainly inconsistent with the CBO. For example, Hansen Howell Wilkie is the only Heninger-related firm that specified what it charged per photocopy, Illinois ECF No. 349-17 at 7, and this firm’s charges are twice the “maximum copy charge” allowed under the CBO. ECF No. 936 at 14. While Co-Lead Counsel and other Kansas attorneys may have normally charged clients in excess of \$.10 per page for copies,⁹⁹ copying charges were reduced to \$.10 to comply with the CBO. Heninger did not. Co-Lead Counsel also would not have approved \$37,575.39 in “cost advances,” Illinois ECF No. 349-11 at 3, or hundreds of dollars for a seminar and related travel, ECF No. 349-10 at 59, 63, when such expense are expressly excluded by the CBO, Illinois ECF No. 936 at 9 (“Attendance at seminars or Continuing Legal Education programs shall not qualify as Common Benefit Work, or the expenses pertaining thereto as Common Benefit Expenses.”).

⁹⁸ Similarly, Heninger firms have attempted to submit work performed by legal assistants as expenses because they out-sourced clerical work. *See, e.g.*, Illinois ECF No. 349-19 at 4 (\$48,779.29 in expenses for “Clerical/Processing” work). Legal assistant work was excluded by Kansas attorney firms. *See* ECF No. 3587 at 51 (during the re-review of common benefit time in the MDL, counsel were asked to ensure that “secretarial work” was excluded).

⁹⁹ *See, e.g.*, ECF No. 3587-1 at 141, ¶ 673(e) (“Consistent with the Common Benefit Order, these expenses were billed at \$.10/page, which is below what we normally charge for these expenses.”).

Just as with the time entries, Heninger may well be entitled to reasonable reimbursement for common-benefit expenses in addition to its litigation fund payment to the MDL and payment of Special Master invoices. But Heninger's original Application and its Supplement fail to distinguish between common-benefit expenses and those expenses disallowed by the CBO, including Heninger's extensive marketing costs. Any reimbursement to Heninger should be consistent with the CBO.

C. Heninger fails to provide sufficient information to determine whether Heninger's request for service awards is reasonable.

Heninger provides little information on the work performed by the 44 individuals for whom it seeks a total of \$220,000 in service awards. Unlike the Kansas common-benefit firms, Heninger does not describe the hours expended by these individuals on behalf of the litigation, other than to note that they sat for a deposition. Without additional detail explaining the quantity and quality of the work performed by these plaintiffs and an articulation as to why a third pool of bellwether plaintiffs provided additional benefits to the class as a whole beyond those provided by the Kansas and Minnesota bellwether pools, Kansas Common Benefit counsel cannot evaluate the reasonableness of the \$5,000 service awards for each of the 44 Illinois plaintiffs.

V. Application of Mitchel Toups and Richard Coffman (ECF Nos. 3566-3567)

Mitchel A. Toups and Richard L. Coffman (with their referral counsel) (collectively "Toups/Coffman") seek an award of attorneys' fees and expenses based on their private fee contracts, purportedly with "over 9,400" clients. ECF No. 3567 at 1 n.1, but they request that the monies be awarded "from the fund." ECF No. 3566 at 2. Alternatively, they request at least \$30 million with a 1.5 multiplier or at least 10% of the total attorneys' fees awarded in the case. ECF No. 3566 at 2.

As an initial matter, Touns/Coffman are not signatories to the JPA, so the arguments advanced by Watts and Bassford regarding a pre-arranged allocation are inapplicable to them. They are already receiving common-benefit fees and expenses from the Kansas Allocation based on work they performed and that was approved by Co-Lead Counsel; this work was limited to work performed for their 15 plaintiffs in the bellwether discovery pool. They do *not* argue that this time was inappropriately reduced or that they have additional, compensable common-benefit time for these plaintiffs. See ECF No. 3587-46 (Touns Decl.); ECF No. 3587-47 (Coffman Decl.). The reality is that they performed very little common-benefit work: collectively, they submitted 322.70 hours, representing a combined lodestar of \$189,257.50 at a blended rate of \$586. See ECF No. 3587-46 at 6; ECF 3587-47 at 6. This is no more than 21.5 hours per plaintiff, and reflects the fact that Kansas attorneys took the laboring oar in shepherding Touns/Coffman's clients through the bellwether discovery process. Ex. 75 at ¶ 155. That they now request more than \$30 million is beyond the pale. *First*, they present no legal basis for fees from the common fund. *Second*, outside of their 322.50 hours of common-benefit work, their other work did not in the slightest result in the creation of the Settlement Fund.

A. Touns/Coffman are Not Entitled to be Paid Contract Fees from the Fund.

Citing no authority, Touns/Coffman merely conclude that they are “entitled to attorneys’ fees calculated using the contingent fee percentages set forth in each of their client’s contracts.” ECF No. 3567 at 6. Courts routinely find undeveloped legal arguments waived.¹⁰⁰ Here, Touns/Coffman assert an entitlement without any legal support for that entitlement. They do not even attach a copy of their contingent fee agreements so the Court could evaluate if that

¹⁰⁰ See *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998) (“Arguments inadequately briefed in the opening brief are waived.”); *Hill v. Kemp*, 478 F.3d 1236, 1251 (10th Cir. 2007) (noting that the Court is not compelled to “pursue late and undeveloped arguments”); *Hudgins v. Colvin*, No. CIV-13-664-M, 2014 WL 2504515, at *2 (W.D. Okla. June 3, 2014) (“The Court will consider waived all ‘unspecific, undeveloped, and unsupported’ arguments.”).

agreement applies in the context of a class action and what their clients were told about the possibility of a class settlement.

Toups/Coffman have already conceded that the Court will decide how to allocate the fee. Specifically, the litigation class notice advised class members that “the Court makes decisions about attorneys’ fees and can only award ‘reasonable’ attorneys’ fees. If you hired a lawyer before you received this notice and want to stay in the class, the Court will determine how much the lawyers will be paid at the end of the case and how it will be divided, if at all, between the lawyers appointed by the Court and the lawyer you already hired.” ECF No. 2703-1 at 8. It further advised class members that if they hired a lawyer after receiving the notice, which the notice advised was unnecessary because class counsel was “working on [their] behalf,” you will have to hire one on your own. *Id.* On October 31, 2016, Toups/Coffman lodged several objections to the notice, but not to this provision. *See* ECF No. 2642-1 at 9. Thus, even if they raised a legitimate basis to award fees based on their private fee contracts, they have waived any right to complain about the Court’s authority here to determine how those fees will be allocated among counsel.

Finally, there are good reasons that Toups/Coffman are trying to short-circuit seeking actual enforcement of their contracts—if evaluated individually, they may not be enforceable. Throughout the litigation, Toups/Coffman disseminated misleading information to putative class members, which could invalidate these contracts.¹⁰¹ Toups/Coffman misleadingly attacked the class mechanism, insinuating that class members cannot “control the terms of any resolution of

¹⁰¹ *See* Tex. Gov’t Code Ann. § 82.065 (“Any contract for legal services is voidable by the client if it is procured as a result of conduct violating ... Rule 7.03 of the Texas Disciplinary Rules of Professional Conduct”); ECF No. 2676 at 9-10; ECF No. 2703 at 2 (“Much information has been disseminated to putative class members in an effort to influence their decisions, some of which is at least arguably inaccurate, which reflects those counsel’s zeal.”).

your claims” if they joined the class.¹⁰² After summary judgment was entered on the Lanham Act claim, Toups/Coffman began representing that “[u]nless [the farmers] are located in [one of the eight bellwether states] the “only way [they] can ... share in any recover is to hire a lawyer and file an individual case.” *Id.* (attaching April 5, 2017 letter); *see also id.* (falsely claiming the nationwide class had been “decertified”). Toups/Coffman ramped up these types of solicitation after the Kansas judgment: in July 2017, using that verdict, asserted: **“If you have been sitting on the litigation sidelines, now is the time to get in the game and file a claim. A nationwide settlement could be announced at any time. ... The only way to protect your legal rights and be compensated by Syngenta for your damages is to hire a lawyer and file an individual case.”** It’s not too late. But it could be soon.” Ex. 79 at Ex. D (emphasis in original).

Apparently, their marketing tactics worked: Toups/Coffman’s client base nearly doubled *after* these solicitations. ECF No. 2642 at 1 (previously claiming to represent only “5342 individual plaintiffs” in October 2016); ECF No. 3358 at 1 (in August 2017, they claimed to represent “over 7400 plaintiffs”). Now, they claim to represent 9,400 plaintiffs, 2,000 more than they represented a year ago. It is not only implausible—*but impossible*—for their representation

¹⁰² Ex. 79 at ¶ 16 (attaching solicitation letter claiming that “[a]s an independent plaintiff, Syngenta must deal with the unique aspects of your business and your claims” and “you—rather than the class action lawyers—will control the terms of any resolution of your claims, thereby putting you in the best possible position to potentially maximize your recovery based on your specific losses, unique business objectives, and industry dynamics.”); *id.* at ¶ 14 (attaching website representing “we believe corn producers may very well fare better as individual plaintiffs”). They also claimed that “[w]e will personally handle your case” without disclosing that, in fact, the class action lawyers were obtaining all the evidence necessary to prosecute even an individual case against Syngenta. *Id.* at ¶ 13. Toups/Coffman never even showed up at most of their bellwether plaintiffs’ depositions (and none of the defendant, third-party, or expert depositions). *Id.* at ¶ 8.

of thousands of clients acquired after the Kansas verdict to have been of any benefit in creating the Settlement Fund.¹⁰³

The Court should not award Toups/Coffman attorneys' fees based on their contracts because there is a very real possibility these contracts may be unenforceable because of the methods used to solicit and retain clients.

B. Under the *Johnson* factors, Toups/Coffman fail to Adequately Support a Request for Additional Fees and Expenses.

Under an analysis of the relevant *Johnson* factors, Toups/Coffman fail to support their fee request. Indeed, they perform no analysis of the factors, thereby waiving the right to do so in reply. At most, they give a conclusory assertion that the individual cases “drove the settlement,” ECF No. 3567 at 9, and the superseded and unenforceable term sheet is proof of this fact. ECF No. 3567 at 10. Yet, they fail to explain how a term that was expressly *rejected* by the Settlement Agreement is proof of anything, except that the parties to the settlement actually refused to agree to anything in the term sheet not included in the final settlement agreement.

When a *Johnson* factor analysis is properly conducted, it conclusively shows that Toups/Coffman are not entitled to additional fees and expenses paid out of the common fund.

Amount Involved and Results Obtained / Skill Requisite to Perform Legal Services Properly. Toups/Coffman did not contribute to the creation of the Settlement Fund (beyond their approved common-benefit work). As an initial matter, around 1,000 of their plaintiffs may not even have filed a case, and unfiled cases exerted no settlement pressure on Syngenta. Ex. 78 at ¶ 54 n.63. They tout their clients' involvement in the MDL bellwether discovery pool, but they overstate their *own* involvement in that regard. Although it is 15 of the MDL bellwether

¹⁰³ Telling, several of the Toups/Coffman affiliated counsel admit in their declarations that they did not begin working on the case until after the Kansas trial. See ECF Nos. 3567-4 at ¶ 4; ECF No. 3567-4 at 55 ¶ 19.

plaintiffs were Toups/Coffman clients (ECF No. 3567 at 3 n.3), *other* Kansas attorneys assisted those clients in responding to discovery and producing them for their deposition. Ex. 75 at ¶ 156. In fact, Toups/Coffman did not even *attend* the depositions for 10 of their bellwether clients. *Id.* See also Ex. 79 at ¶ 8. The paltry 223 hours they contributed to their own bellwether clients cases detracts from, rather than supports their application. *Id.*

Collectively, Toups/Coffman and their referral counsel report to have expended an astounding 69,557.8 hours of labor (with a claimed lodestar of nearly \$25 million) on the claims of plaintiffs who (at most) only served a PFS. *Id.* at ¶ 157. That assertion is subject to serious doubt given that Toups/Coffman filed only a subset of their total clients, and dismissed cases because they could not get the PFSs done. *Id.* Toups/Coffman originally filed a consolidated complaint listing 837 plaintiffs that were transferred to the federal MDL. *Borah et al. v. Syngenta et al.*, 2:15-cv-09133-JWL-JPO, ECF No. 1-1. But, Toups/Coffman could not meet the PFS obligation for over half of these clients; before the December 1, 2015 PFS deadline (ECF No. 1098 at 7), they dismissed 499 of these plaintiffs' claims. See ECF No. 1325. They subsequently filed additional cases,¹⁰⁴ but the total number of non-dismissed cases never totaled 4more than 900 plaintiffs in the MDL – a small fraction of the 9,000 clients Toups/Coffman now claim to represent and for which they seek attorneys' fees and expenses. Apparently some of those plaintiffs filed in Illinois, but it is not clear PFSs were ever served there.

If anything, Toups/Coffman have been a detriment to the Class' claims. When Co-Lead Counsel sought to vacate the Court's order requiring PFSs for cases filed after the bellwether selection process, Syngenta in opposition cited Toups/Coffman's erroneous advertising that "[i]t takes only minutes" and a "few documents" on the producers' part to file and maintain a case.

¹⁰⁴ The subsequent cases were on behalf of an additional 543 plaintiffs (Case No. 2:16-cv-02696, ECF No. 1-1; Case 2:16-cv-02699, ECF No. 1-2; Case No. 2:18-cv-02284, ECF No. 1).

See ECF No. 1218 at 4. Syngenta held up, in open court, examples of deficient PFSs completed and submitted by Touns/Coffman. Ex. 79 at ¶ 6. By failing to comply with the PFS obligation for 499 plaintiffs and ultimately dismissing those claims, they validated Syngenta's insistence on on-going PFS compliance. And, because of their performance, Co-Lead Counsel diverted *hundreds* of hours of their own time away from prosecuting the litigation to help Touns/Coffman comply with their PFS obligations. *Id.* at ¶ 10.

Touns/Coffman also opposed the class notice, objecting to even standard, FJC-approved language that class members who hire a lawyer will have to pay that lawyer separately. *Compare* ECF No. 2642 at 6 with ECF No. 2676 at 16 n.8 (citing Fed. Judicial Ctr. materials). And they opposed preliminary approval because they wanted a separate settlement where they could take 40% of their clients' recoveries. See ECF No. 3529 at 36:15-18 (COURT: "But they point to no prejudice arising from that other really than matters that I think ultimately go to attorney's fees, which maybe is what their beef really is all about.").

They also ignore that most of their clients chose to remain in the nationwide litigation class or were signed up *after* that class was certified. No more than 3,529 Touns/Coffman plaintiffs actually completed an opt-out form; thus, most of the clients for which they now claim a fee remained in the federal litigation class. Ex. 75 at ¶ 157.

Time and Labor Involved / Novelty and Difficult of the Questions. Their (now revised) estimated time of 69,557.8 hours (originally, they estimated "58,860 hours spent working on this litigation"), ECF No. 3567 at 9, is insufficient to justify their fee request. Even if these admittedly reconstructed estimates could be believed, the work they purport to have performed was of the least complexity in the litigation, and their performance in complying with the PFS requirements was not exceptional.

They developed no experts. Ex. 75 at ¶ 158. They spent only 4 hours on pretrial, trial, and post-trial work. *Id.* They attended no depositions (outside of their approved common-benefit work). Ex. 79 at ¶ 8. Less than two percent of their hours (1,100) were spent drafting complaints (work that, under governing orders, required them only to collect the minimal information to complete a Notice to Conform). Ex. 75 at ¶ 158. They spent about 38% of their time on PFS compliance, paper discovery, and file management (although they fail to explain what paper discovery their non-bellwether cases required outside of the PFS). *Id.* And, nearly 60% was spent on pre-settlement communications with clients and perfecting Claim Forms, of which 33.5% was spent on perfecting Claim Forms—the least risky work in the case. *Id.* at ¶ 150. This is largely administrative, not legal, work, with no appreciable class-wide benefit. *See, e.g.,* ECF No. 3567 at 4-5 (“monitoring the litigation,” “answer[ing] questions, *inter alia*, about the litigation,” and “updating a dedicated case website.”).

It also appears much of the work was unnecessary and of Toups/Coffman’s own making. In a February 2018 letter, they promised clients that “**we will file your settlement claim for you**” and that clients “must submit your 2013-2017 FSA Form 578s as part of your settlement claim. **If we don’t submit your FSA Form 578s as part of your claim, you will not be paid.**” Ex. 79 at Ex. D (emphasis in original). Not only was that false, but it would appear to have generated significant, unnecessary work in either the perfecting claim forms or pre-settlement communications category.

Finally, their lodestar is also unsupportable. Incredibly, the blended rate for their 3,341 hours of “[d]iscovery file management” is \$687.50 an hour and their 18,179.9 hours of “[p]re-settlement communications with clients” is billed at \$435.32 an hour. Ex. 75 at ¶ 158 comparing the \$435.32 with the blended rate of \$298.80 an hour for “[d]iscovery file management” from the

Kansas Common Benefit firms). To the extent this represented solicitation, it should plainly be excluded, and to the extent it represents call-center staff answering client questions, it cannot be reasonable to have attorneys staffing such work at \$435.32 an hour for such an excessive amount of time, when the clients' claims were not even in active discovery.

Contingent Nature of the Fee. Although their fee was contingent, so were the fees for the Kansas attorneys. Toups/Coffman chose to invest in a strategy of soliciting clients, building a large inventory, and expecting to be paid handsomely for doing nothing of value—truly freeriding on the efforts of others, even for work associated with their own bellwether clients. Under such circumstances, the Court should give far greater weight to the contingent nature of the work that actually benefitted the class as a whole.

The relative work of Toups/Coffman—despite the unbelievable hours they claimed to have reconstructed—cannot justify a fee of the size they request (“at least \$30 million with a minimum 1.5 multiplier” ECF No. 3567 at 11), if it justifies a fee at all. The amount that Toups/Coffman will receive for approved common-benefit work and expenses is more than reasonable for what they contributed to the creation of the Settlement Fund, under the facts and circumstances here.¹⁰⁵

¹⁰⁵ Toups/Coffman also request (ECF No. 3646 at 3-7) that the Court refer the allocation of fees to their self-selected mediator based on their stated assumption that the applications submitted “are within 20% of \$500 million”. But their chart is inaccurate: at minimum, it omits Heninger (seeking at least \$46.4 million), it understates Watts’ request (\$100 million versus, in actuality, \$180-200 million or more), and it suggests the Paul Byrd Law Firm seeks nothing beyond what was submitted by Minnesota Lead Counsel when they actually request enforcement of their contracts or in the alternative, their lodestar of \$5.9 million with a 3.0 multiplier (*e.g.*, \$ 18 million) (ECF No. 3586 at 7-9).

C. Toups/Coffman fail to justify their expenses.

Toups/Coffman seeks \$374,532.19 in expenses on behalf of themselves and co-counsel. ECF No. 3566 at 2. Since their non-common benefit work was not an actual benefit, there is no basis to award them expenses beyond their approved common-benefit expenses. Moreover, these firms provide no detail or explanation of how these expenses were spent or how they contributed to the settlement fund. *See, e.g.*, ECF No. 3567-1 at 10; ECF No. 3567-2 at 8; ECF No. 3567-3 at ¶12. Several of the law firms seek reimbursement in conspicuously round numbers. *See* 3567-4 at 2 (reflecting Jinks, Crow & Dickson reimbursement of \$12,000.00; John L. Jernigan, III reimbursement of \$64,000.00; and Trousdale Ryan, PC reimbursement of \$1,000). In fact, Mr. Jinks admits that his expenditure figure is an estimate. *Id.* at 61. Similarly, Mr. Trousdale admits that the \$1,000 sought is an estimate of *future* expenses. *Id.* at 93.

VI. MINNESOTA LEAD COUNSEL (FILED IN MINNESOTA, attached to ECF 3587).

Kansas attorneys support the Fee-Sharing Agreement that would result in allocating 12.5% of the 33⅓ percent attorneys' fees to the Minnesota Common Benefit Group. *See* ECF No. 3587 at 45-46. There are, however three discrete issues that Kansas attorneys must address.

A. Watts' Common-Benefit Work is Included in the Minnesota Allocation.

Importantly, the agreement intended to cover *all* common-benefit work performed and approved in Minnesota. *See* ECF No. 3587-8 at 3 n.3 (Fee-Sharing Agreement) (“Daniel E. Gustafson and Lew Remele will allocate fees represented by this percentage among all firms that provided common benefit work in the Minnesota MDL consistent the Minnesota MDL Court’s orders.”). Thus, if Watts is compensated for their approved common-benefit work, that award should come out of the Minnesota Allocation pursuant to the agreement.

Minnesota Lead Counsel now argues that *none* of Watts’ common-benefit work was included because Minnesota Lead Counsel agreed to “accept responsibility to pay the common benefit fees of Bassford Remele and Rick Paul (two firms the Special Masters originally included under Mr. Watts’ responsibility) . . . ” ECF No. 3662-1 at 59 n.24. *First*, there were never any discussions between Minnesota and Kansas Lead Counsel about Bassford’s common-benefit time being excluded from the Minnesota Allocation, and it is unfathomable that Bassford would not be compensated for their *Minnesota* common-benefit time from the *Minnesota* Allocation. Ex. 75 at ¶¶ 195-96. Likewise, although Paul performed work in both the MDL and Minnesota (as an EC member in both jurisdictions), the work was distinct and separately approved by each respective lead counsel. *Id.* at ¶ 197. Paul will be paid for his MDL work from the MDL Allocation, and Kansas Lead Counsel was always clear and unequivocal that Minnesota should honor the work of the firms approved and performed in that jurisdiction.¹⁰⁶ *Id.* at ¶ 198.

Second, with regard to Watts, Kansas Lead Counsel was never privy to any negotiations between Watts and Minnesota Lead Counsel, *id.* at ¶ 8, but the Fee-Sharing Agreement was clear that, as to the aggregate fee, the 12.5% was intended to cover *all* common-benefit work in Minnesota. ECF No. 3587-8 at 3 n.3. See also Ex. 76 at ¶¶ 8-9 (“if Watts submitted those to Minneosta – which I understand his firm did – then the common-benefit time would be compensated out of the Minnesota MDL 12.5% allowation.”) Moreover, Minnesota Lead Counsel was always negotiating from a claimed lodestar of \$35-40 million, which necessarily included Watts’ work—indeed, that work continues to be included as part of their fee application

¹⁰⁶ It was always a curious negotiating position that Minnesota Lead Counsel would attempt to disclaim Paul’s contribution, given that Paul performed more than many, and as much as most, in that jurisdiction, attending many of the depositions for Minnesota; traveling overseas; and, participating in both *Mensik* and the Minnesota class trial. Ex. 75 at ¶ 199.

now. Ex. 75 at ¶ 201 (citing ECF No. 3662-2 at 5). The argument that Watts is not expressly mentioned as being “include[d]” in the definition of the Minnesota group in the Fee-Sharing Agreement does not otherwise make ambiguous the clear statement that follows. ECF No. 3587-8 at 3 n.3. In fact, that agreement defines to “include” only some of the firms being compensated out of the Kansas Allocation. *Compare id.* at 1 n.2 (Fee-Sharing Agreement) (listing 13 firms) with ECF No. 3587-1 at ¶ 643 (identifying “44 law firms that performed common benefit work”).

Finally, Minnesota Lead Counsel claims “Mr. Watts agreed with Mr. Gustafson to give those claims to the Minnesota leadership and that he (Mr. Watts) would rely solely on his private contracts for compensation.” ECF No. 3662-1 at 59 n.24. Kansas Co-Lead counsel responsible for negotiating the Fee-Sharing Agreement were unaware of any such side deal. Ex. 75 at ¶ 200; Ex. 76 at ¶ 10. Moreover, this is not consistent with Watts’ brief, where they contend that if Watts Guerra is awarded less than it bargained for with respect to its contract fees, then it should be awarded not only its expenses, but also a common benefit fee in an amount sufficient to make up the difference.” ECF No. 3611 at 33 n.11. Since Watts is not entitled to their private contract fees in an award from the Court (*supra*), it does not appear they have given up their entitlement to a portion of the Minnesota allocation. Ex. 75 at ¶ 206.

B. PFS Work Did Not Advance the Litigation.

In negotiating the Fee-Sharing Agreement, Minnesota Lead Counsel never represented that PFS compliance work for nonbellwether plaintiffs might be considered common-benefit work in Minnesota. ECF No. 3662-1 at 32, 37. Kansas attorneys disagree that this work benefitted the Class. *See, supra, Argument § I.A.2-3.* Even if Syngenta required PFSs to “reduce the number of individual plaintiffs if those plaintiffs failed to comply with the PFS deadline,” ECF No. 3662-1 at 27, that proves only that the PFS benefitted the individual litigant

(who could have participated in the class action). In any event, if Minnesota Lead Counsel decide to share the fee awarded to them from the Minnesota Allocation with these attorneys, that is their decision.¹⁰⁷ It should not, however, affect the overall allocation of fees between the MDL and Minnesota.

C. The Special Masters Should Recommend How To Divide the Unallocated Portion, but the Courts Should Make a Final Allocation as Between Kansas, Minnesota and Illinois Lead Counsel.

Minnesota Lead Counsel further contend that the Court should award an aggregate fee of 33 ⅓ percent and then refer the matter of allocation to the Special Masters. ECF No. 3662-1 at 60. But the Special Masters have already assisted the parties in allocating the gross fee between Kansas, Minnesota, and Illinois Lead Counsel. After many hours, they recommended and approved the Fee-Sharing Agreement. Ex. 75 ¶ 209. That agreement allocates less in class fees than Kansas attorneys wanted to accept (a substantial reduction in terms of both their contribution and the fact that they represented more than half the class), but it was the hard-bargained deal struck after great effort and expense on behalf of all involved. The issue should not be re-opened. *Id.* ¶ 210. Based on the materials presented and the Fee-Sharing Agreement, the Courts are best positioned, having observed the efforts of all involved, to make a final allocation on this issue. This will allow Lead Counsel to engage in the second step of allocating their portions to each of their respective Common Benefit Attorneys, hopefully without further disputes requiring Court intervention. *Id.*

To the extent matters are referred to the Special Masters, it should be for a recommendation as to how to divide the 20% portion of the attorneys' fees not allocated by the

¹⁰⁷ It also appears Minnesota Lead Counsel did not give common-benefit credit to contracted lawyers for work they did for clients that were bellwether plaintiffs. Kansas attorneys credited this work and included this work in their submission, and intend to compensate these attorneys from the MDL Allocation. Ex. 75 at ¶ 207.

Fee-Sharing Agreement. That is, after all, what the agreement expressly provided. ECF No. 3587-8 at 3 (“The remaining 20% of any attorneys’ fees awarded by the Court will be allocated by the Kansas MDL Court, in consultation and agreement with the Minnesota MDL Court and Judge Herndon of the United States District Court for the Southern District of Illinois, taking into consideration the recommendation by the Special Masters.”).¹⁰⁸

D. Minnesota Lead Counsel’s Expenses Appear Reasonable.

Based on the representations of Minnesota Lead Counsel that the common-benefit expenses submitted were in compliance with the Minnesota CBO those expenses would appear to be reasonable. See ECF No. 3662-1 at 55.

VII. ILLINOIS LEAD COUNSEL (ECF No. 3597)

A. Illinois Lead Counsel Should be Compensated from the Illinois Allocation.

Kansas attorneys’ belief and contention that a 33 ⅓ percent fee is reasonable in the aggregate and the Fee-Sharing Agreement allocating a fee of 17.5% to Illinois Lead Counsel obviate the need to respond to Illinois Lead Counsel’s submission. Kansas attorneys have already summarized work they considered, based on their knowledge of the Illinois state and ethanol cases, work that benefited the Class. See ECF No. 3587 at 44-45.

B. Certain Movants Should be Paid, if at All, From the Illinois Allocation.

The Fee-Sharing Agreement provides that the following firms are covered by the proposed IL Allocation: Clayton A. Clark (Clark, Love & Hutson, GP); Peter J. Flowers (Meyers & Flowers); and Martin J. Phipps (Phipps Anderson Deacon LLP) “as well as [their]

¹⁰⁸ A further point of fact: Minnesota Lead Counsel contends that the settlement “negotiators” persuaded the USDA to provide electronic data for the computation of settlement claims. (at 6) In fact, Co-Lead Counsel expended significant time and cost (hiring a specialized law firm at their own expense) to obtain an agreement from the FSA for electronic FSA 578 data. See ECF No. 3587-1 at ¶¶ 598-60. Prior to that agreement, the term sheet contemplated that producers would have to submit paper FSA 578 documentation or releases.

Referring Counsel, co-counsel and / or joint venture partners.” ECF No. 3587-8 at 2-3 n.4. Four firms that submitted applications: the Law Offices of Craig J. Eiland (ECF Nos. 3592, 3593), Johnson Becker PLLC; Douglas W. Murch / Comey Feste Ltd. (ECF No. 3573); Justin Demerath (ECF No. 3599) are listed as such “referring counsel” by Illinois Lead Counsel. ECF No. 3598-1 at ¶¶ 20, 29, 35, 55, 159 (Ill. Lead Counsel App.). Consistent thereto, two firms claim to have been working under the direction or in coordination with the Illinois Lead Counsel. *See* ECF No. 3593 at 5 (“The Eiland Law Firm has been working in conjunction with Lead Counsel in this Illinois consolidation.”); ECF No. 3576 at 12 (“Working in conjunction with Lead Counsel in this consolidation, Johnson Becker filed some of the first cases in Williamson County.”). Under the Fee-Sharing Agreement and the Settlement Agreement, their applications should be referred to Judge Herndon for a determination of whether they are entitled to a portion of the Illinois Allocation after Illinois Lead Counsel is permitted to make a recommendation. *See* ECF No. 3587-8 at 2 n.4 (“Clayton A. Clark shall petition the Honorable David R. Herndon of the United States District Court for the Southern District of Illinois concerning the allocation of fees among the members of this group.”).

C. There is Insufficient Information to Assess the Reasonableness of Illinois Lead Counsel’s Claimed Expenses.

Illinois Lead Counsel seeks reimbursement of expenses in the amount of \$7,665,415.73. ECF No. 3598 at 50. Certainly, some of the expenses were incurred for the benefit of the entire Class. For example, they paid \$428,896.66 in Special Master Fees, which are Common Benefit fees. ECF No. 3659-2 at 5. But since Illinois Lead Counsel was not operating under a CBO, additional information is required to ensure these expenses meet the necessary requirements to be compensated from the Fund. *See* ECF No. 3598 at 50 (stating only that these expenses were

“reasonably incurred in the prosecution of this litigation” and the expenses were “both necessary and reasonable in the context of this case.”)

All of the Illinois expenses should be consistent with the CBO. The Kansas attorneys did not include, for example, expenses related to marketing, solicitation, town hall meetings or similar expenses because such costs do not fall within the CBO. The same reimbursement rules should apply to all firms seeking to be reimbursed out of the common fund.

The Illinois Leadership Group may well be entitled to reasonable reimbursement for most of these common-benefit expenses. But conformance with the CBO should be required and non-reimbursable expenses should be excluded.

VIII. PAUL BYRD LAW FIRM, PLLC (ECF NO. 3583).

A. Byrd Fails to Justify Additional Attorneys’ Fees.

The Paul Byrd Law Firm and a consortium of related firms (collectively, “Byrd”) seeks attorneys’ fees and expenses based on their 2,500+ purported private fee contracts, or in the alternative based an award of their lodestar (\$5.87 million) plus a 3.0 multiplier, plus reimbursement of litigation expenses in the amount of \$707,567.56.

Byrd’s common-benefit work in Minnesota was submitted by Minnesota Lead Counsel. ECF No. 3662-1 at 529 (\$1.35 million in claimed lodestar). That work will be paid from the Minnesota Allocation. Although a signatory to the JPA, Byrd does not advance the erroneous arguments by Watts and Bassford that the JPA controls the Court’s fee allocation here. *See* ECF no. 3583. Like Watts and Bassford, however, Byrd presents no legal authority for the Court to award attorneys’ fees based on private fee contracts under Rule 23(h) or otherwise. *Supra*, Argument § II.A.1 – II.A.3. Nor does Byrd raise any unique arguments that would justify an award of attorneys’ fees based on the fact that they filed individual cases, complied with PFS obligations in Minnesota, and communicated with their clients to assist them in perfecting

claims. *Supra*, Argument § I.A.2 – I.A.5. Yet, that is precisely the type of work that Byrd claims to have performed here. See Ex. 75 at ¶ 85 (summarizing Byrd’s categorization where non-common benefit work consisted almost entirely of filing complaints (7.9% of hours); PFS and discovery-file management (48.1%); pre-settlement communications and perfection of claims (11.8%), and other (26.9%)).¹⁰⁹ For the reasons already given, this work does not justify additional attorneys’ fees. Even if it does, the work provided minimal value and was not complex; therefore, any fees can be adequately awarded from the \$100.6 million unallocated by the Fee-Sharing Agreement.

B. Byrd’s Expenses are Unjustified.

Byrd seeks reimbursement of \$707,567.56 in “non-common benefit” expenses on behalf of eight firms: (1) itself, (2) Kelly Law Firm, PA, (3) The Awbrey Law Firm, (4) James J. Thompson Jr. Firm, (5) Clark Mason Attorneys, (6) Odom Law Firm, (7) Gale Lush Attorney-at-Law, and (8) Devaughn James Injury Lawyers, which is “exclusive of the costs paid related to common benefit work.” ECF No. 3586 at 8 n.14. As an initial matter, the reimbursement request appears inflated by more than \$36,000 for the Paul Byrd Law Firm. Compare *id.* at 8 (seeking \$306,917.47 in non-common benefit expenses) with ECF No. 3586-2 at 4 (declaration identifying only \$270,214.16 in non-common benefit expenses). Unsurprisingly, Paul Byrd provides no details or itemization regarding what its non-common benefit expenses included.

Similarly, the reimbursement request for the Kelly Law Firm is also inflated by \$65,381.02, which Mr. Kelly admits was already submitted for reimbursement by Paul Byrd. ECF No. 3586-3 at 4, ¶ 8 (“the highlighted portion of which on Exhibit C I understand has been

¹⁰⁹ Byrd’s “other” category includes over \$1.4 million in attorney time spent communicating with clients and referral lawyers, “strategy meetings,” “working on internal Access database & CLX doc depository,” and “travel time to meet clients.” ECF No. 3662-2 at 14. This work did not benefit the Class.

submitted for reimbursement by the Paul Byrd Law Firm.”); *id.* at 24, 27. The remainder of the Kelly expenses appears to relate to 2014-2016 efforts to solicit clients, and would therefore not be recoverable. *See id.* at 24-27.

Additionally, the reimbursement request for the Clark Mason Attorneys is inflated by \$76,569.44. *See* ECF No. 3586-6 at 6 n.1 (“I specifically request the Court exclude the sum of \$76,569.44 as any reimbursement of costs.”); *id.* at 18 (identifying excluded costs as part of the total \$79,910.63 requested). Thus, the total amount of double-counted expenses for Paul Byrd, Kelly, and Clark Mason totals nearly \$180,000 of the \$707,000 sought.

The Awbrey Firm provides a non-detailed list of items on which it allegedly incurred \$84,300 in expenses, but it provides no details or invoices identifying those expenditures or how they contributed to the settlement. (ECF No. 3586-4 at 5 ¶ 8). The Law Firm of James J. Thompson, Jr. identifies a nearly identical list of expenditures for which it seeks reimbursement for \$106,700.00 in expenses. (ECF No. 3586-5 at 5 ¶ 8). However, the categories include costs of creating a client database and costs of staff workers, which is routine law firm overhead that would not ordinarily be billed to individual clients. (*Id.*; ECF No. 3586-4 at 5).

Paul Byrd seeks reimbursement in the amount of \$26,565.39 for the Odom Law Firm. ECF No. 3586 at 8. However, Mr. Winburn’s declaration on behalf of the Odom Law Firm does not identify any amounts or itemization for expenditures in the litigation. ECF No. 3586-7. The Gale Lush Law Firm seeks \$4,722.63 in expenses. ECF 3586-8 at 33-35. However, the \$3,500 of that total was spent on food and rent for solicitation meetings. *Id.* at 33. The remainder of the expenses relate to mileage and office supplies related to obtaining client records and opt-out signatures. *Id.* at 33-34. Finally, DeVaughn James Injury Lawyers asserts that it incurred \$4,000

in expenses but provides no detail regarding how those funds were spent or how they contributed to the settlement. ECF No. 3586-9 at 4.

The categorizations provided by Byrd (ECF No. 3660) do not solve these problems. The total expenses (not including Common Benefit Assessments) categorized add up to \$752,061.96, which does not equal the request. *Id.* Moreover, three firms report an identical miscellaneous expense (\$85,528.33) for the services of Brad Bailey. ECF Nos. 3660-6 at 7-8; ECF No. 3660-7 at 7-8; ECF No. 3660-8 at 7-8. Despite a 39-line description of Bailey’s services, which must be read to be appreciated, Kansas attorneys still have no idea what work this person performed for over \$250,000 nor why it should be considered a reimbursable expenses.

The Byrd group collectively has over \$60,000 in airfare costs; given that any travel necessary to perform common-benefit work should have been submitted through Minnesota Lead Counsel, the reasons for this travel is unknown. ECF No. 3660-1 at 7 (\$10,291.59); *id.* at 8 (\$12,253); ECF No. 3660-2 at 7 (\$10,223.75); ECF No. 3660-3 at 7 (\$17,203.70); ECF No. 3660-6 at 7 (\$4,254.37); 3660-7 at 7 (\$4,805); 3660-8 at 7 (\$1,500). There are similar, corresponding hotel costs. *See id.*

Third, in addition to the miscellaneous expense cited above, the categorizations confirm that Byrd included overhead costs not typically charged to clients including marketing costs, including: a significant cost for “[e]mployees” (\$58,532.89) and a small cost for telephones (\$303.52), as well as other overhead costs such as: “[d]atabase” (\$193,536.42); “equipment” (\$1,829.37) (ECF No. 3660-1 at 8); PFS-IT Costs and FSA Database (\$58,029.63) (ECF No. 3660-2 at 7); “marketing” (\$3,704.88) (ECF No. 3660-3 at 7); and “[r]enting rooms” (\$4,240.63) (ECF No. 3660-4 at 7).

IX. SHIELDS LAW GROUP

A. Shields is Not Entitled to Fees Based on Private Contracts.

The Shields Law Group (“Shields”) seeks attorneys’ fees based on Rule 23(h), but similar to other applicants, they fail to provide a legal basis for the award of such fees based on the existence of private fee agreements. ECF No. 3584 at 2-3. They claim to represent “2,500+” clients, and they report to have performed 16,176.6 hours of work for a claimed lodestar of \$9.8 million. ECF No. 3654 at 1, 6-7. All of the arguments presented above apply equally to Shields.

Some of their work is easily characterized as without benefit to the Class, as it appears they simply attended every hearing and trial in the case. See ECF No. 3654 at 4 (“As stated previously we attended nearly all, if not all, of the *Syngenta* hearings conducted in both Minnesota state court and the federal MDL in Kansas City, Kansas. We also attended all bellwether trials in both Courts.”). Almost all of the rest of their work is predominantly PFS compliance (8,336.6 hours) (claimed lodestar of \$5.28 million) and pre-settlement communications / Claim Form perfection (4,826 and 2,790 hours) (claimed lodestar of \$4.43 million). Ex. 75 at ¶ 223; accord ECF No. 3654-1. They have one of the highest blended rates for handling these administrative tasks at such large hours: PFS work (\$633.43 per hour); pre-settlement communications (\$650 per hour); assisting in claim forms (\$463.71 per hour). *Id.*; see *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 756 (S.D. Tex. 2008) (“The hourly rate for attorneys should not be applied to clerical, secretarial or administrative work, since these are part of office overhead.”). They describe much of their work as taking calls from farmers “looking for an update” or seeking an answer to a “question ... about a letter they may have received regarding deficient PFS.” ECF No. 3584 at 14. While they may have benefitted their clients individually, none of these tasks benefitted the Class as a whole.

The work is not compensable from the common fund. And, even if it was, the work provided minimal value and was not complex; and, the claimed lodestar is inflated because senior attorneys were performing administrative tasks. Consequently, any fees that the Court awards can be adequately awarded from the \$100.6 million unallocated by the Fee-Sharing Agreement, upon recommendation of the Special Masters.

B. Shields Provides Insufficient Information to Award Expenses.

Shields contend they incurred \$402,285.74 in “Syngenta related expenses,” but their application fails to justify those expenses beyond claiming “\$13,522 ... were incurred producing PFS and proof of production documents.” ECF No. 3584-1 at 4. In addition, they did not categorize their expenses as required by the Court’s order. *See* ECF No. 3654.

The underlying materials submitted show that most of the remaining \$388,763.48 in non-common benefit expenses should not be compensated. The vast majority of itemized expenses relate to client acquisition and marketing costs, office equipment and rent, line-of-credit and credit card interest payments, and staff wages. *See generally* ECF No. 3584-7. Additionally, the expenses include almost \$40,000 in reimbursement payments between law firm partners, which essentially double counts the expenditure. *Id.* at 30-31.

Consequently, the request for expense reimbursement should be denied.

X. THE EILAND LAW FIRM (ECF NO. 3592-93)

A. The Eiland Law Firm’s Fee Request Should be Referred to Judge Herndon for Payment from the Illinois Allocation.

The Law Offices of A. Craig Eiland, PC (“Eiland”) seeks “payment of contractually agreed upon fees and expense reimbursement” between the firm and all clients who “receive a

settlement award,” such award to be paid “from the fund created.” ECF No. 3593 at 2. Eiland purports to represent 1,146 plaintiffs in 834 cases in Illinois State Court.¹¹⁰ *Id.* at 2-3.

As explained above, any attorneys’ fees awarded to Eiland should come from the IL Allocation. *See, supra*, Argument § VII.B. Indeed, much of the work Eiland purports to have performed appears to be work for the common-benefit of the Illinois proceedings. *See, e.g.*, ECF No. 3647 at 1 (“Reviewing Syngenta’s document production produced in Illinois litigation; specifically for certain Syngenta employees; preparing deposition hot doc outlines for those certain employees (including document review time tracked by Advansic program).”), 2 (“Working with coordinating Illinois counsel on the development of expert reports”), 5 (“Working with coordinating counsel with cases pending in Illinois including numerous in-person meetings, conference calls, emails, and other correspondence re case strategy and development, experts, motion practice, discovery matters, document review, hearing preparation, etc.”). To the extent the Court considers this application on its merits at this stage of the proceedings (or considers awarding Eiland attorneys’ fees outside of the 17.5% suggested allocation to Illinois Lead Counsel), Eiland’s request should be denied .

First, Eiland is not entitled to an award of fees based on his private fee contracts for the reasons stated above. *See* Argument § II.A. *Second*, Eiland provides no authority for an award of fees “based on its clients[’] proportionate share of acreage compensated in the Settlement.” ECF No. 3592 at 2. *Third*, Eiland’s request for its lodestar of \$7.3 million is unfounded because much, or all, of that time did not benefit the Class. Eiland contends that 500 hours spent opting clients out of the litigation class was “obviously a significant factor in bringing about the overall

¹¹⁰ Eiland’s declaration does not make clear if it filed claims for 834 plaintiffs or filed all 1146 plaintiffs’ claims in 834 cases. If the Court factors whether a case was on file in awarding fees, Eiland should be required to clarify.

class settlement.” ECF No. 3593 at 8. In fact, however, those clients now desire to participate in the class settlement, and opting clients out of the class only diminished the damages that Kansas and Minnesota attorneys could levy against Syngenta. It was not a benefit. Moreover, Eiland appears to include substantial amounts of solicitation time and time spent obtaining opt-out signatures in their fee petition. *See* ECF No. 3593-1 at ¶ 11 (referencing meetings across Nebraska, Iowa and Texas).

The Illinois litigants successfully maintained the *status quo* by defeating Syngenta’s motion to dismiss, but there is no specific evidence of Eiland’s material involvement in that work. *See* ECF No. 3647 at 1. Eiland claims to have met with experts, reviewed Syngenta documents, prepared deposition outlines, and researched legal issues such as the economic loss doctrine (particularly in Nebraska and Texas), limitations issues, substantive state law, and class-action tolling. ECF No. 3593-1 at ¶¶ 15-16. But they identify no depositions that were taken in the Illinois State Court. Nor do they explain how this work actually benefitted class members, given that Kansas and Minnesota attorneys had already completed these same tasks. The work was, at best, duplicative.

Eiland points to Syngenta’s “walk away” right – its right to terminate the settlement in the event a certain portion of Class opt out – but this is a standard feature of any class settlement. In no way does it suggest Syngenta paid a premium on this settlement because there were individual cases. Likewise, the “Most Favored Nations” provision was intended to protect the Class Members by ensuring that they had extracted the best deal from Syngenta. Obviously, Eiland’s clients, of whom 70% he asserts have submitted claims, agree.

A significant portion of Eiland's time is PFS compliance (815 hours), which for the reasons explained was not of benefit. ECF No. 3647 at 1. Finally, 4,015 hours related to client communications. *Id.* at 3.

Eiland's analysis of the *Johnson* factors similarly overstates their contribution. ECF No. 3593 at 11-15. A significant portion of Eiland's time – 5,600 hours – was admittedly secretarial. ECF No. 3593 at 11; ECF No. 3593-1 at ¶ 8 (estimating 5,600 hours by a “legal assistant”). Moreover, the time spent necessarily includes other non-compensable activities, such as solicitation (“client outreach”). ECF No. 3593 at 12. Thus, it is unclear how much time Eiland actually spent litigating their Illinois state cases. Their categorization would appear to show little more than 350 hours of substantive work. ECF No. 3647 at 1 (paper discovery: 320 hours; expert work: 26 hours).

Eiland points to no particular results obtained based on their work. They argue that the case involved complex and novel legal issues. ECF No. 3593 at 11-12 (“including the economic loss doctrine, limitations issues, the Warehouse Act, the Grain Standards Act, class action law, and intra-jurisdictional and cross-jurisdictional class action tolling”). While true, Kansas attorneys provided a road map to succeed on nearly all these issues. Moreover, it is not clear how much work Eiland performed on any of these issues. They largely rely on the *ipse dixit* that “the large number of individual producers who chose to opt-out of the class and the vigorous prosecution of those lawsuits by firms including the Eiland Law Firm was instrumental in the settlement amount being pushed upwards.” ECF No. 3593 at 13. That argument fails, as explained above.

In short, Eiland took no depositions; produced no clients for deposition; served no expert reports; tried no cases; obtained no judgments; and, from what can be determined, obtained no rulings of any kind in their cases. The *Johnson* factors do not support the fee requested.

B. Eiland’s Request for Expenses is Unsupported.

Eiland Law Firm seeks reimbursement of \$53,685.31 in expenses. ECF No. 3593 at 16. While the Eiland Law Firm has itemized its expenses (ECF No. 3612-2), it fails to explain how any expenditure contributed to the Settlement Fund. For instance, Eiland spent \$32,749.25 in postage and copies related to opting its clients out of the class action, sending clients claim forms to participate in the class settlement, sending fee agreements to clients, and sending other correspondence. ECF No. 3612-2 at 1-13, 17-18. None of those costs contributed to the Settlement Fund. Similarly, Eiland vaguely identifies an additional \$20,936.06 in expenses for travel, meals, postage, copies, and filing fees (*id.* at 13-17) but fails to explain how those expenses contributed to the settlement fund. *Id.* at 15. To the extent Eiland is awarded fees, and therefore expenses, his application should be revised consistent with the CBO.

XI. JOHNSON BECKER PLLC (ECF NO. 3583-86)

A. Johnson Becker’s Fee Request Should be Referred to Judge Herndon for Payment from the Illinois Allocation or be Denied.

Johnson Becker PLLC (“Johnson Becker”) requests \$8 million in attorneys’ fees and \$138,130.94 in costs and expenses, which is the amount it “reasonably anticipated” that it would “receive in the event that its private contingency fee agreements ... with its clients were enforced.” ECF No. 3575 at 1. They ask that these fees be “paid from the common fund, and not a farmer’s award.” ECF No. 3576 at 16. And they agree that their clients should pay no more than what the Court awards in fees, regardless of any contingency-percentage contained in

a contract. *Id.* at 15 n.8. There arguments, therefore, suffer from the same legal flaw as Watts’ arguments. *See supra* Argument § II.A.

Johnson Becker claims to represent 3,257 producers.¹¹¹ ECF No. 3576 at 3. They estimate that their clients will receive between \$25 and \$34 million based on an anticipated claims rate. *Id.* But they reserve the right to seek additional money at the conclusion of the claims process. Like Eiland (*supra*), Johnson Becker is “referring counsel” to Illinois Lead Counsel. ECF No. 3598-1 at ¶ 55. So, as argued above, their application should be paid from the Illinois Allocation and referred to Judge Herndon, pursuant to the Fee-Sharing Agreement. *See* Argument § VIII.B.

If considered on the merits, Johnson Becker’s application suffers from the same flaws as other applicants. *First*, Johnson Becker recognizes that Rule 23(h) controls the award of attorneys’ fees, and that it must show its efforts “contribute[d] to the creation of the common fund.” ECF No. 3576 at 13. But it offers no legal support to base its fee under Rule 23(h) on what it “expected” to receive from private fee agreements. *See id.* at 16-20. *Second*, most of Johnson Becker’s time involves PFS compliance (39,433.55 hours), but unlike other firms, Johnson Becker only “served about 220 PFSs.” ECF No. 3576 at 7, 11. Thus, it appears most of that time was spent on incomplete or unserved PFSs. *Id.* Such PFSs have even less arguable benefit than actually-served PFSs. Even when measured against the 2,300 PFS that were “submitted or prepared to submit”¹¹² (ECF No. 3576-1 at ¶ 20), their reported hours works out to *17 hours per PFS*, a multiple of what other firms expended. *See* Ex. 79 at ¶ 11; *Supra*. Factual Background §I. This is unsurprising given that Johnson Becker’s time records were constructed

¹¹¹ Johnson Becker only opted 2,695 of these clients out of the litigation classes. Ex. 75 at ¶ 224. Thus, nearly 600 of their clients remained in the litigation classes, represented by class counsel.

¹¹² The fact that Johnson Becker had not yet completed its PFS compliance in Minnesota strongly suggests it did not even file those cases until, at minimum, after the Kansas verdict.

post-hoc by assuming a completed PFS “involved 11-15 hours of work from a Paralegal and 19-25 hours of work from a Legal Assistance.” See ECF No. 3576-1 at 9 (estimating less time, on a graduated scale, for incomplete PFSs).

Johnson Becker point to work that was predominantly for its own clients’ benefit, not for the benefit of the Class. See ECF No. 3576 at 5-10, 14-15. Most of its arguments repeat arguments made by Eiland, and the same responses apply. *Supra*. It does not explain, beyond repeating *ipsit dixit* that individual cases pressured Syngenta, how any of this work benefits the Class.

Its analysis of the *Johnson* factors also does not support the requested fee. Johnson Becker invested (*time and labor*) only 1,868 hours of attorney time. ECF No. 3650-2. The vast majority of their time – 42,109.8 hours – is admittedly staff time. *Id.* This demonstrates that Johnson Becker built a large inventory of plaintiffs, but not that it invested in the actual prosecution of the case. Johnson Becker (like Eiland) does not demonstrate that it tackled any complex issues (*complexity and skill*) in the case. The extreme number of staff hours demonstrate as much, and while they point to research on class-action tolling doctrines, fail to explain how informing themselves of this doctrine and its intricacies benefitted the Class. ECF No. 3576 at 22. Given that Syngenta never raised statute of limitations, as a defense, it is hard to see that it was a material benefit. Although touting *Results Obtained* in terms of the overall Settlement Fund, Johnson Becker cannot point to anything they did to contribute to the creation or enhancement of that Fund, other than opting out some of their clients, and filing cases—a dubious benefit. See, *supra*, Argument § 1.A.2. Finally, with respect to their lodestar cross-check, the lodestar is inflated by an unreasonable number of hours spent on PFS compliance, equating to 165 hours per completed-and-served PFS, accounting for 87.9% of the lodestar.

B. Johnson Becker Seeks Unreasonable Expenses.

Johnson Becker seeks reimbursement of \$138,130.94 in expenses, while acknowledging that just \$12,460.44 was for the common benefit. ECF No. 3576 at 26. It identifies the remaining “client-specific” costs as filing and service costs (\$107,558.47), seed and grain record costs (\$8,475.79), and opt-out costs (\$9,636.24). *Id.* None of the client-specific costs contributed to the settlement fund. Even within the allegedly common-benefit costs, Johnson Becker seeks reimbursement for thousands of dollars in first-class flights (ECF No. 3576-7 at 2, 5-6, 10-14, 28-29, 34-35, 41-42, 50-51, 56-57, 70-71, 76-77) and hundreds in alcohol purchases (*see id.* at 45, 59, 67), all prohibited by the CBO. The remainder of the “common-benefit” expenses relate to travel and meal expenses. *Id.* at 2-3.

XII. BEASLEY ALLEN (ECF NO. 3577)

Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. (“Beasley”) seeks attorneys’ fees and expenses from the recoveries of its 36 plaintiffs for “keeping the Clients apprised of the progress of the litigation [and] advising them of the benefits and drawbacks of the proposed settlement.” ECF No. 3577 at 2. Although they acknowledge their clients signed 40% contingency-fee agreements, they have agreed to lower those fees to the amount awarded by the Court. *Id.* at 1 n.5; ECF No. 3577-2 at 2 n.2. They invoke Rule 23(h) but provide no authority for its use to award fees “pursuant to private fee contracts.” ECF No. 3577 at 3. They fail to explain how their efforts contributed to the creation of the fund. They spent 489.3 hours on the litigation, most of which (83%) they categorized as “other” which appears to have been predominantly filing for leadership, attending status conferences and hearings, and meeting and vetting clients (among other things). ECF No. 3658-1 at 1-2. None of that was beneficial.

Beasley Allen also seeks reimbursement of \$20,762.81 in expenses as follows: “Court Costs: \$2,533.00; Travel: \$14,356.52; Copy/Printing: \$957.39; Research: \$647.25; Phone:

\$854.00; Postage/Shipping: \$792.99; and Misc: \$621.66 for Process Servers.” ECF No. 3577-2 at 3-4. However, they provide no details or invoices specifically identifying the expenses or how they contributed to the common fund.

XIII. BRAD MORRIS LAW (ECF NOS. 3600, 3601)

The Brad Morris Law Firm PLLC (“Brad Morris”) seeks attorneys’ fees for its “more than eighty (80)” plaintiffs to be paid “from the fund.” ECF No. 3600 at 1. It seeks a payment based on the application of the *Johnson* factors. ECF No. 3601 at 5. But it fails to conduct an actual analysis of those factors, asking merely that its fees be based on its “agreed-upon contingent fee and expenses as to each of [its] clients,” which is one-third of each clients’ recovery. *Id.* at 6. In the alternative (if fee contracts are set aside), it argues that it be awarded “payment from the Fund based on its clients’ proportionate share of acreage compensated in the Settlement.” *Id.* at 6. But those requests appear to be the same request since a contract-based percentage fee would necessarily be based on the amount paid to the clients under the Settlement.

Approximately 60 of Brad Morris’ clients appear to have filed their cases in the MDL. *See* Case No. 2:16-cv-02793. Brad Morris contends its efforts were a “benefit [to] all claimants in the broader litigation by contributing global pressure on defendants through the pendency of thousands of independent claims.” ECF No. 3601 at 3. More than 43% of their time (1,773 hours) was spent on PFS and discovery file management while most of the rest categorized as “other.” ECF No. 3652 at 1-2. Brad Morris conducts no *Johnson* factor analysis to justify their fee request, but that analysis (like similarly situated firms) would show that Brad Morris did not contribute to the creation of the fund.

In their categorizations, but not in their application, Brad Morris asks for \$1,9367.60 in expense reimbursement, but there is no justification as to whether these expenses were reasonably incurred for the class. ECF No. 3652-1 at 1.

XIV. THE DUNK LAW FIRM (ECF NO. 3588)

The Dunk Law Firm (“Dunk”) filed a four paragraph application for attorneys’ fees expressing confusion “about this Court’s orders” and offering to provide “more detailed information” upon request from any “Court or Special Master.” ECF No. 3588 at 2. Dunk claims to represent 50 plaintiffs. ECF No. 3588-1 at ¶ 3. But the docket indicates Dunk has filed claims in the MDL for approximately 61 plaintiffs. See Case Nos. 2:16-cv-02533, 2:16-cv-02612. Dunk reports it has spent 1,630 hours on the litigation, of which 41.3% was spent on PFS compliance (120 hours) and 49.6% on pre-settlement communications with clients (800 hours). Ex. 75 at ¶ 225. Although it conducts no *Johnson* factor analysis, the analysis would be similar to other firms who predominantly filed cases, served PFSs, and communicated with their clients. *Id.*

Dunk & Associates appears to request reimbursement of expenses in the amount of \$41,755.99. ECF No. 3588-1 at 2. However, it fails to provide any details, invoices, or explanation of how those expenditures contributed to the settlement fund. In its supplementation, it has categorized those expenses, claiming \$28,402.80 was spent on experts, but provides no corresponding description of what type of expert or how that expert benefitted the Class. ECF No. 3630 at 3.

XV. THE HODGE LAW FIRM, PLLC (ECF NO. 3590).

The Hodge Law Firm, PLLC (“Hodge”) on behalf itself and local counsel seeks an application of “contractually agreed upon fees and expense reimbursement” for its clients from the fund. ECF No. 3590 at 1. In the alternative, it seeks a lodestar fee and expense award, which

is asserts equals \$565,887.50. *Id.* at 2; ECF No. 3590-2 at ¶ 5. Hodge purports to represent 83 Iowa producers. *Id.* at 2. It agrees that the Court should place “a reasonable cap on the percentage of fees awarded, regardless of that established by [their] client agreements.” *Id.* at 3.

Hodge’s application fails to explain what benefits they conferred on the Class. It does not even establish that any of their plaintiffs filed a claim against Syngenta. There is no mention in their time records of having filed a complaint. *See* ECF No. 3590-1. And the work they describe is consistent with client solicitation and intake. *See* ECF No. 3590 at 2. Yet, they report 215 hours have been spent on PFS compliance. ECF No. 3636 at 1. Most of their time (69.1%) reflects pre-settlement communications and perfecting claim forms. *Id.* at 2. Hodge, thus, has failed to show their efforts benefitted the Class.

The Hodge Law Firm seeks reimbursement for \$46,897.87 in costs expended “on behalf of the Hodge Plaintiffs.” ECF No. 3590 at 2. However, the vast majority of this expense relates to marketing costs, including travel related to signing up clients and associated law firms. (ECF No. 3590-1 at 18-21). Included in these costs are expenditures for “[p]ostage for ... letters sent to clients and potential clients,” agricultural parcel reports, “Advertising - Facebook,” “Advertising - Louisa County Publishing,” and “Advertising - Craftsman Press.” *Id.* These are marketing expenditures that should not be billed to individual clients, much less be reimbursed out of the common fund. Additionally, some of the expenditures are clearly not reasonable, such as a \$1,168 charge for two days of lodging in Des Moines, Iowa, particularly where another identical entry identifies the cost as only \$170. *Id.* at 18-19.

XVI. HOSSLEY-EMBRY (ECF NO. 3604)

Hossley-Embry and its co-counsel and referral lawyers (“Hossley-Embry”) seek attorneys’ fees and expenses equal to one-third of their clients recoveries under the settlement based on their contingent fee contracts. ECF No. 3604 at 2. It purports to represent 650 corn

producers, *id.*, but only 329 of those producers opted out of the litigation class. Ex. 75 at ¶ 226. Thus, approximately half of Hossley-Embry's clients' claims were being directly prosecuted by class counsel.

Moreover, Hossley-Embry's brief fails to explain how their efforts substantially benefited the Class. They do not analyze or attempt to justify their fee under the *Johnson* factors. Nor did they originally provide information sufficient to conduct a lodestar cross check.

In their supplementation, they purport to have expended 221 common-benefit hours of work in the MDL, related to bellwether plaintiffs. ECF No. 3622 at 1, 7; ECF No. 3622-1 at 7. But they never submitted this time to Liaison Counsel as required by the CBO. *See* ECF No. 936 at 17 ("In order to qualify for Common Benefit fees or expenses, MDL Counsel and Participating Counsel shall keep contemporaneous billing records of the time spent in connection with Common Benefit Work on this MDL, indicating with specificity the hours and billing rate, along with a brief note indicating the source of authorization for the activity in question and a brief description of the particular activity. Time and expense submissions shall be made to Lead Counsel on a monthly basis."). Ex. 75 at ¶ 226. Thus, Co-Lead Counsel could not have included this common-benefit time in their submission to the Court.

The rest of Hossley-Embry's work (10,279 hours) relates predominantly to: PFS compliance, pre-settlement communications and claim-form perfection, and "other." ECF No. 3622-1 at 2-3. For the reasons explained, this work did not contribute to creation or enhancement of the fund.

XVII. CONMEY FEST LTD. (ECF NO. 3573).

Douglas Murch, on behalf of Conmey Fest Ltd, ("Conmey") filed a notice of fee interest to "avoid waiver," but otherwise provides no legal argument or facts that would justify an award of fees. ECF No. 3573 at 1-2. Conmey and Murch are referral counsel to Clayton Clark, as they

state in their papers (*id.* at 2) and as identified above. Any fee they are awarded should be awarded from the Illinois Allocation.

To the extent the merits of their claim are considered here, they are entitled to no fee. Based on their supplementation, they appear to have never filed a case (no hours for drafting a complaint) and have merely communicated with clients, assisted in claims perfection, and conducted “other” generalized tasks—none of which benefitted the Class. ECF No. 3631 at 1-2. They present no argument or evidence for attorneys’ fees.

XVIII. O’HANLON, DEMERATH & CASTILLO (ECF No. 3599)

O’Hanlon, Demerath & Castillo (“Demerath”) submit a similar notice of fee interest, identifying themselves as referral counsel with “Clark, Love & Hutson, G.P.” ECF No. 3599 at 2. For the same reasons as Conmey, their application should be referred to Judge Herndon or denied.

XIX. PAUL LLP (ECF NO. 3581).

Paul LLP and co-counsel (“Paul”), who represents 1,641 clients seeks fees “[t]o the extent the Court awards fees based on individual fee agreements.” ECF No. 3581 at 2. They agree “to cap [their] fees at the percentage awarded class counsel” to avoid their clients paying more than absent class members. *Id.* at 3. Paul performed \$5.8 million of lodestar common-benefit work in Minnesota and approximately \$1.4 million in the MDL. *See* ECF No. 3587-1 at 33 ¶ 14; Minn. Fee App. at Ex. 13. This work will all be compensated out of the fees allocated to the Kansas and Minnesota Leadership. Pursuant to the Fee Settlement Allocation if approved by the Court.

However, they report to have performed 3,703.9 additional hours on their inventory of 1,641 clients (ECF No. 3635 at 1-3), including significant PFS work that was contemporaneously recorded, equaling 2.5 hours per PSF. *Supra*, Factual Background § III.

Since Paul seeks fees only “[t]o the extent the Court awards fees based on individual contingency contracts in addition to the common benefit work,” ECF No. 3581 at 7, all of the arguments stated above apply to both their request for fees and expenses. Like other applicants, expenses related to “advertising” should not be included in recoverable costs. ECF No. 3635 at 4.

XX. PAVLACK LAW, LLC (ECF NO. 3569, 3571)

Pavlack Law LLC (“Pavlack”) seeks fees under Rule 23(h). ECF No. 3571 at 1. They “have recommended to [their] clients that they participate in the class action settlement.” *Id.* at 5. They have 49 clients, *id.* at 9, and they seek fees on the basis of the common-fund doctrine. *Id.* at 7-8. They purport to have expended 294 hours on the litigation for a total lodestar of \$92,469. ECF No. 3625. Their work consists primarily of PFS compliance, claims perfection, and “other.” *Id.* Other than the assertion that their cases “maintained pressure on Syngenta,” an argument already addressed, they raise no new arguments about the benefits they brought to the Class. ECF No. 3571 at 8.

Pavlack seeks reimbursement in the amount of \$3,154.71. ECF No. 3569 at 3. These expenses are comprised primarily of filing and service costs, along with the costs associated with opt-outs and claim packets. ECF No. 3571-3 at 1. Pavlack fails to identify how these expenditures contributed to the settlement.

XXI. PENDLEY, BAUDIN & COFFIN, LLP ET AL. (ECF No. 3595).

Pendley, Baudin & Coffin, LLP (“Pendley”) and Saeed & Little, L.L.P (“Saeed”) argue that their work “has in part contributed to the successful resolution of this litigation on behalf of all claimants.” ECF No. 3595-1 at 4. Consequently, they seek “reasonable common benefit attorneys’ fees and reimbursement of expenses as authorized by” Rule 23(h). *Id.* Their cases appear to be pending in the MDL. *Id.* But they never received approval to perform common-

benefit work and never submitted any common-benefit work as required by the CBO. Ex. 75 at ¶ 227. In their supplement, they erroneously identify all of their work as approved common-benefit work (ECF No. 3653), when, in fact, none fits that category. Their request should be denied as they fail to justify their failure to comply with the CBO and they fail to justify how their work benefitted the Class.

Pendley and Saeed also seek reimbursement in the amount of \$4,494.31 and \$702 respectively. ECF No. 3595-5 at 2, ¶ 8; ECF No. 3595-6 at 3, ¶ 16. However, the documentation reflects that Pendley, Baudin & Coffin's request should actually be \$4,434.91. ECF 3595-2 at 12. The majority of expense incurred by Saeed & Little relates to advertisements in the Sagamore newspaper and marketing at a "Farm Equipment Show." ECF No. 3595-3 at 6. They fail to show how any these expenses should be reimbursed from the fund.

XXII. JAMES S. ROGERS (ECF No. 3561-62).

James S. Rogers ("Rogers") seeks attorneys' fees and expenses for performing services for the benefit of the "Washington Class/Class Members." ECF No. 3561 at 1. Rogers purports to have begun "pursuing a claim for putative Washington State class members" on July 17, 2017 (ECF No. 3562 at 1), which is after the Kansas verdict. He seeks fees under Rule 23(h) and the common-fund doctrine (*id.* at 3-6). Aside from reciting legal authority, however, he makes no argument as to how the investigation and filing of a putative Washington class-action complaint contributed or enhanced the settlement fund. He cites *Vioxx* as encouraging courts to broaden the pool of attorneys who participate in MDLs, but Rogers did not participate in this MDL, but as observe its success and attempt join after the work was done.

Rogers seeks reimbursement in the amount of \$19,709.12 for expenses. ECF No. 3561 at 1. Nearly all of the costs sought relate to advertisements and client retention, including

consulting with an ethics professor on advertisement rules. ECF No. 3563-2 at 1. None of these marketing costs should be reimbursed because they did not benefit the Class.

XXIII. SPEER LAW FIRM P.A. (ECF No. 3663).

Although the Speer Law Firm, P.A. (“Speer”) did not submit an application for attorneys’ fees for personal reasons (ECF No. 3663 at 5) it did file a Supplement. *Id.* After reviewing this Supplement, Co-Lead Counsel noticed that some of the time was listed as “Approved Common Benefit Work” and began discussions with Mr. Speer regarding this work. Although the time was not timely submitted to Co-Lead Counsel in part because of these personal reasons, from these discussions Co-Lead Counsel have learned that Speer performed some common-benefit work and incurred some common-benefit expense, consistent with the CBO, on behalf of the bellwether plaintiffs in the MDL through his assistance with depositions of these bellwether plaintiffs. Although untimely and not previously approved by Co-Lead Counsel, Speer and the Co-Lead Counsel believe that this specific common-benefit work and expense should be included as part of the submission from the Kansas attorneys. Co-Lead Counsel believes that this resolves the submission from the Speer Law Firm and no further action by the Court on this supplement is necessary.

XXIV. WESTERVELT, JOHNSON, NICOLL & KELLER, LLC (ECF Nos. 3614, 3655).

Westervelt, Johnson, Nicoll & Keller, LLC (“Westervelt”) filed a two-page request that the Court award “payment of the contractually agreed upon fees” for their clients “from the fund.” ECF No. 3614 at 2.¹¹³ Their request mirrors those of others already discussed. In their supplement, they file additional argument similar to others, in contending that they were “created

¹¹³ Westervelt acknowledges that their application was not timely filed. ECF No. 3614 at 1; ECF No. 3657 at 6-8. Although Co-Lead Counsel objects on the merits, they have no objection to the Court considering the application. In light of the sheer number of applications that required a response, Co-Lead Counsel were not prejudiced by the filing’s lateness.

additional pressure on Defendant to settle and provided a more thorough perspective into the claims of corn producers across the nation.” ECF No. 3657 at 5. Given the lack of evidence that individual cases created pressure on Syngenta, Westervelt has not demonstrated that their work benefitted the Class. For the same reasons, their expenses would not be reimbursable.

XXV. WAGSTAFF & CARTMELL LLP (ECF NO. 3594).

Wagstaff & Cartmell LLP (“Wagstaff”) readily acknowledges that its “fees and expenses submitted for Common Benefit reimbursement” were made through the Minnesota Co-Lead Counsel’s submission. ECF No. 3594 at 2. In that submission, Wagstaff seeks \$2,314,547.50 for its “Common Benefit lodestar” and \$541,267.96 for its “Common Benefit Expenses.” Minnesota Fee App. at Ex. 10 ¶¶ 13, 15.

But Wagstaff now seeks additional compensation for its “non-common benefit work on behalf of our individual clients.” ECF No. 3596 at 5 ¶ 10. Wagstaff does not seek to enforce its fee agreements, but rather to have the Court award the firm all of its lodestar for this non-common benefit time. It initially requested \$1,257,451.00 for its non-common benefit fees and \$15,914.45 for its non-common benefit expenses. ECF No. 3651 at 2. In their Supplement, Wagstaff added \$62,817.50 in additional lodestar for work performed just “in the month of July 2018 to further assist [Wagstaff]’s clients in perfecting their claims submissions, and fees for work on the preparation of [Wagstaff]’s fee petition.” *Id.* Wagstaff also added “an additional \$937.40 incurred as [Wagstaff]’s database fee for July 2018.” *Id.*

Wagstaff raises no unique legal arguments in support of this request to be paid out of a common fund for work and expenses that were admittedly only for Wagstaff’s “individual client representation.” ECF No. 3594 at 1-2. Instead, the only new argument is that Wagstaff has obligations to its “numerous associating counsel” listed in the Exhibit B, who are the “lawyers and firms with whom [Wagstaff] and its clients worked closely.” ECF No. 3596-2 at 5-6 ¶ 12.

These associating counsel have submitted no time records, no expense records and no declarations describing any work they may have undertaken in this litigation. *Id.* Wagstaff suggests that it might “equitabl[y] distribut[e]” its award of non-common benefit money to these firms. ECF No. 3594 at 4.

Wagstaff provides no legal authority that non-common benefit work should be reimbursed out of a common fund so that a law firm can pay its associating law firms for their unspecified, non-common benefit work. For all of the reasons discussed at length in this brief, none of this non-common benefit time and expense should be paid out of the Settlement Fund.¹¹⁴

XXVI. WRIGHT & SCHULTE, LLC (ECF No. 3549).

Based on their individual fee agreements, Wright & Schulte, LLC (“Wright”) seeks “fees equal to” 33 1/3% “of all amounts recovered by the Firm (along with its expense) from the Fund.” ECF No. 3550 at 9. In the alternative, Wright seeks to be paid out of the common benefit fund for “their hourly time and costs in this litigation along with all requested, but unreimbursed, common benefit time.” *Id.*

Like many other Movants, Wright includes thousands of hours in the “Other Work” columns in its Supplement, yet seeks to be paid out of the common fund for this non-common benefit work. ECF No. 3628-1. Wright’s Notes confirm that this work—largely focused on marketing and meeting with clients to sign their fee agreements, preparing “written status update

¹¹⁴ Wagstaff is certainly free to equitably share the millions it seeks in common-benefit lodestar with its associated counsel. Moreover, although Wagstaff does not list any of the Illinois Leadership Group law firms on its list of associated counsel, Wagstaff is one of the “referring counsel” who will share in any award made to the Illinois Leadership Group. See ECF No. 3598 at 1 n.4 (“The ‘Illinois Leadership Group’ seeks fees on behalf of themselves, their attorneys and staff, and all referring counsel. A list of Movants’ referring counsel is attached hereto as Ex. A.”); ECF No. 3598-1 at 4 (Exhibit A listing Wagstaff as one of the referring counsel). Wagstaff could share that money with any of its referring counsel. But these personal, referral obligations do not create a right to compensation out of the Common Benefit fund for work and expense undertaken solely for the benefit of Wagstaff’s individual clients and for work that is not in compliance with the CBO.

communications to all clients,” notifying clients about the settlement and submitting claim forms on their clients’ behalves—was work undertaken for the benefit of their individual clients, not the Settlement Class as a whole. This is not compensable common benefit work. And Wright provides no basis for concluding that any of its expenses fall within the CBO. Instead, the \$62,936.82 in expenses, look commensurate with the non-common benefit time, including more than half of the expenses spent on travel-related categories (hotels, airfare, meals, mileage and ground transportation) related to the non-common benefit time spent meeting with clients.

To the extent Wright performed work consistent with the CBO, Wright submitted this time and these expenses to Minnesota leadership for consideration. ECF No. 3550 at 4 n.1. To the extent such work was consistent with the CBO and included as Common Benefit time and expenses in the Application submitted by Minnesota, Wright should be compensated for this Common Benefit work.

XXVII. BORGESS LAW, LLC (Filed in Minnesota).

Borgess Law, LLC (“Borgess”) filed a petition in Minnesota seeking “payment of the contractually agreed upon fees & expense reimbursement of \$1,703.25 based on its clients’ gross recoveries from any fund created to pay attorneys’ fees and expenses.” Borgess Mem. at 1. Alternatively, it seeks to supplement its application if the Court’ awards fees based on hourly time, which it contends totals “over 250 hours.” *Id.* at 2. Borgess represents that it has nine clients. It raises no unique arguments that have not already been responded to.

XXVIII. KEMP, JONES & COULTHARD LLP (Filed in Minnesota).

Kemp, Jones & Coulthard LLP (“KJC”) seeks a fee of 40% of their clients *gross* recovery, by which they appear to contend they want no reduction for fees awarded to Common Benefit Attorneys. Kemp Mem. at 2 n.1, 8 n.6. They raise no new arguments granting the Court authority to award purportedly enforceable contract fees in a class action. Nor do they raise any

new arguments regarding how their efforts contributed to the creation of the fund. Their application mirrors many of those already discussed, in that they primarily engaged in PFS work, client communications, complaint drafting and maintaining their inventory. See Kemp Supplement (filed in Minnesota only).

XXIX. NOLAN LAW GROUP (Filed in Minnesota).

Nolan Law Group (“Nolan”) asks the Court to award out of the common fund the value of its contingency fee contracts for its 31 clients and reimbursement of \$3,503.92 in expenses. Memorandum in Support of Motion of Nolan Law Group for Award of Attorney Fees and Reimbursement of Costs (“Nolan Mem.”) at 1; Declaration of Thomas P. Routh at ¶ 5. In the alternative, Nolan sought “leave to supplement this request” to provide information on its lodestar on behalf of its individual clients. *Id.* at 1-2. In its Supplement, Nolan identifies 1,180.70 hours spent on behalf of these 31 clients, with the 637.50 hours in the “Approved Common Benefit Work” column already included as part of the Minnesota Leadership Application. Nolan Supplement at Ex. B. To the extent Wright’s work was consistent with the CBO and included in the Minnesota Application, Wright should be compensated for this Common Benefit work.

Nolan’s remaining 543.1 hours and their expenses were spent serving their 31 clients, including responding to “specific client questions,” providing litigation status updates, filing individual lawsuits and assisting clients with claim forms. *Id.* at Ex. A. Nolan raises no unique arguments for why this non-common benefit time and the non-common benefit expenses should be paid out of the common benefit fund.

XXX. OTHER SUPPLEMENTAL FEE SUBMISSIONS.

Six firms that did not file fee and expense applications nonetheless filed supplements in response to the Court’s July 18th Order: The Lyon Firm, A Law Corp. (ECF No. 3632); 'Maggio

| Thompson, LLP (ECF No. 3649); Meshbeshier & Spence, Ltd. (ECF No. 3634); and Wilcox & Williams, LLC (ECF No. 3648). For instance, The Lyon Firm, A Law Corp. seeks compensation for 196 hours (\$46,768 lodestar), primarily for the following two tasks: 39 hours (\$15,600 lodestar) on complaint drafting and 128 hours (\$19,593 lodestar) on Plaintiff Fact Sheets. ECF No. 3632-1 at 1-2. 'Maggio | Thompson, LLP seeks compensation for 453 hours (\$96,226 lodestar) for the following primary categories of tasks: 250 hours (\$68,750 lodestar) on Plaintiff Fact Sheets and 149 hours (\$22,021 lodestar) assisting clients with settlement claims. ECF No. 3649 at 1-3. Similarly, Meshbeshier & Spence, Ltd. seeks compensation for 1,480 hours (\$580,550 lodestar), including the following hours: 793 hours (\$396,250 lodestar) on Plaintiff Fact Sheets; 386 hours (\$125,550 lodestar) on pre-settlement communications with clients; and 229 hours (\$35,850 lodestar) assisting clients with settlement claims. ECF No. 3634-2 at 2-3. Finally, Wilcox & Williams, LLC seeks compensation for 75 hours (\$9,325 lodestar), all of which was spent on Plaintiff Fact Sheets. ECF No. 3648 at 1.

As summarized above, the majority of hours submitted by these firms relates to PFS work. However, for the same reasons discussed above, these submissions do not provide any compelling reason to award attorneys' fees or expenses from the Fund; moreover, the failure to file a timely application and the absence of legal argument constitutes waiver of their right for any portion of the Fee & Expense award, since it necessarily deprives Kansas Lead Counsel of an opportunity to address their arguments.

CONCLUSION

Kansas Lead Counsel respectfully requests that the Court issue a Fee & Expense award in accordance with this *Memorandum*, including:

- adopting the framework set forth in the Fee-Sharing Agreement, including: awarding a fee equal to 33 $\frac{1}{3}$ percent of the \$1.51 billion Settlement Fund (after litigation expenses), where

50% of that Fee Award is allocated to Kansas Co-Lead Counsel for distribution to all Kansas attorneys who performed common-benefit work in compliance with the CBO; 12.5% of that Fee Award is allocated to Minnesota Lead Counsel for distribution to all Minnesota attorneys who performed common-benefit work in compliance with the CBO; 17.5% of the Fee Award is allocated to Illinois Lead Counsel for distribution to those identified in the Fee-Sharing Agreement;

- denying all requests to award fees from the Settlement Fund that are based on private fee contracts or that seek a portion of the Court’s Fee & Expense Award based on what a Movant contends it “might” “could” or “would” receive under such contracts;
- holding that the JPAs do not govern how the Court shall award and allocate attorneys’ fees and expenses from the Settlement Fund (“the overall class recovery”);
- awarding Movants any other attorneys’ fees and expenses that the Court deems contributed to the creation of the Settlement Fund from the Unallocated Fee identified in the Fee-Sharing Agreement upon such procedures that the Court deems appropriate; and,
- awarding any remaining amounts, if any, of the Unallocated Fee to Kansas Lead Counsel for distribution to Kansas attorneys consistent with the *Johnson* factors and their contribution to the creation of the Settlement Fund.

Dated: August 17, 2018

Respectfully Submitted,

/s/ Patrick J. Stueve

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on August 17, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Patrick J. Stueve

Plaintiffs' Co-Lead, Liaison, Class and Settlement
Class Counsel for Plaintiffs

EXHIBIT 75

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**IN RE SYNGENTA AG MIR162 CORN
LITIGATION**

Master File No. 2:14-MD-02591-JWL-JPO

**THIS DOCUMENT RELATES TO
ALL CASES EXCEPT:**

MDL No. 2591

*Louis Dreyfus Company Grains
Merchandising LLC v. Syngenta AG, et
al., No. 16-2788-JWL-JPO*

*Trans Coastal Supply Company, Inc. v.
Syngenta AG, et al., No. 2:14-cv-02637-
JWL-JPO*

*The Delong Co., Inc. v. Syngenta AG, et
al., No. 2:17-cv-02614-JWL-JPO*

*Agribase International Inc. v. Syngenta
AG, et al., No. 2:15-cv-02279-JWL-JPO*

**SUPPLEMENTAL DECLARATION OF PATRICK J. STUEVE
OF STUEVE SIEGEL HANSON LLP**

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I, Patrick J. Stueve, declare as follows:

1. I am a founding partner of Stueve Siegel Hanson LLP (“Stueve Siegel Hanson”) and appointed MDL Co-Lead Counsel, Liaison Counsel and Settlement Class Counsel for Plaintiffs in this MDL.

2. I make this declaration based on my personal knowledge and if called to testify to the contents hereof, I could and would competently do so. I respectfully submit this declaration in support of Plaintiffs’ response to the petitions for attorneys’ fees and expenses filed by other counsel on or about July 10, 2018, and the Supplements filed on or about August 3, 2018.

3. I prepared my declaration with the assistance of other lawyers and staff at the firm with knowledge of the matters reflected herein. I have personally reviewed the information supporting the fee and expense requests that are the subject of this declaration, and, based on that review, I believe that the information contained herein is accurate.

I. THE KANSAS MDL

4. On July 6, 2017, the Court entered its Memorandum and Order consolidating class trials in the MDL. ECF No. 3319. This Order set the following schedule:

- January 22, 2018: consolidated trial of the Arkansas and Missouri classes;
- April 4, 2018: consolidated trial of the Illinois and Nebraska classes;
- May 14, 2018: consolidated trial of the Iowa and South Dakota classes; and
- October 8, 2018: trial of the Ohio class.

5. Although Plaintiffs sought \$217 million in compensatory damages in the Kansas trial alone, the compensatory damages for each of these class trials would exceed that \$217 million verdict.

6. For the Arkansas/Missouri trial alone, Plaintiffs intended to seek at least \$254.6 million. ECF No. 3368 at 30 (Arkansas/Missouri Pretrial Order). For the additional classes, in his April 30, 2017 Expert Report, Dr. Bruce Babcock found that actual damages alone for these trials would exceed \$2.75 billion. In addition, in six of the remaining trials, punitive damages also would have been sought. These filed class actions placed tremendous settlement pressure on Syngenta.

7. Co-Lead Counsel had begun extensive preparations for these trials. We took the work we had done for the Kansas trial and started adjusting and refining our presentations to increase the odds of securing punitive damages in these trials based upon what we had learned from our experiences from the Kansas class trial.

8. On September 15, 2017, Plaintiffs moved to certify twelve additional state classes. ECF No. 3431. Because of the Court's prior class-certification rulings, we anticipated that these classes would be similarly certified. *See, e.g.*, ECF No. 1098 at 10 (Scheduling Order No. 2 stated that with regard to class certification motions, the Court "might elect to rule initially on only one class certification motion, and then enter an order for the parties to show cause why that ruling should not be applied in the other cases.>"). These classes would have covered producers in the entire Corn Belt, and exposed Syngenta to further potential liability. We expected that several of these additional classes would be ready for trial in 2019, following trial of the remaining certified class cases. The Kansas MDL was the only venue where Syngenta faced such potential liability in the immediate.

9. It would have been years before any meaningful number of individual bellwether cases were scheduled for trial. For example, in the Kansas MDL, only class trials had been scheduled through the end of 2019, four years after the MDL was formed. Only one bellwether

had even reached trial in Minnesota prior to the announcement of the settlement. It is telling that although Syngenta settled the one individual case to get to trial (*Mensik*), that was an individual settlement, not a settlement of the lawyers' entire inventory, as you often see in mass tort litigation.

10. I have experience prosecuting mass tort claims and the Syngenta litigation was not conducted as a traditional mass tort model, as some Movants suggest.

11. Because mass tort cases typically involve personal injury claims and thus often are not appropriate for class certification, the filing of individual cases is necessary to toll statutes of limitations. In that model, the filing of individual lawsuits typically places a discovery burden on the defendant. For example, in a typical pharmaceutical mass tort, the defendant must produce an individualized Defendant Fact Sheet for each plaintiff and gather documents from sales representatives who interacted with the plaintiff's physician. Here, Syngenta had no corresponding discovery obligation related to the individually-filed lawsuits and the produced PFSs.

12. Syngenta was not even required to file an answer in many of the individual cases or conduct any individualized-discovery into those claims. Here, the filing of individual lawsuits was not necessary to toll applicable state statute of limitations because of the filed state and nationwide class action cases.

II. MINNESOTA CLASS TRIAL

A. CLASS CERTIFICATION AND TRIAL

13. Co-Lead Counsel provided material support to the Minnesota class certification efforts and the Minnesota class trial. We prepared the experts for class certification in Kansas, drafted all class certification briefing and solely handled the Kansas class evidentiary hearing.

Much of this work, including the class certification briefing, was used in Minnesota by Minnesota leadership.

14. We also assisted with trial preparations in Minnesota, providing, at Minnesota's request: the Kansas class trial exhibit list, drafts of their *Daubert* briefing, the response to the pre-verdict briefing on judgment as a matter of law, and juror feedback and permission to speak with our juror consultant. Minnesota attorneys also had the benefit of the complete trial transcript from Kansas and deposition designations filed with the Court.

15. Co-Lead Counsel Don M. Downing personally prepared both of the Minnesota damages experts, Drs. Carter and Babcock, for trial, traveling to meet with them and Minnesota counsel in-person on several occasions, including to Minnesota for the final prep session for trial.

16. Ultimately, the Minnesota class trial did not reach a verdict prior to settlement. The class ended before Drs. Carter and Babcock could testify at trial.

III. SETTLEMENT

A. NEGOTIATIONS

17. After the Kansas trial, the Court moved the start of the next MDL trial to January 2018, in part so that the parties could engage in serious settlement discussions. ECF No. 3311 (Transcript of Trial Day 15 and the Court's Status Conference) at 2423-24. From my participation in the settlement discussions, I understand that the acquisition of Syngenta by ChemChina, and delays through the summer of 2017 in the closing of that acquisition, delayed Syngenta's ability to put a settlement offer on the table, prior to the fall of 2018.

18. Prior to the start of the Minnesota class trial, the parties had begun for the first time serious settlement negotiations and exchanging settlement figures. By August 30, 2017, the parties had made substantial progress. Prior to the start of Minnesota trial the parties had already

moved to brackets and it appeared almost inevitable to Kansas Co-Lead Counsel that Syngenta's final offer would be \$1.5 billion.

19. Tellingly, Watts only presents Syngenta's (confidential) offers in the settlement negotiations because if they disclosed Plaintiffs' demands and brackets, it would reveal that, after the Minnesota class trial began and following Watts' cross-examinations, Plaintiffs moved downward much more than Syngenta moved upward in the negotiations.

20. The suggestion that one Movant's cross-examinations of two Syngenta's witnesses was a material factor in reaching this settlement amount is unfounded. To the contrary, as detailed above, after those events, Plaintiffs' demand dropped by substantially more than Syngenta's rose. One cannot draw causality between the settlement and any particular event in the Minnesota class trial because the settlement was the culmination of months of negotiations, during which the parties tested each other's resolve.

21. As this Court is aware, Co-Lead Counsel did not sign, authorize, or agree to the September 2017 Term Sheet. At the time, we believed that the Term Sheet inappropriately deprived this Court of jurisdiction over attorneys' fees related to many of the Movants' clients, including Watts. We additionally took the position at the time that the term sheet was unenforceable, in part, because there was no agreement on how the funds would be allocated between the two separate settlements.

22. Ultimately, this issue was resolved by consolidating all of the plaintiffs into a single, class settlement. This allowed the parties to complete negotiations on the settlement terms *because* it created a jurisdiction and mechanism to resolve issues before this Court.

B. SETTLEMENT PRESSURE ON SYNGENTA

23. In their fee applications, many attorneys claim that the filing and maintaining of individual lawsuits, including opting plaintiffs out of the litigation classes, increased settlement pressure on Syngenta, enhancing the settlement fund.

24. Even in the Settlement Term Sheet, Syngenta insisted on a class-wide release, evidence that Syngenta agreed to pay the \$1.51 billion to settle not just the individual claims, but the claims of all class members. *See, e.g.*, ECF No. 3514-1 at 4 (defining the Class Plaintiff Settlement Agreement, which would include a “full and final release of all Class Plaintiffs’ Claims.”).

25. I have worked on class action lawsuits throughout my 30+ year legal career on both the plaintiff and defense side. A Walk Away Right clause is standard in class action settlements, even those without individually-filed cases, and does not reflect that any individually-filed cases were a substantial reason for the settlement.

26. Co-Lead Counsel individually represent over 4,600 clients in this litigation. *See* ECF No. 3587-3 at 35 ¶ 72.

27. Co-Lead Counsel did not individually file cases on behalf of each of these clients because there was no reason to do so. The class claims filed in the MDL preserved each of these client’s claims and filing individual cases unnecessarily required each of these plaintiffs to file unnecessary PFSs. I knew that individual PFSs would give Syngenta additional ammunition for its opposition to Plaintiffs’ class certification motion.

28. Despite retaining over 4,600 producers, Co-Lead Counsel only filed these plaintiffs’ claims when necessary, such as where a bellwether plaintiff was needed or there was a question about whether the statute of limitations was tolled.

29. These clients stood ready to litigate if certification was denied. But, that was ultimately unnecessary; these clients now get to participate in the settlement on the same terms as Watts' clients, and they did not subject themselves to unnecessary discovery, including producing a PFS, because they relied on the class to preserve their claims.

30. Ultimately, the PFSs were not necessary to establish the extent of Syngenta's liability. None of the information on the PFSs was used to determine Syngenta's liability at trial. Aggregate damages models were prepared for and presented in the Kansas trial and those aggregate damages models were used to determine what Syngenta should pay for the class-wide release.

31. Some have claimed that the PFSs were "important to establish the extent of Syngenta's liability" and could "be used for settlement." ECF No. 3611 at 16. But that never turned out to be true.

32. Syngenta demanded a class-wide release, but only a fraction of the nationwide class members ever produced a PFS. And none of the PFSs were used as part of the settlement negotiations.

33. From my participation in the settlement negotiations with Syngenta, these documents played no role in securing the nationwide class settlement.

34. Much is made in the Movants' papers of the threat of the over 70,000 individual cases filed in Minnesota. *See, e.g.*, ECF No. 3568 at 5. Only one case, a single plaintiff in the *Mensik* case, reached trial and that trial was canceled before opening statements.

35. *Mensik* later settled, but only for that plaintiff and only after the Kansas class verdict. This was no surprise. It gave Syngenta's lawyers—just off the Kansas trial—the

opportunity to regroup and recharge before the Minnesota class trial, which presented many times the potential liability of *Mensik*.

36. There was little probability that the *Mensik* result could repeat *ad infinitum*. As this Court previously noted, the “amounts at stake per farm are small enough that separate suits may be impracticable for many class members.” ECF No. 2547 at 28.

37. The prospect and attendant costs of preparing each individual case for trial to achieve a case-by-case settlement was unrealistic. Furthermore, it would have taken success in achieving *full damages* in as many as 7,000 individual trials to repeat the outcome of just the Kansas class trial, and to expose Syngenta to the same liability that the one Kansas trial brought to bear on Syngenta.

38. Even if those plaintiffs secured a 10x punitive damages award, it would have taken as many as 700 individual plaintiff trials.

39. There were nowhere near this many cases ready for trial. Even if there had been, potential liability in the additional MDL class trials would have been rising exponentially at the same time because trials were set for these additional class cases. Consequently, the individual cases likely put little, if any, added pressure on Syngenta, as it was facing multi-billion exposure due to Co-Lead Counsel’s efforts in securing class certification and winning the Kansas class trial.

40. In agreeing to pay \$1.5 billion, Syngenta insisted upon a class-wide release, regardless of whether the Class Member filed a claim to secure a portion for the Settlement Fund. Because, by definition, all Class Members suffered the same injury, Kansas attorneys advocated throughout the settlement negotiations for the least burdensome, simplest claims

process with the longest time to submit claims that it could persuade Syngenta and other members of the PNC to consent to.

41. For nearly all producers, the current Claims Form requires only two substantive answers: the percentage of corn fed on farm in the relevant marketing years; and whether the producers purchased and planted Agrisure Viptera and Duracade. Because of the extensive efforts of Co-lead Counsel working with the FSA, Co-Lead Counsel secured directly from the FSA all other data needed for a farmer to submit a claim, avoiding the time consuming and burdensome process of requiring each farmer to individually collect and provide the required 578 data from the FSA as advocated by those on the PNC who had large inventories of farmers.

42. In his determining how many bushels were included in the nationwide class, Dr. Bruce Babcock previously calculated that, when the Minnesota class is excluded, approximately 74% of those bushels fall within the nationwide class.

43. Dr. Bruce Babcock was asked to review the analysis of The Settlement Alliance (“TSA”) submitted in support of the Watts’ Application. ECF No. 3580-4.

44. As explained in Dr. Babcock’s contemporaneously-filed declaration, he estimates that Watts’ clients constitute approximately 12% of the total corn bushels in the United States. See Declaration of Bruce Babcock, filed contemporaneously as Exhibit 80, at ¶ 20.

45. If the Settlement Fund had been divided between separate “class” and “individual” settlements, as initially proposed, based on a *pro rata* allocation of corn bushels produced by each respective group, the vast majority of the fund, or approximately 74% would have been allocated to the settlement of the certified, federal class.

46. Allocation between the initially proposed two-settlements caused an impasse in the negotiations. Only once the Courts and Special Masters made clear they wanted a single,

nationwide settlement class did it become possible for the parties to agree to treat all similarly-situated producers equally in allocating the Settlement Fund. It also meant that the determination and allocation of attorneys' fees would be decided by the Court, in consultation and with the approval of the Minnesota and Illinois Federal Courts.

C. RELATIONSHIP OF THE CBO ASSESSMENTS TO A CLASS SETTLEMENT

47. From the beginning of this MDL, Co-Lead Counsel have pushed forward on class claims on behalf of all of the farmers across the country and simultaneously prosecuted individual claims as well in the MDL.

48. Co-Lead Counsel drafted the Common Benefit Order ("the CBO"), ECF No. 936, to ensure that it covered both ways in which this litigation could settle: through individual settlements of individual cases, in which case an assessment is required by the CBO; or through a class settlement, in which case no assessments are required and fees are awarded by the Court.

49. The *Mensik* settlement was an individual settlement and therefore *Mensik* counsel paid an assessment as part of this settlement, which was set by the Joint Prosecution Agreement.

50. An assessment was also paid as part of the ADM settlement, again consistent with ADM's status as a Participation Counsel settling an individual lawsuit.

51. If individual lawsuits were to opt-out of this class settlement, they too may be subject to the appropriate assessments depending upon whether the individual lawsuit was filed in the MDL or if the attorney for the individual lawsuit signed a Participation Agreement or the Joint Prosecution Agreement.

52. If we were successful in certifying the class or classes, we drafted the CBO to preserve and ensure the right of Class Counsel to seek an award of fees from the Court from Common Benefit Fund. ECF No. 936 at 20. We would not have agreed to or proposed the CBO if it had not included this right.

53. Consistent with the CBO, Kansas Common Benefit Counsel do not seek an assessment under the CBO, but instead have petitioned the Court for an award of fees and expenses from the Common Benefit Fund.

54. The mechanism for allocating and awarding fees under Rule 23(h) and pursuant to the Class Settlement Exemption in the CBO is exactly what the parties' intended.

IV. FAILURE TO COMPLY WITH THE COMMON BENEFIT ORDER

55. One of the goals of the CBO was to "ensure the efficient prosecution of this litigation," ECF No. 936 at 6, and the path to accomplishing this goal included narrowly defining and reasonably limiting the types of work that could (and would not) constitute Common Benefit work and expenses.

56. Every counsel was on notice as of July 2015 as to the types of time and expenses that this Court believed constituted Common Benefit work.

57. On July 18, 2018, the Court entered an order requiring everyone who filed a motion and petition for an award of attorney fees and expenses to categorize their time, fees and expenses pursuant to a Court-supplied schedule. ECF No. 3613.

58. The categorization required counsel to place time and lodestar in one of two columns: "Approved Common Benefit Work" and "Other Work." ECF No. 3613-1. For the 44 law firms that submitted Kansas Common Benefit time, "Approved Common Benefit Work" was strictly limited to the work that was both consistent with the CBO and approved by Co-Lead Counsel. Thus, the categorizations of "Approved Common Benefit Work" match what was submitted in the Kansas Fee Application. *See* ECF No. 3641.

59. For Minnesota attorneys, Minnesota Lead Counsel attached a consolidated set of charts for most of the firms listed on Exhibit 13 (ECF No. 3662-1) of Daniel E. Gustafson's declaration attached to the Minnesota Fee Application. *See* ECF No. 3662-2 at ¶ 4 (Gustafson

Supp. Decl.). However, additional Minnesota attorneys listed on an amended Exhibit 14 to Gustafson's original declaration (ECF No. 3662-2 at 53) were then instructed to prepare separate supplemental filings and to include time spent on individual PFS and non-lead counsel's bellwether work as "Approved Common Benefit Work." ECF No. 3662-2 at ¶ 18.

60. Thus, it appears Minnesota attorneys applied two different definitions of "Approved Common Benefit Work" in their supplemental submissions. The work reported in Exhibit 13 to Gustafson's declaration, which is part of Minnesota Lead Counsel's application, is not included, which lowers individual firms' "Approved Common Benefit Work" to include only the amounts reported on Gustafson's Exhibit 14.

61. In contrast, all Kansas bellwether work submitted under the CBO was included in both the initial Kansas Fee Application and its Supplement, ECF No. 3641, but individual PFS work by contracted attorneys (for non-bellwether cases) was not included as "Approved Common Benefit Work."

62. Other Movants, such as Heninger Garrison Davis LLC and associated counsel ("Heninger"), placed thousands of hours of time in "Approved Common Benefit Work" even though most of it did not fall within the CBO's definition of approved common benefit work. *See* Illinois ECF No. 354-1.

63. Other than the law firms whose time was included in the Kansas Common Benefit Application, Co-Lead Counsel have not approved a single hour submitted by any of these firms.

64. Many of these Applications include time and expenses that are expressly excluded by the CBO. This time includes, but is not limited to:

- merely reviewing work product created by others, which was excluded by the CBO, ECF No. 936 at 10 (“Mere review of filings and orders generally does not qualify as Common Benefit Work.”);
- marketing activities, efforts to secure a leadership appointment, and attendance at JPML hearing, which were excluded by the CBO, *id.* at 18 n.3 (“Time and expense incurred in client solicitation, efforts to secure a leadership appointment, pre-appointment attendance at meetings of plaintiffs’ counsel, attendance at the JPML hearing, attendance at the initial court hearing and similar tasks shall not be approved.”);
- time spent attending depositions when attendance was not requested, which is excluded by the CBO, *id.* at 8 (“Time and expenses for counsel not designated as one of the authorized questioners or otherwise authorized to attend the deposition by Lead Counsel shall not be considered Common Benefit Work but, rather, as attending on behalf of such counsel’s individual clients.”);
- time spent attending conferences when the attorney had no role at such conferences, which is excluded by the CBO, *id.* at 9 (“Counsel may attend any status conference held in open court, but mere attendance at or listening to a status conference will not be considered Common Benefit Work, and expenses incurred in relation thereto will not be considered Common Benefit Expenses.”); and
- time spent attending seminars, which is excluded by the CBO, *id.* at 9 (“Attendance at seminars or Continuing Legal Education programs shall not qualify as Common Benefit Work, or the expenses pertaining thereto as Common Benefit Expenses.”).

65. These are examples. Co-Lead Counsel urge the Court not to rely on the “Approved Common Benefit Work” as submitted.

V. CATEGORIZATION OF TIME SUBMITTED BY MOVANTS

66. My firm has taken all of the Supplemental submissions from Movants and attempted to summarize these hours, including which hours were placed in which of the Court’s categories.

67. Multiple movants have touted their work in helping their individual clients complete their claim forms. For example, Watts states that he held “town hall meetings in June-July 2018 to provide additional advice and assistance with the claims process” for his clients. ECF No. 3611 at 29.

68. By far, the most common basis for a request for fees and expenses is the work individual counsel have undertaken to fill out Plaintiff Fact Sheets (“PFS”) on behalf of their clients. Movants report 505,379.6 hours and \$80.8 million in lodestar on this category alone, which reflects 60.7% of the total reported hours and 41.8% of the total claimed lodestar. The second most common basis for a request for fees and expenses is the work individual counsel have undertaken to assist their clients in filing Claim Forms. Movants report 74,183.8 hours and \$19.6 million in lodestar on this category alone, which reflects 8.9% of the total reported hours and 10.1% of the total claimed lodestar.

69. From our experience with our clients, the PFS was simple to complete; the bulk of the time to complete the PFS was spent collecting sales contracts, seed receipts, and crop insurance materials.

70. Again, as someone who was involved in the settlement discussions with Syngenta, these documents produced with the PFS specifically played no role in securing the settlement and were not an area of discussion during the settlement negotiations.

A. OVERALL SUMMARY OF HOURS AND LODESTAR

71. Once the hours and lodestar submitted in the Kansas, Minnesota and Illinois Lead Counsel applications are deducted, Movants' submissions can be summarized by firm according to the chart below.¹

¹ In subtracting the hours and claimed lodestar submitted by the Minnesota Lead Counsel, Kansas attorneys subtracted the totals listed on ECF No. 3662-1 at 528 (Exhibit 13). Those listed on Exhibit 14, ECF No. 3662-1 at 531, which Minnesota Lead Counsel represent includes PFS-compliance, are included in the totals listed on the chart on the next page.

Firm	Supplemental "Approved CB Hours"	Supplemental "Other" Hours	Total Supplemental Hours	Supplemental "Approved CB Lodestar"	Supplemental "Other" Lodestar	Total Supplemental Lodestar
Bassford Remele, P.A. (#3640)		1,997.7	1,997.7		\$932,638.50	\$932,638.50
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. (#3658)		489.3	489.3		\$192,744.00	\$192,744.00
Borgess Law, LLC (#3638)	72.0	202.0	274.0	\$28,057.50	\$80,780.00	\$108,837.50
Brad Morris Law Firm, PLLC (#3652)		3,385.2	3,385.2		\$519,805.50	\$519,805.50
Conny Feste Ltd. (#3631)	210.9		210.9	\$49,173.00		\$49,173.00
Coxwell & Associates, PLLC (#3637)	880.0		880.0	\$179,424.00		\$179,424.00
Doyle LLP (MN)	622.1		622.1	\$153,940.00		\$153,940.00
Dunk Law Firm (#3630)		1,630.0	1,630.0		\$362,900.00	\$362,900.00
Heninger Garrison Davis, LLC & Ass'd Counsel (IL #354)	16,843.4	5,953.0	22,796.4	\$8,274,749.39	\$3,074,908.17	\$11,349,657.56
Hodge Law Firm (#3636)		1,380.8	1,380.8		\$587,237.50	\$587,237.50
Hossley-Embry, LLP (##3622, 3623)	221.0	10,279.0	10,500.0	\$76,200.00	\$2,608,575.00	\$2,684,775.00
Johnson Becker PLLC (#3650)	912.7	43,043.0	43,955.7	\$394,147.50	\$6,067,830.00	\$6,461,977.50
Kemp, Jones & Coulthard, LLP (MN)		3,161.8	3,161.8		\$916,777.50	\$916,777.50
Law Offices of A. Craig Eiland (#3647)		13,254.0	13,254.0		\$5,160,250.00	\$5,160,250.00
'Maggio Thompson, LLP (#3649)	250.0	202.7	452.7	\$68,750.00	\$27,475.50	\$96,225.50
Meshbeshier & Spence, Ltd. (#3634)	792.5	687.0	1,479.5	\$396,250.00	\$184,300.00	\$580,550.00
Nolan Law Group (#3645)	637.6	543.1	1,180.7	\$250,855.00	\$213,552.50	\$464,407.50
O'Hanlon, Demerath & Castillo/Demerath Law Office (#3656)		9,505.5	9,505.5		\$3,902,494.31	\$3,902,494.31
Paul Byrd Law Firm, PLLC (#3660)		21,984.8	21,984.8		\$5,079,780.00	\$5,079,780.00
Paul Byrd's Associated Firms (#3660)	669.7	5,522.7	6,192.3	\$371,812.50	\$2,611,342.50	\$2,983,155.00
Paul LLP (#3635)		3,703.9	3,703.9		\$1,360,118.75	\$1,360,118.75
Pavlack Law, LLC and Wagner Reese, LLP (#3625)	108.9	185.1	294.0	\$32,424.00	\$60,045.00	\$92,469.00
Pendley, Baudin & Coffin, L.L.P. (#3653)	251.9		251.9	\$70,033.00		\$70,033.00
Shields Law Group, LLC (#3654)	8,336.6	7,840.0	16,176.6	\$5,280,683.25	\$4,571,000.00	\$9,851,683.25
Sunde Olson Kircher and Zender, PLC (MN)	25.7	47.1	72.8	\$6,425.00	\$11,775.00	\$18,200.00
The Lyon Firm, A Law Corp. (#3632)	130.1	66.0	196.1	\$20,352.50	\$26,415.00	\$46,767.50
Toups/Coffman Referral Counsel (#3646)		11,022.3	11,022.3		\$5,589,666.57	\$5,589,666.57
Toups/Coffman/Richardson (#3646)		58,535.5	58,535.5		\$19,379,019.37	\$19,379,019.37
Wagstaff & Cartmell, LLP (#3651)		3,300.6	3,300.6		\$1,257,451.00	\$1,257,451.00
Watts Guerra LLP (#3661)		373,217.0	373,217.0		\$38,127,193.00	\$38,127,193.00
Watts Guerra's Associate Counsel (#3661)	126,039.1	54,021.9	180,061.0	\$40,418,304.33	\$14,497,330.77	\$54,915,635.10
Westervelt, Johnson, Micoll & Keller, LLC (#3655)		1,663.0	1,663.0		\$316,350.00	\$316,350.00
Wilcox & Williams, LLC (#3648)	74.6		74.6	\$9,325.00		\$9,325.00
Wright & Schulte, LLC (#3628)	2,854.2	2,958.1	5,812.3	\$636,065.00	\$1,279,905.00	\$1,915,970.00
Grand Total	159,932.8	639,781.9	799,714.66	\$56,716,970.97	\$118,999,660.44	\$175,716,631.41

72. In short, Movants claim **799,714.7** hours of work and approximately **\$175.7 million** in lodestar. Those figures are astonishing because only a tiny fraction of the filed

plaintiffs (approximately, 48 plaintiffs in Kansas, 40 plaintiffs in Minnesota, and 47 plaintiffs in Illinois *Poletti*) moved into the bellwether discovery phase.

B. MOVANT’S CATEGORIZATION OF HOURS AND LODESTAR

73. In the summary chart below, Co-Lead Counsel have additionally attempted to summarize the time Movants submitted for each of the Court’s categories.

74. Heninger stands apart from many of the Movants because they conducted substantive discovery and managed a bellwether pool, similar to—although also subsequent to and duplicative of—the bellwether discovery pools in Minnesota and Kansas. Thus, Heninger is excluded from the summary chart below.

75. In addition, Johnson Becker PLLC (“Johnson Becker”) and the Law Offices of Craig A. Eiland (“Eiland”) are excluded because they purport to have performed substantive work in the Illinois state-court cases. These two firms are additionally listed as referral counsel by Martin J. Phipps and Clayton Clark (“Illinois Lead Counsel”) and, therefore, fall under the Clark Allocation of the Fee-Sharing Agreement. ECF No. 3598-1 at 2-3.

76. Excluding these three Movants (Heninger, Johnson Becker and Eiland), the chart summary hours and lodestar by category reveals that the vast majority (over 82%) of the work Movants claim to have done—not already subsumed in the approved common-benefit work submitted by Lead Counsel—falls into just three categories of: PFS compliance (63.12% of total hours), perfection of claim forms (10.10%), and pre-settlement communications (8.99%). No work was performed on *Daubert* motion practice, defendant expert witness work, motions in limine, trial briefing / jury instructions, or post-trial briefing.

Task	Hours	% of Hours	Claimed Lodestar	% of Claimed Lodestar	Blended Rate
PFS	454,305.08	63.12%	\$70,569,035.55	46.20%	\$155.33
Assisting clients in perfecting claims in settlement	72,663.95	10.10%	\$19,177,497.67	12.56%	\$263.92
Pre-settlement communications with clients	64,702.79	8.99%	\$23,606,067.52	15.45%	\$364.84
Other (describe)	57,248.16	7.95%	\$23,762,001.37	15.56%	\$415.07
Paper discovery (plaintiffs)	47,880.90	6.65%	\$5,968,046.25	3.91%	\$124.64
Discovery file management	8,904.60	1.24%	\$4,657,271.90	3.05%	\$523.02
Complaint Drafting	5,654.23	0.79%	\$2,208,621.91	1.45%	\$390.61
Preparation of fee petition	3,300.30	0.46%	\$936,569.18	0.61%	\$283.78
Paper discovery (Syngenta/3d parties)	2,259.25	0.31%	\$426,534.25	0.28%	\$188.79
Administrative work as court-appointed leadership	1,015.10	0.14%	\$372,621.25	0.24%	\$367.08
Defend fact depositions (plaintiffs)	859.30	0.12%	\$638,900.00	0.42%	\$743.51
Settlement negotiations	269.80	0.04%	\$99,115.00	0.06%	\$367.36
Plaintiffs' expert witness work	199.90	0.03%	\$127,972.50	0.08%	\$640.18
Other pretrial motion practice	153.10	0.02%	\$63,365.00	0.04%	\$413.88
Dispositive motion briefing/argument	120.70	0.02%	\$62,499.50	0.04%	\$517.81
Trial (presenting witnesses & argument)	66.60	0.01%	\$32,130.00	0.02%	\$482.43
Fact depositions (Syngenta/3d parties)	52.70	0.01%	\$20,600.00	0.01%	\$390.89
Class Certification	30.60	0.00%	\$3,512.50	0.00%	\$114.79
Discovery motion practice & communications	21.50	0.00%	\$12,385.00	0.01%	\$576.05
Grand Total	719,708.56	100.00%	\$152,744,746.35	100.00%	\$212.23

77. This work was largely administrative. For example, unlike Co-Lead Counsel, Movants did not have to conduct substantial factual and legal investigations to draft complaints because they were able to take advantage of federal and Minnesota Master Complaints, where the process for filing a notice to conform required the lawyer only to collect demographic and corn harvesting acreage information about the producer. These lawyers could also rely on the substantial work product publicly-available in the filed Master Complaints.

78. Perfecting claim forms also required only administrative assistance given the simplicity of the Claim Form. For nearly all, completing the Claim Form takes minutes, not hours. Only those who have not reported all acreage to the FSA or for crop insurance purposes must specify their acreage in a more detailed format. This is expected to apply to a small percentage of producer Class Members

79. Pre-settlement communications with clients (at least those that would not have fallen into one of the substantive categories, like preparing for a fact deposition) would have entailed little more than answering questions and providing clients with updates about the progress that Co-Lead Counsel were making. This was, thus, largely administrative, particularly since bellwether plaintiff activities were considered common-benefit and predominantly handled by Co-Lead Counsel.

80. Other administrative categories, like Discovery file management, contain significant amounts of time (8,904 hours), which are again administrative tasks.

81. By far, the largest category of hours claimed was PFS compliance: 454,305 hours. Most of that time (397,978 hours) was claimed by Watts Guerra and its referral firms (collectively, “Watts”).

82. Although they purport to represent 57,385 clients, they never disclose the total number of PFSs completed and served. But even assuming the completion rate was 100%, this would mean they spent 6.9 hours on average per PFS.

83. In contrast, Paul LLP (“Paul”), who unlike Watts recorded time on their individual cases contemporaneously, expended 1,989 hours on PFS compliance (ECF Nos. 3662-2 at 31; 3635 at 1); their co-counsel expended an additional 619.8 hours (ECF No. 3637-3 at 1), for a total of 2,609 hours. Because Paul disclosed that they completed and served 1,084 PFSs, a

reliable estimate of their average time spent per PFS was only 2.4 hours. ECF No. 3581-1 at 4 ¶ 9. Watts was, thus, nearly three times less efficient than Paul. Given the scale of Watts' inventory, however, one would expect Watts to be more efficient, not less efficient than other firms.

84. If 2.4 hours was a more reasonable estimate of the amount of firm time necessary to complete a PFS, Watts' total PFS hours would fall from 397,978 to 138,116 (a decrease in more than \$36.8 million in claimed lodestar).

85. Other firms with significant PFS-related hours include: Mitchel A. Toups, the Coffman Law Firm and their affiliated counsel ("Toups/Coffman"), who spent 21,468 hours on PFS work; the Paul Byrd Law Firm PLLC and affiliated counsel ("Paul Byrd"), who spent 20,717 hours on PFS work. Neither discloses the number of PFS served. Toups/Coffman do not even disclose the total number of their clients who filed cases. Paul Byrd, however, purports to have filed approximately 2,500 cases, which would mean they spent no less than about 8 hours per PFS on average. ECF No. 3586 at 2. In reviewing his Supplement, Paul Byrd's non-common benefit work consisted almost entirely of: filing complaints (7.9% of hours); PFS and discovery-file management (48.1%); pre-settlement communications and perfection of claims (11.8%), and other (26.9%). ECF No. 3586 at 2; ECF No. 3662-2 at 13-15.

C. MOVANTS' RATES

86. Rates used to calculate the claimed lodestar for PFS work vary significantly. The next chart below shows those rates on a per-firm basis.

Firm	Total Claimed PFS Hours	Total Claimed PFS Lodestar	Blended Rate
Bassford Remele, P.A. (#3640)	141.40	\$41,598.00	\$294.19
Beasley, Allen, Crow, Methvin, Portis & Miles, P.C (#3658)	72.80	\$12,012.00	\$165.00
Borgess Law, LLC (#3638)	72.00	\$28,057.50	\$389.69
Brad Morris Law Firm, PLLC (#3652)	964.00	\$134,160.00	\$139.17
Coxwell & Associates, PLLC (#3637)	619.00	\$129,861.00	\$209.79
Doyle LLP (MN)	622.10	\$153,940.00	\$247.45
Dunk Law Firm (#3630)	120.00	\$30,000.00	\$250.00
Heninger Garrison Davis, LLC & Associated Counsel (IL #354)	3,959.21	\$2,343,763.76	\$591.98
Hodge Law Firm (#3636)	215.25	\$67,043.75	\$311.47
Hossley-Embry, LLP (##3622, 3623)	3,109.00	\$711,300.00	\$228.79
Johnson Becker PLLC (#3650)	39,442.85	\$5,333,286.25	\$135.22
Kemp, Jones & Coulthard, LLP (MN)	638.70	\$169,458.00	\$265.32
Law Offices of A. Craig Eiland (#3647)	815.00	\$509,375.00	\$625.00
'Maggio Thompson, LLP (#3649)	250.00	\$68,750.00	\$275.00
Meshbeshier & Spence, Ltd. (#3634)	792.50	\$396,250.00	\$500.00
Nolan Law Group (#3645)	637.60	\$250,855.00	\$393.44
Paul Byrd Law Firm, PLLC (#3660)	20,133.86	\$2,741,878.25	\$136.18
Paul Byrd's Associated Firms (#3660)	582.85	\$299,662.50	\$514.13
Paul LLP (#3635)	551.88	\$98,402.25	\$178.30
Pavlack Law, LLC and Wagner Reese, LLP (#3625)	196.90	\$48,820.00	\$247.94
Pendley, Baudin & Coffin, L.L.P. (#3653)	18.25	\$1,357.50	\$74.38
Shields Law Group, LLC (#3654)	8,336.60	\$5,280,683.25	\$633.43
Sunde Olson Kircher and Zender, PLC (MN)	25.70	\$6,425.00	\$250.00
The Lyon Firm, A Law Corp. (#3632)	128.20	\$19,592.50	\$152.83
Toups/Coffman Referral Counsel (#3646)	418.65	\$123,661.25	\$295.38
Toups/Coffman/Richardson (#3646)	21,049.20	\$4,644,884.47	\$220.67
Wagstaff & Cartmell, LLP (#3651)	21.90	\$5,475.00	\$250.00
Watts Guerra LLP (#3661)	301,734.48	\$31,169,028.00	\$103.30
Watts Guerra Affiliated Counsel (#3661)	96,243.79	\$25,233,263.58	\$262.18
Westervelt, Johnson, Micoll & Keller, LLC (#3655)	537.15	\$90,537.50	\$168.55
Wilcox & Williams, LLC (#3648)	74.60	\$9,325.00	\$125.00
Wright & Schulte, LLC (#3628)	2,854.20	\$636,065.00	\$222.85
Grand Total	505,379.62	\$80,788,771.31	\$159.86

87. Watts recognized the largely administrative nature of this work, using a blended rate of \$103.30 an hour for this work. But Watts' affiliated counsel did not, using double that rate, at \$262.18 an hour.

88. The highest rate was the Shields Law Firm (“Shields”) whose hourly rate for PFS work is \$633.43 per hour. Similarly, Meshbeshier & Spence, Ltd. (“Meshbeshier”) has an hourly rate of \$500 per hour; Borgess Law, LLC has \$389.69 per hour; and, Toups/Coffman’s referral counsel used \$295.38 per hour.

89. Recalculating the lodestar using this lower blended rate in *just these* categories to reflect the largely administrative nature of these significant hours has a very material impact on the overall lodestar, reducing it by \$57.6 million (from \$152.7 to \$95.1 million).

VI. MOVANTS’ CASES FILED IN THE MDL

90. Many of the law firms seeking to be paid out of the common fund for their purported Common Benefit work and expenses had all or even some of their cases pending in the MDL.

91. These firms include:

- Beasley Allen—lists a total of 36 lawsuits all of which are in the MDL. *See* ECF No. 3577-1;
- Brad Morris—does not specify the total number of claims actually filed out of the 80 clients, but the filed claims were transferred to the MDL, ECF No. 3601-1 at ¶ 9;
- Hossley-Embry—all filed cases are pending in the MDL, ECF No. 3605-1 at ¶ 4;
- Paul LLP—at least 17 cases filed in the MDL and part of the MDL’s Executive Committee, ECF No. 3581-1 at ¶ 5;
- Pavlack Law, LLC—references an unknown number of cases “transfer[ed] to the MDL”, ECF No. 3571 at 3;
- Pendley Baudin—at least 19 plaintiffs in the MDL, ECF No. 3595-5 at ¶ 4;

- Law offices of James S. Rogers—Washington state class action transferred to the MDL, ECF No. 3562 at 2; and
- Toups/Coffman—unspecified number of plaintiffs in the MDL, ECF No. 3567 at 3 n.3.

92. With the exception of the time and expenses included in the Kansas Common Benefit fee and expense application for the Paul and Toups/Coffman firms, none of the rest of these firms performed any Common Benefit work consistent with the CBO and at the direction of Co-Lead Counsel.

VII. MOVANTS' UNFILED CASES

93. Movants' applications do not readily permit the Court to determine if they are seeking fees for filed or unfiled claims, but it does appear a significant number of Movants seek fees for claims that were never filed.

94. For example, the Toups/Coffman Application seeks fees from over 9,400 plaintiffs. As part of my responsibilities as Liaison Counsel, we tracked cases that were filed in and dismissed from the MDL. In the MDL, Toups/Coffman filed claims for fewer than 1,500 plaintiffs (and then dismissed 499 of these). I understand from Lead Counsel in Illinois that they filed claims for 7,238 plaintiffs in Williamson County. This still leaves over 1,000 of their claimed plaintiffs without a filed case.

95. Similarly, the Hodge Law Firm PLLC ("Hodge") does not appear to have filed any cases because they identify no time or work in the category of preparing or filing complaints. ECF No. 3590-1.

96. Johnson Becker appears to have filed cases for only 1,800 of 3,257 plaintiffs. ECF No. 3576 at 1, 4.

97. Pendly Baudin appear to have filed only 19 of their 59 cases. ECF No. 3595-5 at 1, ¶ 4.

VIII. WATTS GUERRA (“WATTS”)

98. In its Application, Watts seeks: 1) “an amount equivalent to a 24.16% contingent fee on gross recoveries of the Watts Guerra Plaintiffs,” ECF No. 3580 at 4, which Watts estimates could total \$181,250,000 if these plaintiffs claim 50% of the fund, ECF No. 3611 at 65; and 2) \$12,846,863.41 for Watts Guerra’s common benefit expenses, ECF No. 3580 at 4. But they claim currently their clients have claimed 55% which would result in a fee of approximately \$200 million using their methodology (1.5 billion * 55% * 24.16%) plus \$12.8 million in expenses. In total, Watts alone seeks \$194-214 million, but that request could even be higher depending upon the value of the settlement claims by Watts’ clients.

A. THE NEGOTIATIONS OF THE CBO AND THE JPAS

99. On February 20, 2015, the Kansas Co-Lead Counsel submitted a proposed Order Establishing Protocols for Common Benefit Work and Expense Funds (“proposed CBO”). Ex. 81. Many of the Movants were copied on the email, including but not limited Mikal Watts. *Id.*

100. The proposed CBO laid out a proposed schedule of “assessments” that Syngenta would be required to “holdback” from any state or federal, filed or unfiled, recovery or settlement, and pay into a Common Benefit Fund. *Id.* at 18-21.

101. It further stated that “no assessment[s]” would apply “to the portion of any class recovery distributed to [an] individual class member if the class member remains in the class (i.e., does not opt-out of the class). Instead all fees and expenses for that class member will come out of the overall class recovery funds provided by defendants, as approved by the Court.” *Id.* at 19.

102. On March 20, 2015, Watts (and others) jointly filed with Co-Lead Counsel an extension of the former's deadline to respond to the proposed CBO, representing that "negotiations concerning [the CBO] that may yield an agreement concerning [it]." ECF No. 303 at 1.

103. That agreement was necessitated because the parties anticipated correctly that the Court would hold "that it lacks jurisdiction to subject [attorneys and plaintiffs without cases in the federal MDL] to the obligations of a common benefit order." ECF No. 403 at 3. At the time, Watts was in the early stages of seeking consolidation of his individual cases in Minnesota and vying for leadership there.

104. Ultimately, those negotiations yielded an agreement, and on April 15, 2015, Co-Lead Counsel e-mailed the Court a revised proposed CBO consistent with that agreement, applicable to cases filed by Watts Guerra LLP. Ex. 82. The revised proposed CBO continued to contain the paragraph stating that these assessments were inapplicable in the event of a class recovery. *Id.*

105. This CBO provision was consistent with the JPAs, which the parties were simultaneously negotiating.

106. The JPA provisions related to assessments were *only* necessary because of the Court's lack of jurisdiction to assess individual cases not pending in the federal MDL. *See* ECF No. 403 at 4. This lack of jurisdiction is why Co-Lead Counsel agreed to reduced assessments for Watts' (and other JPA parties') state cases, but not their federal cases, where this Court had jurisdiction. *See* ECF No. 3611-1 at 7.

107. It is also why the JPAs do not address how fees would be allocated in a class settlement—an agreement was not needed on this issue. If Watts excluded their clients from the

class, the JPA assessments applied; and, if they did not, the Court would decide the allocation as part of awarding reasonable attorneys' fees from the overall class recovery.

108. On May 8, 2015, the Court issued a Memorandum and Order that otherwise overruled all objections lodged against an amended version of the proposed CBO, except for the requirement that assessments be applied to cases outside the Court's jurisdiction. *See* ECF No. 403. The Court's Memorandum and Order instructed Co-Lead Counsel to submit a revised version of the CBO in compliance with the Court's holdings. ECF No. 403.

109. While the parties' JPA required that the Court to approve it, the Court declined to do so in that same Order, concluding that it could not or should not "interject itself ... into a private contractual relationship." ECF No. 403 at 16.

110. Watts and Co-Lead Counsel reconfirmed their desire to effectuate their agreement, notwithstanding the Court's refusal to approval it.

111. Thus, on June 18, 2015, Co-Lead Counsel and prospective Minnesota Lead Counsel, including Watts, executed an Amended and Restated Joint Prosecution Agreement in the Syngenta Litigation ("JPA"). ECF No. 3611-1. The JPA was intended to "resolve all potential, future disputes in connection with Common Benefit Assessments." *Id.* at 4. The agreement defined "Common Benefit Assessment" to mean "a common benefit fee and expense assessment ordered by a state or federal MDL court in connection with a state or federal MDL." *Id.* at 5 § 1.b. It expressly referenced the Court's May 8, 2015 Memorandum and Order as setting the "Benchmark Common Benefit Assessment." *Id.* at §§ 1.a, 1.d.

112. On June 22, 2015, a final revised CBO, incorporating the JPA, was submitted to the Court. Ex. 83. Mikal Watts, among others, were copied on the submission. Watts never, nor

anyone else, objected to the relevant content of this final version, which expressly referenced the Remele/Sieben Group, including Watts, and their rights and obligations under the JPA.²

113. On July 27, 2015, the Court entered the CBO. ECF No. 936. It summarized the JPA, in relevant part, as follows: “They [members of the Remele/Sieben Group] shall pay fee and cost assessments of fifty percent (50%) of the level ordered by this Court for MDL Counsel for all other clients.” *Id.* at 5. The CBO continued to contain, in relevant part, the same language as the initially proposed CBO; to wit, its inapplicability to a class settlement:

“In the event that there is a class settlement, recovery or judgment in favor of the class, no assessment pursuant to this Section will be made, either for attorneys’ fees or for expenses, individually from any class member or his/her/its individual attorney as to the portion of any class recovery distributed to that individual class member if the class member remains in the class (i.e., does not opt-out of the class). Instead, all fees and expenses for that class member will come out of the overall class recovery funds provided by defendants, as approved by the Court, or as otherwise Ordered by the Court. The relationship between class counsel fees and costs obtained through any class settlement or judgment and the Common Benefit Fund will be addressed, if necessary, by later order of the court.

Id. at 20.

114. It was always intended that this paragraph would confirm that “assessments” only applied to individual recoveries; that they would not apply to a class recovery; and in the event of a class recovery, Kansas attorneys would be entitled to seek attorneys’ fees and expenses from the overall class fund for anyone who remains in the class, unencumbered by the CBO or JPA assessments.

115. During negotiations over the CBO and JPA, revised versions of the CBO were submitted to the Court several times. No one, including neither Watts nor any other Movant, ever objected to this understanding or raised an issue with the language quoted above. If anyone had raised an issue or suggested that individual-case assessments set out in the CBO or JPA

² Phipps Anderson Deacon LLP alone objected to the alternative version of the proposed CBO, which referenced their group. ECF No. 898.

would limit, govern, or be a benchmark for the attorneys' fees available from a class settlement, Co-Lead Counsel would not have agreed to either the JPA or to the proposed CBO.

116. This understanding is fully consistent with the JPA, which governs only Common Benefit Assessments, and not any award of attorneys' fees in a class settlement. ECF No. 3611-1.

117. In January 2016, the parties executed a First Addendum to the JPA ("Addendum to JPA") that specifically addressed class actions. Ex. 84. That Addendum provides for a flat-fee payment to Co-Lead Counsel of "33⅓ percent of the attorneys' fees awarded in all MN MDL Class Actions." *Id.* at § 2.a.iv. The "MN MDL Class Actions" were defined to mean "any action pursued in the MN MDL Court on behalf of a class of Producers or Non-Producers whether or not such class has been certified." *Id.* at § 1.d. It does not cover any federal class action. *Id.* at § 1.c. ("Federal MDL Class Action means any action pursued in the Federal MDL Court on behalf of a class of Producers or Non-Producers....").

118. The Addendum confirms that the assessments were only applicable to individual cases. In addressing how fees would be allocated in the event a Minnesota class was not certified and where one of the signatories chose to prosecute a Minnesota putative class members' claims in "one or more individual actions," the agreement stated that signatory would be "subject to all of the same rights and obligations of the Remele/Sieben Group including, but not limited to, ***the assessments on individual cases set forth therein*** [in the JPA]. *Id.* at § 3.b (emphasis added). This Addendum was signed by, *inter alia*, Mikal Watts, Francisco Guerra IV, and Lewis A. Remele, Jr. *Id.* at 8-16.

119. Co-Lead Counsel have consistently taken the position that the JPA and its Addendum are inapplicable to a federal class settlement because the assessments agreed to

therein do not apply in such a settlement. If the JPA contained an agreement on how to divide class fees, there would have been no need to attempt to negotiate the Fee-Sharing Agreement in the first place.

120. From inception of the litigation, I have always expected that if we were successful in certifying a litigation class, many of the producers who filed individual cases would want to participate in a class settlement. We invested heavily in that strategy, working hard over a sustained period of time. The strategy was, ultimately, successful.

121. In the intervening *three* years – neither Watts nor anyone else under the JPA—has served Co-Lead Counsel with prompt notice, as the JPA requires in the event of breach (ECF No. 3611-1 at 18), that Co-Lead Counsel breached its obligations under the JPA by reserving the right to seek a class fee unencumbered by the assessments.

122. Watts suggests that Co-Lead Counsel “might be in breach” of the JPA because his clients are included in the proposed class. ECF No. 3611 at 49.

123. Watts admits, however, that he “allowed [his clients] to be included in a single nationwide class—a decision made for their benefit.” ECF No. 3611 at 48.

124. The JPA prohibited Watts from placing a client on the Excluded Client List if it was in the “client’s best interest” to participate in the class:

By including a client on its Excluded Client List, the applicable member of the Remele/Sieben Group represents and warrants that (1) it believes that it is in their client’s best interest to be excluded from the proposed class and (2) would recommend to such client that he/she/it opt out of the proposed class, if such client was included in the applicable class definition.

ECF No. 3611-1 at § 2(g).

125. By including this provision, attorneys, including Watts, could not hold their clients hostage from a class settlement – by including them on an Excluded Client List – solely

to prevent application of the Class Settlement Exemption and insist that the JPA assessments apply.

126. Ultimately, this provision worked exactly as we intended. Although many signatories, including Watts, invoked this provision with respect to the litigation classes certified by this Court, *none* invoked it with respect to the settlement class.

127. If an agreement had been proposed to share *class* fees, as opposed to the assessment on individual settlements, the acceptable terms to Co-Lead Counsel would have been very different than the assessments in the CBO and the JPA.

128. Co-Lead Counsel would never have agreed to perform nearly *all* of the work necessary to certify and obtain a class settlement and then allocate to Watts 27.5% of his clients' recoveries (***equivalent to 82.5% of the total fee***).

129. Rather, the terms would have reflected the extensive work and risk Co-Lead Counsel were undertaking to certify and manage the classes and conduct the trial of those classes (all but one of which was in the federal MDL).

130. The terms also would have taken into account the concomitant settlement leverage that class-wide liability would exert on Syngenta since such leverage would be due to the Co-Lead Counsel's efforts.

131. Consequently, Co-Lead Counsel would have insisted on a much higher allocation than that reflected in the JPA for class fees than they would have for individual-case assessments.

132. Co-Lead Counsel have not taken any inconsistent positions. They have never represented that they would limit their fee request from a class recovery to the JPA assessment

percentages. To the contrary, we have repeatedly communicated to Watts that the JPA did not apply in a class settlement.

133. The JPA required Watts to produce FSA 578s for each of their non-class clients, and to supplement those documents during the litigation. ECF No. 3611-1 at § 2.b. Watts now claims to represent 57,385 clients, but they produced FSA 578s in compliance with the JPA for less than *half* of those clients.

134. Even as to the half for which FSA 578s were produced, Watts failed to supplement for subsequent crop years as required by the JPA.

135. Watts was given notice of this deficiency during settlement negotiations because it inhibited the parties from definitively estimating the number of bushels produced by Watts' clients. Watts never cured the breach pursuant to the JPA (ECF No. 3611-1 at § 3.f). Instead of expending the resources and costs of doing so, Watts elected to participate in the class settlement. By enjoying the benefits of a class recovery, it is not inequitable for Watts to be subject to its costs

B. WATTS' ROLE IN PROSECUTING CASE

136. Watts' work on its bellwether cases was a small portion (6.8%) of the aggregate common-benefit work performed in Kansas and Minnesota (\$8.3 million of the total \$122.8 million lodestar) to secure the settlement. ECF No. 3580 at 6.

137. Watts widely overstates their role in the prosecution of the case leading up to trial. For example, they claims to have "worked to organize the core liability strategy" and Watts Guerra "was there every step of the way". ECF No. 3611 at 19. They claim Watts Guerra took a leading role in pretrial preparations, *id.* at 17, when they had no involvement in the legal strategy implemented by the Kansas Co-Lead Counsels and no involvement in the significant motion to

dismiss response and summary judgment briefing in the Kansas MDL, the taking of depositions, or the development of any of the experts used in the Kansas MDL litigation.³

138. In fact, after the leadership structure was in place in Kansas and Minnesota, Kansas Co-Lead Counsel took the lead prosecuting the case while Watts and his referral counsel were spending thousands of hours signing up clients. ECF No. 3611 at 5; ECF No. 3580-5 at ¶¶ 39-42.

139. Watts also seeks to claim some credit for the Kansas verdict, contending that the verdict benefitted from the *Mensik* pre-trial work they shared. ECF No. 3611 at 24 (discussing providing Kansas Co-Lead Counsel with “the full *Mensik* trial package”).

140. Watts did *no work* to secure the Kansas trial judgment, which was the litigation result most responsible for the settlement. Co-Lead Counsel actually provided some, draft deposition designations to Minnesota for *Mensik*. Lead Counsel did receive deposition designations served in *Mensik*, but, after reviewing them, elected to go back to the original deposition transcripts and start again. This required substantial time and effort

141. When we asked for an outline of Dr. Giroux’s testimony in *Mensik* (who was days away from testifying before the mistrial), we received a short email with a list of eight topics (no documents).

142. We later learned that Dr. Giroux had minimal preparation prior to *Mensik* even though Minnesota attorneys now claim (accurately) that he was as “critical expert during the Minnesota class trial.” ECF No. 3662-1 at 140.

³ For Watts to claim they “carried the water for [their] clients,” ECF No. 3611 at 59, is to ignore his reliance on the work product created by the Kansas attorneys. Watts attended no depositions of Syngenta’s fact witnesses, relying at trial on testimony largely elicited by Kansas attorneys, and class certification in Minnesota relied on the efforts from Kansas attorneys.

143. In contrast, when Dr. Giroux testified in the subsequent Minnesota class trial, his testimony followed the direct examination elicited in the Kansas trial, which I practiced with Dr. Giroux as part of the Kansas trial.

144. We received no witness outlines, used none of the demonstratives shared, and cannot recall using anything else provided in the *Mensik* materials for the Kansas trial.

C. WATTS' MARKETING

145. Every attorney involved in this litigation had the opportunity to go out and spend enormous amounts of time and expense on marketing.

146. Co-Lead Counsel could have done this, but Co-Lead Counsel instead invested their resources in taking the lead in the discovery from Syngenta.

147. While Watts now expresses regret that he “would have competed” to do much more of the common work,” ECF No. 3611 at 51, the CBO explained the risk of focusing on marketing rather than on work that directly benefitted the class. If Watts’ clients elected to participate in a class settlement, fees would be divided by the Court from the overall class recovery. Rather than participating in discovery against Syngenta, Watts elected to invest his resources in touring the farm belt to build up his inventory of individual plaintiffs.

148. Watts’ hundreds of associate counsel additionally focused on marketing, rather than common benefit work for the class. None of their work met the qualifications of common-benefit work established in Minnesota. Of their now claimed 185,253 hours, approximately 76% were exclusively PFS-related and settlement administration (140,442). ECF No. 3686-2 at 13-17.

149. Watts may be entitled to more from some or all of his clients. They arguably benefitted, individually, from having an individual attorney provide them case updates, advise them on whether to accept the settlement, and to assist them in filing claims.

150. These same services were *not* available in the same manner to Class Members who chose not to hire a contracted lawyer. Indeed, Watts strongly touts that their clients are completing more Claim Forms than other class members. ECF No. 3611 at 37-38 (“Watts Guerra Plaintiffs are *far* outperforming their numbers compared to the class as a whole”). They would purport to be accomplishing this because Watts is assisting in the completion of those forms for their clients based on information from the claims administrator. It does not seem inherently unreasonable for these clients to pay a premium for a service that other class members are not receiving, since that service is at least arguably making their individual recovery possible.

IX. LITIGATION IN MINNESOTA

151. In some respects, the MDL Court entered rulings that were more favorable to plaintiffs than the Minnesota Court. For example, Judge Sipkins ruled *in limine* that plaintiffs could not put forward evidence concerning the conduct of other biotech companies after the launch of Viptera. This precluded evidence of at least five (of the six) instances where biotech companies waited or conducted a limited launch of their new GM traits while waiting on Chinese approvals.

152. Not only did this Court permit such evidence (May 12, 2017 Hr’g Tr. at 54-55), that evidence was central to the Kansas trial in showing that Syngenta violated the standard of care and that other biotech companies did not have the same issues with China that Syngenta was claiming delayed its traits.

X. TOUPS/COFFMAN

153. In their Application, Touns/Coffman seek to be paid out of the common fund for the value of their contractual attorneys’ fees “in the minimum amount of \$34 million” and to receive “\$374,532.19 in reimbursement of expenses.” ECF No. 3566 at 2. In the alternative, “if the Court abrogates the contingency fee agreements,” Touns/Coffman seek attorneys’ fees “in

the amount of at least \$30 million with a minimum 1.5 multiplier” and expenses of \$374,532.19. ECF No. 3566 at 2. Or “in the further alternative,” Toups Coffman seek fees equal to a minimum “10% of the total amount set aside to pay all attorneys’ fees (plus an expense reimbursement of “\$374,532.19)” *Id.*

154. The reality is that they performed very little common-benefit work: collectively, they submitted 322.50 Common Benefit hours, representing a combined lodestar of \$189,257.50 at a blended rate of \$586. ECF No. 3587-1 at 130.

155. This is no more than 14 hours per plaintiff, and reflects the fact that Kansas Common Benefit Attorneys took the laboring ore of shepherding Toups/Coffman’s clients through the bellwether discovery process.

156. They tout their clients’ involvement in the MDL bellwether discovery pool, but they overstate their own involvement in that regard. Although 15 of the MDL bellwether plaintiffs were Toups/Coffman clients (ECF No. 3567 at 3), *other* Kansas Common Benefit Attorneys effectively assumed prosecution of these claims, assisting those clients in responding to discovery and producing them for their deposition. In fact, Toups/Coffman did not even *attend* the deposition for 10 of their bellwether clients. The paltry 223 hours they contributed to their own bellwether clients cases detracts, rather than supports their application

157. Toups/Coffman and their referral counsel report to have expended an astounding 69,557.8 hours of labor (claimed lodestar of nearly \$25 million) on the claims of plaintiffs who (at most) only served a PFS. ECF Nos. 3646-1 at 6-7, 3646-2 at 5-6, 3646-3 at 2-4, 3646-4. That assertion is subject to serious doubt given that there is evidence Toups/Coffman only actually filed (and would been required to submit PFSs) a *much* smaller number of cases

158. They developed no experts. They spent only 4 hours on pretrial, trial, and post-trial work. ECF No. 3646-4 at 27. Less than two percent of their hours (1,100) were spent drafting complaints (work that, under governing orders, required them only to collect the minimal information to complete a Notice to Conform). They spent about 38% of their time on PFS compliance, paper discovery, and file management (although they fail to explain what paper discovery their non-bellwether cases required outside of the PFS). The blended rate for their 3,341 hours of “[d]iscovery file management” is \$687.50 an hour, compared to a blended rate of \$298.80 for Kansas Common Benefit firms for this same category. And their 18,179.9 hours of “[p]re-settlement communications with clients” is billed at \$435.32 an hour. ECF Nos. 3646-1 at 6, 3646-2 at 5.

159. And, nearly 60% of their time was spent on pre-settlement communications with clients and perfecting Claim Forms, of which 33.5% was spent on perfecting Claim Forms—the least risky work in the case. *Id.* This is largely administrative, not legal, work, with no appreciable class-wide benefit. *See, e.g.*, ECF No. 3567 at 4-5 (“monitoring the litigation,” “answer[ing] questions about the litigation,” and “updating a dedicated case website.”).

XI. HENINGER GARRISON DAVIS, LLC (“HGD”)

A. HGD’S EXECUTION OF THE PARTICIPATION AGREEMENT

160. By March 2016, Co-Lead Counsel had reached out to Lew Garrison at Heninger Garrison David, LLC (“HGD”) to ask this firm to sign a Participation Agreement for the Common Benefit Order.

161. Mr. Garrison requested changes to the Participation Agreement to allow his firm to seek reimbursement for other Common Benefit time and expenses expended in Illinois beyond those projects assigned to him by Co-Lead Counsel. Co-Lead Counsel told Mr. Garrison that we

did not believe that the Common Benefit Order allowed this, but that this would be an issue the Court would decide.

162. On or about March 15, 2016, the HGD signed the Common Benefit Participation Agreement HGD. Illinois ECF No. 349-1.

163. The Participation Agreement stated:

The parties do anticipate that, from time to time, Common Benefit Work, as described further below and in various orders entered by the MDL Court, may be performed by Participating Counsel consistent with instructions by MDL Lead Counsel, or other parties having the authority to designate such work. Such acceptance and performance of MDL designated work shall not impact the ability of Participating Counsel to seek reimbursement for Common Benefit expenses and fees **for other work** which was performed on behalf of the Southern District of Illinois litigation, **which was not specifically designated as Common Benefit Work by the MDL**, nor shall such acceptance and performance of MDL designated work entitle Participating Counsel to reimbursement for expenses and fees for other work which was performed on behalf of the Southern District of Illinois Litigation, **which was not specifically designated as Common Benefit Work by the MDL**.

In order to be eligible for reimbursement as Common Benefit Work, time expended **must** be: (a) for the common benefit of all producer and/or non-producer plaintiffs; (b) appropriately authorized by Lead Counsel in writing; (c) **timely submitted using the monthly reports created by Lead Counsel**; (d) reasonable; (e) verified by a partner or shareholder in the submitting firm; and (f) in compliance with the MDL Order.

Illinois ECF No. 349-1 at 8-9 (emphasis added).

164. This language made clear that this reservation of rights was exclusively “for Common Benefit expenses and fees for other work” performed by HGD, “which was not specifically designated as Common Benefit Work by the MDL” *Id.*

165. Although Co-Lead Counsel allowed HGD to include this reservation of rights to raise the issue with the Court, the Participation Agreement states: “MDL Lead Counsel maintains that the eligibility for fees and expenses for Common Benefit Work shall be governed by the

MDL Order and reserves all arguments related to eligibility of requests for fees and expenses.”
Id. at 8.

166. For this assigned common benefit work “to be eligible for reimbursement as Common Benefit Work,” the Participation Agreement signed by HGD stated that “time expended must be: . . . (c) timely submitted using the monthly reports created by Lead Counsel; (d) reasonable; (f) verified by a partner or shareholder in the submitting firm; and (f) in compliance with the Common Benefit Order.” The Participation Agreement additionally stated that all “time must be accurately and contemporaneously maintained,” that time entries “that are not sufficiently detailed may be not considered for common benefit payments” and “Participating Counsel must follow the guidelines set forth in the Court’s Order.” *Id.* at 9.

167. The Participation Agreement contained a nearly identical provision for the reimbursement of Common Benefit Expenses, which required that such expenses “must” be submitted to Co-Lead Counsel on a monthly basis:

In order to be eligible for reimbursement as Common Benefit Expenses, said expenses **must** be: (a) for the common benefit of all producer and/or non-producer plaintiffs; (b) appropriately authorized by Lead Counsel in writing; (c) **timely submitted using the monthly reports created by Lead Counsel**; (d) reasonable; (e) verified by a partner or shareholder in the submitting firm; and (f) in compliance with the Order. Attorneys shall keep all receipts for all expenses, which shall be made available upon request. Examples of authorized and unauthorized expenses are listed in the Order.

Id. at 9 (emphasis added).

168. After HGD signed this Participation Agreement, Co-Lead Counsel assigned only three Common Benefit projects to this firm. First, HGD was asked to assist in the review and analysis of Syngenta’s privilege logs and to participate in the meet and confer conferences regarding these privilege logs. Second, HGD was asked to take the lead in the deposition of Thomas Sleight of U.S. Grains Council. Third, HGD was asked to help with a records subpoena.

No Common Benefit work was ever assigned to the other nine law firms included in the HGD fee application.

169. HGD never submitted to Co-Lead Counsel any common benefit time and expenses for this work assigned by Co-Lead Counsel.

B. HGD'S DISCOVERY PARTICIPATION

170. Other than the deposition of U.S. Grains Counsel, Co-Lead Counsel never requested that HGD attend or participate in a deposition noticed by Co-Lead Counsel.

171. In its fee Application, HGD lists a series of depositions that HGD entitles "Common Benefit Deposition (prepare for, participated in, and/or examined witnesses)." Illinois ECF No. 349 at 21.

172. HGD lists two of its attorneys as attending the Andrew McConville deposition, including claiming that Mark Ekonen attended the "Andy McOnville [sic] (multi-day)."

173. This deposition occurred in Sydney, Australia. No attorney from HGD attended this deposition in person. HGD attorney Christopher Hood entered an appearance by phone on day one of this two-day deposition and is listed as attending on day 2. He did not ask a question during either day of the deposition. There is mention in the transcripts of this deposition that Mr. Ekonnen attended either day of the deposition.

174. At the four day deposition of Yongsheng Zhang, the one day deposition of Eddie Zhu and the one-day deposition of David O'Reilley, HGD attorneys are listed as in attendance, but HGD attorneys asked no questions of the witnesses at these depositions. HGD's attendance at Mr. Zhang's deposition was by phone only.

C. HGD'S ACCESS TO CO-LEAD COUNSEL'S RELATIVITY DATABASE

175. Syngenta began producing documents to Co-Lead Counsel in March 2015.

176. By the end of February 2016, Syngenta had produced to Co-Lead Counsel more than 300,000 documents, totaling in excess of 1.35 million pages.

177. By March 2016, Co-Lead Counsel had reviewed hundreds of thousands of Syngenta's documents, conducted three in-person document review training sessions in Kansas City, and was on month three of depositions of Syngenta's witnesses.

178. Documents produced by Syngenta were all loaded into a Relativity database, which my firm managed. Access to the Relativity database was available to all Coordinating Counsel and all counsel who signed the Common Benefit Order's Participation Agreements.

179. Co-Lead Counsel paid \$90/month for each individual who wanted access to the Relativity database.

180. This license allowed the Relativity user to review and code any document produced by Syngenta. The user could run simple or complex searches across this database, with or without assistance from Stephanie Walters, Stueve Siegel Hanson's e-Discovery Counsel. Ms. Walters additionally helped Coordinated and Participating firms create unique coding layouts if they wanted the Relativity interface to include different coding layouts.

181. After HGD signed the Participation Agreement, HGD requested access to the Relativity database, which Ms. Walters immediately established. Co-Lead Counsel paid \$90 Relativity user fees each month for as many as eight HGD attorneys throughout discovery.

D. HGD'S SUPPLEMENT TO FEE AND EXPENSE APPLICATION

182. In HGD's Supplement, Illinois ECF No. 354, it is difficult to determine which hours fall within which of the Court's categories because the hours added by HGD do not consistently appear in a column with a corresponding timekeeper.

183. HGD does not provide an overall summary of the ten firms included in its original Application. We have attempted to add up the numbers in the various PDFs to arrive at these totals.

184. In its Supplement, HGD states that “HGD’s reported time for common benefit work on behalf of class members is 7,097.50.” Illinois ECF No. 354. It is unclear whether HGD intends for this number to represent just the Approved Common Benefit hours for the HGD firm alone, or whether it purports to represent the entire Approved Common Benefit total from all ten firms included in the HGD filing. In either event, the 7,097.50 does not match either the HGD-alone total or an attempt to manually total the Approved Common Benefit hours submitted by all ten HGD-related firms.

185. HGD’s Supplement also does not include a lodestar total for these common benefit hours. Adding up the lodestar for just the HGD firm, the total Approved Common Benefit lodestar appears to be \$4,841,650.51 and the overall Approved Common Benefit lodestar appears to be \$8,274,749.39 across all HGD firms.

186. In the Supplement Chart filed on behalf of the Onder Law Firm, the Notes column states: All categories ‘Approved’ Common Benefit Work under the terms of Document 936—‘Order Establishing Protocols for Common Benefit Work and Expenses...’ is defined in part as having been formally approved by Lead Counsel.”

187. HGD never provided any of its time and/or expense entries to Co-Lead Counsel and, consequently, none were ever “formally approved by Lead Counsel.”

XII. MINNESOTA LEADERSHIP

A. FEE-SHARING AGREEMENT

188. The Fee-Sharing Agreement, ECF No. 3587-8, was in part intended to avoid friendly-fire between Kansas and Minnesota Common Benefit Attorneys about the relative

contribution of each to obtain the settlement. In negotiating the Fee-Sharing Agreement, the parties gave weight to the fact that the vast majority of the nationwide class and the compensable bushels on which damages were based would have fallen into the federal litigation classes.

189. Based on the determinations of the group's shared expert, the Minnesota class represented only 8% of compensable bushels. In the event Minnesota settled in state court, the amendment to the JPA required Minnesota to pay Kansas Common Benefit Attorneys 33⅓ of their fee; this would have had the effect of reducing their share of any attorneys' fees to just 6% of the compensable, nationwide bushels (if a Minnesota court had awarded one-third of a fund).

190. Thus, Kansas Common Benefit Attorneys represented the vast majority of all releases demanded by Syngenta and had a significant fee interest in any Minnesota class-wide recovery.

191. The agreed-upon allocation reflects not only the Kansas jury verdict, but the fact that after Minnesota class trial, only individual cases remained in Minnesota, while Syngenta faced the threat of multiple class trials in the MDL.

192. In negotiating the Fee-Sharing Agreement, Kansas Common Benefit Attorneys started with nearly twice the common-benefit lodestar as their Minnesota counterparts,⁴ but even that understates their contribution because Minnesota attorneys followed Kansas in many respects. While Minnesota succeeded on the motion to dismiss, they had a successful roadmap to follow because the efforts in Kansas. The same was true on preemption, class certification, and *Daubert / Frye-Mack* briefing.

⁴ In their application, Minnesota now includes (as Exhibit 14) additional hours spent on PFS compliance for non-bellwether plaintiffs. To the extent, Bassford now tries to rely on this time to inflate their lodestar: (1) Kansas attorneys have not included such time in their lodestar; and, (2) such time did not contribute to the creation of the fund, as explained above.

193. The Fee Sharing Agreement is intended to cover all common-benefit work performed and approved in Minnesota. ECF No. 3587-8 at 3 n.3 (“Daniel E. Gustafson and Lew Remele will allocate fees represented by this percentage among all firms that provided common benefit work in the Minnesota MDL consistent the Minnesota MDL Court’s orders.”).

194. Thus, if Watts is compensated for their approved common-benefit work, that award should come out of the Minnesota Allocation pursuant to the agreement.

195. There were never any discussions between Minnesota and Kansas Lead Counsel about Bassford’s common-benefit time being excluded from the Minnesota allocation,

196. It is unfathomable that Bassford would not be compensated for their Minnesota common-benefit time from the Minnesota Allocation.

197. Likewise, although Paul performed work in both the MDL and Minnesota (as an EC member in both jurisdictions), the work was distinct and separately approved by each respective lead counsel.

198. Paul will be paid for his MDL work from the MDL Allocation, and Kansas Lead Counsel was always clear and unequivocal that Minnesota should honor the work of the firms approved and performed in that jurisdiction.

199. It was always a curious negotiating position that Minnesota Lead Counsel would attempt to disclaim Paul’s contribution, given that Paul performed more than many, and as much as most, in that jurisdiction, attending many of the depositions for Minnesota; traveling overseas; and, participating in both Mensik and the Minnesota class trial.

200. Kansas Lead Counsel was never privy to any negotiations between Watts and Minnesota Lead Counsel, but the Fee-Sharing Agreement was clear that, as to the aggregate fee,

the 12.5% was intended to cover all common-benefit work in Minnesota. ECF No. 3587-8 at 3 n.3.

201. Moreover, Minnesota Lead Counsel was always negotiating from a claimed lodestar of \$35-40 million, which necessarily included Watts' work—indeed, that work continues to be included as part of their fee application now. ECF No. 3662-1 at 529.

202. The argument that Watts is not expressly mentioned as being “include[d]” in the definition of the Minnesota group in the Fee-Sharing Agreement does not otherwise make ambiguous the clear statement that follows. ECF No. 3587-8 at 3 n.3.

203. In fact, that agreement defines to “include” only some of the firms being compensated out of the Kansas Allocation. Compare ECF No. 33587-8 at 1 n.2 (Fee-Sharing Agreement) (listing 13 firms) with ECF No. 3587-1 at ¶ 643 (identifying “44 law firms that performed common benefit work”).

204. Minnesota Lead Counsel claims “Mr. Watts agreed with Mr. Gustafson to give those claims to the Minnesota leadership and that he (Mr. Watts) would rely solely on his private contracts for compensation.” (at 46)

205. But that is not consistent with Watts' brief, where they contend that if Watts Guerra is awarded less than it bargained for with respect to its contract fees, then it should be awarded not only its expenses, but also a common benefit fee in an amount sufficient to make up the difference.” ECF No. 3611 at 28 n.11.

206. Since Watts is not entitled to his private contract fees in an award from the Court (*supra*), it does not appear they have given up their entitlement to a portion of the Minnesota allocation

207. It also appears Minnesota Lead Counsel did not give common-benefit credit to contracted lawyers for work they did for clients that were bellwether plaintiffs. Kansas attorneys credited this work and included this work in their submission, and intend to compensate these attorneys from the MDL Allocation. That should come out of the Minnesota allocation.

208. Minnesota Lead Counsel further contend that the Court should award an aggregate fee of 33 $\frac{1}{3}$ percent and then refer the matter of allocation to the Special Masters. (at 57)

209. But the Special Masters have already assisted the parties in allocating the gross fee between Kansas, Minnesota, and Illinois Lead Counsel. After many hours, they recommended and approved the Fee-Sharing Agreement.

210. That agreement allocates less in class fees than Co-Lead counsel wanted to accept (a substantial reduction in terms of both their contribution and the fact that they represented 74% of the bushels produced in the country), but it was the hard-bargained deal struck after great effort and expense on behalf of all involved. The issue should not be re-opened.

211. To the extent matters are referred to the Special Masters, it should be for a recommendation as to how to divide up some or all of the 20% portion of the attorneys' fees not allocated by the Fee-Sharing Agreement. That is, after all, what the agreement provided. ECF No. 3587-8 at 3 ("The remaining 20% of any attorneys' fees awarded by the Court will be allocated by the Kansas MDL Court, in consultation and agreement with the Minnesota MDL Court and Judge Herndon of the United States District Court for the Southern District of Illinois, taking into consideration the recommendation by the Special Masters.")

B. ATTENDANCE AT DEPOSITIONS

212. While Minnesota attorneys and other Movants attended the same depositions as Kansas attorneys, the former spent much time observing, not questioning the witness and

obtaining evidence. Even though the coordination order (ECF No. 1099 at 4) gave Minnesota attorneys “one third of the total time available” to question the witness—the same amount of time presumptively allocated to Kansas attorneys—the reality was different. I asked a paralegal in my office to review each of the deposition transcripts for depositions that were noticed or cross-noticed in the MDL, including witnesses of current or former Syngenta employees, third-party witnesses, and defendants’ expert witnesses. She reviewed 180 days of deposition transcripts. The following chart lists the witnesses and date(s) of his or her deposition:

	WITNESS	DATE
1	Adelman, Jessica Vol. I	4/20/2016
2	Adelman, Jessica Vol. II	4/21/2016
3	Altuna, Pablo (ADM) (Taken in ADM/Louisiana case)	9/29/2016
4	Araba, PhD, Miloud Vol. I	3/3/2016
5	Araba, PhD, Miloud Vol. II	3/4/2016
6	Aspell, Robert Patrick (Cargill) Vol. I (Taken in ADM/Louisiana case)	7/7/2016
7	Aspell, Robert Patrick (Cargill) Vol. II (Taken in ADM/Louisiana case)	7/8/2016
8	Barksdale, William, Vol. I (Cargill) (Taken in ADM/Louisiana case)	6/16/2016
9	Barksdale, William, Vol. II (Cargill) (Taken in ADM/Louisiana case)	6/17/2016
10	Baudler, David Paul, Vol. I (Cargill) individual (Taken in ADM/Louisiana case)	6/14/2016
11	Baudler, David Paul, Vol. II (Cargill) individual (Taken in ADM/Louisiana case)	6/15/2016
12	Baudler, David, Vol. I (Cargill) 30(b)(6) (Taken in ADM/Louisiana case)	5/16/2016
13	Baudler, David, Vol. II (Cargill) 30(b)(6) (Taken in ADM/Louisiana case)	5/17/2016
14	Becraft, Steven (Cargill)	6/27/2016
15	Bell, Brett (Cargill)	6/28/2016
16	Bernens, Jack Vol. I	4/4/2016
17	Bernens, Jack Vol. II	4/5/2016
18	Bernens, Jack Vol. III	4/6/2016
19	Bertels, Paul (NCGA)	5/11/2016
20	Bierman, Michael (taken in Poletti - SDIL case)	6/8/2016
21	Bodin, Timothy, 30(b)(6), Vol. I (Cargill)	6/16/2016
22	Bodin, Timothy, 30(b)(6), Vol. II (Cargill)	6/17/2016
23	Boerm, Christopher, Vol. I (ADM)	6/20/2016
24	Boerm, Christopher, Vol. II(ADM)	6/21/2016
25	Brammer, Elliott (ADM)	6/8/2016
26	Brisco, Robert (individual)	5/17/2016
27	Brisco, Robert 30(b)(6)	5/18/2016

28	Buchanan, David (Cargill)	8/17/2016
29	Butters, Paul (Cargill)	3/29/2017
30	Chen, Jerrity Vol. I (Cargill)	7/5/2016
31	Chen, Jerrity Vol. II (Cargill)	7/6/2016
32	Chen, PhD, Jingwen	3/18/2016
33	Cooklin, Henry (ADM)	5/25/2016
34	Daines, Robert	1/27/2017
35	Eldstrom, Cheryl (Cargill)	12/13/2016
36	Ellington, Ryan for Winnsboro Elevator	5/5/2016
37	Fiedler, Stefan (ADM)	7/15/2016
38	Fields, Nathan Vol. I (NCGA)	5/9/2016
39	Fields, Nathan Vol. II (NCGA)	5/10/2016
40	Finch, Charles	8/9/2016
41	Fischel, Daniel	8/11/2016
42	Fisher, Max Vol. I (NGFA)	5/3/2016
43	Fisher, Max Vol. II (NGFA)	5/4/2016
44	Flickinger, Brent (ADM)	7/8/2016
45	Flickinger, Brent 30(b)(6) (ADM)	6/30/2016
46	Friant, Nick (Cargill)	6/13/2016
47	Giltner, Matt J. (ADM)	10/14/2016
48	Giroux, Randal William Vol. I (Cargill - individual)	6/9/2016
49	Giroux, Randal William, Vol. I (Cargill)	5/16/2016
50	Giroux, Randal William, Vol. II (Cargill - individual)	6/10/2016
51	Giroux, Randal William, Vol. II (Cargill)	5/17/2016
52	Goodwin, Barry K.	1/31/2017
53	Gordon, Randall C. (NGFA)	6/6/2016
54	Grabiell, Rick (ADM) Vol. I	9/8/2016
55	Grabiell, Rick (ADM) Vol. II	9/9/2016
56	Gummelt, Stafanie (ADM)	7/22/2016
57	Hale, William, Vol. I (Cargill) individual	6/29/2016
58	Hale, William, Vol. I, 30(b)(6) (Cargill)	5/18/2016
59	Hale, William, Vol. II (Cargill) individual	6/30/2012
60	Hale, William, Vol. II 30(b)(6) (Cargill)	5/19/2016
61	Hawk, Arvid (GAC-Global Agricultural Consulting)	7/25/2016
62	Huang, JuHui (Syngenta/Cargill), Vol. I	9/22/2016
63	Huang, JuHui (Syngenta/Cargill), Vol. II	9/23/2016
64	Huber, Scott A. (taken in Poletti - SDIL case)	8/4/2016
65	Huber, Scott A. 30(b)(6) Vol. III	1/29/2016
66	Huber, Scott A. 30(b)(6) Vol. I	1/27/2016
67	Huber, Scott A. 30(b)(6) Vol. II	1/28/2016
68	Hull, Sarah Vol. I	3/23/2016
69	Hull, Sarah Vol. II	3/24/2016
70	Hurst, Maurice (Cargill)	12/16/2016

71	Johns, Douglas (ADM) Vol. I	7/18/2016
72	Johns, Douglas (ADM) Vol. II	7/19/2016
73	Jorgenson, Corey Vol. II (Cargill)	5/26/2016
74	Jorgenson, Corey, Vol. I	5/25/2016
75	Keighin, Andrew (ADM)	5/26/2016
76	Lai, Dinh (Cargill)	7/27/2016
77	Langholz, Christopher (Cargill)	6/29/2016
78	LaVigne, Andrew(American Seed Trade Association)	6/2/2016
79	Lee, Charles R. (Poletti case)	8/3/2016
80	Lee, Charles R. Vol. I	3/8/2016
81	Lee, Charles R. Vol. II	3/9/2016
82	Lee, Charles R. Vol. III	3/10/2016
83	Li, Minglu (TransCoastal)	6/3/2016
84	Li, Oscar (Cargill) Vol. I	8/23/2016
85	Li, Oscar (Cargill) Vol. II	8/24/2016
86	Locken, Patrick (Cargill)	3/3/2017
87	Lohmar, Bryan, Ph.D., Vol. I (U.S. Grains Council)	6/23/2016
88	Lohmar, Bryan, Ph.D., Vol. II (U.S. Grains Council)	6/24/2016
89	Mack, Michael Vol. I	4/28/2016
90	Mack, Michael Vol. II	4/29/2016
91	Martin, Duane Vol. I	1/29/2016
92	Martin, Duane Vol. II	2/9/2016
93	Martin, Gary, Co, Vol. I (North American Export Grain Association)	6/2/2016
94	Martin, Gary, Co, Vol. II (North American Export Grain Association)	6/3/2016
95	Martin, Rex Vol. I	5/3/2016
96	Martin, Rex Vol. II	5/4/2016
97	McConville, Andy Vol. I	3/31/2016
98	McConville, Andy Vol. II	4/1/2016
99	McHuguen, Alan	1/17/2017
100	Merceron, David (Cargill)	3/2/2017
101	Miller, Sean, (ADM)	6/2/2016
102	Milne, Travis	1/13/2017
103	Mimms, Quentin (Poletti case?)	4/4/2017
104	Minehart, Paul Vol. I	4/18/2016
105	Minehart, Paul Vol. II	4/19/2016
106	Molnar, Greg (Trans Coastal)	7/1/2016
107	Morgan, David (individual) Vol. I	4/12/2016
108	Morgan, David (individual) Vol. II	4/13/2016
109	Morgan, David 30(b)(6) Vol. I	2/10/2016
110	Morgan, David 30(b)(6) Vol. II	2/11/2016
111	Morgan, David 30(b)(6) Vol. III	2/12/2016
112	Moses, Pamela Vol. I (Trans Coastal)	4/7/2016
113	Moses, Pamela Vol. II (Trans Coastal)	4/8/2016

114	Moses, Pamela Vol. III (Trans Coastal)	5/26/2016
115	Moses, Pamela Vol. IV (Trans Coastal)	5/27/2016
116	Moses, Pamela Vol. V (Trans Coastal)	10/25/2016
117	Nimmo, Todd Vol. I 30(b)(6) (Rail Transfer)	4/20/2016
118	Nimmo, Todd Vol. II 30(b)(6) (Rail Transfer)	4/21/2016
119	Nimmo, Todd Vol. III 30(b)(6) (Rail Transfer)	8/24/2016
120	OMara, Matthew (Biotechnology Industry Org (BIO) 30(b)(6) Vol. I	6/28/2016
121	O'Mara, Matthew (Biotechnology Industry Org (BIO) 30(b)(6) Vol. II	6/29/2016
122	O'Reilly, David PhD	5/24/2016
123	Ozipko, Grant	3/7/2016
124	Page, Anthony G.	1/24/2017
125	Pisk, Davor Vol. I	4/21/2016
126	Pisk, Davor Vol. II	4/22/2016
127	Quain, Cheryl L.	1/19/2016
128	Ramsay, John	4/29/2016
129	Reed, Anthony (ADM)	6/3/2016
130	Reed, Anthony (ADM) 30(b)(6)	6/1/2016
131	Reed, Anthony (ADM) 30(b)(6)	10/14/2016
132	Rennie, Teresa	2/23/2016
133	Roberts, David	3/15/2016
134	Sanfeliu, Alex, Vol. I (Cargill)	6/23/2016
135	Sanfeliu, Alex, Vol. II (Cargill)	6/24/2016
136	Sather, Mark F.	3/2/2016
137	Sheppard, William	2/9/2017
138	Shull, Philip A.	1/27/2017
139	Sleight, Thomas 30(b)(6) Vol. II (U.S. Grains Council)	6/23/2016
140	Sleight, Thomas 30(b)(6) Vol. I (U.S.Grains Council)	6/22/2016
141	Smalley, Steve (Cargill)	2/16/2017
142	Smalley, Steve, Vol. I (Cargill)	5/18/2016
143	Smalley, Steve, Vol. II (Cargill)	5/19/2016
144	Stanko, David (Trans Coastal)	6/9/2016
145	Steiner, Patrick Vol. I	4/26/2016
146	Steiner, Patrick Vol. II	4/27/2016
147	Stonacek, Mark (Cargill)	3/24/2017
148	Stonacek, Mark, Vol. I (Cargill)	5/23/2016
149	Stonacek, Mark, Vol. II (Cargill)	5/24/2016
150	Taets, Joseph, Vol. I (ADM)	6/25/2016
151	Taets, Joseph, Vol. II (ADM)	6/26/2016
152	Thurman, Walter	8/8/2016
153	Trivisvavet, Ponsi Vol. I	4/26/2016
154	Trivisvavet, Ponsi Vol. II	4/27/2016
155	Uhlmeier, Wesley Vol. I (ADM)	6/15/2016

156	Uhlmeyer, Wesley Vol. II (ADM)	6/16/2016
157	Uhlmeyer, Westley (ADM)	6/23/2016
158	Von Lamezan, Stephen (ADM)	7/12/2016
159	Vulcan, Abigail	2/10/2016
160	Ward PhD, Dennis	2/17/2016
161	Wheeler, Jill Vol. I	3/17/2016
162	Wheeler, Jill Vol. II	3/18/2016
163	Wong, Andrew (Cargill) Vol. I	8/29/2016
164	Wong, Andrew (Cargill) Vol. II	8/30/2016
165	Wong, Andrew (Cargill) Vol. III	8/31/2016
166	Woodie, Eric (Trans Coastal)	6/7/2016
167	Xu, Claire	4/4/2016
168	Xu, Jason (Cargill) Vol. I	8/25/2016
169	Xu, Jason (Cargill) Vol. II	8/26/2016
170	Yang, Pauline (Trans Coastal)	6/2/2016
171	Zannoni, Lisa Vol. I	4/12/2016
172	Zannoni, Lisa Vol. II	4/13/2016
173	Zeph PhD, Lawrence Vol. I	1/20/2016
174	Zeph PhD, Lawrence Vol. II	1/21/2016
175	Zhang, PhD, Hongjun	2/1/2017
176	Zhang, PhD, Hongjun Vol. I	3/21/2016
177	Zhang, PhD, Hongjun Vol. II	3/22/2016
178	Zhang, PhD, Hongjun Vol. III	3/23/2016
179	Zhang, PhD, Hongjun Vol. IV	3/24/2016
180	Zhu, Eddie	4/5/2016

213. Next, she categorized all of the attorneys who appeared on the record at each of the depositions and the firm and party on whose behalf they appeared. Finally, based on the report at the beginning of transcript, she counted the number of pages between the beginning and end of each attorney's questioning. Then we totaled the pages for each category of questioner (*i.e.*, Kansas attorneys, Minnesota attorneys, etc.) and calculated a total percentage for each category and a total percentage after subtracting questioning by attorneys representing parties other than a plaintiff (*i.e.*, Syngenta and third-party defendants and witnesses). The results are in the tables after the next paragraph.

214. While Minnesota attorneys attended the same depositions as Kansas attorneys, the former spent more time observing rather than questioning the witnesses. As the tables above and below reflect, even though the coordination order (ECF No. 1099 at 4) gave both Minnesota and Kansas attorneys “one third of the total time available,” the reality was much different. Across Syngenta’s current and former employees, Kansas attorneys conducted **75%** of the examination performed by attorneys for plaintiffs, whereas Minnesota attorneys handled only **21%** of those examinations. Minnesota attorneys took a similar role in examining Syngenta’s expert witnesses, but an even smaller role in examining the third-party witnesses, where they conducted only **12%** of the plaintiffs’ examination (compared to Kansas attorneys’ **60%**). Kansas attorneys’ took the largest role in building the case against Syngenta’s regulatory witnesses. This was key trial evidence to establish both Syngenta’s misrepresentations and its negligence with respect to the status of its Chinese import approvals because none of these witnesses, several of whom resided in China, could be compelled to either the Kansas or Minnesota trials. Kansas attorneys conducted **83%** of the questioning (compared to **6%** by Minnesota attorneys).⁵ From the several days of the Minnesota class trial observed by Kansas attorneys, they can confirm that Minnesota attorneys used much of their questioning from these depositions. *Id.*

⁵ Regulatory witnesses were Miloud Araba, Scott Huber, Claire Xu, Eddie Zhang, Ponsi Trivisvavet, and Yongsheng Zhang.

Syngenta Witnesses			
Questioner	Pgs of Exam.	% Total Questioning	% of Pls Questioning
Pl. ADM	1,646	10.6%	10.6%
3d Party Def Bunge	64	0.4%	-
Pl. Cargill	1,289	8.3%	8.3%
Syngenta	57	0.4%	-
Pl. Louis Dreyfus	26	0.2%	0.2%
Kansas Attorneys	10,514	67.5%	68.0%
Joint EC Member Rep. Both MN and KS	152	1.0%	1.0%
Minnesota Attorneys	909	5.8%	5.9%
Heninger Group	924	5.9%	6.0%
Grand Total	15,581	100.0%	100.0%

Third Party Witnesses			
Questioner	Pgs of Exam.	% Questioning	% of Pls Questioning
Pl. ADM	501	2%	12%
Pl. Cargill	533	2%	13%
Syngenta	21,608	84%	-
Kansas Attorneys	2,460	10%	60%
Minnesota Attorneys	476	2%	12%
Heninger Group	122	0%	3%
MDL Individual Counsel	1	0%	0%
Witnesses' Counsel	10	0%	-
Grand Total	25,711	100%	100%

Defendants' Experts			
Questioner	Pgs of Exam.	% Questioning	% of Pls Questioning
Syngenta	5	0%	-
Kansas Attorneys	2,639	75%	75%
Minnesota Attorneys	724	20%	21%
Heninger Group	-		0%
MDL Individual Counsel	166	5%	5%
Grand Total	3,534	100%	100%

Regulatory Witnesses			
Questioner	Pgs of Exam.	% Questioning	% of Pls Questioning
Pl. ADM	184	5%	5%
Pl. Cargill	70	2%	2%
Syngenta	19	1%	-
Kansas Attorneys	2,922	82%	83%
Minnesota Attorneys	206	6%	6%
Heninger Group	157	4%	4%
Grand Total	3,558	100%	100%

All Witnesses			
Questioner	Pgs of Exam.	% Questioning	% of Pls Questioning
Pl. ADM	2,147	4.8%	9%
Biotechnology Innovation Organization and Witness	-	0.0%	0%
3d Party Def Bunge	64	0.1%	0%
Pl. Cargill	1,822	4.1%	8%
Syngenta	21,670	48.3%	-
3d Party Def Gaviion Grain	-	0.0%	0%
Global Environmental Ethics Counsel	-	0.0%	0%
Pl. Louis Dreyfus	26	0.1%	0%
Kansas Attorneys	15,613	34.8%	68%
Joint EC Member Rep. Both MN and KS	152	0.3%	1%
Minnesota Attorneys	2,109	4.7%	9%
NAEGA	-	0.0%	0%
NCGA	-	0.0%	0%
NGFA	-	0.0%	0%
Rail Transfer	-	0.0%	0%
Heninger Group	1,046	2.3%	5%
Trans Coastal	166	0.4%	1%
Trans Coastal and Prairie Creek Grain	1	0.0%	0%
USGC and Witness	10	0.0%	0%
Grand Total	44,826	100%	100%

215. Since none of the regulatory witnesses lived in Minnesota, Minnesota attorneys effectively delegated that portion of their trial to the Kansas attorneys who conducted these regulatory depositions.

C. ASSISTANCE TO MINNESOTA

216. Fee-Sharing Agreement also gave weight to the fact that Syngenta faced at least seven more class trials in the MDL, and that Kansas attorneys' (as class counsel) represented more than a majority of the corn producers and 74% or more of the corn bushels impacted by the *de facto* trade embargo. And, while the Minnesota class represented 8% of all corn bushels, the Fee-Sharing Agreement recognized that even if Minnesota attorneys obtained a judgment or resolved that case in the Minnesota Court, Kansas attorneys were entitled to a third of their fee awarded under the First Addendum to the JPA. In contrast, Minnesota attorneys were not entitled to any portion of the MDL class recoveries under the Addendum; thus, the greatest share of any nationwide class recovery to which Minnesota attorneys might have been entitled was around 6% of any such recovery. The 12.5% agreed to under the Fee-Sharing Agreement is more than double this amount.

217. Both Kansas and Minnesota reported significant time and lodestar when negotiating the Fee-Sharing Agreement, but, as their respective applications reflect, Kansas attorneys started with nearly twice the common-benefit hours and lodestar as Minnesota. Moreover, hours alone do not reflect relative contribution for several reasons. First, it does not reflect the benefits that Minnesota attorneys obtained by following Kansas attorneys on many early, important issues. Thus, while Minnesota attorneys prevailed in defeating Syngenta's motion to dismiss, they did so after Kansas attorneys demonstrated the path forward. Similarly, they followed on other issues, such as preemption, class certification, and expert-admissibility briefing. Even where filings were simultaneous between the two jurisdictions, drafts of briefs (or final versions) of much, or all, were shared by Kansas attorneys with Minnesota attorneys, and a comparisons show Minnesota attorneys adopted many arguments in substantially the same form and language as those presented in Kansas. For example, we looked at and found that

Minnesota's expert briefs contained much of the language from our drafts for Thurman, Goodwin, Carrato, Shull and McHughen. There were also pages of similarity between the class-certification briefs and the response to the motion to dismiss.

218. Kansas attorneys also led class certification, where they provided drafts of the brief; developed the expert reports and arguments; defended the experts and cross-examined all three of Syngenta's experts; and, handled the joint evidentiary hearing attended by Judge Sipkins. They also provided, on request, their presentation slides used at the oral argument for the Minnesota proceeding.

D. SHARING OF EXPERT EXPENSES

219. The shared or common experts were **Bruce Babcock** (plaintiffs' damages expert for both class certification and trial), **Colin Carter** (same), **Thomas Carrato** (defendants' standard-of-care expert), **Charles Finch** (defendants' damages expert for class certification), **Daniel Fischel** (defendants' damages expert for class certification and trial), **Randal Giroux** (plaintiffs' standard-of-care expert), **Barry Goodwin** (defendants damages expert for trial), **Joseph Keaschall** (plaintiffs' efficacy expert on MIR162 and Event 5307), **Kevin Latner** (plaintiffs' regulatory expert), **Alan McHughen** (defendants' GMO expert), **Dirk Maier** (plaintiffs' contamination expert), **William Sheppard** (defendants' stewardship expert), **Philip Shull** (defendants' regulatory expert), **William Thurman** (defendants damages expert for class certification and trial), and **Hongjun Zhang** (defendants' expert on Chinese law). Kansas attorneys took the lead on each of these experts, either in developing their reports with them and preparing them for their depositions (our experts) or preparing their cross-examination (Syngenta's experts). In addition, Minnesota attorneys developed two experts on corporate governance (Bernard Black and David Teece). We contributed towards the costs of these

experts, but ultimately withdrew them based on Syngenta's *Daubert* motion directed at these experts.

220. Because Minnesota leadership wanted access to the substantial expert work product created by Co-Lead Counsel, Co-Lead Counsel and Minnesota Leadership executed a sharing agreement that allowed such access in exchange for an agreement to share in the costs. Ex. 85.

221. Nearly all of the testifying experts identified by Minnesota leadership for the class trial were identified, retained and developed by Kansas attorneys.

XIII. ADDITIONAL POINTS

222. Co-Lead Counsel, successfully secured full damages on behalf of over 7,000 Kansas producers in the first and only case to reach a verdict.

223. With regard to the Minnesota trial, it is debatable whether calling the witnesses live was a benefit or a detriment. Notwithstanding Mr. Watts' self-evaluation of his cross examinations of Bernens and Lee, calling those witnesses live gave Syngenta an opportunity to put their defenses on display early in the plaintiffs' case. And, the witnesses scored some hits (as did Watts). But in the end, any attempt to predict how that would have played into the jury's verdict is speculative because the jury never reached a verdict.

224. Moreover, there was a downside to keeping the Minnesota class in Minnesota state court: the class could not sue Syngenta Seeds' parent corporations (all of whom were sued in the MDL), risking that any judgment might be unrecoverable. These tradeoffs reflect that neither forum was inherently better for the Plaintiffs.

225. The fee agreement used by my firm and by Co-Lead Counsel for this litigation has a section regarding how our firm would be paid in the event of a class resolution. It states in relevant part: "Client acknowledges and understands that the Law Firms may seek to bring the

Claims as a ‘class action.’ ... Client understands that if the Claims are certified for class treatment, any settlement and any award of attorneys’ fees or expenses would be subject to approval by the Court, and not Client.”

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on this 17th day of August, 2018, in Kansas City, Missouri.

A handwritten signature in blue ink, reading "Patrick J. Stueve". The signature is written in a cursive style with a large initial "P".

Patrick J. Stueve

EXHIBIT 76

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE SYNGENTA AG MIR162 CORN
LITIGATION

Master File No. 2:14-MD-02591-JWL-JPO

THIS DOCUMENT RELATES TO
ALL CASES EXCEPT:

MDL No. 2591

*Louis Dreyfus Company Grains
Merchandising LLC v. Syngenta AG, et
al., No. 16-2788-JWL-JPO*

*Trans Coastal Supply Company, Inc. v.
Syngenta AG, et al., No. 2:14-cv-02637-
JWL-JPO*

*The Delong Co., Inc. v. Syngenta AG, et
al., No. 2:17-cv-02614-JWL-JPO*

*Agribase International Inc. v. Syngenta
AG, et al., No. 2:15-cv-02279-JWL-JPO*

SUPPLEMENTAL DECLARATION OF CHRISTOPHER A. SEEGER

I, Christopher A. Seeger, under penalty of perjury, hereby declare:

1. I am a partner of the firm of Seeger Weiss LLP (“Seeger Weiss”).
2. I am making this declaration based on my personal knowledge and if called to testify to the contents hereof, I could and would competently do so.
3. As the Court is aware, I was appointed to the Plaintiffs’ Settlement Negotiation Committee, ECF No. 3366, to work towards reaching a global resolution of this MDL and the related litigations pending in other courts, both state and federal.
4. As *de facto* chair of that committee, I interacted frequently with Special Master Reisman and Special Master Stack, the Honorable David R. Herndon of the Southern District of

Illinois, Syngenta's counsel, the court-appointed leadership in the Minnesota state class action, and attorneys representing tens of thousands of individual clients in the various Syngenta-related litigations.

5. Based on my extensive involvement in the negotiations, I can confirm that the \$217.7 million Kansas Class verdict in June 2017 and the series of State Class trials scheduled for 2018 and 2019 in this MDL played a significant role in convincing Syngenta that it needed to get serious about entering into a global resolution.

6. As part of those negotiations, Syngenta made it clear that its primary motivation in these settlement discussions was to secure a class-wide release from all U.S. corn farmers who may have priced corn during the relevant time period.

7. Although it hoped that Mikal Watts' clients would participate, Syngenta was willing to proceed with a settlement without them—if necessary—as long as the settlement included a class-wide release.

8. I was also involved in the negotiations that resulted in the Fee Sharing Agreement attached as Ex. 8 to the July 10, 2018 Declaration of Patrick J. Stueve, ECF No. 3587-8.

9. That Fee Sharing Agreement explicitly provided that 12.5% of the fee awarded would be allocated to the Minnesota MDL and that Daniel E. Gustafson and Lew Remele would allocate fees represented by this percentage among all firms that provided common benefit work in the Minnesota MDL that was consistent with the Minnesota MDL Court's orders.

10. Thus, if Watts submitted common benefit time to Minnesota—which I understand his firm did—then that common benefit time would be compensated out of the Minnesota MDL 12.5% allocation. I was unaware of any agreement between Mr. Gustafson and Mr. Watts to the contrary.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on this 17th day of August, 2018, at Ridgefield Park, New Jersey New York.

/s/ Christopher A. Seeger

Christopher A. Seeger

EXHIBIT 77

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**IN RE SYNGENTA AG MIR162 CORN
LITIGATION**

Master File No. 2:14-MD-02591-JWL-JPO

**THIS DOCUMENT RELATES TO
ALL CASES EXCEPT:**

MDL No. 2591

*Louis Dreyfus Company Grains
Merchandising LLC v. Syngenta AG, et
al., No. 16-2788-JWL-JPO*

*Trans Coastal Supply Company, Inc. v.
Syngenta AG, et al., No. 2:14-cv-02637-
JWL-JPO*

*The Delong Co., Inc. v. Syngenta AG, et
al., No. 2:17-cv-02614-JWL-JPO*

*Agribase International Inc. v. Syngenta
AG, et al., No. 2:15-cv-02279-JWL-JPO*

**SUPPLEMENTAL DECLARATION OF DON M. DOWNING OF
GRAY, RITTER & GRAHAM, P.C.**

I, Don M. Downing, under penalty of perjury, hereby declare:

1. I am an officer, director and shareholder at Gray, Ritter & Graham, P.C. (“GRG”) and counsel of record for Plaintiffs in this litigation.

2. I am making this declaration based on my personal knowledge and if called to testify to the contents hereof, I could and would competently do so.

3. This declaration is submitted in support of Plaintiffs’ consolidated response to the applications for attorneys’ fees and expenses submitted by other law firms.

4. In February and March 2016, I spoke with Jim Onder at OnderLaw, LLC regarding whether the attorneys involved in filing the Illinois lawsuits would sign the Common

Benefit Order's Participation Agreement. As a part of these discussions, I sent Mr. Onder a copy of the Participation Agreement.

5. Mr. Onder told me that the firms intended to sign the Participation Agreement and encouraged me to contact Lew Garrison at Heninger Garrison Davis, LLC ("HGD") to discuss.

6. On or about March 6, 2016, I spoke with Mr. Garrison. During this call, Mr. Garrison asked what common benefit work Co-Lead Counsel would assign to his firm to perform. I told him that I anticipated that we would have some work for his firm, but we needed to understand who would have availability to help with this work.

7. With regard to the Participation Agreement, Mr. Garrison said he wanted to reserve his right to seek common benefit fees for work beyond the projects assigned to his firm by Co-Lead Counsel. I told Mr. Garrison that pursuant to the Common Benefit Order, work not directly assigned by Co-Lead Counsel would not be considered Common Benefit work and would not be eligible for common benefit fees or reimbursement of expenses.

8. Mr. Garrison was insistent that he wanted to reserve his right to raise this issue. I told him he was welcome to reserve the right to raise that issue, but it would not alter the language in the Common Benefit Order limiting compensable Common Benefit work to just that work assigned by Co-Lead Counsel.

9. On or about March 15, 2016, HGD signed the Common Benefit Participation Agreement. Although HGD included its reservation of rights to raise the fee issue, the Participation Agreement states, consistent with my phone conversation with Mr. Garrison: "MDL Lead Counsel maintains that the eligibility for fees and expenses for Common Benefit Work shall be governed by the MDL Order and reserves all arguments related to eligibility of requests for fees and expenses."

10. After HGD signed this Participation Agreement, my recollection is that Co-Lead Counsel assigned only three Common Benefit projects to this firm. First, HGD was asked to assist in the review and analysis of Syngenta's privilege logs and to participate in the meet and confer conferences regarding these privilege logs. Second, HGD was asked to take the lead in the deposition of Thomas Sleight of U.S. Grains Council. Third, HGD was asked to draft two records subpoenas to the University of Illinois. No Common Benefit work was ever assigned to the other nine law firms included in the HGD fee application to the best of my recollection.

11. HGD never submitted to Co-Lead Counsel any common benefit time and expenses for this work assigned by Co-Lead Counsel.

12. On June 5, 2018, as part of finalizing the fee application on behalf of Kansas Common Benefit firms, I reached out via email to Mr. Garrison to talk about HGD's Common Benefit time and expenses.

13. On June 6, 2018, Mr. Garrison and I spoke by phone. I directly asked him to belatedly submit any time and expense records for any Common Benefit work, including the two Common Benefit projects assigned to HGD by Co-Lead Counsel.

14. Mr. Garrison told me that he would not submit time or expenses to Co-Lead Counsel for the Common Benefit projects assigned by Co-Lead Counsel and instead intended to submit this time and related expenses as part of his firm's fee application in Illinois.

15. In my previous declaration, I referenced my work to help prepare the two damages experts who testified in the Kansas trial, Dr. Bruce Babcock and Dr. Colin Carter, for their testimony in the Minnesota class trial.

16. As part of this preparation, I shared my direct outlines from the Kansas trial for these experts with Minnesota leadership.

17. After Dr. Babcock and Dr. Carter had testified in the Kansas trial, I traveled to Chicago to meet with both of these experts in person to prepare them for their direct testimony in Minnesota. In my meetings with Drs. Babcock and Carter, I continued to review and revise the direct outline I had created for the Kansas trial to tailor the testimony from these experts for the Minnesota trial.

18. I subsequently traveled to Minnesota to again meet with both experts to prepare them for their direct testimony a final time.

19. The Minnesota class trial ended before either Dr. Babcock or Dr. Carter testified live.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on this 17th day of August, 2018, in St. Louis, Missouri.

/s/ Don M. Downing
Don M. Downing

EXHIBIT 78

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

IN RE SYNGENTA AG MIR162 CORN
LITIGATION

THIS DOCUMENT RELATES TO ALL CASES
EXCEPT:

*Louis Dreyfus Company Grains Merchandising
LLC v. Syngenta AG, et al., No. 16-2788-JWL-JPO*

*Trans Coastal Supply Company, Inc. v. Syngenta
AG, et al., No. 2:14-cv-02637-JWL-JPO*

*The Delong Co., Inc. v. Syngenta AG, et al., No.
2:17-cv-02614-JWL-JPO*

*Agribase International Inc. v. Syngenta AG, et al.,
No. 2:15-cv-02279-JWL-JPO*

Master File No. 2:14-MD-02591-JWL-JPO

MDL No. 2591

**SUPPLEMENTAL DECLARATION OF PROFESSOR ROBERT H. KLONOFF
RELATING TO ATTORNEYS' FEES**

ROBERT H. KLONOFF, under penalty of perjury, declares as follows:

I. INTRODUCTION

1. On July 10, 2018, I submitted a declaration relating to attorneys' fees, costs, and incentive payments. *See* Decl. of Prof. Robert H. Klonoff Relating to Attorneys' Fees, Costs, & Incentive Payments (Dkt. No. 3587-6) (hereinafter "Klonoff Decl."). In that declaration, I examined (1) class counsel's request for attorneys' fees; (2) their proposed allocation of attorneys' fees; (3) their requested out-of-pocket costs; and (4) their proposed incentive payments to certain MDL class representatives and bellwether plaintiffs. I explained in detail why, in my opinion, class counsel's requests were reasonable.

2. Also on July 10, 2018, numerous other attorneys submitted their own fee requests. In some instances, those requests were accompanied by expert declarations. I have been asked by class counsel to opine on certain of those July 10 submissions. In particular, I have been asked to opine on:

(1) the application of the Watts Guerra law firm for attorneys' fees and costs (*see* Fee & Expense Appl. by Watts Guerra LLP (Dkt. No. 3580) (hereinafter "Watts Fee Appl.")), along with other applications raising similar issues, giving special attention to two expert declarations accompanying the Watts application (one submitted by five experts, the other submitted by two experts); and

(2) various attorneys' fees submissions (*e.g.*, the Bassford Remele submission, *see* Bassford Remele, P.A.'s Mot. Regarding Allocation of Attorneys' Fees (Dkt. No. 3565) (hereinafter "Bassford Mot.")) arguing that the Court should defer any decision on attorneys' fees until after the claims period has closed.

As with my original declaration, I am offering my opinions for the Court's consideration based on my background and experience. I recognize, of course, that my role is limited and that this Court will make the ultimate decision.

II. QUALIFICATIONS

3. My qualifications are set forth in my original declaration. *See* Klonoff Decl. ¶¶ 2–15 & App. A.

III. MATERIALS RELIED UPON

4. In addition to the materials listed in my original declaration (*see id.* ¶ 16 & App. B), I have relied upon:

- Fee and Expense Application By Watts Guerra LLP (with all accompanying exhibits, including the expert declarations referenced above) (Dkt. No. 3580);
- Memorandum in Support of the Fee & Expense Application by Watts Guerra LLP (Dkt. No. 3611);
- Memorandum In Support of Touns/Coffman Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Expenses (Dkt. No. 3567);
- Bassford Remele, P.A.'s Memorandum of Law Regarding Allocation of Attorneys' Fees (Dkt. No. 3568);
- Paul Byrd Law Firm, PLLC's Brief in Support of Petition for an Award of Attorneys' Fees and Reimbursement of Costs and Expenses (Dkt. No. 3586);
- Order Establishing Protocols for Common Benefit Work and Expenses and Establishing the Common Benefit Fee and Expense Funds (Dkt. No. 936);
- August 3, 2018 Supplemental Attorneys' Fees Filings from All Jurisdictions;
- Amended and Restated Joint Prosecution Agreement;
- Notices of Corrections to Previously Filed Documents;
- First Addendum to Joint Prosecution Agreement;
- Long-Form Class Settlement Notice;
- Touns/Coffman Exclusions Consolidated Spreadsheet;
- Class Certification Exclusions from Watts Guerra (Appendix A);
- The Court's Microsoft Excel Spreadsheet for the Categorization Supplement; and
- Consolidated Response of Kansas MDL Co-Lead Counsel and Settlement Class Counsel Christopher Seeger to the Various Petitions for Attorneys' Fees (filed contemporaneously).

I have also reviewed additional case law and court filings in other class action cases.

IV. SUMMARY

5. **Watts's and Other Attorneys' Fee Applications.** In justifying their fee applications, Watts, its experts, and certain other attorneys rely on legally erroneous arguments and fail to address critical factual allegations.

6. First, various fee applications address the issue of whether this Court has authority to review contingency fee contracts. As I explain in Section V, this Court need not decide the issue. In any event, the arguments by Watts, its experts, and certain other attorneys that this Court lacks such authority are contrary to settled law.

7. Second, Watts, its experts, and certain other attorneys rely heavily on numerous contingency fee contracts entered into between the attorneys and individual farmers and grain elevators, asserting that the farmers and grain elevators were fully and accurately advised of their rights. Again, as I explain in Section V, this Court need not examine the circumstances surrounding the formation of those contracts, because the individual contracts are not relevant to the Court's award and allocation of attorneys' fees. But, in any event, some of the fee applications fail to address factual allegations that, if true, bear on the circumstances surrounding the formation of the contracts.

8. Third, Watts and its experts argue that class members who hired their own lawyers should pay no more than class members who did not. There is no legal authority for that position, and it is contrary to the class notice in this case and to class notices in literally thousands of other cases.

9. Fourth, Watts and its experts overstate Watts's role in obtaining Syngenta's agreement to settle the litigation for \$1.51 billion. Their argument that the mere filing of individual lawsuits put great pressure on Syngenta is both legally and factually flawed. In my opinion, Syngenta came to the bargaining table mainly as a result of this Court's class certification ruling and class counsel's successful classwide trial verdict before this Court.

10. Fifth, Watts and its experts propose an unreasonably low award for common benefit counsel (other than Watts) and erroneously call that proposal lavish.

11. Sixth, Watts and its experts claim that the Joint Prosecution Agreement (JPA) is binding on class counsel in the context of a class settlement. But class counsel offer substantial arguments to the contrary, including language in this Court's Common Benefit Order (CBO).

12. **Relevance of Final Claims Data.** Contrary to the submissions of Bassford Remele and various other attorneys, it is my opinion that this Court should decide the attorneys' fees issues now, and should not wait until April 2019 or later for final claims data. This is a non-

reversionary settlement, so the Court knows the full amount of the fund, and thus can set proper fee awards now.

13. **Options for Awarding Fees.** Like this case, there are other cases involving a class settlement as well as individual contingency fee contracts. For example, in the *Volkswagen “Clean Diesel”* case,¹ the court set common benefit fees and left contract counsel to decide whether to pursue their individual contingency fee contracts separately in an appropriate forum. Utilizing the *Volkswagen* approach, the Court could apply the well-recognized *Johnson* factors² in evaluating attorneys’ claims for fees based on common benefit work.

V. DISCUSSION

A. Analysis of Various Fee Submissions

1. Introduction

14. A number of attorneys who filed fee applications on July 10, 2018, base their fee claims on contingency fee contracts. For example, in its July 10, 2018 submission (the “Watts fee application”), the Watts Guerra law firm (“Watts”) requests attorneys’ fees from the common fund calculated as follows: (1) it would reduce its contingency fees in its contracts with individual plaintiffs from 40 percent (the contract rate) to 33⅓ percent; (2) from that percentage, it would subtract a common benefit assessment of 9.17 percent of its fees; (3) based on (1) and (2), it would receive 24.16 percent of the gross benefits to its clients; and (4) in addition, it would be reimbursed for its common benefit expenses. All of the claimed fees would come from the common fund.

15. Filed in support of the Watts fee application are two joint expert declarations. The first was authored by Professors Arthur Miller, Geoffrey Miller, Charles Silver, Brian Fitzpatrick, and Alexandra Lahav. *See* Report of Professors Arthur R. Miller, Geoffrey P. Miller, Charles Silver, Brian T. Fitzpatrick, & Alexandra Lahav on Issues of Economics, Procedure, & Policy in Support of the Fee & Expense Appl. by Watts Guerra LLP (Dkt. No. 3580-2) (hereinafter “Miller et al. Decl.”). The second was authored by Professor Silver and Professor Andrew Kull.

¹ *In re Volkswagen “Clean Diesel” Marketing, Sales Practices & Prods Liab. Litig.*, No. 3:15-md-02672-CRB (N.D. Cal.).

² *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989); *see* Klonoff Decl. ¶¶ 52–89.

See Report of Professors Andrew Kull and Charles Silver on Issues of Restitution and Unjust Enrichment in Support of the Fee & Expense Appl. by Watts Guerra LLP (Dkt. No. 3580-3) (hereinafter “Kull/Silver Decl.”). Both the Miller et al. declaration and the Kull/Silver declaration support the Watts request in its entirety. See Miller et al. Decl. at 36 (describing the proposal as “a generous one” and noting that “we support Watts Guerra’s fee application”); Kull/Silver Decl. at 17 (“[W]e support Watts Guerra’s fee application.”).

2. Analysis

a. Although It Is Unnecessary in this Case, This Court Has Authority to Review the Reasonableness of Watts’s and Other Attorneys’ Contingency Fee Contracts

16. As I explain in detail throughout this Declaration, this Court need not undertake a review of the reasonableness of the individual contingency fee agreements. Rather, the Court can award common benefit fees by utilizing the *Johnson* factors.³ Attorneys who wish to enforce their fee contracts could attempt to do so, and the clients would be able to assert all relevant defenses. Nonetheless, the various fee submissions raise the question whether the Court has the authority to cap contingency fees. For example, Bassford Remele argues that the Court *should* cap such fees.⁴ By contrast, Watts (joined by its experts) and Touns/Coffman argue that no such authority exists.⁵ Accordingly, I address these issues herein. Although I am comprehensive in response to these arguments (which are the centerpiece of the presentation of Watts’s experts), the length of my analysis does not change my view that the Court need not undertake a review of the reasonableness of the individual fee agreements for the reasons discussed herein.

17. As noted, Watts and its experts (among others) maintain that contingency fee contracts are sacrosanct and that this Court lacks any authority to examine the reasonableness of the fees,

³ *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87 (1989); see Klonoff Decl. ¶¶ 52–89.

⁴ See Bassford Remele, P.A.’s Mem. of Law Regarding Allocation of Attorneys’ Fees at 30–33 (Dkt. No. 3568) (hereinafter “Bassford Mem.”) (arguing that “this Court should follow the *NFL* framework [for capping contingency fees]”).

⁵ See Watts Mem. at 34 (“[N]either Rule 23 nor inherent powers authorizes judges to override private fee agreements”); Mem. in Support of Touns/Coffman Pls.’ Counsel’s Mot. For an Award of Attorneys’ Fees & Expenses at 6–7 (Dkt. No. 3567) (hereinafter “Touns Mem.”) (“The Court . . . must fashion an attorneys’ fee and expense payment mechanism that honors the contingent fee contracts between [Touns and its clients].”).

even where, as here, Watts seeks to be paid its contractual fees out of the common fund.⁶ According to Watts, “neither Rule 23 nor inherent powers authorizes judges to override private fee agreements—nor should they.” Watts Mem. at 34. The Miller et al. declaration likewise submits that “some judges have *claimed* to possess the inherent authority to cut lawyers’ fees” but that “*we are doubtful any such authority exists in this case.*” Miller et al. Decl. at 16 (emphases added).⁷

18. In my opinion, Watts, its experts, and various other attorneys are incorrect in asserting that the Court lacks authority to review the reasonableness of contingency fee contracts,

⁶ Watts and its experts rely heavily on the contention that the Watts firm (along with 332 associated law firms) entered into binding and enforceable contingency fee contracts with more than 57,000 farmers and grain elevators in the Minnesota consolidated proceeding. See Watts Fee Appl. at 2; Miller et al. Decl. at 5. According to Watts and its experts, these farmers and grain elevators knowingly and voluntarily agreed to 40 percent contingency fees. See Mem. in Support of Fee & Expense Appl. by Watts Guerra LLP at 5–6 (Dkt. No. 3611) (hereinafter “Watts Mem.”); Miller et al. Decl. at 5. Rather than enforcing these individual fee agreements with its clients, Watts seeks its contractual fees from the common fund in an amount that “should reflect as nearly as possible” the 40 percent contractual rate. Watts Mem. at 32.

It is my understanding that MDL class counsel take no position on whether contract counsel can ultimately seek to enforce their individual fee agreements. Instead, the allocation proposed by MDL class counsel does not rely on individual fee agreements at all, but on the application of the *Johnson* factors. As I explained in my original declaration, MDL class counsel propose that the Court should follow the Fee-Sharing Agreement and compensate subclass counsel and other counsel who have performed common benefit work (as those concepts are defined in the Common Benefit Order) from the remaining 20 percent of the fee award, or in some instances from the categories comprising the other 80 percent. For instance, some or all of Watts’s common benefit fees could come from the 12.5 percent Minnesota allocation proposed by the Fee-Sharing Agreement as well as from the residual 20 percent. See Klonoff Decl. ¶ 130. Under MDL class counsel’s proposal, there is no need to address individual contingency fee agreements.

⁷ I should note that some of Watts’s experts have in the past expressed criticism of MDL judges who rely on the “quasi-class action” concept to review contingency fee contracts in non-class MDLs. See, e.g., Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010) (criticizing, *inter alia*, MDL courts’ practice of “cut[ting] non-lead lawyers’ [contractual] fees”); Charles Silver & Lynn A. Baker, *Fiduciaries and Fees: Preliminary Thoughts*, 79 FORDHAM L. REV. 1833, 1854 & n.92 (2011) (arguing, in criticizing the court’s “quasi-class action” approach and contingency fee cap in the *Vioxx* MDL, that “Judge Fallon invented a new power and put ordinary procedural arrangements to uses for which they are not suited”). Importantly, Silver and Miller have repeatedly emphasized that their arguments are not applicable to Rule 23 class actions. See, e.g., Silver & Miller, *supra*, at 113–14 (“The MDLs we discuss are *not* class actions. . . . Class action procedures may not be necessary or appropriate in MDLs.” (emphasis in original)); *id.* at 142–143 (“Judges have missed the fact that MDLs differ from class actions in respects that often render class action procedures inappropriate.”); *id.* at 124 (“[C]laimants can opt out of class actions but not MDLs.”); Affidavit of Geoffrey P. Miller ¶ 16, *In re Vioxx Prods. Liab. Litig.*, No. 2:05-md-01657-EEF-DEK (E.D. La.) (Dkt. No. 18133-2) (filed Mar. 31, 2009) (testifying against fee caps on individual contingency fee contracts but emphasizing that *Vioxx* was not a class action: “[T]hese cases are neither class actions nor shareholder derivative suits.”). Here, however, these experts fail to recognize that the class action context of the instant case differs markedly from the non-class MDL context.

(All cited declarations and unpublished orders are available on PACER under the docket numbers provided. Internet citations have also been provided where available.)

particularly given that such attorneys seek those fees from the common fund. Numerous cases have made clear that courts have inherent authority to regulate attorneys practicing before them. Thus, the Tenth Circuit has noted: “[C]ontingent fee arrangements are . . . subject to the courts’ supervision.”⁸ Similarly, the Eighth Circuit has emphasized: “The court has the power and the responsibility to monitor contingency fee agreements for reasonableness.”⁹ Numerous other courts have made the same point.¹⁰

19. Moreover, a court’s authority to scrutinize contingency fee agreements is especially available in a class action, given the court’s role as a fiduciary for *all* class members.¹¹ Under Federal Rule of Civil Procedure 23(h), in the case of a certified class, “the court may award reasonable attorneys’ fees”¹²

⁸ *Cooper v. Singer*, 719 F.2d 1496, 1505 (10th Cir. 1983), *abrogated on other grounds by Venegas v. Mitchell*, 495 U.S. 82 (1990).

⁹ *Int’l Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1277 (8th Cir. 1980).

¹⁰ *See, e.g., United States v. Overseas Shipholding Grp., Inc.*, 625 F.3d 1, 1 (1st Cir. 2010) (“Both this court and other courts of appeals have held that this supervisory authority encompasses the power to assess the fairness of attorney fee agreements, including contingent fee arrangements.”); *In re Finney*, 130 F. App’x 527, 530 (3d Cir. 2005) (“[A] District Court must be alert to a fee agreement that would unjustifiably enrich an attorney through oppression or overreaching.”); *In re Goldstein*, 430 F.3d 106, 110 (2d Cir. 2005) (“[C]ourts have the right to inquire into fee arrangements . . . to protect the client from excessive fees.” (citation and internal quotation marks omitted)); *In re A.H. Robins Co., Inc.*, 86 F.3d 364, 373 (4th Cir. 1996) (“[F]ederal district courts have inherent power and an obligation to limit attorneys’ fees to a reasonable amount. . . .”); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1111 (7th Cir. 1982) (“Even when the validity of the fee contract itself has not been challenged by the parties, it is within the court’s inherent power of supervision over the bar to examine the attorney’s fee” (citations omitted)); *Hoffert v. General Motors Corp.*, 656 F.2d 161, 165 (5th Cir. 1981) (“[T]he court must scrutinize the reasonableness of the contingent attorneys’ fee contract which affects the net recovery of the plaintiff.”); *In re Michaelson*, 511 F.2d 882, 888 (9th Cir. 1975) (“The courts have inherent power to regulate the bar . . . [including] the right to inquire into fee arrangements . . . to protect the client from excessive fees.”); *McGill v. City of Ottawa*, 773 F. Supp. 1473, 1474 (D. Kan. 1991) (“[F]ederal courts have inherent jurisdiction to supervise the bar and to examine conformance with the reasonable standard of the Code of Ethics.” (citations omitted)).

¹¹ *See, e.g., Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010) (“[T]he District Court evaluates the [settlement] agreement as a fiduciary for absent class members.”); ALAN WRIGHT & ARTHUR R. MILLER, 7A FEDERAL PRACTICE & PROCEDURE § 1765 (3d ed. 2002) (treatise co-authored by Watts’s expert noting that “the judge in a class action . . . sits to protect the interests of the unnamed class members”); *id.* § 1797 (“In considering the settlement of a class action, the district court acts as a fiduciary who must serve as the guardian of the rights of the absent class members”).

¹² Watts’s experts argue that Rule 23, by its terms, does not authorize courts to review contingency fee agreements (and that if it did, the Rule would violate the Rules Enabling Act). *See* Miller et al. Decl. at 21-22. In fact, however, the courts that have chosen to review contingency fee contracts have typically relied on their inherent authority to supervise the reasonableness of fees. That authority exists in both the class and non-class contexts. Rule 23, however, provides additional context in a class action if a court were to elect to review a fee agreement: In awarding fees and determining how such fees should be allocated to class members, a court must consider not only class counsel but also counsel who represent individual class members.

20. Not surprisingly, a number of courts, in both the class action and non-class MDL contexts, have held that they have authority to review the reasonableness and enforceability of contingency fee agreements.¹³ These cases cannot be dismissed as outliers.¹⁴

21. Scholars and respected academic organizations concur with this overwhelming body of law. Yet, as discussed below, Watts, its experts, and certain others take issue with this settled law. Watts's experts focus at length on this issue, but their arguments are legally flawed.

22. In their report, Miller et al. repeatedly cite the Restatement (Third) of the Law Governing Lawyers as support for their view that courts cannot review contingency fee contracts. See Miller et al. Decl. at 12, 13, 16. Yet, the Restatement directly refutes their position. It notes that "courts scrutinize contingent fees with care in determining whether they are reasonable," and it gives the following illustration:

Client seeks Lawyer's help in collecting life-insurance benefits under a \$15,000 policy on Client's spouse and agrees to pay a one-third contingent fee. There is

¹³ See, e.g., *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2018 WL 1658808, at *2 (E.D. Pa. Apr. 5, 2018) (capping contractual fees at 22 percent and noting that "a court has the authority to impose a fee cap derived from both the power of a court presiding over an MDL or class action and the ability of a court to review individual fee awards"); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex. on Apr. 20, 2010*, No. 2:10-md-02179-CJB-JCW, 2012 WL 2236737 (E.D. La. June 15, 2012) (capping contractual fees at 25 percent and noting that the court has "authority to regulate individual attorneys' fees," particularly because "the instant Settlements are structured and preliminarily certified as class action settlements"); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-md-01708-DWF-AJB, 2008 WL 682174, at *18 (D. Minn. Mar. 7, 2008) (applying a 20 percent fee cap and noting that "this Court has the inherent right and responsibility to supervise the members of its bar in both individual and mass actions, including the right to review contingency fee contracts for fairness." (citations and internal quotation marks omitted)); *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606 (E.D. La. 2008) (applying a 32 percent fee cap and noting that "[i]n addition to this Court's equitable authority over the global settlement, the Court also has the inherent authority and concomitant duty to exercise ethical supervision over the parties."); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) (applying a variable 20–35 percent fee cap and noting the need in a non-class MDL "to ensure fair treatment to all parties and counsel regarding fees and expenses"); *In re Joint E. & S. Dists. Asbestos Litig.*, 878 F. Supp. 473, 558 (E.D.N.Y. & S.D.N.Y. 1995) ("Courts reviewing fees pursuant to Rule 23, general equitable powers, or authority to control officers of the court, may override private, contractual fee agreements made by the attorneys representing the parties in the class action or related individual actions."); *In re MGM Grand Hotel Fire Litig.*, 660 F. Supp. 522, 524–25 (D. Nev. 1987) (capping attorneys' fees at 33½ percent in non-class MDL and noting that "[t]he court has the right and the duty to establish equitable fees for *all* of the attorneys" (emphasis added)).

¹⁴ The Miller et al. declaration includes a chart listing nineteen MDL settlements over \$1 billion, and notes that, out of those nineteen cases, "only three judges imposed a cap overriding the fees that the plaintiffs and their lawyers had agreed to." Miller et al. Decl. at 16–18 (Table 1) (emphasis in original). That figure, however, is misleading. The issue was not even raised in most of the cases. Indeed, in many class actions, especially those involving small individual claims, few class members choose to sign up separate counsel, so the issue of the reasonableness of individual contingency fee contracts does not even arise. Where the issue was squarely raised, as in *NFL*, *Deepwater Horizon*, and *Vioxx*, the court either applied a cap or, as in the *Volkswagen "Clean Diesel"* case, it informed individual attorneys that they had to pursue their contracts in separate actions rather than claiming a portion of the common fund.

no reasonable ground to contest that the benefits are due, the claim has not been contested by the insurer, and when Lawyer presents it the insurer pays without dispute. The \$5,000 fee provided by the client-lawyer contract is not reasonable.¹⁵

Moreover, the Restatement specifically notes that “a contingent fee can also be unreasonable either because the percentage rate is excessive or the base against which the percentage is applied is excessive or otherwise unreasonable.”¹⁶ Thus, according to the Restatement, a contingency fee “will be unreasonable if it is an inappropriate measure of the lawyer’s work and risk and the benefit the client derived from the lawyer’s services.”¹⁷ Numerous courts have relied on the Restatement in regulating contingency fee agreements.¹⁸

23. A number of prominent scholars have also recognized the authority of courts to scrutinize the reasonableness of contingency fee agreements. For example, Professor Morris Ratner has stated:

There is no question that trial courts have long claimed inherent authority to supervise members of the bar, and specifically to supervise attorneys’ fees for reasonableness. *Contingency fee contracts are treated differently than the contracts of laypersons, and even of other professionals, because lawyers are subject to special controls, including the disciplinary powers of courts and the ethical prescriptions formulated by bar associations.* Courts’ power to supervise attorneys’ fees for reasonableness is traditionally located in the courts’ power to “regulate the practice of law.” This authority is so widely recognized that many of the attorneys subjected to fee caps in *Vioxx*, *Guidant*, and *Zyprexa* did not even bother to challenge its existence.¹⁹

Similarly, in his testimony in the *NFL Concussion* case as a court-appointed expert, Professor William Rubenstein emphasized that:

¹⁵ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35 cmt. c (2000).

¹⁶ *Id.* § 35 cmt. d.

¹⁷ *Id.*

¹⁸ See, e.g., *Jacobsen v. Oliver*, 555 F. Supp. 2d 72, 83–84 (D.D.C. 2008) (citing the Restatement in assessing reasonableness of contingency fee agreement); *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 290 F. Supp. 2d 840, 851 (N.D. Ohio 2003) (citing the Restatement in voiding certain contingency fee agreements between class members and their individual attorneys); *Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 571, 574 (Colo. App. 2010) (citing the Restatement in finding contingency fee “unreasonable and excessive”).

¹⁹ Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59, 75–76 (2013) (emphasis added; citations omitted).

*[T]here is no doubt that this Court possesses the authority to assess the reasonableness of each class member's contingent fee contract with his individually retained attorney. That is so because the Court has the inherent authority to regulate attorneys appearing before it, and any attorney representing a player making a claim in this class action settlement is effectively appearing before this Court.*²⁰

24. Similarly, Watts's own expert, Professor Brian Fitzpatrick, has previously written that "even apart from Rule 23, federal courts have long believed that they have the 'inherent power' to regulate the contingency fees of the lawyers who practice before them."²¹ Relying on that authority, Fitzpatrick has argued that federal courts have authority to reject contingency fee caps imposed by state law and can award *higher* fees.²² It is impossible to square Fitzpatrick's prior argument—that courts have inherent authority to override state law contingency fee caps—with his argument here that courts lack *any* inherent authority to review contingency fee agreements.

25. Implicitly recognizing that their position conflicts with settled law, Watts's experts purport to carve out special rules for Texas and Minnesota, citing one case from Texas and two from Minnesota. *See* Miller et al. Decl. at 18 (stating that "Texas has rejected the inherent judicial power to reduce lawyers' fees" and that "Minnesota judges . . . have only used the inherent power to *raise* lawyers' fees" (emphasis in original)).²³ But the authorities they cite stand for no such absolute rule.

26. In *In re Polybutylene Plumbing Litigation*,²⁴ the sole Texas case that Watts and its experts cite, the court discussed a "general rule" favoring the enforcement of privately negotiated fee agreements,²⁵ not an *absolute* rule. The court cited a number of "*exceptions* to the general rule," including "pleading and proof of barratry, fraud, breach of fiduciary duty, incapacity,

²⁰ Expert Report of Professor William B. Rubenstein ¶ 17, *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa.) (Dkt. No. 9526) (filed Dec. 11, 2017) (emphasis added; citations omitted). *Accord, e.g.*, PAUL D. RHEINGOLD, LITIGATING MASS TORT CASES § 14:43 (2018) (noting that the role of the court in class actions includes "[s]upervising the fees which individual counsel get at least by ensuring the fees are reasonable, as applied by the applicable canons of ethics").

²¹ Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2078 (2010) (hereinafter "Fitzpatrick, *Class Action Lawyers*") (citing cases).

²² *See id.* at 2077–78.

²³ Texas law is invoked because Watts's fee agreements are all purportedly governed by Texas law (based on forum selection clauses).

²⁴ 23 S.W.3d 428 (Tex. App. 2000).

²⁵ *Id.* at 436.

illegality, *class action*, [and] *the applicability of the ‘common fund doctrine.’*”²⁶ Indeed, the court focused extensively on distinguishing class actions:

[T]his is not a class action lawsuit In this case, every plaintiff had an individual attorney fee contract with [the law firm involved], and each plaintiff had to approve the settlement in order for it to apply to that plaintiff. There is no large group of unnamed members whose interests are represented by a named plaintiff; rather, the plaintiffs here have all filed lawsuits in their own names. . . .²⁷

Because the instant case involves a class action with the vast majority of plaintiffs represented only by class counsel, *Polybutylene Plumbing*—by its own terms—does not apply here. Additionally, because this case involves a common fund, another exception identified by the *Polybutylene Plumbing* court applies here. Finally, as discussed in ¶¶ 32–40, the *Polybutylene Plumbing* court’s exceptions for fraud, illegality, and breach of fiduciary duty might also apply, given the allegations in a class action lawsuit filed against Watts.

27. The Minnesota cases cited by Watts’s experts likewise do not support their argument. Those cases expressly recognize that courts may intervene “when an attorney has taken advantage of a client’s circumstances to exact an unreasonable or unconscionable proportion of the client’s claim”²⁸ As discussed in ¶¶ 32–40, such grounds for intervention may be relevant here. I am particularly puzzled by Miller et al.’s reliance on *Irwin v. Surdyk’s Liquor*,²⁹ in which the court premised its holding overturning statutory requirements for attorneys’ fees in workers’ compensation cases precisely on the authority of courts to review fees for reasonableness:

We have carefully preserved over the years the concept that the judiciary retains final control over attorneys. . . . Legislation that prohibits this court from deviating from the precise statutory amount of awardable attorney fees impinges on *the judiciary’s inherent power to oversee attorneys and attorney fees* by depriving this court of a final, independent review of attorney fees.³⁰

28. Moreover, the underlying premise of Watts and its experts—that state law governs a federal court’s review of the reasonableness of contingency fee agreements—is questionable.

²⁶ *Id.* at 437, 439 (emphases added).

²⁷ *Id.* at 437.

²⁸ *Holt v. Swenson*, 252 Minn. 510, 514, 90 N.W.2d 724, 727–28 (1958).

²⁹ 599 N.W.2d 132 (Minn. 1999).

³⁰ *Id.* at 140–42 (emphasis added).

The Third Circuit has noted that, even in diversity cases, because “the examination of a contingent fee arrangement’s reasonableness . . . implicates our responsibility to supervise the members of our Bar,” courts “must apply federal law.”³¹ The argument for applying federal law when a federal court invokes its inherent authority makes a good deal of sense. As one of Watts’s own experts has previously written:

In light of the fact that the Supreme Court has ruled that [an] . . . ‘inherent power’ to sanction attorneys for misconduct overrides state law to the contrary, it would not be surprising if federal courts concluded that Rule 23 and the courts’ inherent power to regulate the compensation of class counsel trump [state law regarding contingent fee contracts] ³²

29. Under applicable federal law, federal courts clearly have authority to supervise contingency fee agreements if they choose. In *Cooper v. Singer*, for example, the Tenth Circuit noted: “[C]ourts retain supervisory power over the attorney–client relationship. Fees are central to that relationship, and *contingent fee arrangements are therefore subject to the courts’ supervision.*”³³ Other courts are in accord.³⁴

30. To be sure, a court’s use of inherent authority to scrutinize contingency fee agreements must be undertaken with care. But I do not agree with Watts, its experts, and certain other attorneys that a court can *never* examine the reasonableness of contingency fee agreements.

³¹ *In re Finney*, 130 F. App’x 527, 531 n.5 (3d Cir. 2005). *Accord*, e.g., *Mitzel v. Westinghouse Elec. Corp.*, 72 F.3d 414, 417 (3d Cir. 1995) (noting that “contingency fee agreements in diversity cases are to be treated as matters of procedure governed by federal law”); *see also* 5 NEWBERG ON CLASS ACTIONS § 15.2 (5th ed. 2018) (“[I]t is not unusual for federal courts to apply federal fees law and/or federal calculation methods in common fund cases, even those arising under state law. . . . [T]here is a fair argument that the federal court’s equity powers authorize use of federal law.”).

³² Fitzpatrick, *Class Action Lawyers*, *supra* note 21, at 2078 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 51–55 (1991)). Given this analysis, it is surprising that Watts’s experts assume, with no analysis, that state law is controlling.

³³ 719 F.2d 1496, 1505 (10th Cir. 1983) (emphasis added), *abrogated on other grounds by Venegas v. Mitchell*, 495 U.S. 82 (1990).

³⁴ *See*, e.g., *Krause v. Rhodes*, 640 F.2d 214, 218 (6th Cir. 1981) (“A federal district judge has broad equity power to supervise the collection of attorneys’ fees under contingent fee contracts.”); *Int’l Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1277 (8th Cir. 1980) (invoking federal courts’ “supervisory power over the bar by examining contingency agreements between attorney and client”); *Schlesinger v. Teitelbaum*, 475 F.2d 137, 141 (3d Cir. 1973) (“The district courts’ supervisory jurisdiction over contingent fee contracts for services rendered in cases before them is well-established.”); *Cappel v. Adams*, 434 F.2d 1278, 1280 (5th Cir. 1970) (upholding district court’s reduction of contractual contingency fees and noting that “the right to contract for a contingent fee has never been thought to be unrestrained”); *Estate of Mohamed v. Daimler Trucks N. Am., LLC*, No. 16-cv-00651-WMC, 2018 WL 522345, at *1–2 (W.D. Wis. Jan. 23, 2018) (recognizing inherent authority to examine contingency fee agreements and noting that courts “must consider all the circumstances of the case to determine whether the contingency fee amount is a just and reasonable figure” (citation and internal quotation marks omitted)).

Under that view, a court could not—for example—refuse to enforce a fee agreement that is based on fraud or misrepresentation or one that awards 99 percent of any recovery to the attorney. That view, in my opinion, cannot be correct.

31. Again, despite the depth of my analysis above, it is my view that this Court need not decide if it has the authority to review contingency fee agreements (and need not actually review the agreements in this case). But the claims by others that it lacks this authority are incorrect.

b. Allegations in the *Kellogg v. Watts* Class Action Lawsuit

32. Any court that were to review the reasonableness of the individual contingency fee agreements would be tasked with looking into the facts and circumstances surrounding those agreements.

33. Although not necessary here, if such a review were undertaken of the individual fee agreements, a court would need to consider certain factual allegations against Watts and associated law firms involving their contingency fee contracts at issue here. *See* Class Action Complaint for Declaratory & Injunctive Relief & Damages, *Kellogg v. Watts Guerra, LLP*, No. 0:18-cv-01082-DWF-BRT (D. Minn.) (filed Apr. 24, 2018) (Dkt. No. 1) (hereinafter “*Kellogg* Compl.”).³⁵ The *Kellogg* class action lawsuit, which seeks damages and equitable relief, was filed in federal court in Minnesota against Watts and associated law firms on April 24, 2018.³⁶ The class is defined as “all corn growers who signed attorney retainer contracts with Watts Guerra, LLP and its joint venture partners, for representation in claims, suits or other matters arising out of and resulting from economic damages sustained from the use of Syngenta GMO products or those products’ adverse effect on the U.S. corn market.”³⁷ In other words, the class includes the farmers and grain elevators who signed 40 percent contingency fee agreements with Watts.

³⁵ I understand that MDL class counsel take no position on the merits of the allegations in *Kellogg*. Again, MDL class counsel’s proposed allocation relies on the Fee-Sharing Agreement and the *Johnson* factors, not on whether individual contingency fee agreements exist or are enforceable.

³⁶ Hereinafter I refer to this group of defendants collectively as “Watts.”

³⁷ *Kellogg* Compl. ¶ 30.

34. According to the *Kellogg* complaint, Watts falsely told class members that “*only those who sign up (with [Watts]) are eligible to pursue claims.*”³⁸ At various town hall meetings and other settings, Watts allegedly told class members that, in a class action, “*lawyers will get all the money and the farmers may get a gift certificate.*”³⁹ After the appointment of the special master in the MDL, Watts allegedly wrote in a news update: “Since settlement discussions are underway, it is important for any [farmers] who want to participate in the settlement, to sign up (with Watts Guerra, LLP) as soon as possible, so they don’t get left out.”⁴⁰ According to the complaint, class members were never told about the scope of the MDL class actions.⁴¹ The complaint further alleges that Watts “falsely represented to corn growers through direct mail and advertisements and town hall meetings that if they did not sign with [Watts], the growers would lose their right to file a claim.”⁴²

35. If these allegations in the *Kellogg* complaint are true—and many of them purport to be documented⁴³—they directly bear on whether Watts has any legitimate basis to rely upon the 40

³⁸ *Id.* ¶ 8 (emphasis in original); *see also id.* ¶ 81 (citing statement placed on LostCornIncome.com website and otherwise disseminated by Watts after putative class actions had been consolidated in the federal MDL in Kansas that, “if farmers don’t file a suit, which costs them nothing, they will most likely *not be included in any eventual settlement*” (emphasis in original)).

³⁹ *Id.* ¶ 9 (emphasis in original); *see also id.* ¶ 71 (“Farmers were dishonestly told in a barrage of advertisements and community meetings that a ‘*mass tort . . . individual suit*’ is better than a class action.” (emphasis in original)); *id.* ¶ 77 (alleging that Watts deceptively touted its “‘*mass tort . . . individual suit*’ scheme as superior to class actions where ‘lawyers get all the money’ and corn growers only get a gift certificate and discounts for seed corn”); *id.* ¶ 80 (citing Watts’s statement in farm publication *Agweek* and on LostCornIncome.com that “class action suits can end in getting a ‘free bag of seed or some [sale] credit,’ while a mass tort can provide ‘better recovery for the farmers’” (alteration in original)); *id.* ¶ 88 (citing Watts’s statement on 3DollarCorn.com website that “Class Action cases are often settled without the knowledge of the clients under terms that seem to work best for the lawyers who bill the case by the hour. Many of these settlements result in clients being offered coupons or pre-paid debit cards”).

⁴⁰ *Id.* ¶ 146.

⁴¹ *See id.* ¶ 11 (“Farmers were never told that they were putative class members in class actions filed in federal district courts in different states and consolidated [into the Kansas MDL]. Farmers were never told that the class actions consolidated in the MDL in Kansas brought claims on behalf of corn growers across the United States. Farmers were never informed that in a class action, the presiding judge is a fiduciary for the class members, and obligated to invite and consider objections from class members and award a reasonable attorney fee as a percentage of the common fund of monetary damages for the class.”); *id.* ¶ 15 (“[Watts] never advised farmers of the class action proceedings in federal and state court covering the Farmers and their claims. [Watts] never advised Farmers of the merits of those proceedings and what is in the best interest of the Farmers.”).

⁴² *Id.* ¶ 76.

⁴³ The complaint cites to direct quotes from town hall meetings, including quotes that appeared in the press. For example, Mikal Watts was quoted in Iowa’s Storm Lake Pilot Tribune as telling an assembled group of Iowa corn growers that they needed to sign up with his group quickly, and that in a class action, “*lawyers get all the money and the farmers may get a gift certificate.*” *Id.* ¶ 82 (emphasis in original). A number of statements by Watts attorneys

percent contingency fee agreements. If the allegations are true, then the farmers only signed the agreements because they were falsely told by Watts that they otherwise could not recover (or could recover at most worthless gift certificates). Also, if the allegations are true, then class members were not informed that, in the class action, they could recover without having to pay their own attorneys if the class action was successfully litigated or settled.

36. I do not know if the allegations in the *Kellogg* complaint are true. And, as explained throughout this Declaration, the Court need not examine the reasonableness of individual fee contracts. But just as I am not in a position to determine the truth of the allegations in *Kellogg*, Watts's experts are also presumably not in a position to make factual findings in connection with the *Kellogg* complaint. Yet, without even mentioning the *Kellogg* complaint or referencing any other evidence, the Miller et al. declaration asserts that at the town meetings the Watts firm "informed [farmers] of their rights." Miller et al. Decl. at 20; *see also id.* at 14 (stating that farmers were "educated at town halls" but not describing what they were told); *id.* at 8 (stating that "[t]hese fee contracts were entered into by competent, *informed* adults" (emphasis added)). The Miller et al. declaration further asserts, without citing evidence, that Watts "offered [the clients] a combination of quality and price . . . that was deemed reasonable by almost 58,000 clients." *Id.* at 11–12. If the allegations in *Kellogg* are true, however, then those thousands of individuals signed up not as a result of an informed business decision but only because of fraud and/or material misrepresentations by Watts. Importantly, Miller et al. acknowledge: "When deciding whether contingent fees are reasonable, the Restatement . . . advises judges to ask whether 'the lawyer afford[ed] the client a free and informed choice.'" *Id.* at 14 (citation omitted). Yet, once again citing no evidence, Watts's experts conclude: "*Here, the answer is plainly yes.*" *Id.* (emphasis added). But how can these experts conclude that the Watts clients were properly and accurately advised without analyzing the allegations of the *Kellogg* complaint?

37. In short, Miller et al. rely heavily on the 57,000+ contingency fee contracts in supporting Watts's fee request. In doing so, they repeatedly opine that the contracts were based on truthful and complete information being given to the clients. But if they are wrong, and the allegations in

appeared on the websites LostCornIncome.com and 3DollarCorn.com, and in trade publications such as Agweek (a publication focusing on farmers in Minnesota, North Dakota, South Dakota, and Montana). *See id.* ¶¶ 80–88.

Kellogg are correct, then the lynchpin of Watts’s entire fee application—the need to enforce thousands of legitimate fee agreements—collapses.

38. Similarly, Kull/Silver concede that their entire analysis involves a fact-based inquiry. They note that “a contract is unenforceable [if] it was induced by fraud,” and that if fraud exists, the contract’s “price term will not be accepted as the measure of the benefit conferred on the defendant by the fraudulent party.” Kull/Silver Decl. at 14. Yet, like the Miller et al. declaration, the Kull/Silver declaration fails even to mention the *Kellogg* complaint, let alone grapple with its allegations.

39. Either Miller et al. and Kull/Silver were unaware of the *Kellogg* complaint, or they knew about it but simply chose not to address it.⁴⁴ Either way, their conclusions are unreliable because the experts failed to consider the pertinent facts.⁴⁵

⁴⁴ I cannot determine from their declarations if Watts’s experts reviewed the *Kellogg* complaint. Although Fed. R. Civ. P. 26(a)(2)(B) requires an expert to specify “the facts or data considered by the [expert] in forming” his or her opinions, neither expert report proffered by Watts contains a listing of documents that the experts reviewed and relied upon. That omission here is puzzling, since Watts’s experts routinely list the specific documents they considered when they submit attorneys’ fees declarations. See, e.g., Report of Professor Charles Silver on the Reasonableness of Class Counsel’s Requested Award of Attorneys’ Fees at 3–4, *In re Urethane Antitrust Litig.*, No. 2:04-md-01616-JWL (D. Kan.) (Dkt. No. 3251-1) (filed June 1, 2016), available at <http://polyetherpolyolsettlement.com/docs/Ex%20A%20-%20Silver%20Report.pdf> (listing numerous items reviewed); Decl. of Brian T. Fitzpatrick on the Reasonableness of Class Counsel’s Requested Award of Attorneys’ Fees at 3, *In re Urethane Antitrust Litig.*, No. 2:04-md-01616-JWL (D. Kan.) (Dkt. No. 3269-1) (filed July 15, 2016), available at http://polyetherpolyolsettlement.com/docs/Reply_Mem_iso_Attys_Fees_etc_Exhibits_for_website.pdf. (same); Decl. of Brian T. Fitzpatrick at 3, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex. on Apr. 20, 2010*, No. 2:10-md-02179-CJB-JCW (E.D. La.) (filed Aug. 21, 2016) (Dkt. No. 21098-3) (same); Decl. of Professor Geoffrey P. Miller at 3, *In re Takata Airbag Prods. Liab. Litig.*, No. 1:15-md-02599-FAM (S.D. Fla.) (Dkt. No. 2318-3) (filed Jan. 24, 2018), available at <https://www.autoairbagsettlement.com/Content/Documents/Exhibit%20C%20to%20Response%20to%20Objections%20HN.pdf> (same); Decl. of Professor Geoffrey P. Miller at 3, *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 1:13-cv-07789-LGS (S.D.N.Y.) (Dkt. No. 939-39) (filed Jan. 12, 2018) (same); Report of Professor Charles Silver on Attorneys’ Fees at 5–6, *Silverman v. Motorola, Inc.*, No. 1:07-cv-04507 (N.D. Ill.) (Dkt. No. 457) (filed Mar. 19, 2012) (same).

By contrast, I am *certain* that Watts itself was aware of the *Kellogg* complaint, since Watts was served with the complaint on May 7, 2018, more than two months before filing its fee application. See Affidavit of Service, *Kellogg v. Watts Guerra, LLP*, No. 0:18-cv-01082-DWF-BRT (D. Minn.) (filed May 31, 2018) (Dkt. No. 53-3). Moreover, Watts retained counsel in *Kellogg* and moved for an extension of time to answer the complaint on May 21, 2018. See Notice of Joinder in Mot. to Extend Time to Answer, *Kellogg v. Watts Guerra, LLP*, NO. 0:18-cv-01082-DWF-BRT (D. Minn.) (filed May 21, 2018) (Dkt. No. 32). Thus, I can only assume that Watts made a deliberate strategic decision to avoid referencing factual allegations that contradict its fee application. That it would fail to acknowledge such a highly relevant court filing only confirms why courts must have authority to scrutinize the circumstances surrounding contingency fee agreements.

⁴⁵ See, e.g., *Nat’l Credit Union Admin. Bd. v. UBS Sec., LLC*, No. 12-02591-JWL, 2016 WL 7373857, at *13 (D. Kan. Dec. 20, 2016) (Lungstrum, J.) (excluding expert testimony where the expert “lacked access to the information required” for the analysis at issue); *Fanning v. Sitton Motor Lines, Inc.*, No. 08-cv-02464-CM-DJW, 2010 WL 4261476, at *7–8 (D. Kan. Mar. 10, 2010) (Lungstrum, J.) (ruling in a wrongful death case that an expert’s

40. In short, Watts’s experts assert the validity of the Watts fee agreements but they ignore highly relevant factual allegations. More fundamentally, the Watts fee application is flawed because Watts knowingly failed to grapple with crucial evidence (the *Kellogg* complaint) bearing directly on Watts’s claimed entitlement to fees. *See* ¶ 39 n.44.

c. Watts and Its Experts Err in Arguing that All Class Members Should Pay the Same Percentage of Fees Regardless of Whether They Retained Counsel

41. In its fee request, Watts faced a dilemma: its clients agreed to pay 40 percent of their recoveries to Watts, but those same class members will also have their recoveries reduced by attorneys’ fees paid from the settlement fund to common benefit counsel. Watts, of course, does not want to lose the value of its fee contracts, but at the same time, the firm and its experts presumably recognize that imposing 40 percent contracts *and* common benefit fees on those class members who signed separate contracts would likely be unreasonable. The solution that Watts and its experts propose is to make *all* class members equally responsible for the Watts contingency fee contracts, whether they signed a contract or not.

42. Thus, the Miller et al. declaration takes the position that “[a]bsent class members who never hired attorneys should not be rewarded for sitting on their hands,” and that “[t]hey should not fare better than active claimants who participated in the litigation against Syngenta and gave it added impetus by hiring attorneys to whom they promised to pay fees.” Miller et al. Decl. at 28. According to Miller et al., “[b]ecause the farmers are all being treated alike in the settlement, they will all obtain the same benefits from the litigation *and should all bear the same liability for fees and expenses in restitution.*” *Id.* at 24–25 (emphasis added). In my opinion, that view is legally unsupportable and fundamentally unfair to the hundreds of thousands of class members in this case who did not enter into contracts with Watts or any other attorney.

43. The only authority that Watts’s experts cite for their position is the 137-year-old case of *Trustees v. Greenough*,⁴⁶ which is not at all on point. The Supreme Court in *Greenough* held

“conclusion [was] not ‘based upon sufficient facts or data’ . . . [and] did not adequately account for plausible alternative explanations for the decedent’s untimely death” (citation omitted)); *see also, e.g., Cook ex rel. Tessier v. Sheriff of Monroe Cnty.*, 402 F.3d 1092, 1111 (11th Cir. 2005) (“[A] trial court may exclude expert testimony that is imprecise and unspecific, or whose factual basis is not adequately explained.” (citations and internal quotation marks omitted)); *United States v. Thaller*, No. 12-cv-22445, 2016 WL 6441548, at * 12 (S.D. Fla. Nov. 1, 2016) (excluding expert testimony “[b]ecause Plaintiff ha[d] not shown that [the expert] ha[d] an adequate factual basis for his opinions”).

⁴⁶ 105 U.S. 527 (1881).

that a trust beneficiary who undertook litigation on his own to preserve a trust fund for the benefit of himself and others could be awarded allowances from the fund for attorneys' fees and costs. In subsequent decisions, the Supreme Court has explained that *Greenough* simply stands for the proposition that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."⁴⁷ The case says nothing about foisting individual contingency fee contracts on class members who never entered into such contracts.

44. The reason Miller et al. cannot cite a single case on point is that their argument runs counter to a well-settled principle of class actions—that *a class member who hires his or her own attorney is responsible for that attorney's fees*. The class notice in this very case makes clear to class members that, "[i]f you want to be represented by your own lawyer, you may hire one *at your own expense*."⁴⁸ Later, the notice again emphasizes to class members that, "[i]f you choose to hire your own lawyer, you will be responsible for that lawyer's fees and expenses."⁴⁹ The notice in this case is not an outlier. The principle that class members who hire their own lawyers must individually bear that cost is reflected in literally thousands of class notices in class action cases.⁵⁰ The countless judges who approved such notices would be astounded to learn that,

⁴⁷ *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

⁴⁸ Long-Form Notice at 17, *In re Syngenta MIR162 Corn Litig.*, No. 14-md-02591-JWL-JPO (D. Kan.) (Dkt. No. 3507-5), *available at* <https://www.cornseedsettlement.com/Docs/Long%20Form%20Notice.pdf> (emphasis added) (hereinafter "Long-Form Notice").

⁴⁹ *Id.*

⁵⁰ As just a small sample, *see, e.g.*, Long-Form Notice at 6, *In re Motor Fuel Temperature Sales Practices Litig.*, No. 2:07-md-01840-KHV (D. Kan.), *available at* <http://ksd.uscourts.gov/wp-content/uploads/2015/11/mdl-1840-2012.03.01-Court-Approved-Long-Form-with-blanks-filled-in.pdf> ("If you want to be represented by your own lawyer, you may hire one at your own expense. . . . If you want your own lawyer, you will have to pay that lawyer."); Long-Form Notice at 26, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig.*, No. 3:15-md-02672-CRB (N.D. Cal.) (Dkt. No. 1685-3), *available at* <https://www.vwcourtsettlement.com/wp-content/uploads/documents/PSC/Approved%20Exhibit%203%20-%20Long%20Form%20Notice.pdf> ("If you want to be represented by your own lawyer, you may hire one at your own expense."); Long-Form Notice at 7, *McDonough v. Toys "R" Us, Inc.*, No. 2:06-cv-00242-AB (E.D. Pa.), *available at* <http://www.babyproductsantitrustsettlement.com/documents/notice.pdf> ("You do not need to hire your own lawyer But, if you want your own lawyer, you may hire one at your own expense."); Long-Form Notice at 7, *Rubin v. MF Global, Ltd.*, No. 08-cv-02233-VM (S.D.N.Y.), *available at* <http://www.classactionlitigation.com/MF%20Global%20Notice.pdf> ("If you want to be represented by your own lawyer, you may hire one at your own expense."); Long-Form Notice at 7, *In re Samsung DLP Television Class Action Litig.*, No. 07-cv-02141-GEB-MCA (D.N.J.), *available at* <https://www.samsung.com/us/dlptvsettlement/Class%20Action%20Settlement%20Notice.pdf> ("If you want to be represented by your own lawyer, you may hire one at your own expense, but it is not necessary."); Long-Form Notice at 5, *Tripp v. Berman & Rabin, P.A.*, No. 14-cv-02646-DDC-GEB (D. Kan.), *available at* <https://keoghlaw.com/wp-content/uploads/2018/01/Long-Form-Notice-About-the-Settlement.pdf> ("[Y]ou can, at your own expense, talk to your own lawyer."); Revised Long-Form Notice at 19, *Jabbari v. Wells Fargo & Co.*, No.

according to Miller et al., class members who hire their own attorneys do *not* bear a significant cost in doing so but instead can force all other class members to pay an equal share. This is not—and never has been—the law. As one district court stated: “If individual class members wish[] to have the services of individual counsel in addition to class counsel, they should bear the expense themselves.”⁵¹

45. Indeed, in my more than 30 years of practice, teaching, and research in the field of class actions, I have never seen the type of notice that Miller et al. envision: *i.e.*, “If you choose to hire your own lawyer, you will only have to pay a tiny fraction of the cost; the other class members will pay the rest, even though they did not sign any contract.” Not surprisingly, Watts’s experts do not cite a single case where a court has adopted such an approach.

46. The approach of Miller et al. would allow individual plaintiffs to impose the cost of their contingency agreements on individuals who justifiably relied on the class action notice and chose not to retain their own attorneys. Many class members in this very case might have chosen to hire their own attorneys had they known that they would bear only a tiny fraction of the cost, with the lion’s share being imposed on the rest of the class. Because the class notice told class members that they must pay to hire their own individual lawyer, it would be incredibly unfair for this Court to now hold that the notice was wrong and that *all* class members must now pay the fees on behalf of those class members who signed 40 percent contingency fee agreements with Watts. Although Watts and its experts profess to invoke the sanctity of contracts,⁵² their approach imposes severe obligations on class members who never signed contingency fee contracts. Freedom of contract also means freedom *not* to enter into a contract.⁵³

3:15-cv-02159-VC (N.D. Cal.) (Dkt. No. 162-7), *available at* <https://www.cand.uscourts.gov/filelibrary/3132/Settlement-Agreement-Ex-B2.pdf> (“If you want to be represented by your own lawyer, you may hire one at your own expense.”); Long-Form Notice at 14, *In re Payment Card Interchange Fee & Merch. Discount Antitrust Litig.*, No. 1:05-md-01720-JG-JO (E.D.N.Y.), *available at* <https://www.paymentcardsettlement.com/Content/Documents/Settlement%20Long%20Form%20Notice.pdf> (“You do not have to hire your own lawyer. But you can if you want to, at your own cost.”).

⁵¹ *In re Auction Houses Antitrust Litig.*, No. 00-cv-00648, 2001 WL 210697, at *4 (S.D.N.Y. Feb. 26, 2001).

⁵² *See, e.g.*, Watts Mem. at 31 (arguing that its “contractual rights are critical to the decisions the Courts must now make”); Miller et al. Decl. at 2 (arguing that the Court should “[r]espect the allocation of rights and responsibilities that informed and sophisticated parties freely agreed to ex ante and resist the temptation to rewrite those agreements”); Kull/Silver Decl. at 5 (emphasizing importance of “valid contractual arrangements”).

⁵³ *See, e.g.*, R.J.P. KOTTENHAGEN, FROM FREEDOM OF CONTRACT TO FORCING PARTIES TO AGREEMENT 2 (2005), *available at* <https://repub.eur.nl/pub/14270/from%20freedom%20of%20contract.pdf> (“In the western world,

47. I must also take serious issue with Watts and its experts when they refer to the class members in this case who did not sign on with Watts as “free-riders” (Watts Mem. at 36), and as individuals who “sat on their hands” (Miller et al. Decl. at 24–25). These derogatory terms misperceive the entire point of a class action, and the use of such terms is extremely unfair to class members who did not sign contingency fee contracts. As noted, the notice approved by this Court told class members that “you do not need to hire your own lawyer,”⁵⁴ and the long-form notice specifically urged caution in hiring an individual attorney.⁵⁵ By *not* hiring separate counsel, those class members helped to ensure the efficiency of the litigation; they were doing exactly what they were supposed to do to make the class action device work properly. The position of Watts and its experts—that class members who wish to act with integrity (and avoid becoming “free riders”) should hire their own attorneys—would destroy the efficiencies of a class action. Class actions would be routinely accompanied by thousands of duplicative individual lawsuits, with the lawyers who file such cases comforted with the assurance that their fees will be paid by the entire class, even if all or virtually all of the work is done by class counsel. The whole purpose of a class action would be thwarted. As one of Watts’s experts has noted elsewhere, attorneys’ fees should “not become a windfall to attorneys at the expense of the class.”⁵⁶ And as another of Watts’s experts has explained, the class action device originated precisely to avoid the waste and inefficiency of “adjudicat[ing] the controversy in piecemeal fashion . . . [and] trying the common questions repetitively in separate actions”⁵⁷

freedom of contract is one of the axioms of contract law. This means that parties are free to enter or *not to enter* into agreements.” (emphasis added)).

⁵⁴ Notice of Class Action Lawsuit ¶ 18 (Dkt. No. 2703-1).

⁵⁵ See Long-Form Notice at 17 (“You may receive letters or calls from lawyers seeking to represent you in this case. You have the right to consult an attorney for advice about whether to stay in the Settlement Class and accept the settlement. You should be cautious, however, about advice from attorneys recommending that you exclude yourself from the Settlement Class so that they can represent you in an individual lawsuit against Syngenta, because these attorneys have a financial motive in having you hire them.”).

⁵⁶ Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 94 (2003).

⁵⁷ WRIGHT & MILLER, *supra* note 11, § 1751; see also *id.* § 1754 (objectives of the class action device include “the elimination of repetitious litigation and possibly inconsistent adjudications involving common questions, related events, or requests for similar relief”).

48. Likewise, the Supreme Court has made clear that a major purpose of tolling the statute of limitations under *American Pipe & Construction Co. v. Utah*⁵⁸ is to avoid having class members hire their own lawyers to pursue individual lawsuits:

A putative class member who fears that class certification may be denied would have every incentive to file a separate action prior to the expiration of his own period of limitations. *The result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of American Pipe were designed to avoid.*⁵⁹

In *American Pipe* itself, the Court explained that the filing of multiple individual lawsuits “is simply inconsistent with Rule 23 *A federal class action is no longer an ‘invitation to joinder’ but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions.*”⁶⁰

49. Consider the *Volkswagen “Clean Diesel”* case, for example. It would have made no sense for class members to hire thousands of individual lawyers to litigate the identical issues. The vast majority of *Volkswagen* class members wisely chose not to do so, thereby avoiding needless duplication. To call the class members in *Volkswagen* who chose not to hire their own attorneys “free riders” (or accuse them of “sitting on their hands”) is to misperceive the benefits of aggregation: the resolution of approximately a half a million claims without unnecessarily increasing fees and expenses through the involvement of thousands of individual lawyers. By the same token, class members in the instant case were not “free riders.” They were simply allowing the case to proceed efficiently through the vehicle of a class action, relying on class counsel to do the heavy lifting. And their instincts were confirmed by the fact that Watts has now advised its own clients to make claims under the class settlement and not to litigate individually. *See* ¶ 64.

50. Importantly, as discussed more fully in ¶ 70, to the extent that Watts’s work on behalf of individual clients aided class counsel in securing the settlement, Watts is entitled to petition this

⁵⁸ 414 U.S. 538 (1974).

⁵⁹ *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 350–51 (1983) (emphasis added).

⁶⁰ 414 U.S. at 550 (emphasis added). *Accord, e.g., China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1802 (2018) (“Economy of litigation favors delaying individual claims until after a class-certification denial.” (citation and internal quotation marks omitted)).

Court for a share of common benefit fees. Thus, attorneys' fees for any work performed by Watts that benefited the class as a whole *will* come from the common fund.

d. Watts and Its Experts Overstate the Firm's Role in Achieving the Historic Settlement

51. In my opinion, Watts and its experts overstate Watts's role in Syngenta's decision to settle. Watts repeatedly touts the pressure placed on Syngenta by its individual cases. *See, e.g.*, Watts Mem. at 8 ("Mr. Watts and his colleagues knew that active proceedings and the threat of juries in multiple jurisdictions would increase the litigation pressure on Syngenta."); *id.* at 16 (citing "litigation pressure of tens of thousands of individual claims"). Watts's experts embrace the claim that Watts played a critical role in the instant litigation. *See* Miller et al. Decl. at 1 ("[L]eadership lawyers with lots of signed clients bring leverage to multi-district litigation that relatively client-less lawyers do not."). The Miller et al. declaration contends that, by signing up so many individual plaintiffs, the firm communicated to Syngenta that plaintiffs would continue to litigate regardless of the Court's ruling on class certification. *See id.* at 5 ("By . . . bringing suit on behalf of more than 57,000 farmers . . . , Watts Guerra eliminated any hope Syngenta had of fending off liability by defeating class certification."). It also argues that Watts helped secure a ruling that punitive damages could be awarded in the Minnesota case. And it contends that Watts played a significant role in the two partial Minnesota trials. In the end, however, Miller et al. provide no evidentiary support for their assertions that Watts's contributions were "indispensable" and that, "[b]ut for Watts Guerra's work, including the pressure imposed on Syngenta by its docket and the threat of punitive damages, it is unlikely that there would be a \$1.51 billion settlement on the table today." *Id.* at 5, 7; *see also id.* at 9 (arguing that Watts's individual lawsuits "benefited other claimants by increasing the pressure on Syngenta to settle").

52. Courts have recognized that not all efforts by counsel are of equal value in achieving a successful resolution of a class action or non-class MDL litigation. As Judge Fallon explained in the *Vioxx* MDL:

In a case of this kind, not all types of work are created equal. Hours spent taking depositions, participating in hearings, or trials, actively participating in developing the appropriate litigation strategies and tactics (through moot court presentations or similar practices), drafting briefs, actively participating in Court conferences, arguing motions, negotiating with opposing counsel to reach a settlement, and actively managing and organizing the administrative aspects of

the case are some of the more significant types of work that a case of this sort requires and deserves the most recognition. This, of course, is not the only type of work that such a case requires. Documents must be reviewed, categorized, and analyzed; e-mails must be read and responded to; claimants must be kept advised; meetings must be attended and in general the litigation must be monitored. This work, while necessary and often time consuming does not deserve equal treatment when allotting fees. In short, there is a hierarchy of value for work that tends to have a greater impact on the litigation and generates more ‘common benefit.’ Such work deserves greater compensation.⁶¹

In *Vioxx*, Judge Fallon prepared a chart listing “each category of work performed by [each fee applicant], and the total time logged in performing that task.” Judge Fallon explained that “[e]ach category was assigned a number, *with categories such as participating in trials, participating in settlement negotiation, taking depositions, writing briefs, and committee leadership having a larger number*. A total of these numbers generally revealed the individuals who performed the most significant work in resolving the litigation.”⁶²

53. Here, there can be no serious question that class counsel performed the bulk of the work in the key areas identified by Judge Fallon. In particular, class counsel conducted virtually all offensive and third-party discovery; conducted defensive discovery in the MDL; prepared and filed master complaints; briefed and argued key legal issues raised in dispositive motions; briefed and argued class certification in the MDL; led expert discovery; prepared for—and tried—the Kansas class trial (which resulted in a \$217.7 million verdict); and took the lead in settlement negotiations. *See* Klonoff Decl. ¶¶ 18–30, 131. After reviewing Watts’s July 10, 2018 briefing, it is still my opinion that the lion’s share of the work that led to the settlement was performed by Kansas class counsel.

54. As noted, according to Watts and its experts, a crucial contribution by Watts was the increased pressure on Syngenta to settle by filing lawsuits for individual plaintiffs, all of whom were already putative class members in the nationwide and state classes asserted in the MDL. *See* ¶ 51. But neither Watts nor its experts explain why the filing of Watts’s individual cases put

⁶¹ *In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740, 772–73 (E.D. La. 2011) (citation, internal quotation marks, and paragraph break omitted).

⁶² Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 388–89 (2014) (emphasis added).

critical pressure on Syngenta. In my opinion, those lawsuits did not lead to the settlement; they may in fact have been counterproductive.⁶³

55. Not surprisingly, Watts and its experts cite no authority for their counterintuitive argument that the mere filing of individual suits is common benefit work. To the contrary, Judge Breyer in *Volkswagen* squarely rejected that argument when it was made by contract counsel in that case:

[T]he filings alone did not materially drive settlement negotiations with Volkswagen. *See In re Cendant*, 404 F.3d [173], 191, 196, 204 [(3d Cir. 2005)] (explaining that non-class counsel should not normally be compensated for “fil[ing] complaints and otherwise prosecut[ing] the early stages of litigation,” which is best viewed as “entrepreneurial effort,” rather than as work that benefits the class).⁶⁴

56. Judge Breyer is plainly correct. Volkswagen was not afraid of individual trials involving a single automobile. It was afraid of a classwide judgment involving about 500,000 vehicles.

57. The argument that Watts’s filings here caused Syngenta to settle is weak for several reasons.

58. First, it is telling that the presence of those individual cases did not bring Syngenta to the table before class counsel’s victory in the Kansas class trial. Syngenta itself made clear that it would not settle before going through a trial. *See Klonoff Decl.* ¶¶ 33, 73. In my view, it was the pressure of class certification and class counsel’s trial victory in Kansas (and the fear of

⁶³ Some attorneys go even further than Watts and rely on *unfiled* cases as purportedly putting pressure on Syngenta. For instance, the Troups/Coffman application seeks fees for work done on behalf of more than 9,400 clients, even though those lawyers filed fewer than 1,500 cases (and then dismissed almost 500 of those) in the MDL. I understand that they also filed suit for 7,238 plaintiffs in Williamson County, Illinois, but that leaves cases for approximately 1,000 plaintiffs unfiled. *See Troups Mem.* at 2; Consolidated Response of Kansas MDL Co-Lead Counsel & Settlement Class Counsel Christopher Seeger to the Various Petitions for Attorneys’ Fees at 31–32 (filed contemporaneously) (hereinafter “Co-Lead Response”). Many of the reasons (discussed herein) why Watts’s *filed* cases did not pose major pressure on Syngenta to settle apply *a fortiori* to unfiled cases.

⁶⁴ *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 3:15-md-02672-CRB, 2017 WL 1474312, at *4 (N.D. Cal. Apr. 24, 2017) (fourth and fifth alterations in original). The Tenth Circuit’s opinion in *Gottlieb v. Barry*, 43 F.3d 474, 489 (10th Cir. 1994), distinguished by the court in *Volkswagen*, is not to the contrary. There, the court determined that it was illogical to assume that lawyers who prosecuted cases for 16 months “should be wholly uncompensated.” *Id.* As I note (*see* ¶¶ 50, 70–71), Watts should indeed be compensated for work that directly benefited the class. My point is simply that Watts and its experts err in arguing that the mere filing of individual suits was a crucial pressure point that convinced Syngenta to settle.

massive additional classwide verdicts) that brought Syngenta to the table.⁶⁵ Indeed, by Watts’s own admission, Syngenta did not make its first settlement offer until August 10, 2017—just weeks after the June 23, 2017 Kansas trial verdict. *See* Decl. of Mikal C. Watts in Support of the Fee & Expense Application by Watts Guerra LLP ¶ 264 (Dkt. No. 3580-5) (hereinafter “Watts Decl.”).⁶⁶

59. Second, Miller et al.’s contention that the individual lawsuits put Syngenta on notice that the litigation would continue even without a class action (*see* Miller et al. Decl. at 5) became moot after common benefit counsel successfully achieved class certification in this Court in September 2016 and convinced the Tenth Circuit to deny Rule 23(f) review. The cases were also not a serious threat even before class certification. Watts never would have (or could have) taken these cases to trial one by one, a point it later admitted. *See* ¶ 64.

60. Third, the thousands of individual lawsuits may have actually been *harmful* to plaintiffs’ cause. I understand that average losses in the instant case are only about \$34,491.69 per farmer. *See* Co-Lead Response at 34 (citing Pls.’ Mot. to Certify Class at 97–98 (Dkt. No. 2164), which discusses that average loss). The individual lawsuits were thus negative-value suits, meaning that the cost to Watts of bringing individual cases would greatly exceed the potential benefits.⁶⁷ Syngenta, by contrast, could logically decide to spend far more to defend an individual case than

⁶⁵ I understand that, until the parties jointly filed a motion to stay proceedings pending execution of the settlement agreement (Dkt. No. 3452), four additional trials—composed of seven certified classes—were in the MDL trial queue for 2018 alone. *See* Co-Lead Response at 8. That compressed trial schedule most likely would have occurred before Syngenta was able to secure Tenth Circuit (or Supreme Court) rulings in connection with the \$217.7 million Kansas verdict.

⁶⁶ Although Watts’s experts try to minimize the central role of the Kansas class trial verdict in achieving the settlement, one of its experts has testified in another case that even the *threat* of winning at trial is *the* crucial pressure point in aggregate litigation: “The point that the prospect of winning at trial is what gives plaintiffs’ attorneys bargaining leverage in settlement negotiations is as true in aggregate proceedings as in single plaintiff cases.” Decl. of Charles Silver at 5, *In re Gen. Motors LLC Ignition Switch Litig.*, No. 1:14-md-02543-JMF (S.D.N.Y.) (filed Feb. 5, 2016) (Dkt. No. 2243-2). (Nowhere does Silver’s testimony suggest that the mere filing of individual cases results in “bargaining leverage” in achieving a settlement.) *A fortiori*, a classwide *verdict* in an actual trial provides substantial pressure to settle, and that was the case here.

⁶⁷ *See, e.g., In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*, 295 F.R.D. 112, 144 (E.D. La. 2013) (explaining that negative-value claims are those whose “monetary value does not warrant individual prosecution due to discovery and expert witness expense and other costs” (citations and internal quotation marks omitted)). Indeed, in the instant case, this Court noted in certifying the class that “the litigation of individual suits would be grossly inefficient, costly, and time consuming because the parties, witnesses, and courts would be forced to endure unnecessarily duplicative litigation. . . . [T]he amounts at stake per farm are small enough that separate suits may be impracticable for many class members.” Mem. & Order at 27–28 (Dkt. No. 2547) (citation and internal quotation marks omitted).

the case is worth in order to crush the plaintiffs and their attorneys.⁶⁸ As two commentators have explained, “*the separate action process is structured so that the defendant always can exploit its natural incentive to outspend the individual plaintiff in litigating the common questions to gain the upper hand in any solo action.*”⁶⁹ By contrast, “[in] a class action, both sides have equivalent aggregate investment incentives, and hence there is no structural bias against either party.”⁷⁰

61. Watts’s filing of large numbers of individual cases was also counterproductive because it increased the risk that class certification would be denied. Numerous individual lawsuits can lead to inconsistencies, management difficulties, and needless duplication of effort. As one of Watts’s experts has explained, “[i]f the court finds that several other actions already are pending and that a clear threat of multiplicity and a risk of inconsistent adjudications actually exist, a class action may not be appropriate since, unless the other suits can be joined, which is seldom feasible, a Rule 23 proceeding only will result in one more action.”⁷¹ As a related matter, numerous individual lawsuits can aid the defendant in arguing that a class action is not the superior method of adjudicating the controversy. As Professor Edward Sherman has noted, “[i]nsofar as existing individual suits indicate that the class members have adequate, non-class remedies available, multiple suits may actually offer a salutary vehicle for avoiding the cumbersomeness of a class action.”⁷²

62. These are not just theoretical concerns. At class certification, Syngenta made a significant point out of the fact that numerous individual cases had been filed, noting that “*thousands of plaintiffs have voted with their feet by filing individual actions to avoid being part of a class action in the MDL and instead filing in Minnesota and elsewhere.*” Syngenta’s Opposition to Producer Pls.’ Mot. for Class Certification at 110 (Dkt. No. 2335) (hereinafter

⁶⁸ The fact that Watts signed up many individuals does not change the analysis, since those individuals represent a small percentage of the class. Indeed, I understand that in total, individual plaintiffs constituted only 18 percent of the total corn bushels involved, with those represented by class counsel constituting 82 percent of the corn bushels. See Co-Lead Response at 32–33.

⁶⁹ David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEGAL ANALYSIS 305, 306–07, 328 (2014) (emphasis added).

⁷⁰ *Id.* at 306. Indeed, those authors note that increasing the number of individual plaintiff lawsuits actually *harms* plaintiffs: “[A]s the number of plaintiffs suing separately increases, so does the intensity of the structural bias against them.” *Id.* at 328.

⁷¹ Wright & Miller, *supra* note 11, § 1780 (footnote omitted).

⁷² Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 511 (1987).

“Opp. to Class Cert.”) (emphasis in original). According to Syngenta, the individual filings showed that “many farmers believe they have a vital interest in controlling the prosecution of their own separate actions.” *Id.* Importantly, Syngenta relied on *In re Genetically Modified Rice Litigation*,⁷³ the prior putative class action with the greatest similarity, noting that in that case “the *GM Rice* court pointed to the fact [in denying class certification] that ‘hundreds of plaintiffs have shown interest in prosecuting their claims’ separately.” Opp. to Class Cert. at 110 (quoting *Genetically Modified Rice*, 251 F.R.D. 392, 400 (E.D. Mo. 2008)). Syngenta also argued that the filing of individual suits undercut class counsel’s arguments that “that these are ‘negative value’ cases that individuals do not have the economic incentive to pursue.” Opp. to Class Cert. at 112. Syngenta cited and quoted *Bustillos v. Board of County Commissioners of Hidalgo County*,⁷⁴ which stated that “the extent to which proposed class members have already filed individual claims” is “probative evidence whether the claims are truly negative value or whether the plaintiffs’ counsel is merely representing that they are to enhance his argument for certification.” Opp. to Class Cert. at 112 (quoting *Bustillos*, 310 F.R.D. at 655–56). And in its Rule 23(f) petition, Syngenta noted that “*tens of thousands* of suits remain to be resolved individually,” arguing that “[the] extraordinary number of suits remaining for individual resolution necessarily defeats a finding that a class action would be superior.” Rule 23(f) Pet. for Permission to Appeal Class Certification Order at 11–12, *In re Syngenta AG MIR162 Corn Litig.*, No. 16-607 (10th Cir.) (filed Oct. 11, 2016) (hereinafter “Syngenta Rule 23(f) Pet.”). In that filing, Syngenta criticized this Court’s “specula[tion] that individual plaintiffs would not really want control over their own actions when it got closer to trial” (*id.* at 12), and it concluded: “[T]ens of thousands of individual suits conclusively show that these are not negative value claims.” *Id.* at 13. In short, Watts served up—on a silver platter—arguments for Syngenta to use in opposing class certification. The fact that class counsel was eventually able to persuade this Court to certify a class does not undercut the fact that Watts’s strategy of filing individual lawsuits was not helpful to the cause of class certification.

63. In sum, as I have explained above, Watts and its experts nowhere acknowledge the adverse strategic consequences of flooding the courts with thousands of individual lawsuits.

⁷³ No. 4:06-md-01811-CDP (E.D. Mo.)

⁷⁴ 310 F.R.D. 631 (D.N.M. 2015).

64. In my opinion, perhaps the best proof that Watts’s individual cases did not pose a threat to Syngenta is Watts’s own conduct after a settlement was reached. If Watts’s individual cases truly put pressure on Syngenta, Watts would *not* have advised its clients to join in the class settlement. Instead, Watts would have used its supposed power and leverage to negotiate a *better* deal for its clients than the class members received in the class settlement. As it turned out, however, Watts advised its clients to join the class settlement.⁷⁵ Mikal Watts himself candidly acknowledged in his declaration in support of the Watts fee application that the individual lawsuits did not provide a practical, timely solution: “[G]etting [the individual farmers] to trial would take many decades, long after the remaining life expectancy of most farmers had passed.” Watts Decl. ¶ 300 (emphasis added). Mikal Watts’s concession is fatal to Watts’s argument that the existence of these individual cases put serious pressure on Syngenta.⁷⁶ Surely Syngenta’s experienced counsel understood—even prior to Mikal Watts’s concession—that Watts was bluffing when it threatened to try these thousands of cases one at a time.

65. My opinion—that Watts’s filing of individual lawsuits did not put significant pressure on Syngenta—is not based just on my academic background. Most importantly, it is confirmed by my extensive experience representing large corporate defendants as a Jones Day partner in more than 100 class actions. My worry as a class action defense lawyer was always about class certification—and especially about an adverse verdict in a classwide trial. Except for cases involving massive individual damages (such as mass tort personal injury cases, which are normally not suitable for class certification), I felt little or no pressure by the filing of numerous individual lawsuits, since I knew my client could always out-litigate (and outspend) plaintiffs one trial at a time.⁷⁷ In short, as Watts’s own expert and numerous courts have previously noted,

⁷⁵ The same phenomenon occurred in *Volkswagen* and *NFL*; in both cases, the vast majority of individual plaintiffs ended up participating in the class settlements. See *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 3:15-md-02672-CRB, 2016 WL 6248426, at *16 (N.D. Cal. Oct. 25, 2016) (noting approximately 0.7 percent opt-out rate in approving 2.0-liter settlement and explaining that “the number of opt outs continues to decrease as Class Members revoke their requests for exclusion”); *In re Nat’l Football League Players’ Concussion Injury Litig.*, 307 F.R.D. 351, 369–70 (E.D. Pa. 2015) (noting approximately 1 percent opt-out rate in approving settlement).

⁷⁶ Watts also acknowledged that he saved his firm and associated counsel more than \$100 million in administrative fees as a result of the participation by Watts’s clients in the class settlement. Watts Decl. ¶ 321. This is further proof that individual trials would have been cost-prohibitive for Watts.

⁷⁷ The only exception is that, occasionally even after the denial of class certification, a string of decisive and large plaintiff victories in bellwether trials might convince a defendant to reach a global settlement. That occurred, for example, in *Genetically Modified Rice*. In that case, which involved individual damages ranging into the millions of

it is the certification of a class action, and not the filing of individual lawsuits, that typically causes defendants to settle a class action lawsuit.⁷⁸

66. Watts and its experts also rely heavily on Watts’s preparation of plaintiff fact sheets in support of Watts’s fee application. *See* Watts Mem. at 15–16; Miller et al. Decl. at 6. Similar arguments are made by other contract counsel seeking fees. *See, e.g.*, Paul Byrd Law Firm, PLLC’s Brief in Support of Pet. for an Award of Attorneys’ Fees & Reimbursement of Costs & Expenses at 3 (Dkt. No. 3586) (“The amount of effort and skill and time it took to successfully complete the Plaintiff Fact Sheets deserves recognition . . .”). But that work cannot reasonably be characterized as common benefit work. Such work may have helped the individual clients, but the argument that the class as a whole was helped is, in my view, specious. Taken to its logical conclusion, the argument of Watts and its experts is that anything that helps the individuals by definition helps the class. Such an argument, if accepted, would destroy the whole distinction between common benefit work and work that only helps individual plaintiffs.

dollars, after class certification was denied, plaintiffs won five separate bellwether trials (and settled two more cases during trial), with jury verdicts as high as \$11.8 million in compensatory damages and \$125 million in punitive damages. Following those verdicts, the defendant agreed to a global settlement worth \$750 million. *See Genetically Modified Rice*, No. 4:06-md-01811-CDP, 2012 WL 6085153, at *8 (E.D. Mo. Nov. 2, 2012) (describing background of litigation); David Bario, *Bayer Loses Biggest Genetically Modified Rice Verdict Yet: \$136.8 Million in Arkansas State Court Trial Against Riceland Cooperative*, THE AM. LAWYER (Mar. 22, 2011), <https://www.law.com/americanlawyer/almID/1202487422350/> (discussing jury verdicts and noting that “Bayer and its lawyers . . . are now 0-for-7 in trials”). There, the impressive trial verdicts—not the mere filing of multiple cases—presumably convinced the defendant to settle. Here, by the same token, Syngenta did not agree to settle merely because of multiple individual cases, but did so only after the Kansas class verdict. And here, unlike in *Genetically Modified Rice*, Watts cannot claim that it achieved a victory in *any* Minnesota trials, let alone multi-million dollar verdicts in five bellwether trials. The most Watts can do is praise Mikal Watts’s cross examinations in one aborted Minnesota trial. *See* ¶ 68 n.82. Moreover, unlike *Genetically Modified Rice*, as Watts itself has conceded (*see* ¶ 64), the individual damages in this case are not large enough to support the threat of major verdicts in individual litigation.

⁷⁸ Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem”*, 92 HARV. L. REV. 664, 679 n.63 (1979) (one of Watts’s experts noting that, “[o]nce the case is certified as a class action, the size of the potential liability takes on a frightening dimension”); *see also, e.g., In re Modafinil Antitrust Litig.*, 837 F.3d 238, 249 (3d Cir. 2016) (noting that “class certification is often the defining moment in class actions” (citation and internal quotation marks omitted)); DONNA M. NAGY ET AL., SECURITIES LITIGATION AND ENFORCEMENT 429 (3d ed. 2011) (“The court’s decision on certification carries enormous significance for all concerned. If certification is denied, most (and possibly all) members of the might-have-been class will lose the opportunity to recover because they lack the resources to sue individually. On the other hand, a grant of certification may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.” (citations and internal quotation marks omitted)). *See also* Report of Professor Charles Silver on the Reasonableness of Class Counsel’s Requested Award of Attorneys’ Fees at 19, *In re Urethane Antitrust Litig.*, No. 2:04-md-01616-JWL (D. Kan.) (Dkt. No. 3251-1) (filed June 1, 2016), available at <http://polyetherpolyolsettlement.com/docs/Ex%20A%20-%20Silver%20Report.pdf> (“The belief that plaintiffs’ attorneys can collect buckets of dollars just by *filing* class actions isn’t true.” (emphasis added)).

As one of Watts's experts has noted elsewhere, "common benefit work, by definition, serves the interests of *all* plaintiffs."⁷⁹ Indeed, as with the filing of individual cases in the first place, the completion of individual fact sheets in the instant case gave Syngenta arguments for *opposing* class certification. *See, e.g.*, Syngenta Rule 23(f) Pet. at 16 & n.7 (arguing that "even a limited sample" of fact sheets confirmed the need for "individualized fact finding," thus making a class action inappropriate).⁸⁰

67. Watts and its experts also make a big point of the fact that Watts's clients have thus far filed claim forms at a much higher rate than the class as a whole. *See* Watts Mem. at 23 (noting that "as of July 2, 2018, ***more than half*** of the completed claims received by the Claims Administrator . . . are from class members identifying themselves as Watts Guerra clients" (italics and boldface in original)); Miller et al. Decl. at 6 (citing same statistic). Watts and its experts assume that this statistic somehow shows that a benefit has been conferred on the class as a whole (although they do not explain why that is so). In my view, however, the filing of a claim form typically does not confer a benefit on the class as a whole. Certainly, the filing of claim forms here cannot be said to have exerted pressure on Syngenta—which had already agreed to the settlement and which will receive a release binding on all class members who do not opt out, regardless of whether any particular class member submits a claim form. If Watts's statistic is accurate, it might provide an argument that Watts's clients should pay Watts a separate sum under their contracts for the special attention they received, but it does not justify the award of common benefit fees.

68. Additionally, although Watts's experts ignore the importance of the \$217.7 million Kansas verdict, they assert (as does Watts itself) that Watts "*establish[ed]* that [punitive] damages should be awarded by the jury in the Minnesota Class trial" Miller et al. Decl. at 5 (emphasis added); *see also* Watts Mem. at 53.⁸¹ But they have no valid basis for claiming that a

⁷⁹ Decl. of Geoffrey Parsons Miller ¶ 10, *In re Gen. Motors LLC Ignition Switch Litig.*, No. 1:14-md-02543-JMF (S.D.N.Y.) (filed Feb. 1, 2016) (Dkt. No. 2200-1) (emphasis added).

⁸⁰ Filling out plaintiff fact sheets has been recognized as a relatively minor contribution. *See In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-md-01708-DWF-AJB, 2008 WL 682174, at *15 (D. Minn. Mar. 7, 2008) ("Other counsel . . . did substantially less work, with some doing no more than filing a Complaint and a Plaintiff Fact Sheet, or work requiring even less skill.").

⁸¹ The fact that Watts's experts essentially ignore the pivotal role of the Kansas trial verdict cannot be squared with their approach in other cases. *See, e.g.*, Report of Professor Charles Silver on the Reasonableness of Class Counsel's Requested Award of Attorneys' Fees at 24–25, *In re Urethane Antitrust Litig.*, No. 2:04-md-01616-JWL

victory for plaintiffs (let alone a judgment with a punitive damages award) was a certainty.⁸² Indeed, at the time the settlement term sheet was agreed upon, the Minnesota trial was not even close to being completed (Minnesota counsel had yet to put their damages experts on the stand), so it is difficult to understand how Watts and its experts can be so confident as to how the trial would have come out had the case gone to verdict.

69. Finally, to the extent that Watts seeks fees for redoing work that was already done by class counsel, or for keeping its clients abreast of developments, that work should not, in my view, justify a common benefit award. As the Court set forth in its July 27, 2015 Order Establishing Protocols for Common Benefit Work and Expenses and Establishing the Common Benefit Fee and Expense Funds (Dkt. No. 936), “‘Common Benefit Work’ means services performed for the benefit of *all* producer and/or *all* non-producer plaintiffs . . . and specifically authorized by Lead Counsel.” *Id.* at 7 (emphases added). As the Third Circuit has noted, it “cannot see how the monitoring [of class proceedings, keeping clients informed, and advising clients regarding the class settlement] itself benefits the class as a whole, as opposed to the attorney’s individual client.”⁸³ Similarly, as one district court reasoned: “[T]here is [no] reason for the class as a whole to compensate large numbers of lawyers for individual class members for keeping abreast of the case on behalf of their individual clients, keeping their individual clients informed, or duplicating the efforts of lead counsel.”⁸⁴

(D. Kan.) (Dkt. No. 3251-1) (filed June 1, 2016), *available at* <http://polyetherpolyolsettlement.com/docs/Ex%20A%20-%20Silver%20Report.pdf> (“Winning a large class action lawsuit takes more than being right. It takes enormous resources and exceptional lawyering, and even then the lawyers face serious risk. . . . The difficulty of winning an enormous class action is hard to overstate.”).

⁸² Watts and Miller et al. claim that Mikal Watts’s cross examination of Syngenta senior executives at the Minnesota class trial was a watershed event leading to settlement. Watts boasted that the cross examination was so devastating that it was “abundantly clear to all that a punitive damages finding was likely.” Watts Mem. at 53; *see also id.* at 2 (claiming that Mikal Watts “savaged Syngenta executives on cross examination,” thus “ma[king] punitive damages all but inevitable”). According to Watts, that cross examination “forced Syngenta finally to accept that it faced not just hundreds of millions of dollars in compensatory damages but a likely multi-*billion* dollar judgment,” and “[t]hen, in an instant, it was over.” *Id.* (emphasis added); *see also* Miller et al. Decl. at 7 (noting their “understand[ing]” that Mikal Watts’s cross examination “made it clear that a punitive damages finding was quite possible, even likely”). In my experience, nothing is inevitable in the world of jury trials, especially an award of punitive damages. Indeed, MDL class counsel note that, after the Watts cross examinations, plaintiffs reduced their settlement demand by far more than the amount by which Syngenta increased its offer. *See* Co-Lead Response at 10. In short, the notion that Mikal Watts’s cross examination at the never-completed Minnesota trial was the *sine qua non* leading to the \$1.51 billion settlement is hard to take seriously.

⁸³ *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 201 (3d Cir. 2005).

⁸⁴ *In re Auction Houses Antitrust Litig.*, No. 00-cv-00648, 2001 WL 210697, at *4 (S.D.N.Y. Feb. 26, 2001). *Accord, e.g., In re Heritage Bond Litig.*, No. 02-ml-01475-DT-RCX, 2005 WL 1594389, at *18 (C.D. Cal. 2005).

70. In any event, as noted (§ 50), the fact that Watts is not entitled to compensation merely for filing large numbers of cases does not mean that Watts must go away empty handed. To the extent that Watts can show that its work was truly common benefit work—that it actually benefited the class as a whole—it may seek compensation from the settlement fund for that work under the Court’s procedures. Indeed, some of the work described by Watts strikes me as potentially suitable for some common benefit fees, including: conducting bellwether discovery, working on class certification in Minnesota, participating in the aborted Minnesota trials, briefing issues regarding admissibility of expert testimony, and participating in settlement talks. *See Watts Mem.* at 5–23.

71. In sum, while Watts may be entitled to some fees for common benefit work, any work that “benefited only an individual client and not the common fund does not trigger a fee entitlement.”⁸⁵

72. To the extent that contract counsel wish to enforce their contracts, as opposed to seeking reasonable fees from the common fund for work that benefited the class, that “is a matter of contract law, subject to the codes of professional conduct, and such disputes should be resolved in the appropriate forum.”⁸⁶ Indeed, Watts concedes that it has that remedy; it notes that unless

(“[A]ttorneys who confer no benefit on the class and simply serve the interests of an individual plaintiff are not entitled to be compensated from the common fund.”); *In re Honeywell Int’l, Inc. Sec. Litig.*, No. 2:00-cv-03605-DRD-SDW, slip op. at 3 (D.N.J. Oct. 14, 2004) (Dkt. No. 261) (When attorneys confer a benefit on the class they are entitled to an award of attorneys’ fees. Conversely, attorneys who confer no benefit on the class and simply serve the interests of an individual plaintiff are not entitled to be compensated from the common fund.” (citations omitted)).

⁸⁵ 5 NEWBERG ON CLASS ACTIONS § 15:59 (5th ed. 2018) (citations omitted). *Accord, e.g., In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 3:15-md-02672-CRB, 2017 WL 1474312, at *3 (N.D. Cal. Apr. 24, 2017) (“In ‘common fund’ cases, a court may award non-class counsel a reasonable attorney’s fee only if counsel’s work conferred a benefit on the *class*, as opposed to on an individual client.” (emphasis in original) (citing *Gottlieb v. Barry*, 43 F.3d 474, 489 (10th Cir. 1994))). I would also note that there is tension between the Miller et al. declaration and the Kull/Silver declaration on this point. The former “approach[es] the Watts Guerra fee application from a contractual perspective” (Miller et al. Decl. at 7), namely, relying on the sanctity of the 57,000+ individual fee contracts as the key to awarding fees to Watts. By contrast, the Kull/Silver declaration recognizes that in the “‘horizontal’ common fund allocation” among lawyers, the focus is on the “contribut[ions] (*in the form of common benefit work*)” Kull/Silver Decl. at 4 (emphasis added).

⁸⁶ *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 3:15-md-02672-CRB, 2017 WL 1474312, at *5 (N.D. Cal. Apr. 24, 2017). The case of *In re Chinese-Manufactured Drywall Products Liability Litigation*, No. 09-cv-02047 (E.D. La. Jan. 31, 2018) (Dkt. No. 21168), cited by Watts (*see Watts Mem.* at 37), is distinguishable. In that case, the settlement included funds that were specifically designated for fees for both class counsel and contract counsel. *See Chinese-Manufactured Drywall*, Dkt. No. 21168 at 4 (defendant agreed to pay a separate amount “for attorneys’ fees, which include[d] both the fees for contract counsel and those for common benefit counsel”). By contrast, Syngenta did not designate a portion of its settlement to pay contract counsel for non-common benefit work.

this Court allows contract counsel to be paid out of the common fund, there will be “immense pressure on all retained counsel to resort to attorney liens.” Watts Mem. at 58.

73. Finally, I would note that, unlike some personal injury cases involving difficult, plaintiff-specific issues of injury, causation, and damages, the issues here did not require the services of individual attorneys in addition to common benefit counsel. That reality should be taken into consideration by this Court in awarding fees. Notably, the claim form in the proposed class settlement is very simple, requiring only the most basic information for a farmer to secure recovery.⁸⁷ In most instances, the class member does not even need to attach documentation.⁸⁸ Thus, contract counsel cannot credibly argue that they were essential to enable their clients to fill out claim forms.

e. Watts’s Experts Err in Characterizing Watts’s Proposed Treatment of MDL Class Counsel as Generous

74. The Miller et al. declaration submits that, “[u]nder the Watts Guerra proposal . . . the other common benefit lawyers in this case will be compensated *lavishly*.” Miller et al. Decl. at 33–34 (emphasis added). They calculate that, under Watts’s proposal:

[I]f the Courts award *one-third* of the settlement for attorney fees and expenses, and absent class members (*i.e.*, the 500,000 class members who did not retain lawyers) file claims by which they collect *one-half* of the remaining settlement funds, the other common benefit lawyers will receive \$319 million. As a percentage of the total settlement, \$319 million would be 21.25%. *This sum is nearly without precedent*. By contrast, the lawyers in the Watts Guerra Group will not fare nearly as well

Id. at 34 (emphases in original).

75. Miller et al.’s contention that a 21.25 percent common benefit award to lawyers other than Watts is “nearly without precedent” is both legally erroneous and contrary to several of these experts’ own declarations in other cases. Miller et al. claim that, based on their research, “the highest previous take for common benefit counsel was 29.4% and the second highest was only 14.4%.” Miller et al. Decl. at 34. This assertion is wrong on many levels. To begin with,

⁸⁷ See Long-Form Notice at 13 (“You can submit an electronic Claim Form in just a few quick and easy steps on the settlement website.”).

⁸⁸ See *id.* at 14 (“You do not need to obtain copies of your FSA 578 Report to make a claim. After you submit a Claim Form consenting to disclosure of the FSA data to the Claims Administrator to use for processing your claim . . . this information will be provided directly by the FSA.”).

Miller et al. offer a chart of common benefit awards in several \$1 billion+ settlements, but omit *Allapattah Services, Inc. v. Exxon Corp.*,⁸⁹ a case involving a \$1.06 billion fund in which the court awarded 31⅓ percent in fees. See Klonoff Decl. ¶ 94 (Table 1). This omission is difficult to understand, since Watts's own expert submitted a declaration in that case endorsing class counsel's 33⅓ percent fee request.⁹⁰ I would also note that, by arbitrarily setting the line at \$1 billion, Miller et al. avoided including *In re Urethane Antitrust Litigation*, in which this Court awarded attorneys' fees to common benefit counsel of 33⅓ percent of the \$835 million fund just two years ago.⁹¹ Moreover, I showed in my original declaration that in many other mega-fund cases (involving funds of more than \$100 million), courts have awarded more than 30 percent in fees. See Klonoff Decl. ¶ 94 (Table 1). Those cases should be precedent *a fortiori* for Watts's experts, who have argued repeatedly and forcefully that fees should *increase* as a percentage matter as the common fund increases.⁹² In other words, consistent with their own writings, their

⁸⁹ 454 F. Supp. 2d 1185 (S.D. Fla. 2006).

⁹⁰ See Expert Report of Professor Charles Silver Concerning Attorneys' Fees & Expenses, *Allapattah Services, Inc. v. Exxon Corp.*, No. 1:91-cv-00986-ASG (S.D. Fla.) (Dkt. No. 2638) (filed Feb. 16, 2006) ("In my opinion, the request for [33⅓ percent] fees and expenses is reasonable . . .").

⁹¹ See *In re Urethane Antitrust Litig.*, No. 04-md-01616-JWL, slip op. (D. Kan. July 29, 2016) (Dkt. No. 3276) (Lungstrum, J.) (awarding attorneys' fees); *In re Urethane Antitrust Litig.*, No. 2:04-md-01616-JWL, 2016 WL 4060156 (D. Kan. July 29, 2016) (Lungstrum, J.) (addressing objections to attorneys' fees petition).

⁹² For example, Professor Fitzpatrick has testified that "it is better *not* to lower fee percentages because the settlement is large," since "doing so does little more than misalign the incentives of class counsel to fight for the largest settlement, and, indeed, may incentivize some class counsel to settle cases earlier for smaller sums." Decl. of Brian T. Fitzpatrick at 14 & n.4, *In re High-Tech Employees Antitrust Litig.*, No. 11-CV-2509-LHK (N.D. Cal.) (Dkt. No. 1079) (filed May 8, 2015), available at http://www.hightechemployeeelawsuit.com/media/303927/15-5-8_1079_fitzpatrick_decl_motion_for_attorney_fees.pdf (emphasis added). Fitzpatrick presented a similar argument in *Urethane*, providing the following illustration to support his position:

[S]uppose class counsel could settle a case for \$500 million and receive a 33% fee award or settle a case for \$800 million but receive a 20% fee award. Class counsel would rather settle such a case for \$500 million (and a \$165 million fee award) than \$800 million (and a \$160 million fee award). That is the very definition of perverse incentives.

Decl. of Brian T. Fitzpatrick on the Reasonableness of Class Counsel's Requested Award of Attorneys' Fees at 7, *In re Urethane Antitrust Litig.*, No. 2:04-md-01616-JWL (D. Kan.) (Dkt. No. 3269-1) (filed July 15, 2016), available at http://polyetherpolyolsettlement.com/docs/Reply_Mem_iso_Attys_Fees_etc_Exhibits_for_website.pdf. Similarly, Professor Silver has argued that "[a]lthough it sometimes is suggested that fee percentages should decline as recoveries increase, that isn't so." Report of Professor Charles Silver on the Reasonableness of Class Counsel's Requested Award of Attorneys' Fees at 29, *In re Urethane Antitrust Litig.*, No. 2:04-md-01616-JWL (D. Kan.) (Dkt. No. 3251-1) (filed June 1, 2016), available at <http://polyetherpolyolsettlement.com/docs/Ex%20A%20-%20Silver%20Report.pdf>. Accord, e.g., Expert Report of Professor Charles Silver at 4, *In re (Bank of Am.) Checking Acct. Overdraft Litig.*, No. 1:09-md-02036-JLK (S.D. Fla.) (Dkt. No. 1885-12) (filed Sept. 16, 2011) ("Private parties would never contract for [the mega-fund rule that fee percentages should decline as recoveries increase] because doing so would punish success." (quoting *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (internal quotation marks omitted)) Numerous other examples could be cited. See, e.g., Decl. of Professor Charles Silver on

chart should have included settlements far below \$1 billion. As Professor Fitzpatrick noted in *Urethane*, “settlement size, by itself, is not a good reason to reduce fee percentages.”⁹³

76. I would also note that Professors Geoffrey Miller, Fitzpatrick, and Silver⁹⁴ have repeatedly endorsed attorneys’ fees for class counsel (without reference to contract attorneys) of 30 percent or more. Among numerous examples, Professor Fitzpatrick submitted a declaration to this Court arguing in favor of a 33⅓ percent fee award for class counsel in *Urethane*.⁹⁵ Similarly, Professor Geoffrey Miller testified in support of class counsel’s request for attorneys’ fees of 30 percent in the *J.C. Penney* securities case,⁹⁶ and he explicitly recognized only months ago in his declaration in the *Takata Airbag Litigation* that “[f]ees of 30% or higher are observed even in ‘mega’ cases [when class counsel] generate excellent results under conditions of elevated risk.”⁹⁷ Likewise, Professor Silver testified in support of class counsel’s 33 percent fee request in the \$590 million *Dahl v. Bain Capital Partners LLC* settlement,⁹⁸ and in support of class counsel’s 40 percent fee request in *Cook v. Rockwell International Corp.*⁹⁹ Numerous other

the Reasonableness of Class Counsel’s Requested Award of Attorneys’ Fees, *Cook v. Rockwell Int’l Corp.*, No. 1:90-cv-00181-JLK (D. Colo.) (Dkt. No. 2435-13) (filed Jan. 12, 2017) (praising “the attitude Judge Lungstrum displayed in *Urethane*” because “he rejected the [mega-fund rule that percentages should decline as recoveries increase]”).

⁹³ See Decl. of Brian T. Fitzpatrick on the Reasonableness of Class Counsel’s Requested Award of Attorneys’ Fees at 6, *In re Urethane Antitrust Litig.*, No. 2:04-md-01616-JWL (D. Kan.) (Dkt. No. 3269-1) (filed July 15, 2016), available at http://polyetherpolyolsettlement.com/docs/Reply_Mem_iso_Attys_Fees_etc_Exhibits_for_website.pdf (also noting that “many courts have [so] recognized”).

⁹⁴ I can find no prior declarations on point by Professors Arthur Miller, Lahav, or Kull.

⁹⁵ See Decl. of Brian T. Fitzpatrick on the Reasonableness of Class Counsel’s Requested Award of Attorneys’ Fees, *In re Urethane Antitrust Litig.*, No. 2:04-md-01616-JWL (D. Kan.) (Dkt. No. 3269-1) (filed July 15, 2016), available at http://polyetherpolyolsettlement.com/docs/Reply_Mem_iso_Attys_Fees_etc_Exhibits_for_website.pdf.

⁹⁶ See Decl. of Professor Geoffrey P. Miller, *Marcus v. J.C. Penney Co., Inc.*, No. 6:13-cv-00736-RWS-KNM (E.D. Tex.) (Dkt. No. 166-15/4891) (filed Oct. 25, 2017), available at http://www.jcpenneysecuritieslitigation.com/media/1122471/declaration_of_prof_geoffrey_p_miller_re_dkt_166_.pdf.

⁹⁷ Decl. of Professor Geoffrey P. Miller at 11, *In re Takata Airbag Prods. Liab. Litig.*, No. 1:15-md-02599-FAM (S.D. Fla.) (Dkt. No. 2318-3) (filed Jan. 24, 2018), available at <https://www.autoairbagsettlement.com/Content/Documents/Exhibit%20C%20to%20Response%20to%20Objections%20HN.pdf>.

⁹⁸ See Report of Professor Charles Silver on the Reasonableness of Lead Counsel’s Request for Payment of Attorneys’ Fees & Expenses, *Dahl v. Bain Capital Partners LLC*, No. 1:07-cv-12388-WGY (D. Mass.) (Dkt. No. 1059) (filed Nov. 13, 2014).

⁹⁹ See Decl. of Professor Charles Silver on the Reasonableness of Class Counsel’s Requested Award of Attorneys’ Fees, *Cook v. Rockwell Int’l Corp.*, No. 1:90-cv-00181-JLK (D. Colo.) (Dkt. No. 2435-13) (filed Jan. 12, 2017).

examples can be cited for each of these experts.¹⁰⁰ The declarations of these experts in other cases highlight, with myriad statistics and charts, many awards *to class counsel alone* of more than 30 percent, even in so called mega-fund cases. As Watts's expert, Professor Fitzpatrick, put it in discussing fee awards to class counsel, "courts *often* award fees equal to one-third of class action settlements."¹⁰¹

77. Moreover, in none of these cases do Fitzpatrick, Silver, or Miller argue that the fees from the common fund must be shared with contract counsel who signed clients to individual contingency fee contracts but did not benefit the class.¹⁰² In none of them do these experts argue that class members who did not hire lawyers are "free riders" or must pay their share of the fees

¹⁰⁰ See, e.g., Decl. of Brian T. Fitzpatrick, *In re (PNC Bank) Checking Account Overdraft Litig.*, No. 1:09-md-02036-JLK (S.D. Fla.) (Dkt. No. 3350-50) (filed Mar. 22, 2013) (endorsing class counsel's 30 percent attorneys' fees request); Decl. of Bryan T. Fitzpatrick, *Chaudhri v. Osram Sylvania, Inc.*, No. 2:11-cv-05504-MCA (D.N.J.) (Dkt. No. 88-4) (filed Jan. 9, 2015) (endorsing class counsel's 33⅓ percent fee request); Decl. of Brian T. Fitzpatrick, *In re Takata Airbag Prods. Liab. Litig.*, No. 1:15-md-02599-FAM (S.D. Fla.) (Dkt. No. 2033-3) (filed Sept. 8, 2017) (endorsing class counsel's 30 percent fee request); Decl. of Geoffrey P. Miller at 24, *Chieftain Royalty Co. v. QEP Energy Co.*, No. 6:11-cv-00212-KEW (W.D. Okla.) (filed Apr. 26, 2013), available at <http://www.chieftain-qep.com/Portals/0/Documents/06%20Declaration%20of%20Geoffrey%20P.%20Miller%20in%20Support%20of%20Stipulation%20and%20Agreement%20of%20Settlement,%20Application%20for%20Attorneys%27%20Fees%20and%20Notice%20of%20Proposed%20Settlement.pdf> (endorsing class counsel's 40 percent fee request, citing numerous fee awards within the Tenth Circuit over 36 percent); Decl. of Geoffrey P. Miller, *Chieftain Royalty Co. v. XTO Energy Inc.*, No. 6:11-cv-00029-KEW (E.D. Okla.) (Dkt. No. 206) (filed Feb. 23, 2018) (endorsing class counsel's 40 percent fee request); Expert Report of Professor Charles Silver, *In re (Bank of Am.) Checking Acct. Overdraft Litig.*, No. 1:09-md-02036-JLK (S.D. Fla.) (Dkt. No. 1885-12) (filed Sept. 16, 2011) (endorsing class counsel's 30 percent fee request).

¹⁰¹ Decl. of Brian T. Fitzpatrick on the Reasonableness of Class Counsel's Requested Award of Attorneys' Fees at 4, *In re Urethane Antitrust Litig.*, No. 2:04-md-01616-JWL (D. Kan.) (Dkt. No. 3269-1) (filed July 15, 2016), available at http://polyetherpolyolsettlement.com/docs/Reply_Mem_iso_Attys_Fees_etc_Exhibits_for_website.pdf.

¹⁰² Professor Fitzpatrick, for example, submitted attorneys' fees declarations in *NFL Concussion*, *Volkswagen "Clean Diesel,"* and *BP Deepwater Horizon*. In all three cases, the issue of how to treat contract counsel was prominent and contentious, and Fitzpatrick's failure to say anything about those lawyers in supporting fees for class counsel is telling. For instance, Fitzpatrick nowhere suggested that a portion of the attorneys' fees in those cases should go to contract counsel. To the contrary, Fitzpatrick assumed that the award would go solely to class counsel (and other common benefit counsel). See Decl. of Brian T. Fitzpatrick at 2, *In re Nat'l Football League Players' Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa.) (Dkt. No. 8447-2) (filed Oct. 10, 2017) (discussing, without mentioning individual contingency fee agreements, "how to allocate fees among multiple firms that have worked on behalf of *[the] class*" (emphasis added)); Decl. of Brian T. Fitzpatrick in Support of Pls.' Mot. for Attorneys' Fees & Costs at 17–18, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 3:15-md-02672-CRB (Dkt. No. 2175-2) (filed Nov. 8, 2016) (acknowledging some individual contingency fee agreements but endorsing attorneys' fees only for common benefit counsel); Decl. of Brian T. Fitzpatrick at 7, 9–34, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex. on Apr. 20, 2010*, No. 2:10-md-02179-CJB-JCW (E.D. La.) (filed Aug. 21, 2016) (Dkt. No. 21098-3) (discussing percentage and lodestar methods for calculating fees to "class counsel" alone). And in other cases in which Silver, Geoffrey Miller, and Fitzpatrick urged fees of 30 percent or more to class counsel, it was clear that numerous individual lawsuits had been filed. See, e.g., Transfer Order at 2, *In re Takata Airbag Prods. Liab. Litig.*, No. 1:15-md-02599-FAM (J.P.M.L. Feb. 6, 2015) (Dkt. No. 1) (noting that "constituent and tag-along actions are pending across the country in more than two dozen districts").

for those class members who chose to hire their own attorneys. In none of them do the experts argue that class members who hired their own lawyers should pay no more in fees than class members who did not.¹⁰³ In none of them do the experts argue that contract lawyers should be paid out of a common fund for *non*-common benefit work. In short, the expert declarations submitted by Miller et al. and Kull/Silver here are significant departures from these experts' prior submissions to courts in numerous other cases.

f. The Arguments of Watts and Its Experts Regarding the Joint Prosecution Agreement Are Meritless

78. Watts and its experts contend that this Court need not fret over the allocation of attorneys' fees because the lawyers themselves worked out all of the details in the Participation Agreements and Minnesota Joint Prosecution Agreements ("JPA"). Miller et al. note, for example, that the JPA is "a valid contract, binding on its signatories," and that this Court specifically approved and incorporated the JPA in its own Order Establishing Protocols for Common Benefit Work and Expenses and Establishing the Common Benefit Fee and Expense Funds (Dkt. No. 936) ("CBO"). Miller et al. Decl. at 27. Similarly, Kull/Silver assert that "[t]he

¹⁰³ Importantly, in each of these cases (as discussed in ¶ 44), the class notice clearly specified that each class member must independently pay for an individual lawyer if he or she chooses to retain one. See Long-Form Notice at 5, *In re Urethane Antitrust Litig.*, No. 2:04-md-01616-JWL (D. Kan.), available at <http://polyetherpolyolsettlement.com/docs/notice.pdf> ("Plaintiffs' Counsel represent you and other members of the Class. . . . If you want to be represented by your own lawyer, you may hire one at your own expense. . . . You do not need to hire your own lawyer If you hire your own lawyer, you will have to pay for that lawyer at your own expense."); Long-Form Notice at 13–14, *In re Takata Airbag Prods. Liab. Litig.*, No. 1:15-md-02599-FAM (S.D. Fla.), available at <https://www.autoairbagsettlement.com/Content/Documents/Honda/Honda%20Notice.pdf> ("The Court has appointed lawyers to represent you and other Class Members. . . . If you want to be represented by another lawyer, you may hire one to appear in Court for you at your own expense."); Long-Form Notice at 10, *Marcus v. J.C. Penney Co., Inc.*, No. 6:13-cv-00736-RWS-KNM (E.D. Tex.), available at http://www.jcpenneysecuritieslitigation.com/media/1021126/v3_jys_notice_072717_final.pdf ("If you are a Class Member . . . [y]our interests will be represented by Lead Counsel. If you choose, you may enter an appearance individually or through your own counsel at your own expense."); Long-Form Notice at 3, *In re (Bank of Am.) Checking Acct. Overdraft Litig.*, No. 1:09-md-02036-JLK (S.D. Fla.) (Dkt. No. 3338-1), available at <https://ecf.flsd.uscourts.gov/doc1/051111962641> ("If you elect to hire your own lawyer, you will be responsible to pay your lawyer's fees and costs."); Long-Form Notice at 8, *Dahl v. Bain Capital Partners LLC*, No. 1:07-cv-12388-WGY (D. Mass.) (Dkt. No. 1044-1) ("If you want to be represented by your own lawyer, you may hire one at your own expense."); Long-Form Notice at 18, *Cook v. Rockwell Int'l Corp.*, No. 1:90-cv-00181-JLK (D. Colo.) (Dkt. No. 2407-3) ("[Y]ou do not need to hire your own lawyer You may, however, hire a lawyer at your own expense"); Long-Form Notice at 6, *Chaudhri v. Osram Sylvania, Inc.*, No. 2:11-cv-05504-MCA (D.N.J.), available at https://autolightclaims.com/Portals/0/Documents/4113_LiteBrite_LF%20Notice_WEB_v2.pdf ("If you want to be represented by your own lawyer, you may hire one at your own expense."); Long-Form Notice at 7, *In re (PNC Bank) Checking Account Overdraft Litig.*, No. 1:09-md-02036-JLK (S.D. Fla.) (Dkt. No. 2008-6) ("If you want to be represented by your own lawyer in this case, you may hire one at your own expense."); Long-Form Notice at 7, *Chieftain Royalty Co. v. XTO Energy Inc.*, No. 6:11-cv-00029-KEW (E.D. Okla.) (Dkt. No. 197) ("If you retain separate counsel, you will be responsible for his or her fees and expenses out of your own pocket.").

JPA, by its terms and as adopted by the Courts’ common benefit orders, ... fixed a contract price” for the work of the attorneys in this case. Kull/Silver Decl. at 7.

79. Watts itself is certainly free to expound on its interpretation of the JPA and the Court’s orders, but I am surprised that its experts feel qualified to opine *as experts* on the construction, validity, and applicability of the JPA or the correct interpretation of the Court’s procedural orders in this litigation. I do not purport to offer an “expert” opinion on the meaning of the JPA and CBO. The various attorneys seeking fees have briefed (and will continue to brief) the meaning of those items. I would note, however, that Watts’s experts, in embracing Watts’s interpretations, have failed to grapple with substantial arguments to the contrary. They simply assume, without analysis, that the JPA would continue to apply in the context of a class action settlement, and that this Court intended for the JPA to continue to apply in that context.¹⁰⁴

i. Class Counsel’s Arguments Rebutting Watts and Its Experts Based on the CBO

80. The Kansas MDL lawyers make substantial arguments that the CBO and JPA do not apply to class settlements. *See* Mem. in Support of Kansas MDL Co-Lead Counsel & Settlement Class Counsel Seeger’s Pet. for Award of Attorneys’ Fees, Reimbursement of Expenses, & Service Awards to Class Representatives/Bellwether Plaintiffs & Allocation of Attorneys’ Fee Award at 7–8 (Dkt. No. 3587) (hereinafter “7/10/18 Co-Lead Fee Mem.”); Decl. of Patrick J. Stueve ¶ 617 (Dkt. No. 3587-1) (hereinafter “Stueve Decl.”); Co-Lead Response at 6, 13–17, 59–78. As they note (*see* Co-Lead Response at 60–62), Section IV.B3 of the CBO provides that defendants shall hold back and set aside (for the common benefit fee fund and common benefit expense fund) certain percentages of any settlement or judgment as “assessment[s].” CBO at 20–21. Those assessments, which varied from 5.5 percent to 13 percent, governed recoveries in cases filed in the Kansas MDL, cases of attorneys who signed the Participation Agreement, and cases filed in Minnesota state court by attorneys who were parties to the JPA. Critically,

¹⁰⁴ Miller et al. cite Professor John Coffee for the proposition that fee-splitting contracts among lawyers should be viewed by a court with “benign neglect.” Miller et al. Decl. at 26 (quoting John C. Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 903 (1987)). Those experts, however, have cited Professor Coffee out of context. Coffee was discussing the circumstance in which attorneys “[s]eek[] to renege on their agreement.” *Id.* at 902. Nowhere does Coffee argue that a court should treat a contract with “benign neglect” when, as here, some of the parties to the contract argue that it was not intended to apply to the circumstance at issue. Here, class counsel argue that the JPA was not intended to apply to a class settlement.

however, class counsel point to language in the CBO—not seriously analyzed by Watts or its experts—that, in their view, demonstrates that the assessments referenced in the CBO do not apply to attorneys’ fees or expenses sought or awarded in a class action settlement. *See* 7/10/18 Co-Lead Fee Mem. at 7–8; Stueve Decl. ¶ 617; Co-Lead Response at 13–17, 59–78. Specifically, they point to the following language:

*In the event that there is a class settlement, recovery or judgment in favor of the class, no assessment pursuant to this Section will be made, either for attorneys’ fees or for expenses, individually from any class member or his/her/its individual attorney as to the portion of any class recovery distributed to that individual class member if the class member remains in the class (i.e., does not opt-out of the class).*¹⁰⁵

81. Thus, class counsel have put forth an argument, bolstered by the text of the CBO, to support their view that the CBO does not apply in the class settlement context. Even assuming that Watts’s experts are qualified to offer “expert” testimony on the interpretation of the CBO or the parties’ intentions in executing the JPA, it is not credible for them to essentially ignore this potentially dispositive language.

ii. Class Counsel’s Arguments Rebutting Watts and Its Experts Based on the Negotiation of the JPA

82. Watts and its experts rely on various provisions of the JPA that address common benefit assessments. *See, e.g.*, Watts Mem. at 40–41; Miller et al. Decl. at 31–32. Class counsel argue, however, that the JPA does not limit attorneys’ fees that Kansas common benefit counsel can recover from a fund created by a class settlement (even one that includes clients of JPA signatories). They further argue that the JPA does not dictate the allocation of fees between class counsel and contract counsel in the event of a class settlement. And they note that Watts and its experts offer no argument that the term “assessment” can be validly construed to include class settlements (as opposed to individual recoveries). Class counsel also explain that the JPA was negotiated in the context of the original proposed (and filed) CBO (which included the class settlement exemption discussed above). *See* Co-Lead Response at 13–17, 59–78.

83. Again, I am not in a position to opine as an expert on the correct construction of the JPA, and it is not clear why Watts’s experts believe that they are qualified to do so. In any case,

¹⁰⁵ CBO at 20 (emphasis added).

Watts's experts have given their interpretation of the JPA without addressing the substantial arguments that can be raised to the contrary. Especially given the fact that Watts's experts do not identify what evidence they reviewed in rendering their opinions (*see* ¶ 39 & n.44), their interpretation of the JPA (and their implicit rejection of the language of the CBO discussed above) should be given no weight.

iii. Watts and Its Experts Err in Arguing that Even If the JPA Does Not Apply, Its Allocation of Fees Should Govern Under Principles of Restitution

84. Kull/Silver implicitly recognize that Watts and Miller et al. are on shaky ground in relying on the JPA as a binding contract in the context of a class settlement. Thus, they argue that, even if the JPA is *not* binding for a class settlement, its allocation principles should nonetheless govern as a matter of restitution because the agreement is a hard fought, arms-length determination of what the various lawyers believed were fair allocations. *See* Kull/Silver Decl. at 13-16. But if, as Kansas MDL counsel argue, the allocations under the JPA were never intended to apply to a class settlement, then it makes no sense to use the JPA as a restitutionary proxy for what should be done in the class settlement. Class counsel note that, had the parties understood that the JPA *would* apply to a class settlement, the terms that were negotiated would have been very different. *See* Co-Lead Response at 60–62. Indeed, Kansas MDL counsel maintain that it is precisely because they knew that the JPA would not apply to a class action that they were willing to agree to the JPA's terms. *See id.* It is fundamental that if an unenforceable contract is to be used as the basis for restitution, the contract must involve the same subject matter and issues.¹⁰⁶ Thus, a contract that was never intended to apply to a class settlement

¹⁰⁶ Kull/Silver cite section 31 of the Restatement (Third) of Restitution and Unjust Enrichment for the proposition that “[i]f the parties have specified a price for a performance that has no definitive market value . . . the value to the recipient of claimant’s performance may be properly determined, for restitution purposes, by what the recipient has offered to pay.” Kull/Silver Decl. at 15. Of critical importance, however, that same section goes on to caution that “[t]here is no claim under this section for a performance for which the [recipient] did not—at least implicitly—agree to pay” RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 31 cmt. d (2011) (emphasis added). Thus, if it is true that class counsel here did not agree to the JPA’s allocation scheme in the context of a class action, then the Restatement and case law authorities cited by Kull/Silver are inapposite.

None of the cases cited by Kull/Silver (*see* Kull/Silver Decl. at 5 & n.5) suggests that an unenforceable contract can be used as a restitutionary proxy for the parties’ intent in circumstances not contemplated by the unenforceable contract at issue. For example, in *Oxborough v. St. Martin*, 169 Minn. 72, 210 N.W. 854 (1926), an oral contingency fee agreement between attorney and client was unenforceable under the Statute of Frauds, but it addressed the same services actually rendered by the attorney that were the subject of the claim of restitution. As the court stated: “[W]hen there has been an understanding . . . as to the value of the services by consenting to give a certain amount therefor, that fact ought . . . to be received in evidence as an admission against the client as to what

cannot serve as a proxy for what the parties deemed a fair allocation of fees in a class settlement. In short, unless they can show that class counsel intended the JPA to apply to a class settlement, Watts and its experts cannot rely on the JPA as the basis for how the Court should rule on the fee dispute here.

B. Various Attorneys Err in Arguing for Deferral of Fee Determinations Until Final Claims Data Is Available

85. A number of the July 10, 2018 submissions contend that this Court should defer any ruling on attorneys' fees until all claims data is available. As Bassford Remele argue: "[W]e believe that an equitable fee allocation can occur only after the claim period has closed and the respective courts have the raw claims data available to determine which clients have participated in the settlement." Bassford Mem. at 6. Significantly, these submissions cite no relevant authority for the proposition that in a case like the present one—which does not involve a reversionary settlement—a court should delay awarding fees until all claims data is submitted.

86. Class counsel advise me that claims data will not be finalized until, at the earliest, April 2019. Indeed, they tell me that the date could be much later than that. I assume those facts to be correct for purposes of my opinion. Under those circumstances, holding back a ruling on fees would, in my view, be unfair to class counsel, who have invested substantial time and resources on this case since 2014 with no recovery of attorneys' fees or expenses. In my view, there must be a major reason in order to justify postponing a ruling on fees for many more months. I see none here.

87. It is critical to note that this is a non-reversionary settlement. Regardless of which particular class members submit claims, no amount of the \$1.51 billion settlement will revert to Syngenta. The entire amount will go to class members (after the award of attorneys' fees and expenses). Thus, the Court has everything it needs to render a fee award. As I testified in my original declaration (*see* Klonoff Decl. ¶¶ 49–90), fees should be awarded based on the percentage basis (and with an analysis of the *Johnson* factors). There is no possibility that the amount of the fund will decrease.

value he placed on the services." *Id.* at 75, 855. Likewise, in *Pelletier v. Johnson*, 188 Ariz. 478, 937 P.2d 668 (Ct. App. 1996), a contract for the sale of vinyl siding was held unenforceable due to the seller's noncompliance with statutory notice requirements. The contract was used as a basis for restitution, however, because it set forth an agreed price for precisely the vinyl siding purchased. These unremarkable cases do not provide any support for using the JPA as a basis for restitution in a situation beyond the scope of the parties' agreement.

88. A reversionary settlement (which is not involved here) would create a different situation, and might justify postponement of a fee award until the claims rate is determined. Consider, for example, a \$1 billion fund with a reversionary clause. If class members claim only \$100 million of the fund, it would not make sense to award fees based on a percentage of \$1 billion. For example, an award of 40 percent of the \$1 billion (\$400 million) would result in a fee award four times the amount actually received by the class. That is why courts dealing with reversionary clauses sometimes express a preference for holding off on awarding fees until the claims data is available. As one court noted in the context of a reversionary class settlement:

The Court's primary concern . . . is whether a fee award of \$1,583,333.33—a full one-third of the \$4,750,000 common fund—is commensurate to the benefits actually bestowed on class members in this case. [O]nly 39% of the 4,018 class members have filed Claim Forms and are eligible to receive settlement checks. The Court finds this response rate to be unimpressive, particularly where each class member is eligible to receive a fairly substantial amount of money. As a result of the low claim rate, Class Counsel stands to collect 33 and 1/3% of a \$4,750,000 common fund, whereas only 26% of the fund will end up in class members' pockets, and *39% of the fund will revert to Defendants*. Arguably, the fee award in this case is closer to a 50/50 split between Class Counsel and the class members, rather than the one-third requested by counsel.¹⁰⁷

This problem does not exist here. The Court can award fees with the knowledge that the fund will definitely be \$1.51 billion and that, under no circumstances, will any of that fund revert to Syngenta.

89. Notably, nothing in Rule 23 supports a broad practice of deferring attorneys' fees pending final claims data. Indeed, during the Civil Rules Advisory Committee's recent (and exhaustive) consideration of proposed amendments to Rule 23, the issue of claims rate data came up specifically, but the Committee did not go forward with any change to Rule 23 that would

¹⁰⁷ *Roberts v. TJX Companies, Inc.*, No. 13-cv-13142-ADB, 2016 WL 8677312, at *10–13 (D. Mass. Sept. 30, 2016) (emphasis added). *Accord, e.g., Valdez v. Neil Jones Food Co.*, No. 1:13-cv-00519-AWI-SAB, 2015 WL 11109826, at *1–2 (E.D. Cal. Dec. 3, 2015) (expressing concern “that the attorney fee request in this claims-made settlement is based on the maximum settlement amount” and noting “concern[s] about the potential reversion”); *see also* Robert H. Klonoff & Mark Herrmann, *The Class Action Fairness Act: An Ill-Conceived Approach to Class Settlements*, 80 TUL. L. REV. 1695, 1698–1705, 1713 (2006) (expressing concern about calculating attorneys' fees where value to class members of the settlement is unknown, and noting that “both coupon settlements and reversionary settlements raise the question of how to determine the true value of the benefit to the class when calculating fees”).

require deferral of the award of attorneys' fees until all claims data was received.¹⁰⁸ The only mention of the issue in the proposed amendments (presently due to go into effect on December 1, 2018) is the following remark in the Committee Notes:¹⁰⁹ "In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results."¹¹⁰ That brief comment does not support the deferral of an attorneys' fee award here. In my personal opinion, the reference to "[i]n some cases" means that there needs to be a strong reason to defer, such as the existence of a provision that all unclaimed funds will revert to the defendant.¹¹¹

C. Some Options for the Court in Addressing Common Benefit and Contract Attorney Claims for Fees

90. As I have argued, the approach of Watts and certain others for awarding fees is not persuasive. First, it makes no sense to provide compensation out of the common fund for time spent that benefited only individual clients and not the class as a whole. The class was told in the class notice (consistent with class notices in thousands of other cases) that anyone hiring his or her own lawyer would have to pay for that lawyer's services. It would be very unfair to now pay such lawyers out of the common fund for non-common benefit work (and thus require all class members to contribute out of their shares of the fund).

91. It is important to reiterate that attorneys with individual contracts who also performed common benefit work (as Watts and many others claim to have done) can submit their common benefit time and urge the Court to award common benefit fees for that work. Here, if the Court

¹⁰⁸ I was a member of the Civil Rules Committee during that period, and was also a member of the Class Action Subcommittee that focused specifically on Rule 23.

¹⁰⁹ See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (refusing to give weight to Committee Notes).

¹¹⁰ TRANSMITTAL OF PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE 21–22 (Oct. 4, 2017), available at http://www.uscourts.gov/sites/default/files/2018-04-26-congressional_package_final_posted_to_the_website_0.pdf; see also Pending Rules & Forms Amendments, UNITED STATES COURTS, <http://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments> (last visited Aug. 12, 2018).

¹¹¹ Indeed, even a modest claims data proposal offered to the Committee from a non-member did not move forward. See Letter from Brian Wolfman et al. to Richard Marcus, Associate Reporter to the Advisory Comm. on Civil Rules (Mar. 17, 2015), available at <http://src.bna.com/cqs>. That proposal would *not* have required deferral of a fee award until all claims data was gathered; rather, it merely would have required a report, at the end of the claims process, regarding how the funds were distributed. The fact that even that modest proposal was not adopted further refutes the argument by Bassford Remele and others that this Court should postpone the awarding of fees until all claims data has been finalized.

adopts the allocation proposed by MDL class counsel (*see* Klonoff Decl. ¶¶ 129–131), Watts will be eligible for common benefit fees from both the 12.5 percent of total fees allocated to common benefit counsel in the Minnesota litigation and the 20 percent to be allocated among common benefit counsel in the Court’s discretion. Moreover, an award of common benefit fees here (to class counsel and other attorneys who justify common benefit time) does not foreclose attorneys with contingency fee contracts from attempting to enforce their contracts as a matter of contract law (subject to all defenses).

92. In most class actions, disputes between common benefit counsel and contract counsel do not arise. In my experience, many class actions involve few individual fee agreements, usually because the small amounts at stake do not justify contracts with large numbers of individual class members. In other class actions, attorneys with individual fee contracts simply choose not to enforce them, or the plaintiffs simply pay the fees per the contract. At the other end of the spectrum are cases in which a class is not suitable but an MDL proceeding is still justified. That is the situation in many mass tort cases, and was true (for example) in *Vioxx*¹¹² and *Zyprexa*.¹¹³ In such cases, every plaintiff is represented by counsel pursuant to a fee agreement.

93. This case is a hybrid; it is a class action, but there are also thousands of individual contracts. It is not unique, however. There are other cases that have involved both class actions and numerous individual contracts, and those cases provide potential guidance to this Court in deciding how to allocate fees.

94. For example, the Court may wish to consider the approach of Judge Breyer in the *Volkswagen* case.¹¹⁴ There, Judge Breyer awarded common benefit fees based on benefits conferred on the class as a whole,¹¹⁵ and left individual attorneys free to seek fees directly from their clients as “a matter of contract law, subject to the codes of professional conduct.”¹¹⁶ Under

¹¹² *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606 (E.D. La. 2008).

¹¹³ *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488 (E.D.N.Y. 2006).

¹¹⁴ *In re Volkswagen “Clean Diesel” Marketing, Sales Practices & Prods Liab. Litig.*, No. 3:15-md-02672-CRB (N.D. Cal.).

¹¹⁵ *In re Volkswagen “Clean Diesel” Marketing, Sales Practices & Prods Liab. Litig.*, No. 3:15-md-02672-CRB, 2017 WL 1047834 (N.D. Cal. Mar. 17, 2017).

¹¹⁶ *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 3:15-md-02672-CRB, 2017 WL 1474312, at *5 (N.D. Cal. Apr. 24, 2017). *See id.* at *1 n.1 (noting that 244 motions were filed by individual attorneys who were not compensated by the settlement fund).

that model, all contract lawyers here—including Watts—could seek fees from the common fund for any and all time that they can justify as common benefit time. At the same time, individual contract counsel would have to decide whether, in addition to recovering whatever common benefit fees they can prove, they want to sue to enforce their contracts against their clients. Such actions would not be part of this MDL but, as Judge Breyer noted in *Volkswagen*, would “be resolved in the appropriate forum.”¹¹⁷ In that forum, the clients would have the opportunity to assert all available defenses.

95. In the *NFL Concussion* case,¹¹⁸ Judge Brody took a different approach. There, in a settled class action involving retired NFL players alleging injuries from concussions, the court determined—applying criteria similar to the *Johnson* factors—that class counsel should receive 11 percent.¹¹⁹ In that case, the settlement occurred very early, with no formal discovery, no briefing or ruling on class certification, and no class trial.¹²⁰ In analyzing whether—and at what amount—to cap contract attorneys’ fees, the court found that separately represented class members should not have to pay more than, in total, 33 percent in fees.¹²¹ Thus, the court capped contract attorneys’ fees at 22 percent.¹²² Professor Bill Rubenstein, the court-appointed expert upon whom Judge Brody relied, noted that, “given the relatively streamlined nature of the litigation, the clients’ total fee payments should be far less than, in some instances, 60+% of their recoveries.”¹²³ Contract attorneys in *NFL*, as in *Volkswagen*, could not recover individual

¹¹⁷ *Id.*

¹¹⁸ *In re Nat’l Football League Players’ Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa.).

¹¹⁹ *See In re Nat’l Football League Players’ Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2018 WL 1635648 (E.D. Pa. Apr. 5, 2018).

¹²⁰ *See id.* at *5 (“This settlement was secured without formal discovery, with limited litigation of motions, and with no bellwether trials.”). As I previously noted (*see* Klonoff Decl. ¶¶ 51–101), the instant case warrants fees of 33⅓ percent because the circumstances are very different than those in *NFL*.

¹²¹ *See In re Nat’l Football League Players’ Concussion Injury Litig.*, No. 2:12-md-02323-AB, 2018 WL 1658808, at *3 (E.D. Pa. Apr. 5, 2018).

¹²² *See id.*

¹²³ Expert Report of Professor William B. Rubenstein ¶ 28, *In re Nat’l Football League Players’ Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa.) (Dkt. No. 9526) (filed Dec. 11, 2017); *see also* Rely of Professor William B. Rubenstein to Responses to Expert Report ¶ 6, *In re Nat’l Football League Players’ Concussion Injury Litig.*, No. 2:12-md-02323-AB (E.D. Pa.) (Dkt. No. 9571) (filed Jan. 19, 2018) (supplemental report recommending 22 percent cap on individual contingency fee agreements). Similarly, in *Deepwater Horizon*, the court capped individual contingency fees at 25 percent, citing Judge Fallon’s reasoning in *Vioxx* and noting that contract attorneys “reaped a great benefit from the [class action] structure” and the “tremendous economies of scale for the lawyers who would otherwise be responsible for preparing thousands of individual cases for trial”). *In re Oil Spill by the Oil*

contractual fees from the common fund, but were required to take the matter up with their individual clients and sue separately in an appropriate forum if they sought to enforce their contracts. The difference is that in *NFL*, the fees that contract counsel could seek were capped.

96. In my view, the *Volkswagen* model is preferable in this case, as it avoids the need for the Court to undertake the difficult task of setting a reasonable fee cap.

97. Ultimately, consistent with MDL class counsel’s proposed allocation, this Court can determine Watts’s entitlement to common benefit fees from the common fund by simply applying the established *Johnson* factors to all of the attorneys’ time.¹²⁴ Significantly, Watts’s own experts have on numerous occasions applied and embraced the *Johnson* factors (or similar factors from other circuits).¹²⁵ Indeed, Watts itself cites the *Johnson* factors with approval numerous times in its brief (*see* Watts Mem. at 29, 30, 31, 58), and concedes that “[i]n the class context, the Tenth Circuit judges the reasonableness of attorney fees against the familiar [*Johnson*] factors.” *Id.* at 29. Yet, inexplicably, Watts and its experts abandon the *Johnson* factors with respect to Watts’s own fees and urge a complicated formula—derived without any case law precedent. No doubt Watts has created an exception for itself because it understands that, under the *Johnson* factors, it would not fare nearly as well as it would under its “for this case only” formula. But Watts cannot legitimately abandon the universally endorsed *Johnson* factors merely because those factors do not yield an award as high as Watts would like.

Rig “Deepwater Horizon” in the Gulf of Mex. on Apr. 20, 2010, No. 2:10-md-02179-CJB-JCW, 2012 WL 2236737, at *1–2 (E.D. La. June 15, 2012).

¹²⁴ Those factors are identified and explained in detail in my original declaration. *See* Klonoff Decl. ¶¶ 52–90; *see also, e.g., In re Copley Pharm., Inc.*, 50 F. Supp. 2d 1141, 1150 (D. Wyo. 1999) (“[T]he *Johnson* factors . . . provide a useful framework for assessing the quality and quantity of counsel’s work.” (citation and internal quotation marks omitted)).

¹²⁵ *See, e.g.,* Report of Professor Charles Silver on the Reasonableness of Class Counsel’s Requested Award of Attorneys’ Fees at 6–34, *In re Urethane Antitrust Litig.*, No. 2:04-md-01616-JWL (D. Kan.) (Dkt. No. 3251-1) (filed June 1, 2016), *available at* <http://polyetherpolyolsettlement.com/docs/Ex%20A%20-%20Silver%20Report.pdf> (28-page analysis of fee request under the *Johnson* factors, noting that those factors are the appropriate test because they “identify features of representations that are likely to affect market rates”); Decl. of Geoffrey P. Miller at 31–42, *Chieftain Royalty Co. v. XTO Energy Inc.*, No. 6:11-cv-00029-KEW (E.D. Okla.) (Dkt. No. 206) (filed Feb. 23, 2018) (extensive analysis endorsing class counsel’s 40 percent fee request under the *Johnson* factors); Decl. of Brian T. Fitzpatrick at 10–32, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex. on Apr. 20, 2010*, No. 2:10-md-02179-CJB-JCW (E.D. La.) (filed Aug. 21, 2016) (Dkt. No. 21098-3) (applying *Johnson* factors); Decl. of Brian T. Fitzpatrick at 9–19, *In re Takata Airbag Prods. Liab. Litig.*, No. 1:15-md-02599-FAM (S.D. Fla.) (Dkt. No. 2033-3) (filed Sept. 8, 2017) (applying Eleventh Circuit’s *Camden I* factors and noting overlap with *Johnson* factors).

VI. CONCLUSION

98. For the reasons stated above, Watts, its experts, and various other attorneys offer legally and factually flawed arguments supporting their fee applications.

99. This Court should decide the attorneys' fees issues now, and should not wait until all claims data is in.

100. In awarding fees, the Court should apply the *Johnson* factors to determine Watts's and other attorneys' entitlement to fees from the common fund.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct based on information known to me.



Robert H. Klonoff

August 17, 2018

EXHIBIT 79

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

**IN RE SYNGENTA AG MIR162 CORN
LITIGATION**

Master File No. 2:14-MD-02591-JWL-JPO

**THIS DOCUMENT RELATES TO
ALL CASES EXCEPT:**

MDL No. 2591

*Louis Dreyfus Company Grains
Merchandising LLC v. Syngenta AG, et
al., No. 16-2788-JWL-JPO*

*Trans Coastal Supply Company, Inc. v.
Syngenta AG, et al., No. 2:14-cv-02637-
JWL-JPO*

*The Delong Co., Inc. v. Syngenta AG, et
al., No. 2:17-cv-02614-JWL-JPO*

*Agribase International Inc. v. Syngenta
AG, et al., No. 2:15-cv-02279-JWL-JPO*

SUPPLEMENTAL DECLARATION OF SCOTT A. POWELL

I, Scott A. Powell, declare as follows:

1. I am a partner at Hare, Wynn, Newell & Newton, LLP (“Hare Wynn”) and counsel of record for Plaintiffs.

2. I make this declaration based on my personal knowledge and in my capacity as a partner at, and representative of, Hare Wynn. In preparing this declaration I consulted with lawyers and staff members at Hare Wynn who also have knowledge of the matters discussed herein. If called to testify to the contents of this declaration, I could and would competently do so.

3. As described in more detail in my previously filed Declaration in Support of Motion for Award of Attorneys’ Fees and Expenses, Hare Wynn managed the production of

written discovery from the producer plaintiffs in the above-styled litigation. (ECF No. 3587-2 ¶¶ 100-145.) In carrying out those responsibilities, lawyers and staff members at my firm worked with lawyers who had filed cases on behalf of individual producers who were obligated to submit plaintiff fact sheets. Lawyers and staff at my firm also worked closely with other lawyers who were collecting written discovery from bellwether selections.

4. Richard Coffman and Mitchell Toups filed two cases that were transferred to this Court in the spring of 2015: *J&P Farm, et al. v. Syngenta Corp., et al*, No. 2:15-cv-07999-JWL-JPO and *Borah, et al. v. Syngenta AG, et al.*, No. 2:15-cv-09133-JWL-JPO. The *J&P Farm* complaint named 20 plaintiffs and the *Borah* complaint named 837 plaintiffs. Coffman and Toups failed to submit plaintiff fact sheets for a majority of those plaintiffs.

5. We communicated with Coffman and Toups and counsel for Syngenta regarding deadlines for submission of the fact sheets for the *Borah* plaintiffs. We made efforts to negotiate deadlines for the *Borah* plaintiffs' fact sheets separate from the deadlines set for the other plaintiffs in the MDL, and Hare Wynn contacted Coffman and Toups on numerous occasions to check on the status of their fact sheet preparation. Coffman and Toups were slow in providing fact sheets for the *Borah* plaintiffs and had only submitted a small number of fact sheets by the early fall of 2015.

6. At a status conference in October 2015, Syngenta complained about the failure of some plaintiffs to submit plaintiff fact sheets. By Syngenta's count, most of the plaintiffs who had not submitted fact sheets by that time were Coffman and Toups clients named in the *Borah* complaint. See Trans. of Oct. 19, 2015 Status Conf. at 85:25, 86:10-11 (Syngenta's counsel stating that either 741 or 817 plaintiff fact sheets were outstanding and that "[w]e . . . still don't have 666 or so *Borah* fact sheets."). Hare Wynn similarly concluded based on review of our

records that most of the plaintiffs who had not submitted a fact sheet by the time of that status conference were named in the *Borah* complaint.

7. Following the status conference, this Court on October 21, 2015, directed all plaintiffs to provide completed fact sheets by December 1, 2015, or the Court would “favorably entertain a motion by Syngenta to dismiss that plaintiff’s claims pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute.” (ECF No. 1090 at 6-7.) Several days later, on October 29, 2015, Coffman and Toups voluntarily dismissed the claims of 499 plaintiffs named in the *Borah* complaint. See ECF No. 8, *Borah, et al. v. Syngenta AG, et al*, No. 2:15-cv-09133 (D. Kan.).

8. Several of Coffman and Toups’ clients were selected for the bellwether discovery pool. Three plaintiffs named in the *Borah* case who were selected as bellwethers had to dismiss their cases because we understood that they had not sold corn since November 2013. Fourteen plaintiffs named in the *Borah* case remained in the bellwether discovery pool. Coffman and Toups’ firms provided some assistance with collecting discovery from those plaintiffs, but lawyers at other firms—including Ashlea Schwarz, Dirk Hubbard, and Haile DeBass—were primarily responsible for collecting discovery from those plaintiffs. As I previously noted, Jason Earley and/or I took, defended, or attended over 40 depositions in this litigation. (ECF No. 3587-2 ¶ 166) Neither Toups nor Coffman attended any of those depositions.

9. Coffman and Toups filed two more cases that were transferred to the MDL in 2016: *Williams Farms, LLC, et al. v. Syngenta AG, et al*, No. 2:16-cv-02696-JWL-JPO and *Dirba Farms, et al. v. Syngenta AG, et al.*, No. 2:16-cv-02699-JWL-JPO. The complaints named 216 and 302 producer plaintiffs, respectively.

10. Hare Wynn paralegal Darcy Glasgow was assigned to work with Coffman and Toups’ firms to help coordinate the production of fact sheets. There were numerous days when

Darcy spent a majority of her time reviewing fact sheets prepared by Coffman and Toups to identify potential deficiencies, verifying which fact sheets were ready to be produced, and formatting the fact sheets for production. She frequently flagged for Coffman and Toups potential deficiencies in their fact sheets and communicated with Coffman and Toups' staff members regarding those potential deficiencies, as well as other issues related to the fact sheet production. Altogether Darcy exchanged 150-200 e-mails regarding fact sheets to paralegals at Coffman and Toups' office. Chris Randolph and I also contacted Coffman and Toups' offices on numerous occasions by phone or e-mail to discuss plaintiff fact sheets.

11. Hare Wynn lawyers and staff members also devoted hundreds of hours to assisting our own clients with the completion of plaintiff fact sheets. As I previously mentioned, Hare Wynn and the other co-lead firms filed complaints on behalf of approximately 150 plaintiffs that our firms represented in Kentucky and Mississippi under individual contracts. (ECF No. 3587-2 ¶ 212.) Hare Wynn devoted approximately 740 hours—which averaged out to around 5 hours per plaintiff—collecting the information and documents requested in those Kentucky and Mississippi plaintiffs' fact sheets. We did not classify that time as common benefit.

12. Lawyers at my office have seen some of the solicitation materials that Coffman and Toups distributed to corn farmers.

13. I have attached as Exhibit A a letter that was produced by bellwether plaintiff B-F James & Sons, Inc. at BFJames000000251 in response to one of Syngenta's discovery requests.

14. I have attached as Exhibit B screenshots taken on August 14, 2018, from <https://corncasesettlement.com/syngenta-corn-litigation-u-s-corn-farmers-must-decide-whether-stay-class-action-opt-file-individual-case-april-1-2017/>.

15. I have attached as Exhibit C a screenshot taken on August 14, 2018, from <https://corncasesettlement.com/syngenta-corn-lawsuit-game-changer/>

16. I have attached as Exhibit D a letter signed by T. Christopher Tuck, who represents he is co-counsel with Coffman and Toups.

17. Hare Wynn received multiple calls from farmers and lawyers who were confused by statements they had either read in Coffman and Toups' advertising material or heard in presentations from Coffman and Toups' referring lawyers.

18. I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on this 15th day of August 2018 in Manatee County, Florida.

/s/ Scott A. Powell
Scott A. Powell

EXHIBIT A

ADVERTISING MATERIAL RE: SYNGENTA AG MIR 162 GENETICALLY-ENGINEERED CORN LITIGATION

Dear South Dakota Corn Producer:

In 2009, Syngenta released a genetically engineered corn trait, MIR162, into the U.S. market. The first generation of MIR162 corn was known as "Agrisure Viptera." The second generation, "Agrisure Duracade," was released and distributed for planting in 2014.

Syngenta submitted the MIR 162 corn trait to the Chinese government for approval in March 2010, but it has not yet been approved, and there is no indication it will ever be approved. As a result, as of November 2013, China, the third-largest U.S. corn export market, has stopped importing U.S. corn—thereby causing U.S. farmers to suffer damages in excess of \$1 billion.

Since that time, hundreds of class action lawsuits have been filed against Syngenta, all of which have been consolidated in federal court in Kansas City before senior Judge John W. Lungstrum. Co-counsel, Richard Coffman of the Coffman Law Firm, and I are representing U.S. corn producers against Syngenta. We are trial lawyers with national law practices experienced in representing farmers in agricultural litigation—most recently in the genetically-engineered rice litigation, and currently in the genetically-engineered soft white wheat litigation.

We, however, are not part of the class action litigation. We represent our clients on an individual basis as independent plaintiffs. As an independent plaintiff, Syngenta must deal with the unique aspects of your business and your claims. As an independent plaintiff, you—rather than the class action lawyers—will control the terms of any resolution of your claims, thereby putting you in the best possible position to potentially maximize your recovery based on your specific losses, unique business objectives, and industry dynamics.

Independent plaintiff settlements, if secured, also do not require court approval, and are not subject to claims administration proceedings or appeals. The reverse is true in class actions.

The U.S.D.A. Farm Service Agency maintains a list of all U.S. corn producers. We identified you from this list as a corn producer that may have claims against Syngenta for tainting the U.S. corn market. If you are not represented by a lawyer in connection with your claims, we would appreciate the opportunity to represent you.

We represent our clients on a full contingent fee basis. Under our Contract, we will advance all expenses on your behalf, and you will not owe us a dime for attorneys' fees, litigation expenses or court costs unless we secure a recovery for you. Your share of the expenses and costs will be deducted from your share of the recovery—but only if we secure a recovery for you. Otherwise, you will owe us nothing for fees, expenses or costs.

Enclosed, for your convenience, is a copy of our Contract. If you would like to hire us, please complete and sign the Contract, and mail, email or fax it to us (toll free). We will countersign it and send you a fully executed copy. We will personally handle your case; it will not be referred to another lawyer, and it will not be a part of the class action litigation.

We look forward to working with you on this very important matter. If you have any questions, please contact Richard or me. Our full contact information is set forth in the enclosed Contract.

Best regards,

Mitchell A. Toups

ADVERTISING MATERIAL

EXHIBIT B



January 6, 2017

There are two "camps" in the Syngenta corn litigation—the class action camp and the individual plaintiff camp. We are not the class action lawyers. We only represent individual plaintiffs for whom we file individual cases.

That said, the Court recently certified the class action side of the case. By now, every U.S. corn producer has received the Syngenta corn lawsuit class notice. It's the law.

Here's the good news: just because you received the Syngenta corn litigation class notice does not mean you have to stay in the class action. You have the following options:

Option No. 1. Do nothing, proceed as an unnamed, anonymous class member, and be bound by whatever happens in the Syngenta corn lawsuit class action—good or bad.

Option No. 2. Formally exclude yourself from the Syngenta corn lawsuit class action (also known as opting-out of the class action), file your own individual case—including certain legal claims not asserted in the class action—and control your own destiny.

BEWARE OF SCAMMERS

June 27, 2018

SYNGENTA CORN SETTLEMENT
CLAIM FILING PERIOD STARTS
TODAY

May 11, 2018

SYNGENTA CORN CASE
SETTLEMENT PRELIMINARILY
APPROVED

April 5, 2018

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(also known as opting-out of the class action), file your own individual case—including certain legal claims not asserted in the class action—and control your own destiny.

You may exclude yourself from the Syngenta corn lawsuit class action by submitting the appropriate Class Action Exclusion Request Form by April 1, 2017. All of our clients will receive the appropriate Class Action Exclusion Request Form by mail, which they will return to us. We will then submit the forms on their behalf. Our clients are opting-out of the Syngenta corn lawsuit class action because they have filed individual cases.

If you also want to opt-out of the Syngenta corn lawsuit class action and need a form, here is the link to a printable version of the [Class Action Exclusion Request Form if you farm as an individual](#). Here is the link to a printable version of the [Class Action Exclusion Request Form if you farm in an entity](#) (i.e., a corporation, partnership, LLP, LLC, trust, estate, or other entity).

Setting aside the fact that we believe corn producers may very well fare better as individual plaintiffs, there are other compelling reasons to opt-out of the Syngenta corn lawsuit class action and file an individual case—such as (1) individual plaintiffs—not the class action lawyers—will control the resolution of their claims, (2) Syngenta must deal with the unique aspects of individual plaintiffs' claims, and (3) individual plaintiff settlements do not require court approval, are not subject to delay caused by class administration, and are not subject to further delay or reversal on appeal. The reverse is true in class actions.

These are very important considerations in light of the fact that the Court recently appointed a special master to oversee settlement discussions on a parallel track with the Syngenta corn litigation test case trials scheduled to begin in 2017.

For the most part, you will have to assemble the same types of documents and information to participate in any Syngenta corn lawsuit class action recovery—assuming there is one—that you must assemble to file an individual case. So why not file an individual Syngenta corn lawsuit case right here, right now, and put yourself in the best possible position to maximize your recovery?

That said, we recommend that all corn producers who have not yet hired a lawyer in this matter to consult with one immediately about this very important decision. **The April 1, 2017 deadline is rapidly approaching.**

Questions? Call or email us. We take telephone calls and answer emails from corn farmers. We are accessible.



SYNGENTA CORN LAWSUIT SETTLEMENT

(877) 453-5297 (TOLL-FREE)

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corn lawsuit class action and file an individual case—such as (1) individual plaintiffs—not the class action lawyers—will control the resolution of their claims, (2) Syngenta must deal with the unique aspects of individual plaintiffs' claims, and (3) individual plaintiff settlements do not require court approval, are not subject to delay caused by class administration, and are not subject to further delay or reversal on appeal. The reverse is true in class actions.

These are very important considerations in light of the fact that the Court recently appointed a special master to oversee settlement discussions on a parallel track with the Syngenta corn litigation test case trials scheduled to begin in 2017.

For the most part, you will have to assemble the same types of documents and information to participate in any Syngenta corn lawsuit class action recovery—assuming there is one—that you must assemble to file an individual case. So why not file an individual Syngenta corn lawsuit case right here, right now, and put yourself in the best possible position to maximize your recovery?

That said, we recommend that all corn producers who have not yet hired a lawyer in this matter to consult with one immediately about this very important decision. **The April 1, 2017 deadline is rapidly approaching.**

Questions? Call or email us. We take telephone calls and answer emails from corn farmers. We are accessible.

We also would be pleased to represent you (please complete our [Digital Online Contract](#)), file an individual case for you, and submit a Class Action Exclusion Request Form on your behalf. We are here to help.

Mitchell A. Toups | 409.832.1800 | matoups@wgttl.com

Richard L. Coffman | 409.833.7700 | rcoffman@coffmanlawfirm.com

Filed Under: [Syngenta Corn Lawsuit Updates](#)

WE REPRESENT CORN FARMERS IN ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AGAINST SYNGENTA IN THE CORN LITIGATION.

THIS SYNGENTA CORN CASE SETTLEMENT WEBSITE IS A COLLABORATIVE EFFORT BETWEEN THE FOLLOWING COOPERATING LAW FIRMS:

MITCHELL A. TOUPS | WELLER, GREEN, TOUPS, & TERRELL, LLP | 2615 CALDER ST, SUITE 400 | BEAUMONT, TX 77702
T. 409.832.1800 | F. 409.832.8577 | MATOUPS@WGTTTLAW.COM

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EXHIBIT C



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SYNGENTA CORN LAWSUIT GAME CHANGER

April 5, 2017

The Kansas City federal judge dismissed the lone legal claim on which the national class action was based. This is a Syngenta corn lawsuit game changer. There no longer is a national class action protecting the legal rights of corn producers who chose to stay in the Syngenta corn lawsuit class action and not opt out. Unless corn producers are located in Arkansas, Illinois, Iowa, Kansas, Minnesota, Missouri, Nebraska, Ohio, and South Dakota—where state class actions are certified—the only way they can participate in the Syngenta corn lawsuit and share in any recovery is to hire a lawyer and file an individual case.

We represent over 7000 individual plaintiffs with individual cases in the Syngenta corn lawsuit, including 15 of the 48 case plaintiffs. If you don't have a lawyer, we would be pleased to represent you. Under our contingent fee Contract, we will advance all expenses. There is no up-front out-of-pocket cost to you. And we don't get paid unless you get paid. Check out our Digital Online Contract. Or print the PDF version.

Questions? Call or email us. We will take your call and answer your questions. We are here to help. This is going to be a great year for U.S. corn farmers with individual cases on file in the Syngenta corn lawsuit. Should a settlement be announced, it is quite possible it may only be available to corn producers with individual cases on file. Don't be left behind. Complete and return your Contract today, so we may file your individual case and protect your legal rights.

Filed Under: Syngenta Corn Lawsuit Updates

LITIGATION UPDATES

BEWARE OF SCAMMERS

June 27, 2018

SYNGENTA CORN SETTLEMENT CLAIM FILING PERIOD STARTS TODAY

May 11, 2018

SYNGENTA CORN CASE SETTLEMENT PRELIMINARILY APPROVED

April 5, 2018

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WE REPRESENT CORN FARMERS IN ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AGAINST SYNGENTA IN THE CORN LITIGATION.

THIS SYNGENTA CORN CASE SETTLEMENT WEBSITE IS A COLLABORATIVE EFFORT BETWEEN THE FOLLOWING COOPERATING LAW FIRMS:

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EXHIBIT D



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Edward J. Westbrook

ATTORNEY ADVERTISING RE: SYNGENTA GMO CORN LITIGATION

*****GAME CHANGER: \$217.7 MILLION VERDICT AGAINST SYNGENTA*****

July 14, 2017

Dear Corn Producer:

In the first of a series of trials, a Kansas City federal court jury, on June 23, awarded a class of 7,000 Kansas corn farmers \$217.7 million in damages against Syngenta for prematurely releasing its Viptera and Duracade GMO corn seed before the seed was approved by China—thereby depressing U.S. corn prices. On July 7, Syngenta settled a Nebraska corn farmer's case on the eve of trial. The last two weeks have been very good for U.S. corn farmers seeking justice for Syngenta's wrongful actions.

The next trial is scheduled to begin on August 14 in state court in Minneapolis. So why is this important to you? Because the purpose of these trials is to convince Syngenta that this is serious litigation and it faces substantial financial liability if it does not resolve the litigation and compensate all damaged U.S. corn farmers. Syngenta has clearly heard the strong message sent to it by the Kansas jury.

We expect it may take a few more similar verdicts to get Syngenta to the bargaining table. But the litigation is certainly moving in the right direction. If you have grown and sold corn since 2013, you have been damaged and have a claim. If you have been sitting on the litigation sidelines, now is the time to get in the game and file a claim. A nationwide settlement could be announced at any time.

Unlike in Kansas, there is no class action protecting your legal rights. The national class action was dismissed in April. The only way to protect your legal rights and be compensated by Syngenta for your damages is to hire a lawyer and file an individual case. It's not too late. But it could be soon.

My co-counsel, Richard Coffman and Mitch Toups (both of Beaumont, Texas), and I represent corn producers nationwide who have filed individual cases. We are not the class action lawyers. We identified you from the USDA FSA list of U.S. corn farmers. If you have not already hired a lawyer, we would be pleased to represent you.

Enclosed is our contingent fee Contract. We will advance all expenses and court costs. There is no up-front out-of-pocket cost to you. Under our Contract, we don't get paid unless you get paid. If you would like to hire us, please complete and sign the enclosed Contract and email, fax (toll-free), or mail it to us. We will countersign it, and send you a fully signed copy and welcome letter explaining next steps.

Questions? Please contact us. Our full contact information is in the Contract. We are here to help.

Best regards,

T. Christopher Tuck

EXHIBIT 80

Declaration of Bruce Babcock

August 11, 2018

I, Bruce Babcock, declare as follows:

1. I was asked by counsel to review the analysis conducted by The Settlement Alliance (TSA) for John Cracken and Watts Guerra LLP dated July 2018. I first give a brief overview of the TSA report and then provide my review. I then provide an alternative estimate of bushels and acreage produced by Watts and Guerra clients that makes the simple assumption that the number of acres harvested by these clients, on average, equals the average number of acres harvested for all U.S. corn producers.

Overview of TSA Analysis

2. The apparent objective of the TSA analysis was to report the number of bushels that Watts Guerra claims were produced by its corn-producer clients in the Syngenta litigation. The method used by TSA was to estimate the average number of acres planted by these clients, to then multiply this average by the total number of clients and the average number of bushels produced per acre. This results in an estimate of the total number of bushels of corn produced by these clients. For most of its analysis, TSA relies solely on information provided by Watts Guerra. It offers no opinion on the validity of that information and expressly disclaims any opinion on the “size of Watts Guerra’s clients’ claim to the settlement pool.” TSA Report at 3.

3. The method used to estimate the average number of acres planted was to sample from the total number of clients claimed by Watts Guerra, and to then use acreage data obtained from the sampled clients’ FSA Form 578 data to calculate the total number of acres of each sampled client. The sample was 2.5% of the claimed 57,385 clients, which yields a sample of 1,435. Of the 1,435 sampled clients, 400 (28%) did not have Form 578 data so they were eliminated from the analysis. Another 44 clients did not have complete information so they were also eliminated from the sample leaving a sample size of 991, which means that 31% of the original sample did not have FSA 578 data that could be used.

4. Data that was supplied to TSA from Watts Guerra include case identifier, county, state, acres by year, ownership percentage, client bushels by year and yield by year. Yield and client bushels are not reported by producers on Form 578. TSA makes clear that it is relying solely on Watts Guerra for this information. Its analysis is dependent upon the “completeness, accuracy, and validity of that information” and it “does not make any representation as to the external information provided by Watts Guerra as derived from its internal database.” TSA Report at 3.

5. Footnote 1 of the TSA summary table on page 5 indicates that Watts Guerra provided complete acreage data only for the 2013-2014 crop years. No explanation is provided

on why data from the remaining four crop years was not provided. No information was provided by TSA about how they used the 2013-2014 data to calculate acreage for subsequent years other than TSA used the 2013-2014 data to estimate the percentage of farmers who planted corn in a given year and then applied this estimate to all subsequent years.

6. The average number of acres of corn on the sample of 991 clients was calculated by TSA at 491 acres. Multiplying this number by the average ownership share of 73.1% and by the average percentage of the sampled farmers who produce corn in a given year of 94.3% yields the average number of corn acres per farm of 338. Multiplying 338 acres per client by the claimed 57,385 clients results in 19.41 million acres of corn. In 2013, U.S. corn farmers harvested 87.668 million acres of corn, which means that TSA estimates that the 57,385 Watts Guerra clients harvested 21.9% of the U.S. corn acres in 2013, which compares to the 23.1% of U.S. corn bushels that TSA reports on page 7. TSA expressly disavows any suggestion that this reported number, or any other analysis in its report, contains its own opinion. Rather, TSA makes clear that “[a]ll analysis in this report is purely presumptive, and the information presented does not represent TSA’s opinion as to the size of Watts Guerra’s clients’ claim to the settlement pool. Rather, it is derivative analysis of external information provided by Watts Guerra.” TSA Report at 3.

Likelihood of Sampling Bias

7. The TSA estimate of 338 average acres per Watts Guerra client is an unbiased estimate of the actual acres per client only if there is no sampling bias. According to TSA they constructed their sample by creating a random starting point in a list of clients and then taking every 40th client. This could indeed create a random sample of clients. But TSA eliminated 31% of this random sample based on whether full FSA 578 data was available. The remaining 991 clients could also be a random sample from the entire population of clients, but only if the characteristics of the 444 clients eliminated from the sample are identical to the characteristics of the 991 clients who remain in the sample.

8. The only difference between the two groups of clients is that one group took the trouble to submit FSA 578 acreage information and the other group did not. It seems reasonable to conclude that the likelihood that a farmer took the time to submit FSA 578 information increases with the potential financial return from taking this action. Because market losses depend on farm size, it is likely that larger farmers had a greater likelihood of submitting FSA 578 data than smaller farmers. This would mean that the average farm size of the 444 clients that were eliminated from the TSA sample would be smaller than the 991 clients who submitted their data. Thus, the actual average farm size of the original sample of 1,435 clients would be smaller than the average farm size of 338 acres.

9. For example, if the average farm size of the 444 clients who were eliminated from the sample was 200 acres, then the average farm size of the 1,435 original sample would be 295 acres, not 338 acres, a reduction of 11.9%. This example shows that the TSA-constructed confidence intervals of plus or minus 3.5% is not valid in the presence of sampling bias. An

11.9% reduction in average farm size is far outside the TSA-claimed confidence interval of plus or minus 3.5%. The likely presence of sampling bias in the TSA sample makes both the estimate of average farm size and the confidence interval unreliable.

10. No justification was provided by TSA for why they did not calculate the actual number of acres of the farmers who submitted FSA 578 information rather than to take a sample. If they had done so, then they would have the exact number of acres harvested by Watts Guerra clients who provided FSA 578 data, rather than an estimate. However, this exact number would not provide an unbiased estimate of the number of acres harvested by clients who did not submit FSA 578 information if, as seems likely, the average size of such clients is smaller than the average size of farmers who submitted the data.

An Estimate of Average Acres

11. I was provided FSA 578 data for Watts Guerra clients as part of my work in the Syngenta case. The data was compiled in large spreadsheets. The spreadsheets contained information on 22,872 Watts Guerra clients. It is not clear to me whether the FSA 578 data that was provided to me were the same data provided to TSA. The only evidence to suggest that TSA used different data than was provided to me is that 22,872 clients with FSA 578 data represents 40% of the TSA-claimed number of Watts Guerra clients. In contrast, TSA eliminating 31% of their original sample implies that approximately 69% of Watts Guerra clients provided FSA 578 information. So either TSA was provided more FSA 578 data than was made available to me, or there are fewer than 57,385 Watts Guerra clients.

12. As part of the work that I did in the Syngenta case I estimated the average number of acres harvested by state for Watts Guerra clients for which I had FSA 578 data. The results are shown in Table 1. I was provided complete data for 2013 and 2014. The results are reported separately for the states with many clients, with the remaining states lumped together as All Other States. As shown the average farm size of Watts Guerra clients who submitted FSA 578 data varies significantly across states, ranging from over 400 acres in South Dakota to less than 250 acres in Illinois. Across all clients the average number of acres per client was 317.5 acres in 2013 and 295.9 acres in 2014. Across the two years the average number of acres per client was 306.7 which is 9.3% below the TSA estimate. My calculations accounted for ownership share and whether corn was planted in a particular year so it is analogous to the TSA estimate of 338 acres per client.

13. As shown, the data that was provided to me indicates a lower number of acres per client with FSA 578 data than calculated by TSA. In 2013, the average number of acres is 6% lower than TSA's estimate and in 2014, the estimate is 12.5% lower, both of which fall outside the TSA-constructed confidence interval of plus or minus 3.5% for clients who submitted FSA 578 data. The fact that the average number of acres from 22,872 clients falls significantly outside the confidence interval of TSA constructed from 991 clients verifies the unreliability of the TSA estimate and confidence interval.

Table 1. Average Acres Per Year of Watts Guerra Clients Who Submitted FSA 578 Data

	2013	2014	Number of Clients with FSA 578 Information
State	Average Acres		
SD	460.9	423.4	1,698
IA	270.5	268.7	5,415
IL	248.8	237.8	3,443
NE	284.1	267.9	2,675
MN	340.3	309.1	4,945
IN	317.3	293.1	1,683
Other States	392.3	343.8	3,013
Aggregate	317.5	295.9	22,872

Source: Calculated by author.

An Estimate of Share of U.S. Corn Production

14. The presence of sample bias caused by Watts Guerra clients who submitted FSA 578 data being likely larger, on average, than clients who did not submit such data, makes it difficult to use a sampling approach to reliably estimate the average number of acres harvested for all Watts Guerra clients. An alternative method to estimate the number of acres harvested and bushels produced is to treat Watts Guerra clients as being equal in size to the average size of corn producers in each of the states where the clients reside. The steps I utilized to reach this alternative estimate are set forth below.

15. The first step is to determine the number of Watts Guerra producers by state. I need the state for each client because I use the state average yield to determine total production of clients in each state and because my method assumes that the average number of acres farmed by Watts Guerra clients is equal to the average number of acres farmed by all corn farmers in each state. According to a list made available to me last October, the total number of Watts Guerra clients was 49,412. According to TSA, Watts Guerra now claims 57,385 clients. I do not have access to the list of additional clients so I cannot determine how to allocate these clients to each state. So, instead, I increase the number of clients in each state by 16.1% ($57,385/49,412 = 1.161$).

16. I estimated the number of corn producers in each state using US crop insurance data in 2013. The Risk Management Agency of USDA reports the total number of corn policies sold each year. A corn policy can be purchased only by a person who has a share in a corn farm. In 2013 89% of US corn acreage was insured in the program. A total of 564,722 policies were sold in 2013.

17. To account for the 11% of acreage that was not insured in 2013 I divided the number of corn policies sold in each state by the percentage of corn acreage that was insured in each state. This calculation assumes that the non-insured acreage had the same number of corn producers per 1,000 acres as the insured acreage. After this division, I estimate that there are 637,081 corn producers in the United States, where a producer is defined as somebody who has a share in at least one corn farm. This definition is consistent with the class member definition of a producer in this case.

18. The number of crop insurance policies sold overstates the number of corn producers because a separate policy is needed if a producer has land in more than one county. To account for producers who have land in more than one county I subtracted the number of farms in each state that had acreage in excess of a certain number of acres from the number of policies sold. I obtained the size distribution of farms from the Census of Agriculture data. In 2012 there were 50,119 corn farms which had more than 500 acres. I assume that each of these corn farmers had land in more than one county. Thus, this leaves 586,862 corn producers.

19. I compared the number of corn producers from the crop insurance database (adjusted for farms with land in more than one county) with the number of notices that were sent out about this case. Names and addresses of notice recipients were obtained from the FSA subsidy database. According to counsel 643,780 were sent out by FSA.

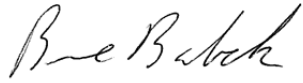
20. I estimated the number of bushels produced by Watts Guerra clients by first multiplying state corn production each year from 2013 to 2017 by the ratio of clients in each state to the total number of corn producers in each state. I then summed across all states. The results are presented in Table 2. As shown, and assuming Watts Guerra truly has 57,385 clients as now represented, I calculate that the share of corn production from Watts Guerra ranged from 11.9% to 12.5% from 2013 to 2017 and averaged 12.2% over this time period.

Table 2. Estimate of Watts Guerra Client Share of U.S. Corn Production: 2013 – 2017

Year	Total Production (million bushels)		Watts Guerra Client Share
	Watts Guerra Clients	United States	
2013	1,645	13,829	11.9%
2014	1,690	14,216	11.9%
2015	1,705	13,602	12.5%
2016	1,861	15,148	12.3%
2017	1,786	14,604	12.2%
Totals	8,686	71,398	12.2%

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Signed in Manhattan Beach, CA on August 11, 2018.

A handwritten signature in black ink, appearing to read "Bruce Babcock". The signature is written in a cursive, flowing style.

Bruce A. Babcock

EXHIBIT 81

From: Stueve, Pat
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 'jason.stitt@kutakrock.com'; 'James.Sulentic@KutakRock.com'; 'cpekron@qgtlaw.com';
 'ajprice@qgtlaw.com'; 'jtull@qgtlaw.com'; 'greg.holland@smithmoorelaw.com';
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 'MDummermuth@whgllp.com'; 'wlightsey@wyche.com'; 'hparr@wyche.com'

Subject:

In re: Syngenta AG MIR162 Corn Litigation, Case No. 14-md-2591-JWL-JPO

Attachments:

Proposed Common Benefit Order.docx

Dear Judge Lungstrum:

Pursuant to the Court's Scheduling Order No. 1 at paragraph 5(b), attached please find in Word format a proposed Order Establishing Protocols for Common Benefit Work and Expenses and Establishing the Common Benefit Fee and Expense Funds. Counsel for Defendants and known counsel for Plaintiffs in the MDL are copied on this email.

Respectfully submitted,

Patrick J. Stueve
 Plaintiff's Lead and Liaison Counsel

Patrick J. Stueve

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

In Re: Syngenta AG MIR162 Corn Litigation	)))))))	MDL No. 2591
This document relates to: All Cases	)))	Case No. 2:14-md-2591-JWL-JPO

**ORDER ESTABLISHING PROTOCOLS FOR COMMON BENEFIT WORK
AND EXPENSES AND ESTABLISHING THE COMMON
BENEFIT FEE AND EXPENSE FUNDS**

On January 22, 2015, the Court entered an order appointing Co-Lead Counsel, the Executive Committee, Interim Class Counsel and Liaison Counsel. ECF No. 67 (the “Leadership Order”). The Leadership Order permits Co-Lead Counsel (“Lead Counsel”) to assess other plaintiffs’ counsel for the expenses of the litigation and requires parties to maintain contemporaneous records of their time and expenses devoted to this matter. *Id.* at ¶¶ 4(m), 6.

The Leadership Order also defines the authority, duties and responsibilities of counsel appointed to leadership roles in this multidistrict proceeding (the “MDL”) and supplements the guidelines and rules for staffing, fees, expenses and billing records by attorneys acting for the common benefit of all producer and/or all non-producer plaintiffs in this multidistrict litigation for claims relating to or arising from genetically modified Syngenta corn, the commercialization of Agrisure Viptera or Agrisure Duracade or of any corn including genetically modified traits MIR162 or Event 5307 (“Corn”). This Order additionally provides for the fair and equitable sharing among plaintiffs’ counsel of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all producer and/or all non-producer plaintiffs in this complex litigation.

I. GOVERNING PRINCIPLES AND THE COMMON BENEFIT DOCTRINE

The common benefit governing principles are derived from the United States Supreme Court’s common benefit doctrine, as initially established in *Trustees v. Greenough*, 105 U.S. 527 (1881) and as refined throughout the last century in cases including *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884), *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *see also* Manual for Complex Litigation, § 14.215 (4th ed. 2004) (noting that “Lead and liaison counsel may have been appointed by the court to perform functions necessary for the management of the case but not appropriately charged to their clients” and encouraging an order early in the litigation that “establish[es] the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions.”); Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 374 (2014) (“Because the work that the PSC performs inures to the common benefit of all plaintiffs and their primary counsel (the counsel that they employed), MDL transferee courts usually establish a procedure for creating a common benefit fee to compensate the members of the PSC and the members of any subcommittees who have done common benefit work.”).

The Court’s authority to establish a fund and to order contributions also derives from its equitable authority and its inherent managerial power over this consolidated and multidistrict litigation. *See, e.g., In re Diet Drugs*, 582 F.3d 524, 546-47 (3rd Cir. 2009); *In re Air Crash Disaster at Fla. Everglades*, 549 F.2d 1006, 1008 (5th Cir. 1977); Manual for Complex Litigation, § 20.312 (“MDL judges generally issue orders directing the defendants who settle MDL-related cases contribute a fixed percentage of the settlement to a general fund to pay national counsel.”); Fallon, *supra*, at 378 (the common benefit doctrine is justified “on principles of equity or quantum meruit or class action procedures or [a court’s] inherent authority”).

II. SCOPE OF THIS ORDER

This Order governs the use of Common Benefit Work, as defined below, by MDL Counsel, Participating Counsel and Non-Participating Counsel.

A. MDL Counsel

For purposes of this Order, the term “MDL Counsel” includes: 1) all counsel appointed to leadership roles in the Leadership Order; 2) any other counsel who is authorized by Lead Counsel to perform Common Benefit Work (as defined below) and who agrees to perform Common Benefit Work; and 3) each attorney who represents one or more plaintiffs in a case that at any time has been pending in this MDL or in any case later filed in, transferred to, or removed to this Court, unless all of that attorney’s cases are remanded back to state court, and continues to apply as to any case dismissed from this Court or to any case remanded back to a federal transferor court. The obligations of this Order follow any such cases to their ultimate disposition.

B. Participating Counsel

All counsel who are not already MDL Counsel, as defined above, are eligible to sign the Participation Agreement, attached hereto as Exhibit A (the “Participation Agreement”). All counsel who execute the Participation Agreement are hereinafter referred to as “Participating Counsel” and all Participating Counsel are subject to this Order and the jurisdiction of this Court relating to this Order. Solely in their respective capacities as counsel for the Cargill and ADM plaintiffs, counsel for the Cargill and ADM plaintiffs have agreed to execute Participation Agreements and, solely for purposes of this Order, these counsel are included in the definition of Participating Counsel, and are not MDL Counsel.

The Participation Agreement is a voluntary agreement between Lead Counsel and executing plaintiffs’ attorneys allowing the Participating Counsel access to Common Benefit

Work. Counsel who sign the Participation Agreement and all MDL Counsel shall be entitled to receive and to use for their cases all Common Benefit Work performed by or for Lead Counsel and other counsel at Lead Counsel's direction in this MDL to the same extent that such work is available to MDL Counsel.

Any plaintiffs' attorney who is not MDL Counsel, who wants to become a Participating Counsel and who currently has at least one Corn case on file in any state or federal court outside of this MDL shall execute the Participation Agreement within 45 days of the entry of this Order or within 45 days of notification by Lead Counsel of this Order, whichever date is later. Any plaintiffs' attorney who at the time this Order is entered does not have a case pending in any state or federal court and who wants to become a Participating Counsel shall execute the Participation Agreement within 45 days of the date their first Corn client is engaged or within 120 days of entry of this Order, whichever date is later. For any plaintiff's counsel who are not MDL Counsel, the failure to execute a Participation Agreement within the time frame set forth in the preceding paragraph will result in higher assessment percentages as a result of later execution. *Accord In re: Testosterone Replacement Therapy Prods. Liab. Litig.*, No. 14-cv-1748, MDL No. 2545, ECF No. 488 (Corrected Case Management Order No. 16 (Establishing Common Benefit Fee and Expense Funds)) at 3 (N.D. Ill. Nov. 25, 2014) (ordering an increase in the fee assessment from 8% to 16% if the participation agreement is not timely executed). These higher percentages are set forth in Section IV(B)(3)(c)-(d).

C. Non-Participating Counsel

Plaintiffs' attorneys who are not MDL Counsel may choose not to execute the Participation Agreement (such counsel are deemed "Non-Participating Counsel"). Non-Participating Counsel are not entitled to incur Common Benefit Expenses, participate in

Common Benefit Work, access or possess Common Benefit Work, or make use of Common Benefit Work for any purpose or for any potential claimants. No MDL Counsel or Participating Counsel shall provide in any way (oral or written) Common Benefit Work of any kind to Non-Participating Counsel. Any Non-Participating Counsel who utilizes or intentionally accesses Common Benefit Work, including but not limited to settlement work on behalf of all producer and/or all non-producer plaintiffs, but fails to sign a Participation Agreement shall be subject to a cost assessment and a higher fee assessment as set forth in Section IV(B)(3)(e). This assessment shall apply to each and every Corn case in which that Non-Participating Counsel is counsel and/or has a fee interest, whether such Corn cases are filed, unfiled or tolled.¹ The Court encourages any state or federal judges to whom any Corn case is assigned, which is not transferred to this MDL, to require plaintiffs' counsel in those cases to execute the Participation Agreement. Access to the Common Benefit Work in all jurisdictions will promote the just and efficient resolution of these cases and respect the comity of the court systems. *Accord In re Genetically Modified Rice Litig.*, No. 06 MD 1811 CDP, ECF No. 2574 (Memorandum and Order regarding the creation of a common benefit trust fund) at 2 (E.D. Mo. Feb. 24, 2010) ("I urge the parties to consider the unjust enrichment issues in their settlement negotiations, and I urge the state court judges handling the cases to consider requiring participation in the fund by the parties over whom they have jurisdiction.").

III. ADOPTION OF CASE MANAGEMENT PROTOCOLS

The Court hereby adopts the following guidelines for the management of case-staffing, timekeeping, expense reimbursement, and related Common Benefit issues, and instructs Lead

¹ Furthermore, for any Non-Participating Counsel who utilizes Common Benefit Work but fails to sign a Participation Agreement, both the fee and cost assessment shall be paid solely out of the Non-Participating Counsel's portion of any recovery and shall not be borne by the client, except if the Non-Participating Counsel is being paid solely an hourly rate.

Counsel to distribute additional guidelines as may be necessary to ensure the efficient prosecution of this litigation. The recovery of Common Benefit attorneys' fees and expenses will be limited to MDL Counsel and Participating Counsel (together with necessary staff of their respective firms).

MDL Counsel and Participating Counsel shall be eligible to receive Common Benefit attorneys' fees and reimbursement of expenses only if the time expended, expenses incurred, and activity in question were: (a) for the Common Benefit of all producer and/or non-producer plaintiffs; (b) conducted by Lead Counsel and their respective firms or otherwise appropriately authorized by Lead Counsel in writing; (c) timely submitted; (d) reasonable; and (e) verified by a partner or shareholder in the submitting firm. Lead Counsel is empowered to engage a Certified Public Accountant ("CPA") to review these submissions.

As further detailed below, all counsel who seek to recover Court-awarded Common Benefit fees and expenses shall keep a daily, contemporaneous record of their time and expenses, noting with specificity the amount of time, billing rate, and activities, along with a brief note indicating which Lead Counsel authorized the activity in question. All counsel who seek to recover Court-awarded Common Benefit fees and expenses agree to the terms and conditions herein, including submitting to this Court's jurisdiction and agreeing that this Court has plenary authority regarding the assessment award and allocation of Common Benefit fees and expenses. The Court will determine at a later date, if needed, the methodology for allocating any Common Benefit assessments among those who performed approved work and incurred approved expenses. There is no guaranty that all of the time submitted by any counsel or firm will be compensated and the submitted hourly rate for the work that is compensated is not guaranteed.

A. Common Benefit Work

1. Authorization for Compensable Common Benefit Work

“Common Benefit Work” means services performed for the benefit of all producer and/or all non-producer plaintiffs (“Common Benefit”) and specifically authorized by Lead Counsel. Common Benefit Work includes, but is not limited to, investigation, discovery (whether documents, interrogatories, depositions or otherwise), coding or other analytical work relating to documents or evidence, research, motions and responses to motions, exhibits, bellwether trials and transcripts, all other work performed under the direction of Lead Counsel for the benefit of all producer and/or all non-producer plaintiffs, and orders on substantive matters involving Common Benefit Work. Authorization to perform Common Benefit Work shall be obtained from Lead Counsel under a procedure that they will determine.

Unless specifically and explicitly authorized in writing, no time spent on developing or processing individual issues in any case for an individual client, no time spent on the solicitation of potential clients and no time spent on any unauthorized work, will be considered or should be submitted. No client-related time, save certain time relating to cases which in the future may be selected as bellwether cases or time related to class representatives in a Master or Consolidated Class Complaint, shall be considered Common Benefit Work. Examples of authorized Common Benefit Work and unauthorized work include, but are not limited to:

a) Depositions: Lead Counsel shall exercise discretion, judgment, and prudence to designate only that number of attorneys to participate in any given deposition that is commensurate with the nature of that deposition so as to avoid over-staffing. Time and expenses for counsel not designated as one of the authorized questioners or otherwise authorized to attend the deposition by Lead Counsel shall not be considered Common Benefit Work but,

rather, as attending on behalf of such counsel's individual clients.

b) Conference Calls and Meetings: Conference calls and meetings held at the direction of Lead Counsel for discussion of case management, coordination, and litigation activity are generally considered Common Benefit Work. Calls and meetings solely to impart status information generally are not Common Benefit Work as to those listening. Attorneys designated by Lead Counsel to run or participate in those calls, on the other hand, are working for the Common Benefit by keeping other attorneys educated about the litigation and their time is Common Benefit Work. During such telephone or conference calls and meetings, there is a presumption that only the authorized active participants' time will qualify as Common Benefit Work, although exception may be made for good cause as determined by Lead Counsel.

c) MDL Status Conferences: Status conferences will be held so that the litigation moves forward and legal issues are resolved with the Court. Counsel may attend any status conference held in open court, but mere attendance at or listening to a status conference will not be considered Common Benefit Work, and expenses incurred in relation thereto will not be considered Common Benefit Expenses. Attorneys designated by Lead Counsel to prepare agendas, confer with opposition counsel and otherwise address issues that will be raised at a given status conference or requested by Lead Counsel to be present at a status conference are considered to be performing Common Benefit Work. Similarly, any attorney whose attendance at a status conference is specifically requested by the Court to address a common issue may submit his or her time for evaluation as Common Benefit Work.

d) Identification and Work-Up of Experts: Identification, interview, discussions, preparation of reports and all other matters involving experts on common issues, experts relating to cases selected as bellwether cases or experts related to a Master or

Consolidated Class Complaint are considered Common Benefit Work. All services and expenses related to experts retained without authorization by Lead Counsel are not eligible for Common Benefit fees or expenses.

e) Attendance at Seminars: Attendance at seminars or Continuing Legal Education programs shall not qualify as Common Benefit Work, or the expenses pertaining thereto as Common Benefit Expenses.

f) Trial Consultants and Preparation: Trial consultants and participation in trial preparation, mock trials or focus group activity for bellwether trials may qualify as Common Benefit Work and Common Benefit Expense as authorized by Co-Lead Counsel.

g) Document Discovery: All work performed and expenses incurred in connection with document discovery (including meet-and-confers with opposing counsel and any motions to compel) relating to common issues and authorized by Lead Counsel qualify as Common Benefit Work and Common Benefit Expense. If an attorney elects to review documents without prior authorization by Lead Counsel, that review is not considered Common Benefit Work. It is the Court's expectation that counsel will minimize the number of individual timekeepers from a single law firm to ensure the efficiency of time spent on this litigation. Descriptions associated with "document review" must contain sufficient detail to allow those reviewing the time entry to generally ascertain what was reviewed.

h) Motions: All research, drafting, and presentation of motions and responses to motions on common issues and authorized by Lead Counsel are considered Common Benefit Work.

i) Review of Filings and Orders: Mere review of filings and orders

generally does not qualify as Common Benefit Work. It is anticipated that there will be a large number of filings in this case and mere review of these filings will not be approved as Common Benefit Work. Those attorneys working on assignments by Lead Counsel requiring them to reasonably review, analyze, or summarize certain filings and substantive orders of this Court in connection with their assignments are doing so for the Common Benefit. In addition, it is expected that Lead and Liaison Counsel, as well as members of the Executive Committee, will review case management and substantive orders of the Court as part of their leadership responsibilities. Reasonable time spent reviewing these court rulings and orders by court-appointed leadership will be considered Common Benefit Time.

j) Emails and Correspondence: Except for Lead and Liaison Counsel, their assigned attorneys and staff working on this MDL and those designated by Lead Counsel to work on assignments requiring them to review emails and correspondence, time recorded for reviewing emails and other correspondence is not compensable as Common Benefit Work. For example, review of an email or other correspondence sent to dozens of attorneys to keep them informed on a matter on which they are not specifically working would not be compensable as Common Benefit Work.

k) Written Discovery: Only those attorneys designated by Lead Counsel to review discovery are working for the common benefit and their time accordingly considered Common Benefit Work. All other counsel are reviewing those discovery responses for the benefit of their own clients, and such review will not be considered Common Benefit Work.

l) Travel Time: Reasonable Travel Time may be compensable as Common Benefit Work, to the extent necessary and approved by Lead Counsel in connection

with assigned Common Benefit Work or to the extent work otherwise compensable is performed while in transit. In the event that Participating Counsel or MDL Counsel are unsure if the action they are about to undertake is considered Common Benefit Work, they shall ask Lead Counsel in advance as to whether such time may be compensable.

2. Verification

The forms detailing potential Common Benefit Work shall be certified by an attorney with authority in each firm attesting to the accuracy of the submissions.

B. Common Benefit Expenses

“Common Benefit Expenses” means expenses authorized by Lead Counsel and incurred for the benefit of all producers and/or all non-producer plaintiffs. Expense submissions shall be made to Lead Counsel on a monthly basis, by deadlines to be set by Lead Counsel, in accordance with the guidelines set forth herein. Only reasonable expenses incurred while performing work specifically authorized in writing by Lead Counsel will be eligible for consideration as common benefit expenses; any expense over \$500 must be specifically approved in advance in writing by Lead Counsel.

No client-related expenses, save certain expenses relating to cases which in the future may be selected as potential bellwether cases or those related to class representatives in a Master or Consolidated Class Complaint, shall be considered Common Benefit Expenses, unless exceptional circumstances exist and are approved by later order of this Court.

1. Travel Limitations: Only reasonable expenses will be reimbursed. Except in extraordinary circumstances approved by Lead Counsel, all travel reimbursements are subject to the following limitations:

a) Airfare: Ordinarily, only the price of the lowest available,

convenient coach fare seat will be reimbursed. Business/First Class Airfare will not be reimbursed. In the event that non-coach air travel is utilized, including economy plus or premium economy, the attorney shall be reimbursed only to the extent of the lowest available, convenient coach fare, which must be contemporaneously documented. If non-coach, private or charter travel is elected, the applicant is required to document what the lowest available, convenient coach fare in effect at that time was, and that is all that can be reimbursed.

b) Hotel: Hotel room charges for the average available room rate of a business hotel, such as the Hyatt, Hilton, Westin, and Marriott hotels, in the city in which the stay occurred, will be reimbursed. Liaison Counsel shall attempt to negotiate a reduced rate for a hotel located near their offices for the benefit of all counsel. Luxury hotels will not be fully reimbursed but, rather, will be reimbursed at the average available rate of a business hotel.

c) Meals: Meal expenses must be reasonable. Expenses that significantly exceed the meal allowances for federal employees may not be approved for reimbursement. There will be no reimbursement for alcoholic beverages, room service, mini-bar items, or movies.

d) Cash Expenses: Miscellaneous cash expenses for which receipts generally are not available (*e.g.*, tips, luggage handling) will be reimbursed up to \$50.00 per trip, as long as the expenses are properly itemized.

e) Automobile Rental: Luxury automobile rentals will not be fully reimbursed, unless only luxury automobiles are available. Counsel must submit evidence of the unavailability of non-luxury vehicles. If luxury automobiles are selected when non-luxury vehicles are available, then the difference between the luxury and non-luxury vehicle rates must be shown on the travel reimbursement form and only the non-luxury rate may be claimed.

f) Mileage: Mileage claims must be documented by stating origination point, destination, total actual miles for each trip and rate per mile paid by the attorney's firm. The rate will be the IRS Standard Business Mileage Rate for the period in which the mileage was driven.

2. Non-Travel Limitations

a) Long Distance, Conference Call, and Cellular Telephone Charges: Common Benefit long distance, conference call, and cellular telephone charges must be documented as individual call expenses in order to be compensable. Such charges are to be reported at actual cost.

b) Shipping, Overnight, Courier, and Delivery Charges: All claimed Common Benefit shipping, overnight, courier, or delivery expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package. Such charges are to be reported at actual cost.

c) Postage Charges: A contemporaneous postage log or other supporting documentation must be maintained and submitted for Common Benefit postage charges. Such charges are to be reported at actual cost.

d) Facsimile Charges: Contemporaneous records should be maintained and submitted showing faxes sent and received. The per-fax charge shall not exceed \$0.50 per fax.

e) In-House Photocopy: A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is \$0.10 per page for in-firm photocopies and any necessary vendor photocopies shall be at actual cost.

f) Computerized Research: Lexis, Westlaw, or Bloomberg:

Claims for Lexis, Westlaw, Bloomberg, or other computerized legal research expenses should be in the exact amount charged to the firm and appropriately allocated for these research services.

3. Verification

The forms detailing expenses shall be certified by an attorney with authority in each firm attesting to the accuracy of the submissions. Attorneys shall maintain all receipts for all expenses, which shall be available upon request.

4. Shared Costs and Capital Contributions

Each Lead Counsel and other counsel as designated by Lead Counsel shall pay a monetary amount, as directed below, which shall be used to pay reasonable and necessary Common Benefit Expenses on an ongoing basis (the “Shared Costs”). The timing and amount of each contribution will be determined by Lead Counsel and must be paid within 30 days of the date of written request by Lead Counsel. Failure to timely pay capital contributions as may be requested by Lead Counsel throughout this litigation will be grounds for barring counsel from submitting Common Benefit Work or Common Benefit Expenses for reimbursement.

All costs that fall under the following categories and/or other expenses incurred for the benefit of all producer and/or all non-producer plaintiffs as determined by Lead Counsel shall be considered Shared Costs and shall qualify for submission and payment:

- a)** court, filing and service costs related to common issues;
- b)** service costs, including translation fees, for service of the consolidated complaints on all domestic and foreign defendants named in those complaints;
- c)** deposition and court reporter costs for depositions (excluding those

that are client-specific);

- d)** document depository creation, operation, staffing, equipment and administration;
- e)** translation costs related to the above;
- f)** Lead Counsel, Liaison Counsel, or Executive Committee administration matters;
- g)** legal, financial institutional and accountant fees relating to expenses;
- h)** expert witness and consultant fees and expenses for experts whose opinions, advice and testimony would be generic and for the common benefit of all producers or all non-producers covered by a consolidated or master complaint. There shall be no reimbursement for case specific experts, except for liability and causation experts in class or bellwether cases, at the discretion of the Lead Counsel;
- i)** printing, copying, coding, scanning related to the above (out-of-house or extraordinary firm costs);
- j)** research by outside third-party vendors/consultants/attorneys, approved by Lead Counsel;
- k)** investigative services, approved by Lead Counsel; and
- l)** mediator costs.

No client-related costs, save certain costs relating to cases selected in the future as potential bellwether cases or those related to class representatives in a Master or Consolidated Class

Complaint, shall be considered Shared Costs, unless exceptional circumstances exist. All Shared Costs must be approved by Lead Counsel prior to payment.

Lead Counsel shall prepare and be responsible for distributing additional reimbursement procedures. Requests for payment shall include sufficient information to permit Lead Counsel and a CPA, if engaged by Lead Counsel, to account properly for expenses and to provide adequate detail to the Court.

5. Held Costs

“Held Costs” are Common Benefit Expenses carried by counsel in this MDL or by Participating Counsel and reimbursed as and when Lead Counsel determines to do so. Held Costs are those that do not fall into the above Shared Cost categories but are incurred for the common benefit of all producers or non-producers covered by a consolidated complaint. No client-specific costs can be considered Held Costs, other than certain Common Benefit Expenses relating to class representative or potential bellwether plaintiffs at the discretion of Lead Counsel.

Held Costs shall be recorded in accordance with the guidelines set forth herein and in additional procedures as prepared by Lead Counsel.

C. Timekeeping and Submission of Time and Expense Records

All time and expenses must be accurately and contemporaneously maintained and tracked. In order to qualify for Common Benefit fees or expenses, MDL Counsel and Participating Counsel shall keep contemporaneous billing records of the time spent in connection with Common Benefit Work on this MDL, indicating with specificity the hours and billing rate, along with a brief note indicating the source of authorization for the activity in question and a brief description of the particular activity. Time and expense submissions shall be made to Lead

Counsel on a monthly basis, by deadlines to be set by Lead Counsel, in accordance with the guidelines set forth herein and using monthly reports to be distributed by Lead Counsel so that Lead Counsel may retain those forms for later submission to this Court if and when necessary. The first submission is due on March 31, 2015, and should include all time and expense through February 28, 2015. Thereafter, all time and expense reports shall be submitted on the last calendar day of each month and shall cover the time period through the end of the preceding month (*i.e.*, the April 30, 2015 submission should include all time and expenses incurred during the month of March 2015).² Generally, only time and expense incurred after the Court's January 22, 2015 Order appointing Plaintiffs' Leadership shall be submitted and considered as potential Common Benefit Work.³

Time and expense entries that are not sufficiently detailed will not be considered for payment of Common Benefit fees. All time for Common Benefit Work by each firm shall be recorded and maintained in tenth-of-an-hour increments. The failure to secure authorization from Lead Counsel to incur Common Benefit time and expenses, or to maintain and timely provide such records or to provide a sufficient description of the activity, will be grounds for

² Although counsel should submit all Common Benefit Expenses incurred in a certain month in the submission made on the last calendar day of the next month, some third party billing and credit card statement schedules may make such expense submission difficult. In such circumstances and in compliance with guidelines developed by Lead Counsel, counsel may submit expenses incurred in the previous two months that – because of circumstances outside the submitting counsel's control – could not have been submitted by the Court-ordered deadline. Any common benefit expenses submitted more than two months in arrears shall not be considered as Common Benefit Expenses absent good cause as determined by Lead Counsel.

³ In their discretion, Lead Counsel may consider time and expense incurred before the Court's January 22, 2015 Order as Common Benefit Work and Common Benefit Expense if the time or expense benefitted all producer and/or all non-producer plaintiffs in a material and direct way. Time and expense incurred in client solicitation, efforts to secure a leadership appointment, pre-appointment attendance at meetings of plaintiffs' counsel, attendance at the JPML hearing, attendance at the initial court hearing and similar tasks will not be approved.

denying the recovery of attorneys' fees or expenses in whole or in part. Lead Counsel must maintain all time submissions in a format so that the Court may review any application for fees.

IV. PLAINTIFFS' COMMON BENEFIT FEE AND EXPENSE FUNDS

A. Establishing the Fee and Expense Funds

Plaintiffs' Liaison Counsel is directed to establish two interest-bearing accounts to receive and disburse funds (the "Funds") as provided in this and subsequent Orders. The first fund shall be designated the "Corn Common Benefit Fee Fund" and the second fund shall be designated the "Corn Common Benefit Expense Fund." These funds will be held subject to the direction of this Court.

By subsequent Order of this Court, the Court may appoint a qualified certified public accountant (the "CPA") to serve as Escrow Agent over the Funds and to keep detailed records of all deposits and withdrawals and to prepare tax returns and other tax filings in connection with the Funds, if needed. Such subsequent Order may specify the hourly rates to be charged by the CPA and for the CPA's assistants, who shall be utilized where appropriate to control costs. The CPA shall submit quarterly detailed bills to Plaintiffs' Liaison Counsel and the Court, at the Court's request. Upon approval by the Court, the CPA's bills shall be paid from the Corn Common Benefit Expense Fund and shall be considered Shared Costs. Plaintiffs' Liaison Counsel shall provide a copy of this Order to the CPA.

B. Payments into the Corn Common Benefit Fee and Corn Common Benefit Expense Funds

1. General Standards

All counsel and plaintiffs who are subject to this Order who agree to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, with

respect to Corn claims or a Corn case are subject to an assessment on the Gross Monetary Recovery, as provided herein.

2. Gross Monetary Recovery

Gross Monetary Recovery includes any and all amounts paid by defendants through settlement or pursuant to a judgment. In measuring the “Gross Monetary Recovery,” the parties are to (a) exclude any court costs that are to be paid by the defendant, but include any attorneys’ fee awards under any fee-shifting statute or rule; (b) include any payments to be made by the defendant to a third party; (c) include the present value of any fixed and certain payments to be made in the future; and (d) if applicable, subtract any recovery paid by the plaintiff to a defendant through settlement or pursuant to a judgment for counterclaim(s) asserted in a Corn case by a defendant.

3. Assessment Amounts

In the event that there is a class settlement, recovery or judgment in favor of the class, no assessment pursuant to this Section will be made, either for attorneys’ fees or for expenses, individually from any class member or his/her/its individual attorney as to the portion of any class recovery distributed to that individual class member if the class member remains in the class (i.e., does not opt-out of the class). Instead, all fees and expenses for that class member will come out of the overall class recovery funds provided by defendants, as approved by the Court, or as otherwise Ordered by the Court. The relationship between class counsel fees and costs obtained through any class settlement or judgment and the Common Benefit Fund will be addressed, if necessary, by later order of the court.

The assessments in this Order represent a holdback (*see, e.g., In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256 (E.D.N.Y. 2006)) and shall not be altered absent further order of the

Court. The obligations in this Section shall follow the case to its final disposition, including a court having jurisdiction in bankruptcy.

Defendants shall hold back⁴ and set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund the following amounts in this Section.

a) For recoveries by any client of an MDL Counsel (whether the client's case is filed in a federal or state court or is unfiled), as defined above, the assessments are:

- for each producer client, a total 11% assessment amount (8% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 9% assessment amount (7% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

b) For recoveries by any client (whether the client's case is filed in a federal or state court or is unfiled) whose attorney is not an MDL Counsel, but whose attorney becomes a Participating Attorney by voluntarily executing the Participation Agreement within 45 days of entry of this Order or notice by Lead Counsel if they have at least one Corn case on file in any court as of the entry of this Order, whichever date is later and as defined in Section II(B) above, or within 45 days of the date their first Corn client is engaged or 120 days of entry of this Order, whichever date is later, the assessments are:

- for each producer client, a total 7% assessment amount (4% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or

⁴ In the event any defendant fails to hold back the assessments required by this Section, plaintiffs' counsel has an equal duty to pay the appropriate holdback amounts to the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund. Under all scenarios (except to the extent the attorney is being paid an hourly rate), the fee assessment shall be paid from the attorney's portion of the recovery and shall not be borne by the client.

- for each non-producer client, a total 5.5% assessment amount (3.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

c) For recoveries by any client (whether the client's case is filed in a federal or state court or is unfiled) whose attorney is not an MDL Counsel, whose attorney has at least one Corn case on file in any court, and whose attorney becomes a Participating Attorney by voluntarily executing the Participation Agreement more than 45 days but less than 90 days of entry of this Order, filing of the Participating Counsel's first Corn case in any court or notice by Lead Counsel, as defined in Section II(B) above, whichever date is later, the assessments are:

- for each producer client, a total 9% assessment amount (6% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 7.5% assessment amount (5.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

d) For recoveries by any client (whether the client's case is filed in a federal or state court or is unfiled) whose attorney is not an MDL Counsel, but whose attorney becomes a Participating Attorney by voluntarily executing the Participation Agreement 90 or more days after entry of this Order or notice by Lead Counsel if the attorney has at least one Corn case on file in any court as of the entry of this Order, whichever is later and as defined in Section II(B) above, or more than 45 days after the date the attorney's first Corn client is engaged or more than 120 days after entry of this Order if the attorney does not have at least one Corn case on file in any court as of the entry of this Order, the assessments are:

- for each producer client, a total 13% assessment amount (10% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or

- for each non-producer client, a total 11.5% assessment amount (9.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

e) For recoveries by any client (whether the client's case is filed in a federal or state court or is unfiled) whose attorney is a Non-Participating Counsel, but who utilizes or intentionally accesses Common Benefit Work, the assessments are:

- for each producer client, a total 13% assessment amount (10% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 11.5% assessment amount (9.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.
- For this category only, both the fee and the cost assessments shall come out of the attorney's portion of the recovery (except for lawyers paid solely by the hour) and shall not be borne by the client.
- Non-Participating Counsel who utilizes or intentionally accesses Common Benefit Work and who later become MDL Counsel or execute a Participation Agreement shall not be entitled to a reduction in the assessment amounts set forth in in Subsection IV(B)(3)(e) and the assessments set forth in this subsection shall apply to all cases in which that attorney has a fee interest.

4. Defendants' Obligations to Pay Common Benefit Assessments

Defendants and their counsel shall not distribute any proceeds, whether by settlement or in satisfaction of a judgment, to any plaintiff's counsel (or directly to a plaintiff) until after: (1) defendants' counsel notifies Plaintiffs' Liaison Counsel in writing of the existence of a settlement or judgment and the name of the individual plaintiff's attorney, and (2) Plaintiffs' Liaison Counsel has advised defendants' counsel in writing whether or not the individual plaintiff's attorney is an MDL Counsel, Participating Counsel and/or is Non-Participating Counsel subject to an assessment and the amount (stated as a percentage of the recovery) of the

assessment pursuant to this Order.⁵ Plaintiffs' Liaison Counsel shall share this information with Plaintiffs' Lead Counsel, who shall otherwise keep this information confidential.

For cases subject to an assessment, defendants are directed to withhold an assessment from any and all amounts paid to plaintiffs and their counsel and to pay the assessment directly into the Funds as a credit against the settlement or judgment. No notice or order of dismissal of any plaintiff's claim, subject to this Order, shall be entered unless accompanied by a certificate of plaintiff's and defendants' counsel that the assessment, if applicable, will be withheld and will be deposited into the Funds at the same time the settlement proceeds are paid to settling counsel. If, for any reason, the assessment is not or has not been so withheld, the plaintiff's counsel whose case is being resolved is responsible for paying the assessment into the Funds promptly.

To preserve the confidentiality of settlement amounts, if such confidentiality is agreed to by the settling parties in their settlement agreement(s), details of any individual settlement agreement, individual settlement amount, and/or amounts deposited into escrow by any particular defendant shall be confidential and shall not be disclosed by the CPA to anyone other than Lead Counsel or the Court, upon request. Monthly statements from the CPA shall be provided to Plaintiffs' Lead and Liaison Counsel (and, if the Court so requests, to the Court) showing the quarterly deposits from all defendants, disbursements, interest earned, financial institution charges, if any, and current balance.

5. Reporting Obligations

Upon learning of a Corn case being filed in any state court or any federal court outside of

⁵ Failure of Liaison Counsel to identify a Non-Participating Counsel as being obligated to pay an assessment based on unauthorized use of Common Benefit Work because of a lack of knowledge of such use on the part of Liaison Counsel at such time shall not relieve such Non-Participating Counsel of its assessment obligation under this Order.

this MDL, Defendants' Liaison Counsel shall notify Plaintiffs' Liaison Counsel of such filing within 30 days of service of the complaint/petition upon any defendant. Such notice shall include the name, firm name, and firm address of the plaintiff's attorney(s) and the date of such filing, so that Plaintiffs' Liaison Counsel can notify that attorney of this Order and offer him or her the opportunity to become a Participating Counsel.

Plaintiffs' Liaison Counsel shall provide Defendants' Liaison Counsel, the CPA, and the Court, if requested, with a list of cases and/or counsel who have signed Participation Agreements. This same list shall be made available to all plaintiffs' counsel with cases in this MDL, as well as any other plaintiffs' counsel who signs the Participation Agreement, upon request. In the event there is a dispute as to whether a case should be on the list, Plaintiffs' Lead Counsel shall seek to resolve the matter with the particular plaintiff's counsel informally, and if that is unsuccessful, upon motion to the Court. The parties' reporting obligations shall continue quarterly until the conclusion of this MDL.

V. DISTRIBUTIONS

A. Court Approval

The amounts deposited into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund shall be available for distribution to MDL Counsel and Participating Counsel who have performed professional services or incurred expenses for the Common Benefit of all producer and/or all non-producer plaintiffs as authorized by Lead Counsel. No amounts will be disbursed without review and approval by the Court, or such other mechanism as the Court may order. This Court retains jurisdiction over any common benefit award or distribution.

B. Application for Distribution

Each MDL Counsel or Participating Counsel performing Common Benefit Work has the right to present a claim(s) for compensation and/or reimbursement through a procedure directed

by Lead Counsel prior to any distribution approved by this Court. Any Non-Participating Counsel shall not be eligible to receive common benefit payments for any work performed or expenses incurred.

Plaintiffs' Lead Counsel shall make recommendations to this Court for distributions to MDL Counsel and Participating Counsel performing Common Benefit Work and/or incurred Common Benefit Expenses. In the event that there is not unanimous agreement among Plaintiffs' Lead Counsel, each Lead Counsel shall only have one vote and each vote shall bear the same weight. A decision about the recommendation to the Court by the Lead Counsel need only be made by a majority of votes. Lead Counsel shall determine on their own the most fair and efficient manner by which to evaluate all of the time and expense submissions in making its recommendation to this Court. This Court will give due consideration to the recommendation of Lead Counsel in making its ruling on the award of common benefit fees and common benefit cost reimbursement.

IT IS SO ORDERED.

Dated this ____ day of _____, 2015 at Kansas City, Kansas.

JOHN W. LUNGSTRUM
UNITED STATES DISTRICT JUDGE

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

In Re: Syngenta AG MIR162	)	
Corn Litigation	)	
	)	MDL No. 2591
	)	
This document relates to:	)	Case No. 2:14-md-2591-JWL-JPO
All Cases	)	

**EXHIBIT A TO CMO NO. _____
(Common Benefit Participation Agreement)**

THIS COMMON BENEFIT PARTICIPATION AGREEMENT is made this ____ day of _____, 201__, by and between the Plaintiffs’ Co-Lead Counsel, as appointed by the United States District Court for the District of Kansas in MDL 2591, and _____ **[Name of the Law Firm Executing the Agreement]** (the “Participating Counsel”), on behalf of all of their clients having claims for claims relating to or arising from genetically modified Syngenta corn, the commercialization of Agrisure Viptera or Agrisure Duracade or of any corn including genetically modified traits MIR162 or Event 5307 (“Corn”).

WHEREAS, the United States District Court for District of Kansas has appointed Don Downing, William Chaney, Scott Powell and Patrick Stueve to serve as Co-Lead Counsel (“Lead Counsel”) and Patrick Stueve to serve as Liaison Counsel (“Liaison Counsel”) to facilitate the conduct of pretrial proceedings in the Corn actions; and

WHEREAS, the Lead Counsel, in association with other attorneys working for the common benefit of plaintiffs, have developed or are in the process of developing work product that will be valuable in all proceedings and benefit all producer and/or all non-producer plaintiffs

alleging injury or damages caused by this Corn (“Common Benefit Work Product”); and

WHEREAS, Participating Counsel is desirous of acquiring the Common Benefit Work Product for the benefit of his or her client(s).

NOW THEREFORE, in consideration of the covenants and promises contained herein, and intending to be legally bound hereby, the parties agree as follows:

I. SCOPE OF AGREEMENT

A. Purpose

This Participation Agreement (the “Agreement”) is a private cooperative agreement between plaintiffs’ attorneys to share Common Benefit Work Product pursuant to the Court’s Order Establishing Protocols for Common Benefit Work and Expenses and Establishing the Common Benefit Fee and Expense Funds (the “Order”), which is incorporated herein. By signing this Participation Agreement, the Participating Counsel who executes this Agreement is entitled to receive and use Common Benefit Work Product, regardless of the venue in which Participating Counsel’s cases are pending.

B. Rights and Obligations of Participating Counsel

Participating Counsel shall be provided access to the Common Benefit Work Product, including access to the document depository. Participating Counsel agrees that all Corn cases and/or claims in which Participating Counsel has any fee interest, including unfiled cases, tolled cases, and/or cases filed in any state or federal court, are all subject to the terms of this Participation Agreement.

Participating Counsel shall produce a list that correctly sets forth the name of each client represented by them and/or in which they have an interest in the attorney fee, regardless of what that interest is, who has filed a Corn civil action. Such list shall include the court and docket number of each such case. Participating Counsel shall also produce a list that contains the name

of each client represented by them and/or in which they have an interest in the attorney fee, regardless of what that interest is, who has not yet filed a civil action. Participating Counsel shall supplement the lists on a quarterly basis and provide the lists to Plaintiffs' Liaison Counsel via electronic mail at Syngenta@stuevesiegel.com. The initial list shall be provided within 14 calendar days of signing this Agreement and must be supplemented every 90 days thereafter.

II. AGREEMENT TO PAY AN ASSESSMENT ON GROSS RECOVERY

Subject to the terms of this Agreement and the terms of the Order, Participating Counsel who agrees to settle, compromise, dismiss, or reduce the amount of a claim, or with or without trial, recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, for any Corn claims on behalf of any client are subject to an assessment of the Gross Monetary Recovery, as provided herein, regardless of whether Participating Counsel has actually accessed or used Common Benefit Work prior to any resolution..

A. Gross Monetary Recovery Defined

"Gross Monetary Recovery" includes any and all amounts paid to plaintiffs' and/or their counsel by defendant(s) through a settlement or pursuant to a judgment. In measuring the Gross Monetary Recovery, the parties are to (a) exclude court costs that are to be paid by the defendant, but include any attorneys' fee awards under any fee-shifting statute or rule; (b) include any payments to be made by the defendant to a third party; (c) include the present value of any fixed and certain payments to be made in the future; and (d) if applicable, subtract any recovery paid by the plaintiff to a defendant through settlement or pursuant to a judgment for counterclaim(s) asserted in a Corn case by a defendant.

B. Assessment Amount

This assessment herein represents a holdback (*see, e.g., In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256 (E.D.N.Y. 2006)). The obligations in this Section shall follow all cases to

their final disposition, including a court having jurisdiction in bankruptcy. The following assessment shall be set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund.

For recoveries by Your clients (whether the client's case is filed in a federal or state court or is unfiled) if You are voluntarily executing the Participation Agreement within 45 days of entry of the Order or notice from Lead Counsel if you have at least one Corn case on file in any court as of the entry of this Order, whichever date is later and as defined in the Court's Order, Sections II(B), IV(B)(3)(b), or within 45 days of the date Your first Corn client is engaged or 120 days of entry of the Court's Order, whichever date is later, the assessments are:

- for each producer client, a total 7% assessment amount (4% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 5.5% assessment amount (3.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

For recoveries by Your clients (whether the client's case is filed in a federal or state court or is unfiled) if you have at least one Corn case on file in any court as of the entry of the Court's Order and You are voluntarily executing the Participation Agreement more than 45 days but less than 90 days of entry of the Order or notice from Lead Counsel, as detailed in the Court's Order, Sections II(B), IV(B)(3)(c), whichever date is later, the assessments are:

- for each producer client, a total 9% assessment amount (6% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 7.5% assessment amount (5.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

For recoveries by Your clients (whether the client's case is filed in a federal or state court or is unfiled) if You are voluntarily executing the Participation Agreement 90 or more days after entry of the Order or notice from Lead Counsel if you have at least one Corn case on file in any

court as of the entry of the Court's Order, whichever is later and as detailed in the Court's Order, Sections II(B), IV(B)(3)(d), or more than 45 days after the date Your first Corn client is engaged or more than 120 days after entry of the Court's Order if You do not have at least one Corn case on file in any court as of the entry of this Order, the assessments are:

- for each producer client, a total 13% assessment amount (10% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 11.5% assessment amount (9.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

In the event any defendant fails to hold back the assessments required by this Section, it is Your duty to pay the appropriate holdback amounts to the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund. Under all scenarios (except to the extent You are being paid an hourly rate), the fee assessment shall be paid from Your portion of the recovery and shall not be borne by Your client.

C. Covered Cases

By signing this Agreement, the Participating Counsel agrees that the assessment shall apply to all of his or her law firm's un-filed cases, tolled cases, federal cases, including those not transferred to the MDL, and/or cases filed in any state court in which they have a fee interest, regardless of the size of that fee interest.

D. Attorneys' Fee Lien

With respect to each client represented in connection with Corn related claims that are filed or pending in any federal or state court, are un-filed, or are subject to a tolling agreement, Participating Counsel agrees to have defendants deposit or cause to be deposited in the Corn Common Benefit Fee and Expense Funds established by the District Court in the MDL a percentage of the Gross Monetary Recovery recovered by each such client that is equal to the

assessment amount. In the event defendants do not deposit the assessed percentage into the Funds, Participating Counsel shall deposit or cause to be deposited in the Corn Common Benefit Fee and Expense Funds a percentage of the Gross Monetary Recovery recovered by each such client that is equal to the assessment amount. Participating Counsel, on behalf of themselves, their affiliated counsel, and their clients, hereby grant and convey to Plaintiffs' Lead Counsel a lien upon and/or a security interest in any fee (a) generated as a result of any recovery by any client who they represent in connection with any Corn-related claims and (b) they have any interest in, to the full extent permitted by law, in order to secure payment in accordance with the provisions of this Agreement. Participating Counsel will undertake all actions and execute all documents that are reasonably necessary to effectuate and/or perfect this lien and/or security interest.

III. COMMON BENEFIT WORK AND EXPENSES

A. Common Benefit Expenses Eligible for Reimbursement

In order to be eligible for reimbursement as Common Benefit Expenses, said expenses must be: (a) for the common benefit of all producer and/or non-producer plaintiffs; (b) appropriately authorized by Lead Counsel in writing; (c) timely submitted using the monthly reports created by Lead Counsel; (d) reasonable; (e) verified by a partner or shareholder in the submitting firm; and (f) in compliance with the Order. Attorneys shall keep all receipts for all expenses, which shall be made available upon request. Examples of authorized and unauthorized expenses are listed in the Order.

B. Common Benefit Work Eligible for Reimbursement

In order to be eligible for reimbursement as Common Benefit Work, time expended must be: (a) for the common benefit of all producer and/or non-producer plaintiffs; (b) appropriately authorized by Lead Counsel in writing; (c) timely submitted using the monthly reports created by

Lead Counsel; (d) reasonable; (e) verified by a partner or shareholder in the submitting firm; and (f) in compliance with the Order. Moreover, if counsel is a member of Plaintiffs' Executive Committee or other firm authorized by Lead Counsel to perform Common Benefit Work and fails to timely submit capital contributions as may be requested by Lead Counsel throughout this litigation, such counsel and members of his/her firm shall not be allowed to submit common benefit time or expenses for reimbursement.

"Common Benefit Work" means services performed for the benefit of all producer and/or all non-producer plaintiffs ("Common Benefit") and specifically authorized by Lead Counsel. Unless specifically and explicitly authorized in writing, no time spent on developing or processing individual issues in any case for an individual client, no time spent on the solicitation of potential clients and no time spent on any unauthorized work, will be considered or should be submitted. No client-related time, save certain time relating to cases which may be selected in the future as bellwether cases or time related to class representatives in a Master or Consolidated Class Complaint, shall be considered Common Benefit Work. Examples of authorized and unauthorized work are listed in the Order.

C. Counsel to Whom Common Benefit Work May Be Shared

Participating Counsel are prohibited from sharing Common Benefit Work Product with Non-Participating Counsel, such as counsel with cases in state courts who do not execute a Participation Agreement. No Participating Counsel shall provide in any way (oral or written) Common Benefit Work or other benefit from the work product created by Plaintiffs' Lead Counsel, MDL Counsel, as defined in the Court's Order, and/or other Participating Counsel of any kind to Non-Participating Counsel, as defined in the Court's Order.

D. Submission of Time and Expense Records

All time must be accurately and contemporaneously maintained. Participating Counsel shall keep a daily record of time spent in connection with Common Benefit Work on this litigation, indicating with specificity the hours, location, and particular activity. Time entries that are not sufficiently detailed may not be considered for common benefit payments and time submissions may be audited by a CPA. All common benefit time shall be maintained in tenth-of-an-hour increments.

Participating Counsel must follow the guidelines set forth in the Court's Order and in other written guidelines as established by Lead Counsel. All time and expense submissions must use the forms provided by Liaison Counsel and must be submitted electronically by the end of each calendar month, beginning on March 31, 2015. Failure to provide submissions in a timely manner shall result in a waiver of attorneys' fees and expenses claimed for the time period that is the subject of the submission. Failure to submit time and expense records in the electronic format on forms approved by Plaintiffs' Lead Counsel may also result in the waiver of attorneys' fees and expenses. Time spent compiling the data for the time and expense submissions is not considered common benefit time.

The undersigned Participating Counsel understands, acknowledges and agrees that there is no guaranty that all of the time submitted by any counsel or law firm will be compensated and that the hourly rate for the work that is compensated is not guaranteed (*e.g.*, that Lead Counsel may award different hourly rates for different work and for the same work performed by different attorneys or law firms). The undersigned also understands, acknowledges, and agrees that all hours are not going to be viewed equally and awarded at the same rate (*e.g.*, document review time and deposition/trial time may not be treated and awarded at the same rate).

E. Distribution of Fees

1. No Individual Right to the Funds: No party or attorney has any individual right to any common benefit funds except to the extent directed by order of the MDL Court. Common benefit funds will not constitute the property of any party or attorney or be subject to garnishment or attachment for the debts of any party or attorney except when and as directed by court order.

2. Court Approval: The amounts deposited in the Corn Common Benefit Fee Fund shall be available for distribution to attorneys who have performed professional services or incurred expenses for the common benefit. The MDL Court retains jurisdiction over any common benefit award. The undersigned Participating Counsel, on behalf of themselves, their law firm, their affiliated counsel, and their clients, hereby consents to the jurisdiction of the MDL Court in connection with any common benefit award.

[Participation Agreement continues on the next page]

I _____ [name of attorney] hereby represent that I have the authority to execute this Agreement on behalf of my law firm, _____ [insert name of law firm], and on behalf of all of my Corn clients. I hereby represent that I have the authority to bind my law firm and all of my Corn clients to the terms of this Participation Agreement.

My law firm's first Corn case was filed in any state or federal court on _____, 201____. I hereby certify that my law firm DID or DID NOT [please circle] have a Corn case on file in any state or federal court as of _____, 2015, the date the MDL Court entered the Order.

PLEASE INITIAL ONLY ONE OF THE FOLLOWING:

_____ [please initial] I hereby certify that I am executing this Participation Agreement within 45 days of entry or notice as defined in the Court's Order, Sections II(B), IV(B)(3)(b), if I had at least one Corn case on file in any court as of the entry of the Court's Order, or within the 45 or 120 days as defined in the Court's Order, Sections II(B), IV(B)(3)(b), if I did not have at least one Corn case on file in any court as of the entry of the Court's Order, and the assessments on all recoveries by my clients (whether the client's case is filed in a federal or state court or is unfiled) are:

- for each producer client, a total 7% assessment amount (4% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 5.5% assessment amount (3.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

_____ [please initial] I hereby certify that I had at least one Corn case on file in any court as of the entry of the Court's Order and I am executing this Participation Agreement more than 45 days and less than 90 days after entry or notice as defined in the Court's Order, Sections

II(B), IV(B)(3)(c), and the assessments on all recoveries by my clients (whether the client's case is filed in a federal or state court or is unfiled) are:

- for each producer client, a total 9% assessment amount (6% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 7.5% assessment amount (5.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

_____ [please initial] I hereby certify that I had at least one Corn case on file in any court as of the entry of the Court's Order and I am executing this Participation Agreement 90 or more days after entry or notice as detailed in the Court's Order, Sections II(B), IV(B)(3)(d), or I did not have at least one Corn case on file in any court as of the entry of the Court's Order and I am executing this Participation Agreement more than 45 or 120 days as defined in the Court's Order, Sections II(B), IV(B)(3)(b), and the assessments on all recoveries by my clients (whether the client's case is filed in a federal or state court or is unfiled) are:

- for each producer client, a total 13% assessment amount (10% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 11.5% assessment amount (9.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

I further agree that the fee assessment portion will be deducted from my attorney's fee and not from my client's portion of the recovery (except to the extent You are being paid an hourly rate).

These assessments shall apply to all Corn claims against any defendant by persons or entities represented by my law firm, whether such claims are filed, unfiled or tolled, that have not been asserted in a filed state Corn case.

[Continued on the next page]

Dated: _____

Law Firm Name:

Attorney's Name:

[Signatures continue on the next page]

Dated: _____

Patrick J. Stueve
CO-LEAD COUNSEL AND LIAISON COUNSEL FOR
PLAINTIFFS

Dated: _____

Don M. Downing
CO-LEAD COUNSEL FOR PLAINTIFFS AND
INTERIM RULE 23 CLASS COUNSEL

Dated: _____

William B. Chaney
CO-LEAD COUNSEL FOR PLAINTIFFS

Dated: _____

Scott Powell
CO-LEAD COUNSEL FOR PLAINTIFFS

Respectfully Submitted by:

/s/ Patrick J. Stueve

Patrick J. Stueve—KS Bar #13847

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Birmingham, AL 35203

Telephone: (205) 328-5330

scott@hwnn.com

CO-LEAD COUNSEL FOR PLAINTIFFS

EXHIBIT 82

From: Stueve, Pat
Sent: Wednesday, April 15, 2015 9:20 PM
To: 'KSD_Lungstrum_Chambers@ksd.uscourts.gov'
Cc: 'abrown@BradyPrestonBrown.com'; 'across@careydanis.com'; 'adam@krauseandkinsman.com';
 'adam@pulaskilawfirm.com'; 'adesteian@bassford.com'; 'admin@davidsykeslaw.com';
 'aftomt2001@yahoo.com'; 'afuller@grayreed.com'; 'alevitt@gelaw.com';
 'andrew@lemmonlawfirm.com'; 'andy.brister@gmail.com'; 'aplant@battlewinn.com';
 'ashlea@paulmcinnes.com'; 'bberryman@wattsguerra.com'; 'bbleichner@cclawmn.com';
 'bbrady@BradyPrestonBrown.com'; 'bbuck@badhambuck.com';
 'bdeacon@deaconlawfirm.com'; 'bej@dominalaw.com'; 'ben@bulldogtitle.com';
 'ben@stuckyfields.com'; 'bfinley@thefinleyfirm.com'; 'bill@hopkinsfirm.com';
 'blair@onderlaw.com'; 'blkinsley@crumleyroberts.com'; 'block@blocklawfirm.com';
 'bmcculley@mcculleymccluer.com'; 'bmilbourn@wbsvlaw.com'; 'bobbymoak402@att.net';
 'bozemanmarcus@hotmail.com'; 'brad.buhrow@zimmreed.com'; 'brennan@chapman-lewis-
 swan.com'; 'brian.miller@roystonlaw.com'; 'bvines@hwnn.com';
 'bwischnowski@willsonpechacek.com'; 'caseycastleberry2003@yahoo.com';
 'CBurger@stevensbrand.com'; 'cclark@triallawfirm.com'; 'ccrow@jinkslaw.com';
 'cellis@brelaw.com'; 'cgreene@greeneespel.com'; 'charles.zimmerman@zimmreed.com';
 'chet@getgordon.com'; 'chris@diazlawfirm.com'; 'chris@hwnn.com';
 'chuckm@coxwelllaw.com'; 'clark@clarkmason.com'; 'cmarshall@bassford.com';
 'cmcgaha@emersonpoynter.com'; 'cpinyan@brookspierce.com'; 'cschaffer@lfsblaw.com';
 'cspeer@speerlawfirm.com'; 'cvandenberg@sidley.com'; 'dad@dominalaw.com';
 'david.cialkowski@zimmreed.com'; 'david.hoffman@sidley.com'; 'dbacine@barrack.com';
 'dbecnel@becnellaw.com'; 'dcates@cateslaw.com'; 'ddefeo@defeokolker.com';
 'ddowning@grgpc.com'; 'dee.miles@beasleyallen.com'; 'demerathlaw@aol.com';
 'dfenchel@lawfdb.com'; 'dgoodwin@gustafsongluek.com'; 'dgraham@sidley.com';
 'dgustafson@gustafsongluek.com'; 'dhedlund@gustafsongluek.com';
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Subject: In Re: Syngenta AG MIR162 Corn Litigation, Case No. 2:14-md-02591-JWL-JPO
Attachments: 5FU9865-Revised Proposed Common Benefit Order.DOCX

Dear Judge Lungstrum:

Pursuant to the Court's April 8, 2015 Order (Doc. 343), attached please find in Word format a revised proposed Order Establishing Protocols for Common Benefit Work and Expenses and Establishing the Common Benefit Fee and Expense Funds. Counsel for Defendants and known counsel for Plaintiffs in the MDL are copied on this email.

Respectfully submitted,

Patrick J. Stueve
 Plaintiff's Co-Lead and Liaison Counsel

Patrick J. Stueve

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

In Re: Syngenta AG MIR162 Corn Litigation	)	
	)	
	)	MDL No. 2591
	)	
This document relates to: All Cases	)	Case No. 2:14-md-2591-JWL-JPO
	)	

**ORDER ESTABLISHING PROTOCOLS FOR COMMON BENEFIT WORK
AND EXPENSES AND ESTABLISHING THE COMMON
BENEFIT FEE AND EXPENSE FUNDS**

On January 22, 2015, the Court entered an order appointing Co-Lead Counsel, the Executive Committee, Interim Class Counsel and Liaison Counsel. ECF No. 67 (the “Leadership Order”). The Leadership Order permits Co-Lead Counsel (“Lead Counsel”) to assess other plaintiffs’ counsel for the expenses of the litigation and requires parties to maintain contemporaneous records of their time and expenses devoted to this matter. *Id.* at ¶¶ 4(m), 6.

The Leadership Order also defines the authority, duties and responsibilities of counsel appointed to leadership roles in this multidistrict proceeding (the “MDL”) and supplements the guidelines and rules for staffing, fees, expenses and billing records by attorneys acting for the common benefit of all producer and/or all non-producer plaintiffs in this multidistrict litigation for claims relating to or arising from genetically modified Syngenta corn, the commercialization of Agrisure Viptera or Agrisure Duracade or of any corn including genetically modified traits MIR162 or Event 5307 (“Corn”). This Order additionally provides for the fair and equitable sharing among plaintiffs’ counsel of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all producer and/or all non-producer plaintiffs in this complex litigation.

I. GOVERNING PRINCIPLES AND THE COMMON BENEFIT DOCTRINE

The common benefit governing principles are derived from the United States Supreme Court’s common benefit doctrine, as initially established in *Trustees v. Greenough*, 105 U.S. 527 (1881) and as refined throughout the last century in cases including *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884), *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *see also* Manual for Complex Litigation, § 14.215 (4th ed. 2004) (noting that “Lead and liaison counsel may have been appointed by the court to perform functions necessary for the management of the case but not appropriately charged to their clients” and encouraging an order early in the litigation that “establish[es] the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions.”); Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 374 (2014) (“Because the work that the PSC performs inures to the common benefit of all plaintiffs and their primary counsel (the counsel that they employed), MDL transferee courts usually establish a procedure for creating a common benefit fee to compensate the members of the PSC and the members of any subcommittees who have done common benefit work.”).

The Court’s authority to establish a fund and to order contributions also derives from its equitable authority and its inherent managerial power over this consolidated and multidistrict litigation. *See, e.g., In re Diet Drugs*, 582 F.3d 524, 546-47 (3rd Cir. 2009); *In re Air Crash Disaster at Fla. Everglades*, 549 F.2d 1006, 1008 (5th Cir. 1977); Manual for Complex Litigation, § 20.312 (“MDL judges generally issue orders directing the defendants who settle MDL-related cases contribute a fixed percentage of the settlement to a general fund to pay national counsel.”); Fallon, *supra*, at 378 (the common benefit doctrine is justified “on principles of equity or quantum meruit or class action procedures or [a court’s] inherent authority”).

II. SCOPE OF THIS ORDER

This Order governs the use of Common Benefit Work, as defined below, by MDL Counsel, Participating Counsel, Non-Participating Counsel and Attorneys Mikal C. Watts and Martin J. Phipps, their respective firms, Watts Guerra LLP, and Phipps Anderson Deacon LLP and, with respect to certain jointly represented clients, certain co-counsel of those firms as described in more detail in separate agreements those firms reached with Co-Lead Counsel.

A. MDL Counsel

For purposes of this Order, the term “MDL Counsel” includes: 1) all counsel appointed to leadership roles in the Leadership Order; 2) any other counsel who is authorized by Lead Counsel to perform Common Benefit Work (as defined below) and who agrees to perform Common Benefit Work; and 3) each attorney who represents one or more plaintiffs in a case that at any time has been pending in this MDL or in any case later filed in, transferred to, or removed to this Court, unless all of that attorney’s cases are remanded back to state court, and continues to apply as to any case dismissed from this Court or to any case remanded back to a federal transferor court. The obligations of this Order follow any such cases to their ultimate disposition.

B. Participating Counsel

All counsel who are not already MDL Counsel, as defined above, are eligible to sign the Participation Agreement, attached hereto as Exhibit A (the “Participation Agreement”). All counsel who execute the Participation Agreement are hereinafter referred to as “Participating Counsel” and all Participating Counsel are subject to this Order and the jurisdiction of this Court relating to this Order. Solely in their respective capacities as counsel for the Cargill and ADM plaintiffs, counsel for the Cargill and ADM plaintiffs have agreed to execute Participation Agreements and, solely for purposes of this Order, these counsel are included in the definition of

Participating Counsel, and are not MDL Counsel.

The Participation Agreement is a voluntary agreement between Lead Counsel and executing plaintiffs' attorneys allowing the Participating Counsel access to Common Benefit Work. Counsel who sign the Participation Agreement and all MDL Counsel shall be entitled to receive and to use for their cases all Common Benefit Work performed by or for Lead Counsel and other counsel at Lead Counsel's direction in this MDL to the same extent that such work is available to MDL Counsel.

Any plaintiffs' attorney who is not MDL Counsel, who wants to become a Participating Counsel and who currently has at least one Corn case on file in any state or federal court outside of this MDL shall execute the Participation Agreement within 45 days of the entry of this Order or within 45 days of notification by Lead Counsel of this Order, whichever date is later. Any plaintiffs' attorney who at the time this Order is entered does not have a case pending in any state or federal court and who wants to become a Participating Counsel shall execute the Participation Agreement within 45 days of the date their first Corn client is engaged or within 120 days of entry of this Order, whichever date is later. For any plaintiff's counsel who are not MDL Counsel, the failure to execute a Participation Agreement within the time frame set forth in the preceding paragraph will result in higher assessment percentages as a result of later execution. *Accord In re: Testosterone Replacement Therapy Prods. Liab. Litig.*, No. 14-cv-1748, MDL No. 2545, ECF No. 488 (Corrected Case Management Order No. 16 (Establishing Common Benefit Fee and Expense Funds)) at 3 (N.D. Ill. Nov. 25, 2014) (ordering an increase in the fee assessment from 8% to 16% if the participation agreement is not timely executed). These higher percentages are set forth in Section IV(B)(3)(c)-(d).

C. Non-Participating Counsel

Plaintiffs' attorneys who are not MDL Counsel may choose not to execute the Participation Agreement (such counsel are deemed "Non-Participating Counsel"). Non-Participating Counsel are not entitled to incur Common Benefit Expenses, participate in Common Benefit Work, access or possess Common Benefit Work, or make use of Common Benefit Work for any purpose or for any potential claimants. No MDL Counsel or Participating Counsel shall provide in any way (oral or written) Common Benefit Work of any kind to Non-Participating Counsel. Any Non-Participating Counsel who utilizes or intentionally accesses Common Benefit Work, including but not limited to settlement work on behalf of all producer and/or all non-producer plaintiffs, but fails to sign a Participation Agreement shall be subject to a cost assessment and a higher fee assessment as set forth in Section IV(B)(3)(e). This assessment shall apply to each and every Corn case in which that Non-Participating Counsel is counsel and/or has a fee interest, whether such Corn cases are filed, unfilled or tolled.¹ The Court encourages any state or federal judges to whom any Corn case is assigned, which is not transferred to this MDL, to require plaintiffs' counsel in those cases to execute the Participation Agreement. Access to the Common Benefit Work in all jurisdictions will promote the just and efficient resolution of these cases and respect the comity of the court systems. *Accord In re Genetically Modified Rice Litig.*, No. 06 MD 1811 CDP, ECF No. 2574 (Memorandum and Order regarding the creation of a common benefit trust fund) at 2 (E.D. Mo. Feb. 24, 2010) ("I urge the parties to consider the unjust enrichment issues in their settlement negotiations, and I

¹ Furthermore, for any Non-Participating Counsel who utilizes Common Benefit Work but fails to sign a Participation Agreement, both the fee and cost assessment shall be paid solely out of the Non-Participating Counsel's portion of any recovery and shall not be borne by the client, except if the Non-Participating Counsel is being paid solely an hourly rate.

urge the state court judges handling the cases to consider requiring participation in the fund by the parties over whom they have jurisdiction.”).

D. Mikal C. Watts and Martin J. Phipps

In accordance with separate agreements voluntarily negotiated between Co-Lead Counsel and Mikal C. Watts and Martin J. Phipps and their respective firms, Watts Guerra LLP and Phipps Anderson Deacon, LLP these attorneys and, with respect to clients they jointly represent with Watts or Phipps, their co-counsel, all as defined in the agreements, (“Watts and Phipps”), will not be considered MDL Counsel, Participating Counsel or Non-Participating Counsel under this Order. Rather, their rights and obligations will be governed by terms of the voluntary agreements they have signed. Those rights and obligations that are material to this Order are summarized below.² Essentially, Watts and Phipps:

1. Shall be entitled to use Common Benefit Work.
2. Shall pay fee and cost assessments identical to those paid by MDL Counsel for clients who: (a) first filed in federal court; (b) first filed in state court but whose case is removed and remand is denied; or (c) settled through an MDL settlement.
3. Shall pay fee and cost assessments of fifty percent (50%) of the level ordered by this Court for MDL Counsel for clients who: (a) never had a case pending in federal court; (b) never filed in any jurisdiction; (c) first filed in state court and the case remained in state court; or (d) filed in state court, and the case was removed to federal court and (i) remand was

² Watts and Phipps’ rights and obligations are governed by the specific language in their agreements with MDL Co-Lead Counsel, which have been provided *in camera* to the Court, and not by the summaries contained in this Order.

granted or (ii) remand has not yet ruled upon at the time of recovery.

4. Shall not be eligible to seek Common Benefit payments from the Common Benefit Fund established by this Court, and federal MDL leadership, shall not be eligible to seek Common Benefit payments from a Common Benefit Fund that may be established by any state court.

Watts and Phipps are uniquely situated in this litigation. They have agreed to undertake significant efforts to promote appropriate federal-state coordination and cooperation. They also have agreed to seek from any state court overseeing coordinated state court proceedings common benefit assessments that are identical in percentage to the MDL assessment percentages, and to take steps to avoid duplicate assessments in federal and state courts. This step should discourage assessment-based forum selection decisions. Given these and other undertakings to which Watts and Phipps have agreed with MDL Co-Lead Counsel, as reflected in joint prosecution agreements submitted *in camera* to the Court, the Court finds that treating Watts and Phipps separately is in the best interests of all plaintiffs, and that the provisions of these agreements with Watts and Phipps, submitted to the Court *in camera*, relevant to this Order and thus requiring review and approval by this Court are approved.

III. ADOPTION OF CASE MANAGEMENT PROTOCOLS

The Court hereby adopts the following guidelines for the management of case-staffing, timekeeping, expense reimbursement, and related Common Benefit issues, and instructs Lead Counsel to distribute additional guidelines as may be necessary to ensure the efficient prosecution of this litigation. The recovery of Common Benefit attorneys' fees and expenses will be limited to MDL Counsel and Participating Counsel (together with necessary staff of their respective firms).

MDL Counsel and Participating Counsel shall be eligible to receive Common Benefit

attorneys' fees and reimbursement of expenses only if the time expended, expenses incurred, and activity in question were: (a) for the Common Benefit of all producer and/or non-producer plaintiffs; (b) conducted by Lead Counsel and their respective firms or otherwise appropriately authorized by Lead Counsel in writing; (c) timely submitted; (d) reasonable; and (e) verified by a partner or shareholder in the submitting firm. Lead Counsel is empowered to engage a Certified Public Accountant ("CPA") to review these submissions.

As further detailed below, all counsel who seek to recover Court-awarded Common Benefit fees and expenses shall keep a daily, contemporaneous record of their time and expenses, noting with specificity the amount of time, billing rate, and activities, along with a brief note indicating which Lead Counsel authorized the activity in question. All counsel who seek to recover Court-awarded Common Benefit fees and expenses agree to the terms and conditions herein, including submitting to this Court's jurisdiction and agreeing that this Court has plenary authority regarding the assessment award and allocation of Common Benefit fees and expenses. The Court will determine at a later date, if needed, the methodology for allocating any Common Benefit assessments among those who performed approved work and incurred approved expenses. There is no guaranty that all of the time submitted by any counsel or firm will be compensated and the submitted hourly rate for the work that is compensated is not guaranteed.

A. Common Benefit Work

1. Authorization for Compensable Common Benefit Work

"Common Benefit Work" means services performed for the benefit of all producer and/or all non-producer plaintiffs ("Common Benefit") and specifically authorized by Lead Counsel. Common Benefit Work includes, but is not limited to, investigation, discovery (whether documents, interrogatories, depositions or otherwise), coding or other analytical work relating to

documents or evidence, research, motions and responses to motions, exhibits, bellwether trials and transcripts, all other work performed under the direction of Lead Counsel for the benefit of all producer and/or all non-producer plaintiffs, and orders on substantive matters involving Common Benefit Work. Authorization to perform Common Benefit Work shall be obtained from Lead Counsel under a procedure that they will determine.

Unless specifically and explicitly authorized in writing, no time spent on developing or processing individual issues in any case for an individual client, no time spent on the solicitation of potential clients and no time spent on any unauthorized work, will be considered or should be submitted. No client-related time, save certain time relating to cases which in the future may be selected as bellwether cases or time related to class representatives in a Master or Consolidated Class Complaint, shall be considered Common Benefit Work. Examples of authorized Common Benefit Work and unauthorized work include, but are not limited to:

a) Depositions: Lead Counsel shall exercise discretion, judgment, and prudence to designate only that number of attorneys to participate in any given deposition that is commensurate with the nature of that deposition so as to avoid over-staffing. Time and expenses for counsel not designated as one of the authorized questioners or otherwise authorized to attend the deposition by Lead Counsel shall not be considered Common Benefit Work but, rather, as attending on behalf of such counsel's individual clients.

b) Conference Calls and Meetings: Conference calls and meetings held at the direction of Lead Counsel for discussion of case management, coordination, and litigation activity are generally considered Common Benefit Work. Calls and meetings solely to impart status information generally are not Common Benefit Work as to those listening. Attorneys designated by Lead Counsel to run or participate in those calls, on the other hand, are

working for the Common Benefit by keeping other attorneys educated about the litigation and their time is Common Benefit Work. During such telephone or conference calls and meetings, there is a presumption that only the authorized active participants' time will qualify as Common Benefit Work, although exception may be made for good cause as determined by Lead Counsel.

c) MDL Status Conferences: Status conferences will be held so that the litigation moves forward and legal issues are resolved with the Court. Counsel may attend any status conference held in open court, but mere attendance at or listening to a status conference will not be considered Common Benefit Work, and expenses incurred in relation thereto will not be considered Common Benefit Expenses. Attorneys designated by Lead Counsel to prepare agendas, confer with opposition counsel and otherwise address issues that will be raised at a given status conference or requested by Lead Counsel to be present at a status conference are considered to be performing Common Benefit Work. Similarly, any attorney whose attendance at a status conference is specifically requested by the Court to address a common issue may submit his or her time for evaluation as Common Benefit Work.

d) Identification and Work-Up of Experts: Identification, interview, discussions, preparation of reports and all other matters involving experts on common issues, experts relating to cases selected as bellwether cases or experts related to a Master or Consolidated Class Complaint are considered Common Benefit Work. All services and expenses related to experts retained without authorization by Lead Counsel are not eligible for Common Benefit fees or expenses.

e) Attendance at Seminars: Attendance at seminars or Continuing Legal Education programs shall not qualify as Common Benefit Work, or the expenses pertaining thereto as Common Benefit Expenses.

f) Trial Consultants and Preparation: Trial consultants and participation in trial preparation, mock trials or focus group activity for bellwether trials may qualify as Common Benefit Work and Common Benefit Expense as authorized by Co-Lead Counsel.

g) Document Discovery: All work performed and expenses incurred in connection with document discovery (including meet-and-confers with opposing counsel and any motions to compel) relating to common issues and authorized by Lead Counsel qualify as Common Benefit Work and Common Benefit Expense. If an attorney elects to review documents without prior authorization by Lead Counsel, that review is not considered Common Benefit Work. It is the Court's expectation that counsel will minimize the number of individual timekeepers from a single law firm to ensure the efficiency of time spent on this litigation. Descriptions associated with "document review" must contain sufficient detail to allow those reviewing the time entry to generally ascertain what was reviewed.

h) Motions: All research, drafting, and presentation of motions and responses to motions on common issues and authorized by Lead Counsel are considered Common Benefit Work.

i) Review of Filings and Orders: Mere review of filings and orders generally does not qualify as Common Benefit Work. It is anticipated that there will be a large number of filings in this case and mere review of these filings will not be approved as Common Benefit Work. Those attorneys working on assignments by Lead Counsel requiring them to reasonably review, analyze, or summarize certain filings and substantive orders of this Court in connection with their assignments are doing so for the Common Benefit. In addition, it is expected that Lead and Liaison Counsel, as well as members of the Executive Committee, will

review case management and substantive orders of the Court as part of their leadership responsibilities. Reasonable time spent reviewing these court rulings and orders by court-appointed leadership will be considered Common Benefit Time.

j. Emails and Correspondence: Except for Lead and Liaison Counsel, their assigned attorneys and staff working on this MDL and those designated by Lead Counsel to work on assignments requiring them to review emails and correspondence, time recorded for reviewing emails and other correspondence is not compensable as Common Benefit Work. For example, review of an email or other correspondence sent to dozens of attorneys to keep them informed on a matter on which they are not specifically working would not be compensable as Common Benefit Work.

k) Written Discovery: Only those attorneys designated by Lead Counsel to review discovery are working for the common benefit and their time accordingly considered Common Benefit Work. All other counsel are reviewing those discovery responses for the benefit of their own clients, and such review will not be considered Common Benefit Work.

l) Travel Time: Reasonable Travel Time may be compensable as Common Benefit Work, to the extent necessary and approved by Lead Counsel in connection with assigned Common Benefit Work or to the extent work otherwise compensable is performed while in transit. In the event that Participating Counsel or MDL Counsel are unsure if the action they are about to undertake is considered Common Benefit Work, they shall ask Lead Counsel in advance as to whether such time may be compensable.

2. Verification

The forms detailing potential Common Benefit Work shall be certified by an attorney

with authority in each firm attesting to the accuracy of the submissions.

B. Common Benefit Expenses

“Common Benefit Expenses” means expenses authorized by Lead Counsel and incurred for the benefit of all producers and/or all non-producer plaintiffs. Expense submissions shall be made to Lead Counsel on a monthly basis, by deadlines to be set by Lead Counsel, in accordance with the guidelines set forth herein. Only reasonable expenses incurred while performing work specifically authorized in writing by Lead Counsel will be eligible for consideration as common benefit expenses; any expense over \$500 must be specifically approved in advance in writing by Lead Counsel.

No client-related expenses, save certain expenses relating to cases which in the future may be selected as potential bellwether cases or those related to class representatives in a Master or Consolidated Class Complaint, shall be considered Common Benefit Expenses, unless exceptional circumstances exist and are approved by later order of this Court.

1. Travel Limitations: Only reasonable expenses will be reimbursed. Except in extraordinary circumstances approved by Lead Counsel, all travel reimbursements are subject to the following limitations:

a) Airfare: Ordinarily, only the price of the lowest available, convenient coach fare seat will be reimbursed. Business/First Class Airfare will not be reimbursed. In the event that non-coach air travel is utilized, including economy plus or premium economy, the attorney shall be reimbursed only to the extent of the lowest available, convenient coach fare, which must be contemporaneously documented. If non-coach, private or charter travel is elected, the applicant is required to document what the lowest available, convenient coach fare in effect at that time was, and that is all that can be reimbursed.

b) Hotel: Hotel room charges for the average available room rate of a business hotel, such as the Hyatt, Hilton, Westin, and Marriott hotels, in the city in which the stay occurred, will be reimbursed. Liaison Counsel shall attempt to negotiate a reduced rate for a hotel located near their offices for the benefit of all counsel. Luxury hotels will not be fully reimbursed but, rather, will be reimbursed at the average available rate of a business hotel.

c) Meals: Meal expenses must be reasonable. Expenses that significantly exceed the meal allowances for federal employees may not be approved for reimbursement. There will be no reimbursement for alcoholic beverages, room service, mini-bar items, or movies.

d) Cash Expenses: Miscellaneous cash expenses for which receipts generally are not available (*e.g.*, tips, luggage handling) will be reimbursed up to \$50.00 per trip, as long as the expenses are properly itemized.

e) Automobile Rental: Luxury automobile rentals will not be fully reimbursed, unless only luxury automobiles are available. Counsel must submit evidence of the unavailability of non-luxury vehicles. If luxury automobiles are selected when non-luxury vehicles are available, then the difference between the luxury and non-luxury vehicle rates must be shown on the travel reimbursement form and only the non-luxury rate may be claimed.

f) Mileage: Mileage claims must be documented by stating origination point, destination, total actual miles for each trip and rate per mile paid by the attorney's firm. The rate will be the IRS Standard Business Mileage Rate for the period in which the mileage was driven.

2. Non-Travel Limitations

a) Long Distance, Conference Call, and Cellular Telephone

Charges: Common Benefit long distance, conference call, and cellular telephone charges must be documented as individual call expenses in order to be compensable. Such charges are to be reported at actual cost.

b) Shipping, Overnight, Courier, and Delivery Charges: All claimed Common Benefit shipping, overnight, courier, or delivery expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package. Such charges are to be reported at actual cost.

c) Postage Charges: A contemporaneous postage log or other supporting documentation must be maintained and submitted for Common Benefit postage charges. Such charges are to be reported at actual cost.

d) Facsimile Charges: Contemporaneous records should be maintained and submitted showing faxes sent and received. The per-fax charge shall not exceed \$0.50 per fax.

e) In-House Photocopy: A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is \$0.10 per page for in-firm photocopies and any necessary vendor photocopies shall be at actual cost.

f) Computerized Research: Lexis, Westlaw, or Bloomberg: Claims for Lexis, Westlaw, Bloomberg, or other computerized legal research expenses should be in the exact amount charged to the firm and appropriately allocated for these research services.

3. Verification

The forms detailing expenses shall be certified by an attorney with authority in each firm attesting to the accuracy of the submissions. Attorneys shall maintain all receipts for all

expenses, which shall be available upon request.

4. Shared Costs and Capital Contributions

Each Lead Counsel and other counsel as designated by Lead Counsel shall pay a monetary amount, as directed below, which shall be used to pay reasonable and necessary Common Benefit Expenses on an ongoing basis (the “Shared Costs”). The timing and amount of each contribution will be determined by Lead Counsel and must be paid within 30 days of the date of written request by Lead Counsel. Failure to timely pay capital contributions as may be requested by Lead Counsel throughout this litigation will be grounds for barring counsel from submitting Common Benefit Work or Common Benefit Expenses for reimbursement.

All costs that fall under the following categories and/or other expenses incurred for the benefit of all producer and/or all non-producer plaintiffs as determined by Lead Counsel shall be considered Shared Costs and shall qualify for submission and payment:

- a)** court, filing and service costs related to common issues;
- b)** service costs, including translation fees, for service of the consolidated complaints on all domestic and foreign defendants named in those complaints;
- c)** deposition and court reporter costs for depositions (excluding those that are client-specific);
- d)** document depository creation, operation, staffing, equipment and administration;
- e)** translation costs related to the above;
- f)** Lead Counsel, Liaison Counsel, or Executive Committee administration matters;

- g)** legal, financial institutional and accountant fees relating to expenses;
- h)** expert witness and consultant fees and expenses for experts whose opinions, advice and testimony would be generic and for the common benefit of all producers or all non-producers covered by a consolidated or master complaint. There shall be no reimbursement for case specific experts, except for liability and causation experts in class or bellwether cases, at the discretion of the Lead Counsel;
- i)** printing, copying, coding, scanning related to the above (out-of-house or extraordinary firm costs);
- j)** research by outside third-party vendors/consultants/attorneys, approved by Lead Counsel;
- k)** investigative services, approved by Lead Counsel; and
- l)** mediator costs.

No client-related costs, save certain costs relating to cases selected in the future as potential bellwether cases or those related to class representatives in a Master or Consolidated Class Complaint, shall be considered Shared Costs, unless exceptional circumstances exist. All Shared Costs must be approved by Lead Counsel prior to payment.

Lead Counsel shall prepare and be responsible for distributing additional reimbursement procedures. Requests for payment shall include sufficient information to permit Lead Counsel and a CPA, if engaged by Lead Counsel, to account properly for expenses and to provide adequate detail to the Court.

5. Held Costs

“Held Costs” are Common Benefit Expenses carried by counsel in this MDL or by Participating Counsel and reimbursed as and when Lead Counsel determines to do so. Held Costs are those that do not fall into the above Shared Cost categories but are incurred for the common benefit of all producers or non-producers covered by a consolidated complaint. No client-specific costs can be considered Held Costs, other than certain Common Benefit Expenses relating to class representative or potential bellwether plaintiffs at the discretion of Lead Counsel.

Held Costs shall be recorded in accordance with the guidelines set forth herein and in additional procedures as prepared by Lead Counsel.

C. Timekeeping and Submission of Time and Expense Records

All time and expenses must be accurately and contemporaneously maintained and tracked. In order to qualify for Common Benefit fees or expenses, MDL Counsel and Participating Counsel shall keep contemporaneous billing records of the time spent in connection with Common Benefit Work on this MDL, indicating with specificity the hours and billing rate, along with a brief note indicating the source of authorization for the activity in question and a brief description of the particular activity. Time and expense submissions shall be made to Lead Counsel on a monthly basis, by deadlines to be set by Lead Counsel, in accordance with the guidelines set forth herein and using monthly reports to be distributed by Lead Counsel so that Lead Counsel may retain those forms for later submission to this Court if and when necessary. The first submission is due on May 31, 2015, and should include all time and expense through April 30, 2015. Thereafter, all time and expense reports shall be submitted on the last calendar day of each month and shall cover the time period through the end of the preceding month (*i.e.*,

the June 30, 2015 submission should include all time and expenses incurred during the month of May 2015).³ Generally, only time and expense incurred after the Court's January 22, 2015 Order appointing Plaintiffs' Leadership shall be submitted and considered as potential Common Benefit Work.⁴

Time and expense entries that are not sufficiently detailed will not be considered for payment of Common Benefit fees. All time for Common Benefit Work by each firm shall be recorded and maintained in tenth-of-an-hour increments. The failure to secure authorization from Lead Counsel to incur Common Benefit time and expenses, or to maintain and timely provide such records or to provide a sufficient description of the activity, will be grounds for denying the recovery of attorneys' fees or expenses in whole or in part. Lead Counsel must maintain all time submissions in a format so that the Court may review any application for fees.

IV. PLAINTIFFS' COMMON BENEFIT FEE AND EXPENSE FUNDS

A. Establishing the Fee and Expense Funds

Plaintiffs' Liaison Counsel is directed to establish two interest-bearing accounts to receive and disburse funds (the "Funds") as provided in this and subsequent Orders. The first fund shall be designated the "Corn Common Benefit Fee Fund" and the second fund shall be

³ Although counsel should submit all Common Benefit Expenses incurred in a certain month in the submission made on the last calendar day of the next month, some third party billing and credit card statement schedules may make such expense submission difficult. In such circumstances and in compliance with guidelines developed by Lead Counsel, counsel may submit expenses incurred in the previous two months that – because of circumstances outside the submitting counsel's control – could not have been submitted by the Court-ordered deadline. Any common benefit expenses submitted more than two months in arrears shall not be considered as Common Benefit Expenses absent good cause as determined by Lead Counsel.

⁴ In their discretion, Lead Counsel may consider time and expense incurred before the Court's January 22, 2015 Order as Common Benefit Work and Common Benefit Expense if the time or expense benefitted all producer and/or all non-producer plaintiffs in a material and direct way. Time and expense incurred in client solicitation, efforts to secure a leadership appointment, pre-appointment attendance at meetings of plaintiffs' counsel, attendance at the JPML hearing, attendance at the initial court hearing and similar tasks will not be approved.

designated the “Corn Common Benefit Expense Fund.” These funds will be held subject to the direction of this Court.

By subsequent Order of this Court, the Court will appoint a Special Master who is a qualified certified public accountant (the “Special Master”) to serve as Escrow Agent over the Funds and to keep detailed records of all deposits and withdrawals and to prepare tax returns and other tax filings in connection with the Funds, if needed. Such subsequent Order may specify the hourly rates to be charged by the Special Master and for the Special Master’s assistants, who shall be utilized where appropriate to control costs. The Special Master shall submit quarterly detailed bills to Plaintiffs’ Liaison Counsel and the Court, at the Court’s request. Upon approval by the Court, the Special Master’s bills shall be paid from the Corn Common Benefit Expense Fund and shall be considered Shared Costs. Plaintiffs’ Liaison Counsel shall provide a copy of this Order to the Special Master. The parties may jointly propose a Special Master for the Court’s consideration. If the parties are unable to agree on a proposed Special Master, the Court will select a neutral Special Master to serve in this role.

B. Payments into the Corn Common Benefit Fee and Corn Common Benefit Expense Funds

1. General Standards

All counsel and plaintiffs who are subject to this Order who agree to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, with respect to Corn claims or a Corn case are subject to an assessment on the Gross Monetary Recovery, as provided herein.

2. Gross Monetary Recovery

Gross Monetary Recovery includes any and all amounts paid by defendants through

settlement or pursuant to a judgment. In measuring the “Gross Monetary Recovery,” the parties are to (a) exclude any court costs that are to be paid by the defendant, but include any attorneys’ fee awards under any fee-shifting statute or rule; (b) include any payments to be made by the defendant to a third party; (c) include the present value of any fixed and certain payments to be made in the future; and (d) if applicable, subtract any recovery paid by the plaintiff to a defendant through settlement or pursuant to a judgment for counterclaim(s) asserted in a Corn case by a defendant.

3. Assessment Amounts

In the event that there is a class settlement, recovery or judgment in favor of the class, no assessment pursuant to this Section will be made, either for attorneys’ fees or for expenses, individually from any class member or his/her/its individual attorney as to the portion of any class recovery distributed to that individual class member if the class member remains in the class (i.e., does not opt-out of the class). Instead, all fees and expenses for that class member will come out of the overall class recovery funds provided by defendants, as approved by the Court, or as otherwise Ordered by the Court. The relationship between class counsel fees and costs obtained through any class settlement or judgment and the Common Benefit Fund will be addressed, if necessary, by later order of the court.

The assessments in this Order represent a holdback (*see, e.g., In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256 (E.D.N.Y. 2006)) and shall not be altered absent further order of the Court. The obligations in this Section shall follow the case to its final disposition, including a court having jurisdiction in bankruptcy.

Defendants shall hold back⁵ and set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund the following amounts in this Section.

a) For recoveries by any client of an MDL Counsel (whether the client's case is filed in a federal or state court or is unfiled), as defined above, the assessments are:

- for each producer client, a total 11% assessment amount (8% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 9% assessment amount (7% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.⁶

⁵ In the event any defendant fails to hold back the assessments required by this Section, plaintiffs' counsel has an equal duty to pay the appropriate holdback amounts to the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund. Under all scenarios (except to the extent the attorney is being paid an hourly rate), the fee assessment shall be paid from the attorney's portion of the recovery and shall not be borne by the client.

⁶ As indicated above, the fee and expense assessment percentages contained in this subsection (a) apply to Watts and Phipps' producer and non-producer clients who:

1. first filed in federal court;
2. first filed in state court but whose case is removed and remand was denied by this Court; or
3. settled through an MDL settlement.

Defendants shall hold back and set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund the percentages contained in this subsection (a) for Watts and Phipps' clients in these categories.

With respect to Watts' and Phipps' producer and non-producer clients who fall within the categories below, the fee and expense assessment percentages shall be fifty percent (50%) of the amount ordered herein in this subsection (a):

1. never had a case pending in federal court;
2. never filed in any jurisdiction;
3. filed first in state court and the case remanded in state court; or
4. filed in state court, was removed to federal court and (a) remand was granted or (b) remand was not yet ruled upon at the time of recovery.

b) For recoveries by any client (whether the client's case is filed in a federal or state court or is unfiled) whose attorney is not an MDL Counsel, but whose attorney becomes a Participating Attorney by voluntarily executing the Participation Agreement within 45 days of entry of this Order or notice by Lead Counsel if they have at least one Corn case on file in any court as of the entry of this Order, whichever date is later and as defined in Section II(B) above, or within 45 days of the date their first Corn client is engaged or 120 days of entry of this Order, whichever date is later, the assessments are:

- for each producer client, a total 7% assessment amount (4% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 5.5% assessment amount (3.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

c) For recoveries by any client (whether the client's case is filed in a federal or state court or is unfiled) whose attorney is not an MDL Counsel, whose attorney has at least one Corn case on file in any court, and whose attorney becomes a Participating Attorney by voluntarily executing the Participation Agreement more than 45 days but less than 90 days of entry of this Order, filing of the Participating Counsel's first Corn case in any court or notice by Lead Counsel, as defined in Section II(B) above, whichever date is later, the assessments are:

- for each producer client, a total 9% assessment amount (6% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 7.5% assessment amount (5.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

Defendants shall hold back and set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund 50% of the percentages contained in this subsection (a) for Watts and Phipps' clients in these categories.

d) For recoveries by any client (whether the client's case is filed in a federal or state court or is unfiled) whose attorney is not an MDL Counsel, but whose attorney becomes a Participating Attorney by voluntarily executing the Participation Agreement 90 or more days after entry of this Order or notice by Lead Counsel if the attorney has at least one Corn case on file in any court as of the entry of this Order, whichever is later and as defined in Section II(B) above, or more than 45 days after the date the attorney's first Corn client is engaged or more than 120 days after entry of this Order if the attorney does not have at least one Corn case on file in any court as of the entry of this Order, the assessments are:

- for each producer client, a total 13% assessment amount (10% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 11.5% assessment amount (9.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

e) For recoveries by any client (whether the client's case is filed in a federal or state court or is unfiled) whose attorney is a Non-Participating Counsel, but who utilizes or intentionally accesses Common Benefit Work, the assessments are:

- for each producer client, a total 13% assessment amount (10% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 11.5% assessment amount (9.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.
- For this category only, both the fee and the cost assessments shall come out of the attorney's portion of the recovery (except for lawyers paid solely by the hour) and shall not be borne by the client.
- Non-Participating Counsel who utilizes or intentionally accesses Common Benefit Work and who later become MDL Counsel or

execute a Participation Agreement shall not be entitled to a reduction in the assessment amounts set forth in in Subsection IV(B)(3)(e) and the assessments set forth in this subsection shall apply to all cases in which that attorney has a fee interest.

4. Defendants' Obligations to Pay Common Benefit Assessments

Defendants and their counsel shall not distribute any proceeds, whether by settlement or in satisfaction of a judgment, to any plaintiff's counsel (or directly to a plaintiff) until after: (1) defendants' counsel notifies Plaintiffs' Liaison Counsel in writing of the existence of a settlement or judgment and the name of the individual plaintiff's attorney, and (2) Plaintiffs' Liaison Counsel has advised defendants' counsel in writing whether or not the individual plaintiff's attorney is an MDL Counsel, Participating Counsel, Watts and Phipps and/or is Non-Participating Counsel subject to an assessment and the amount (stated as a percentage of the recovery) of the assessment pursuant to this Order.⁷ Plaintiffs' Liaison Counsel shall share this information with Plaintiffs' Lead Counsel, who shall otherwise keep this information confidential.

For cases subject to an assessment, defendants are directed to withhold an assessment from any and all amounts paid to plaintiffs and their counsel and to pay the assessment directly into the Funds as a credit against the settlement or judgment. No notice or order of dismissal of any plaintiff's claim, subject to this Order, shall be entered unless accompanied by a certificate of plaintiff's and defendants' counsel that the assessment, if applicable, will be withheld and will be deposited into the Funds at the same time the settlement proceeds are paid to settling counsel. If, for any reason, the assessment is not or has not been so withheld, the plaintiff's counsel whose

⁷ Failure of Liaison Counsel to identify a Non-Participating Counsel as being obligated to pay an assessment based on unauthorized use of Common Benefit Work because of a lack of knowledge of such use on the part of Liaison Counsel at such time shall not relieve such Non-Participating Counsel of its assessment obligation under this Order.

case is being resolved is responsible for paying the assessment into the Funds promptly. If any Non-Participating Counsel identified by Plaintiffs' Liaison Counsel as being subject to an assessment, objects to defendants' payment of an assessment into the funds, such payment shall be made to the Special Master to be held in an escrow account until the Court determines whether the payment is subject to an assessment, and if so, in what amount. If the court determines the payment is subject to an assessment, the Special Master shall pay the assessment amount into the Funds. If the Court determines that the payment is not subject to an assessment, the Special Master shall return the funds to plaintiff's counsel. The Special Master shall provide Plaintiffs' Lead and Liaison Counsel with written verification that defendants have made full and complete payments to the Funds (or to the Escrow Account) in accordance with this Order and with all procedures established by the Special Master. The full and complete payments and the required verification from the Special Master shall discharge defendants' and defendants' counsel's obligations and responsibilities with respect to the deposited funds, including any disputes between or among plaintiffs and plaintiffs' counsel as to the allocation of such funds.

To preserve the confidentiality of settlement amounts, if such confidentiality is agreed to by the settling parties in their settlement agreement(s), details of any individual settlement agreement, individual settlement amount, and/or amounts deposited into escrow by any particular defendant shall be confidential and shall not be disclosed by the Special Master to anyone other than the Court, upon request or by Order of the Court. Monthly statements from the Special Master shall be provided to Plaintiffs' Lead and Liaison Counsel (and, if the Court so requests, to the Court) showing only the total quarterly deposits from all defendants, any disbursements, interest earned, and financial institution charges, if any, and the current balance.

5. Reporting Obligations

Upon learning of a Corn case being filed in any state court or any federal court outside of this MDL, Defendants' Liaison Counsel shall notify Plaintiffs' Liaison Counsel of such filing within 30 days of service of the complaint/petition upon any defendant. Such notice shall include the name, firm name, and firm address of the plaintiff's attorney(s) and the date of such filing, so that Plaintiffs' Liaison Counsel can notify that attorney of this Order and offer him or her the opportunity to become a Participating Counsel.

Plaintiffs' Liaison Counsel shall provide Defendants' Liaison Counsel, the Special Master, and the Court, if requested, with a list of cases and/or counsel who have signed Participation Agreements. This same list shall be made available to all plaintiffs' counsel with cases in this MDL, as well as any other plaintiffs' counsel who signs the Participation Agreement, upon request. In the event there is a dispute as to whether a case should be on the list, Plaintiffs' Lead Counsel shall seek to resolve the matter with the particular plaintiff's counsel informally, and if that is unsuccessful, upon motion to the Court. The parties' reporting obligations shall continue quarterly until the conclusion of this MDL.

V. DISTRIBUTIONS

A. Court Approval

The amounts deposited into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund shall be available for distribution to MDL Counsel and Participating Counsel who have performed professional services or incurred expenses for the Common Benefit of all producer and/or all non-producer plaintiffs as authorized by Lead Counsel. No amounts will be disbursed without review and approval by the Court, or such other mechanism as the Court may order. This Court retains jurisdiction over any common benefit award or distribution.

B. Application for Distribution

Each MDL Counsel or Participating Counsel performing Common Benefit Work has the right to present a claim(s) for compensation and/or reimbursement through a procedure directed by Lead Counsel prior to any distribution approved by this Court. Any Non-Participating Counsel shall not be eligible to receive common benefit payments for any work performed or expenses incurred.

Plaintiffs' Lead Counsel shall make recommendations to this Court for distributions to MDL Counsel and Participating Counsel performing Common Benefit Work and/or incurred Common Benefit Expenses. In the event that there is not unanimous agreement among Plaintiffs' Lead Counsel, each Lead Counsel shall only have one vote and each vote shall bear the same weight. A decision about the recommendation to the Court by the Lead Counsel need only be made by a majority of votes. Lead Counsel shall determine on their own the most fair and efficient manner by which to evaluate all of the time and expense submissions in making its recommendation to this Court. This Court will give due consideration to the recommendation of Lead Counsel in making its ruling on the award of common benefit fees and common benefit cost reimbursement.

IT IS SO ORDERED.

Dated this ____ day of _____, 2015 at Kansas City, Kansas.

JOHN W. LUNGSTRUM
UNITED STATES DISTRICT JUDGE

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

In Re: Syngenta AG MIR162	)	
Corn Litigation	)	
	)	MDL No. 2591
	)	
This document relates to:	)	Case No. 2:14-md-2591-JWL-JPO
All Cases	)	

**EXHIBIT A TO CMO NO. _____
(Common Benefit Participation Agreement)**

THIS COMMON BENEFIT PARTICIPATION AGREEMENT is made this ____ day of _____, 201__, by and between the Plaintiffs’ Co-Lead Counsel, as appointed by the United States District Court for the District of Kansas in MDL 2591, and _____ **[Name of the Law Firm Executing the Agreement]** (the “Participating Counsel”), on behalf of all of their clients having claims for claims relating to or arising from genetically modified Syngenta corn, the commercialization of Agrisure Viptera or Agrisure Duracade or of any corn including genetically modified traits MIR162 or Event 5307 (“Corn”).

WHEREAS, the United States District Court for District of Kansas has appointed Don Downing, William Chaney, Scott Powell and Patrick Stueve to serve as Co-Lead Counsel (“Lead Counsel”) and Patrick Stueve to serve as Liaison Counsel (“Liaison Counsel”) to facilitate the conduct of pretrial proceedings in the Corn actions; and

WHEREAS, the Lead Counsel, in association with other attorneys working for the common benefit of plaintiffs, have developed or are in the process of developing work product that will be valuable in all proceedings and benefit all producer and/or all non-producer plaintiffs

alleging injury or damages caused by this Corn (“Common Benefit Work Product”); and

WHEREAS, Participating Counsel is desirous of acquiring the Common Benefit Work Product for the benefit of his or her client(s).

NOW THEREFORE, in consideration of the covenants and promises contained herein, and intending to be legally bound hereby, the parties agree as follows:

I. SCOPE OF AGREEMENT

A. Purpose

This Participation Agreement (the “Agreement”) is a private cooperative agreement between plaintiffs’ attorneys to share Common Benefit Work Product pursuant to the Court’s Order Establishing Protocols for Common Benefit Work and Expenses and Establishing the Common Benefit Fee and Expense Funds (the “Order”), which is incorporated herein. By signing this Participation Agreement, the Participating Counsel who executes this Agreement is entitled to receive and use Common Benefit Work Product, regardless of the venue in which Participating Counsel’s cases are pending.

B. Rights and Obligations of Participating Counsel

Participating Counsel shall be provided access to the Common Benefit Work Product, including access to the document depository. Participating Counsel agrees that all Corn cases and/or claims in which Participating Counsel has any fee interest, including unfiled cases, tolled cases, and/or cases filed in any state or federal court, are all subject to the terms of this Participation Agreement.

Participating Counsel shall produce a list that correctly sets forth the name of each client represented by them and/or in which they have an interest in the attorney fee, regardless of what that interest is, who has filed a Corn civil action. Such list shall include the court and docket number of each such case. Participating Counsel shall also produce a list that contains the name

of each client represented by them and/or in which they have an interest in the attorney fee, regardless of what that interest is, who has not yet filed a civil action. Participating Counsel shall supplement the lists on a quarterly basis and provide the lists to Plaintiffs' Liaison Counsel via electronic mail at Syngenta@stuevesiegel.com. The initial list shall be provided within 14 calendar days of signing this Agreement and must be supplemented every 90 days thereafter.

II. AGREEMENT TO PAY AN ASSESSMENT ON GROSS RECOVERY

Subject to the terms of this Agreement and the terms of the Order, Participating Counsel who agrees to settle, compromise, dismiss, or reduce the amount of a claim, or with or without trial, recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, for any Corn claims on behalf of any client are subject to an assessment of the Gross Monetary Recovery, as provided herein, regardless of whether Participating Counsel has actually accessed or used Common Benefit Work prior to any resolution.

A. Gross Monetary Recovery Defined

"Gross Monetary Recovery" includes any and all amounts paid to plaintiffs' and/or their counsel by defendant(s) through a settlement or pursuant to a judgment. In measuring the Gross Monetary Recovery, the parties are to (a) exclude court costs that are to be paid by the defendant, but include any attorneys' fee awards under any fee-shifting statute or rule; (b) include any payments to be made by the defendant to a third party; (c) include the present value of any fixed and certain payments to be made in the future; and (d) if applicable, subtract any recovery paid by the plaintiff to a defendant through settlement or pursuant to a judgment for counterclaim(s) asserted in a Corn case by a defendant.

B. Assessment Amount

This assessment herein represents a holdback (*see, e.g., In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256 (E.D.N.Y. 2006)). The obligations in this Section shall follow all cases to

their final disposition, including a court having jurisdiction in bankruptcy. The following assessment shall be set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund.

For recoveries by Your clients (whether the client's case is filed in a federal or state court or is unfiled) if You are voluntarily executing the Participation Agreement within 45 days of entry of the Order or notice from Lead Counsel if you have at least one Corn case on file in any court as of the entry of this Order, whichever date is later and as defined in the Court's Order, Sections II(B), IV(B)(3)(b), or within 45 days of the date Your first Corn client is engaged or 120 days of entry of the Court's Order, whichever date is later, the assessments are:

- for each producer client, a total 7% assessment amount (4% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 5.5% assessment amount (3.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

For recoveries by Your clients (whether the client's case is filed in a federal or state court or is unfiled) if you have at least one Corn case on file in any court as of the entry of the Court's Order and You are voluntarily executing the Participation Agreement more than 45 days but less than 90 days of entry of the Order or notice from Lead Counsel, as detailed in the Court's Order, Sections II(B), IV(B)(3)(c), whichever date is later, the assessments are:

- for each producer client, a total 9% assessment amount (6% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 7.5% assessment amount (5.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

For recoveries by Your clients (whether the client's case is filed in a federal or state court or is unfiled) if You are voluntarily executing the Participation Agreement 90 or more days after entry of the Order or notice from Lead Counsel if you have at least one Corn case on file in any

court as of the entry of the Court's Order, whichever is later and as detailed in the Court's Order, Sections II(B), IV(B)(3)(d), or more than 45 days after the date Your first Corn client is engaged or more than 120 days after entry of the Court's Order if You do not have at least one Corn case on file in any court as of the entry of this Order, the assessments are:

- for each producer client, a total 13% assessment amount (10% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 11.5% assessment amount (9.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

In the event any defendant fails to hold back the assessments required by this Section, it is Your duty to pay the appropriate holdback amounts to the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund. Under all scenarios (except to the extent You are being paid an hourly rate), the fee assessment shall be paid from Your portion of the recovery and shall not be borne by Your client.

C. Covered Cases

By signing this Agreement, the Participating Counsel agrees that the assessment shall apply to all of his or her law firm's un-filed cases, tolled cases, federal cases, including those not transferred to the MDL, and/or cases filed in any state court in which they have a fee interest, regardless of the size of that fee interest.

D. Attorneys' Fee Lien

With respect to each client represented in connection with Corn related claims that are filed or pending in any federal or state court, are un-filed, or are subject to a tolling agreement, Participating Counsel agrees to have defendants deposit or cause to be deposited in the Corn Common Benefit Fee and Expense Funds established by the District Court in the MDL a percentage of the Gross Monetary Recovery recovered by each such client that is equal to the

assessment amount. In the event defendants do not deposit the assessed percentage into the Funds, Participating Counsel shall deposit or cause to be deposited in the Corn Common Benefit Fee and Expense Funds a percentage of the Gross Monetary Recovery recovered by each such client that is equal to the assessment amount. Participating Counsel, on behalf of themselves, their affiliated counsel, and their clients, hereby grant and convey to Plaintiffs' Lead Counsel a lien upon and/or a security interest in any fee (a) generated as a result of any recovery by any client who they represent in connection with any Corn-related claims and (b) they have any interest in, to the full extent permitted by law, in order to secure payment in accordance with the provisions of this Agreement. Participating Counsel will undertake all actions and execute all documents that are reasonably necessary to effectuate and/or perfect this lien and/or security interest.

III. COMMON BENEFIT WORK AND EXPENSES

A. Common Benefit Expenses Eligible for Reimbursement

In order to be eligible for reimbursement as Common Benefit Expenses, said expenses must be: (a) for the common benefit of all producer and/or non-producer plaintiffs; (b) appropriately authorized by Lead Counsel in writing; (c) timely submitted using the monthly reports created by Lead Counsel; (d) reasonable; (e) verified by a partner or shareholder in the submitting firm; and (f) in compliance with the Order. Attorneys shall keep all receipts for all expenses, which shall be made available upon request. Examples of authorized and unauthorized expenses are listed in the Order.

B. Common Benefit Work Eligible for Reimbursement

In order to be eligible for reimbursement as Common Benefit Work, time expended must be: (a) for the common benefit of all producer and/or non-producer plaintiffs; (b) appropriately authorized by Lead Counsel in writing; (c) timely submitted using the monthly reports created by

Lead Counsel; (d) reasonable; (e) verified by a partner or shareholder in the submitting firm; and (f) in compliance with the Order. Moreover, if counsel is a member of Plaintiffs' Executive Committee or other firm authorized by Lead Counsel to perform Common Benefit Work and fails to timely submit capital contributions as may be requested by Lead Counsel throughout this litigation, such counsel and members of his/her firm shall not be allowed to submit common benefit time or expenses for reimbursement.

"Common Benefit Work" means services performed for the benefit of all producer and/or all non-producer plaintiffs ("Common Benefit") and specifically authorized by Lead Counsel. Unless specifically and explicitly authorized in writing, no time spent on developing or processing individual issues in any case for an individual client, no time spent on the solicitation of potential clients and no time spent on any unauthorized work, will be considered or should be submitted. No client-related time, save certain time relating to cases which may be selected in the future as bellwether cases or time related to class representatives in a Master or Consolidated Class Complaint, shall be considered Common Benefit Work. Examples of authorized and unauthorized work are listed in the Order.

C. Counsel to Whom Common Benefit Work May Be Shared

Participating Counsel are prohibited from sharing Common Benefit Work Product with Non-Participating Counsel, such as counsel with cases in state courts who do not execute a Participation Agreement. No Participating Counsel shall provide in any way (oral or written) Common Benefit Work or other benefit from the work product created by Plaintiffs' Lead Counsel, MDL Counsel, as defined in the Court's Order, and/or other Participating Counsel of any kind to Non-Participating Counsel, as defined in the Court's Order.

D. Submission of Time and Expense Records

All time must be accurately and contemporaneously maintained. Participating Counsel shall keep a daily record of time spent in connection with Common Benefit Work on this litigation, indicating with specificity the hours, location, and particular activity. Time entries that are not sufficiently detailed may not be considered for common benefit payments and time submissions may be audited by a CPA. All common benefit time shall be maintained in tenth-of-an-hour increments.

Participating Counsel must follow the guidelines set forth in the Court's Order and in other written guidelines as established by Lead Counsel. All time and expense submissions must use the forms provided by Liaison Counsel and must be submitted electronically by the end of each calendar month, beginning on May 1, 2015. Failure to provide submissions in a timely manner shall result in a waiver of attorneys' fees and expenses claimed for the time period that is the subject of the submission. Failure to submit time and expense records in the electronic format on forms approved by Plaintiffs' Lead Counsel may also result in the waiver of attorneys' fees and expenses. Time spent compiling the data for the time and expense submissions is not considered common benefit time.

The undersigned Participating Counsel understands, acknowledges and agrees that there is no guaranty that all of the time submitted by any counsel or law firm will be compensated and that the hourly rate for the work that is compensated is not guaranteed (*e.g.*, that Lead Counsel may award different hourly rates for different work and for the same work performed by different attorneys or law firms). The undersigned also understands, acknowledges, and agrees that all hours are not going to be viewed equally and awarded at the same rate (*e.g.*, document review time and deposition/trial time may not be treated and awarded at the same rate).

E. Distribution of Fees

1. No Individual Right to the Funds: No party or attorney has any individual right to any common benefit funds except to the extent directed by order of the MDL Court. Common benefit funds will not constitute the property of any party or attorney or be subject to garnishment or attachment for the debts of any party or attorney except when and as directed by court order.

2. Court Approval: The amounts deposited in the Corn Common Benefit Fee Fund shall be available for distribution to attorneys who have performed professional services or incurred expenses for the common benefit. The MDL Court retains jurisdiction over any common benefit award. The undersigned Participating Counsel, on behalf of themselves, their law firm, their affiliated counsel, and their clients, hereby consents to the jurisdiction of the MDL Court in connection with any common benefit award.

[Participation Agreement continues on the next page]

I _____ [name of attorney] hereby represent that I have the authority to execute this Agreement on behalf of my law firm, _____ [insert name of law firm], and on behalf of all of my Corn clients. I hereby represent that I have the authority to bind my law firm and all of my Corn clients to the terms of this Participation Agreement.

My law firm's first Corn case was filed in any state or federal court on _____, 201____. I hereby certify that my law firm DID or DID NOT [please circle] have a Corn case on file in any state or federal court as of _____, 2015, the date the MDL Court entered the Order.

PLEASE INITIAL ONLY ONE OF THE FOLLOWING:

_____ [please initial] I hereby certify that I am executing this Participation Agreement within 45 days of entry or notice as defined in the Court's Order, Sections II(B), IV(B)(3)(b), if I had at least one Corn case on file in any court as of the entry of the Court's Order, or within the 45 or 120 days as defined in the Court's Order, Sections II(B), IV(B)(3)(b), if I did not have at least one Corn case on file in any court as of the entry of the Court's Order, and the assessments on all recoveries by my clients (whether the client's case is filed in a federal or state court or is unfiled) are:

- for each producer client, a total 7% assessment amount (4% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 5.5% assessment amount (3.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

_____ [please initial] I hereby certify that I had at least one Corn case on file in any court as of the entry of the Court's Order and I am executing this Participation Agreement more than 45 days and less than 90 days after entry or notice as defined in the Court's Order, Sections

II(B), IV(B)(3)(c), and the assessments on all recoveries by my clients (whether the client's case is filed in a federal or state court or is unfiled) are:

- for each producer client, a total 9% assessment amount (6% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 7.5% assessment amount (5.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

_____ [please initial] I hereby certify that I had at least one Corn case on file in any court as of the entry of the Court's Order and I am executing this Participation Agreement 90 or more days after entry or notice as detailed in the Court's Order, Sections II(B), IV(B)(3)(d), or I did not have at least one Corn case on file in any court as of the entry of the Court's Order and I am executing this Participation Agreement more than 45 or 120 days as defined in the Court's Order, Sections II(B), IV(B)(3)(b), and the assessments on all recoveries by my clients (whether the client's case is filed in a federal or state court or is unfiled) are:

- for each producer client, a total 13% assessment amount (10% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 11.5% assessment amount (9.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

I further agree that the fee assessment portion will be deducted from my attorney's fee and not from my client's portion of the recovery (except to the extent You are being paid an hourly rate).

These assessments shall apply to all Corn claims against any defendant by persons or entities represented by my law firm, whether such claims are filed, unfiled or tolled, that have not been asserted in a filed state Corn case.

[Continued on the next page]

Dated: _____

Law Firm Name:

Attorney's Name:

[Signatures continue on the next page]

Dated: _____

Patrick J. Stueve
CO-LEAD COUNSEL AND LIAISON COUNSEL FOR
PLAINTIFFS

Dated: _____

Don M. Downing
CO-LEAD COUNSEL FOR PLAINTIFFS AND
INTERIM RULE 23 CLASS COUNSEL

Dated: _____

William B. Chaney
CO-LEAD COUNSEL FOR PLAINTIFFS

Dated: _____

Scott Powell
CO-LEAD COUNSEL FOR PLAINTIFFS

Respectfully Submitted by:

/s/ Patrick J. Stueve
Patrick J. Stueve—KS Bar #13847
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**CO-LEAD COUNSEL AND LIAISON COUNSEL
FOR PLAINTIFFS**

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CO-LEAD COUNSEL FOR PLAINTIFFS

EXHIBIT 83

From: Stueve, Pat
Sent: Monday, June 22, 2015 3:16 PM
To: 'KSD_Lungstrum_Chambers@ksd.uscourts.gov'
Cc: 'mmodl@axley.com'; 'csweeney@axley.com'; 'nathan@bccnlaw.com'; 'sbasser@barrack.com';
'dbacine@barrack.com'; 'jpb@barrettllawms.com'; 'kgoza@bflawfirm.com';
'adesteian@bassford.com'; 'cmarshall@bassford.com'; 'jabatts@battslaw.com';
'jbelljr@battslaw.com'; 'jmckellar@battslaw.com'; 'msmith@battslaw.com';
'dbecnel@becnellaw.com'; 'kklibert@becnellaw.com'; 'mmoreland@becnellaw.com';
'ben@bulldogtitle.com'; 'phil@bohrerlaw.com'; 'scott@bohrerlaw.com'; 'cellis@brelaw.com';
'smendenhall@brelaw.com'; 'jrobinson@brelaw.com'; 'bbrady@BradyPrestonBrown.com';
'abrown@BradyPrestonBrown.com'; 'mpreston@BradyPrestonBrown.com';
'andy.brister@gmail.com'; 'rking@brookspierce.com'; 'cpinyan@brookspierce.com';
'dsmith@brookspierce.com'; 'mark.bryant@bryantpsc.com'; 'across@careydanis.com';
'sdoles@careydanis.com'; 'jlowe@careydanis.com'; 'dcales@cateslaw.com';
'bbleichner@cclawmn.com'; 'jbores@cclawmn.com'; 'kcambronne@chestnutcambronne.com';
'frondoni@cclawmn.com'; 'clark@clarkmason.com'; 'lcross@cross-lawfirm.com';
'blkinsley@crumleyroberts.com'; 'dan@dmhlawfirm.com'; 'admin@davidsykeslaw.com';
'ddefeo@defeokolker.com'; 'demerathlaw@aol.com'; 'bej@dominalaw.com';
'dad@dominalaw.com'; 'jemerson@emersonpoynter.com'; 'scott@emersonpoynter.com';
'wcrowder@emersonpoynter.com'; 'cmcgaha@emersonpoynter.com'; 'dfenchel@lawfdb.com';
'esexton@gtandslaw.com'; 'gingras@gcllawyers.com'; 'straka@gcllawyers.com';
'jhouseal@glankler.com'; 'todd@gorijulianlaw.com'; 'earonowitz@gelaw.com';
'alevitt@gelaw.com'; 'afuller@grayreed.com'; 'wchaney@grayreed.com'; 'dyork@grayreed.com';
'ggarrison@grgpc.com'; 'JSapp@grgpc.com'; 'ddowning@grgpc.com';
'esindbergporter@greeneespel.com'; 'jursu@greeneespel.com'; 'msledge@gsslw.net';
'patm@grieslenhardt.com'; 'dgoodwin@gustafsongluek.com';
'dgustafson@gustafsongluek.com'; 'dhedlund@gustafsongluek.com';
'etaubel@gustafsongluek.com'; 'jason@hwnn.com'; 'Scott@hwnn.com'; 'bvines@hwnn.com';
'chris@hwnn.com'; 'rlewis@hausfeld.com'; 'mpava@hausfeld.com';
'jpizzirusso@hausfeldllp.com'; 'John.Gray@heidmanlaw.com'; 'rsteiner@heinsmills.com';
'scrompton@allfela.com'; 'eholland@allfela.com'; 'rhorn@hab-law.com'; 'jkronawitter@hab-law.com';
'jhovland@hovlandasmus.com'; 'tim@timjameslaw.com';
'ggoodier@joneswalker.com'; 'jkelly@kellylawfirm.net'; 'r.jones@kempjones.com';
'robert@krauseandkinsman.com'; 'adam@krauseandkinsman.com'; 'jt@jimthompsonlaw.com';
'mmiller@michaelmillerlaw.com'; 'Scott@lemmonlawfirm.com'; 'andrew@lemmonlawfirm.com';
'cschaffer@lfsblaw.com'; 'rkshelquist@locklaw.com'; 'flahey@locklaw.com';
'smullins@luckeymullins.com'; 'paul@lundberglawfirm.com'; 'gflax@martinbrowne.com';
'don@mayerlawoffice.net'; 'ehoaglund@mhclaw.com'; 'chet@getgordon.com';
'lfeldman@milberg.com'; 'pnovak@milberg.com'; 'pwedgworth@milberg.com';
'caseycastleberry2003@yahoo.com'; 'aftomt2001@yahoo.com'; 'tzenter@nzsslw.com';
'dnelson@nzsslw.com'; 'fsartor@nzsslw.com'; 'gsnellings@nzsslw.com'; 'jdemerath@808west.com';
'blair@onderlaw.com'; 'dewitt@onderlaw.com'; 'freeborn@onderlaw.com';
'onder@onderlaw.com'; 'quillin@onderlaw.com'; 'tpatterson@patterprahl.com';
'paul@paulbyrdlawfirm.com'; 'paul@paulmcinnes.com'; 'ashlea@paulmcinnes.com';
'nrockforte@pbclawfirm.com'; 'pwpendley@pbclawfirm.com'; 'jperez@pbclawfirm.com';
'mphipp@phippscavazos.com'; 'g.blanchfield@rwblawfirm.com';
'm.wendorf@rwblawfirm.com'; 'b.penney@rwblawfirm.com'; 'dick@renschlawyers.com';
'sean@renschlawyers.com'; 'rfewell@centurytel.net'; 'nolan@rileyjacksonlaw.com';
'wardrouse@qwestoffice.net'; 'jon@sllawfirm.com'; 'ecomite@scott-scott.com';
'dkeatos@seegerweiss.com'; 'jobrien@seegerweiss.com'; 'sweiss@seegerweiss.com';
'dgraham@sidley.com'; 'cvandenberg@sidley.com'; 'jconroy@simmonsfirm.com';

Cc: 'phanly@simmonsfirm.com'; 'plesko@simmonsfirm.com'; 'cspeer@speerlawfirm.com';
'CBurger@stevensbrand.com'; 'mhoy@stevensbrand.com';
'daniel.bukovac@stinsonleonard.com'; 'scott.roberts@stinsonleonard.com';
'jalphin@stromlaw.com'; 'mpacella@stromlaw.com'; 'petestrom@stromlaw.com'; Schwartz,
Rachel; Six, Steve; Stueve, Pat; Wilders, Brad; 'rcoffman@coffmanlawfirm.com';
'jdiazjr@msattorneys.com'; 'tripp@diazlawfirm.com'; 'chris@diazlawfirm.com';
'jlyon@thelyonfirm.com'; 'scarlette@poppelawfirm.com'; 'kirk@poppelawfirm.com';
'hans@poppelawfirm.com'; 'warner@poppelawfirm.com'; 'bozemanmarcus@hotmail.com';
'thomas@tethrashlaw.com'; 'tcartmell@wcllp.com'; 'thudson@wagstaffcartmell.com';
'ebarton@wcllp.com'; 'tjpreuss@wcllp.com'; 'bmilbourn@wbsvlaw.com';
'tbender@wbsvlaw.com'; 'bberryman@wattsguerra.com'; 'fguerra@wattsguerra.com';
'wmaiberger@wattsguerra.com'; 'eallred@wgclawfirm.com'; 'mcwatts@wattsguerra.com';
'matoups@wgttl.com'; 'wbell@wesjan.com'; 'jrwhaley@whaleylaw.com';
'jcox@willsonpechacek.com'; 'bwischnowski@willsonpechacek.com'; 'rkerlick@wphk-law.com';
'myira@yiralaw.com'; 'brad.buhrow@zimmreed.com'; 'david.cialkowski@zimmreed.com';
'hhr@zimmreed.com'; 'ronald.sholes@arlaw.com'; 'david.stein@arlaw.com';
'mark.surprenant@arlaw.com'; 'DBarnes@bsdd.com'; 'rhudson@berkowitzoliver.com';
'tschult@berkowitzoliver.com'; 'jgoodman@babco.com'; 'wgoodman@babco.com';
'stthomas@babco.com'; 'TJW@gpnlaw.com'; 'mark.trachtenberg@haynesboone.com';
'patrick.haney@kirkland.com'; 'jordan.heniz@kirkland.com'; 'michael.jones@kirkland.com';
'robin.mccue@kirkland.com'; 'ragan.naresh@kirkland.com'; 'patrick.philbin@kirkland.com';
'edwin.u@kirkland.com'; 'scott.aberson@maslon.com'; 'david.schultz@maslon.com';
'cpekron@qgtlaw.com'; 'ajprice@qgtlaw.com'; 'jtull@qgtlaw.com';
'greg.holland@smithmoorelaw.com'; 'corinne.jones@smithmoorelaw.com';
'mfarris@stites.com'; 'jtate@stites.com'; 'jaime.theriot@troutmansanders.com';
'rthies@webberthies.com'; 'MDummermuth@whgllp.com'; 'wlightsey@wyche.com';
'hparr@wyche.com'

Subject: In re: Syngenta AG MIR162 Corn Litig., Case No. 14-md-2591-JWL-JPO--Word versions of New
Proposed Common Benefit Orders

Attachments: Exhibit A.docx; Exhibit B.docx

Dear Judge Lungstrum:

Attached to this email are the Word versions of the proposed common benefit orders, which were attached to Plaintiffs' Notice of Substitution of Exhibits as Exhibits A and B, ECF No. 859.

Respectfully submitted,

Pat Stueve
Co-Lead and Liaison Counsel for Plaintiffs

Patrick J. Stueve
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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

In Re: Syngenta AG MIR162 Corn Litigation	)	
	)	
	)	MDL No. 2591
	)	
This document relates to: All Cases	)	Case No. 2:14-md-2591-JWL-JPO
	)	

**ORDER ESTABLISHING PROTOCOLS FOR COMMON BENEFIT WORK
AND EXPENSES AND ESTABLISHING THE COMMON
BENEFIT FEE AND EXPENSE FUNDS**

On January 22, 2015, the Court entered an order appointing Co-Lead Counsel, the Executive Committee, Interim Class Counsel and Liaison Counsel. ECF No. 67 (the “Leadership Order”). The Leadership Order permits Co-Lead Counsel (“Lead Counsel”) to assess other plaintiffs’ counsel for the expenses of the litigation and requires parties to maintain contemporaneous records of their time and expenses devoted to this matter. *Id.* at ¶¶ 4(m), 6.

The Leadership Order also defines the authority, duties and responsibilities of counsel appointed to leadership roles in this multidistrict proceeding (the “MDL”) and supplements the guidelines and rules for staffing, fees, expenses and billing records by attorneys acting for the common benefit of all producer and/or all non-producer plaintiffs in this multidistrict litigation for claims relating to or arising from genetically modified Syngenta corn, the commercialization of Agrisure Viptera or Agrisure Duracade or of any corn including genetically modified traits MIR162 or Event 5307 (“Corn”). This Order additionally provides for the fair and equitable sharing among plaintiffs’ counsel of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all producer and/or all non-producer plaintiffs in this complex litigation.

I. GOVERNING PRINCIPLES AND THE COMMON BENEFIT DOCTRINE

The common benefit governing principles are derived from the United States Supreme Court’s common benefit doctrine, as initially established in *Trustees v. Greenough*, 105 U.S. 527 (1881) and as refined throughout the last century in cases including *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884), *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *see also* Manual for Complex Litigation, § 14.215 (4th ed. 2004) (noting that “Lead and liaison counsel may have been appointed by the court to perform functions necessary for the management of the case but not appropriately charged to their clients” and encouraging an order early in the litigation that “establish[es] the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions.”); Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 374 (2014) (“Because the work that the PSC performs inures to the common benefit of all plaintiffs and their primary counsel (the counsel that they employed), MDL transferee courts usually establish a procedure for creating a common benefit fee to compensate the members of the PSC and the members of any subcommittees who have done common benefit work.”).

The Court’s authority to establish a fund and to order contributions also derives from its equitable authority and its inherent managerial power over this consolidated and multidistrict litigation. *See, e.g., In re Diet Drugs*, 582 F.3d 524, 546-47 (3rd Cir. 2009); *In re Air Crash Disaster at Fla. Everglades*, 549 F.2d 1006, 1008 (5th Cir. 1977); Manual for Complex Litigation, § 20.312 (“MDL judges generally issue orders directing the defendants who settle MDL-related cases contribute a fixed percentage of the settlement to a general fund to pay national counsel.”); Fallon, *supra*, at 378 (the common benefit doctrine is justified “on principles of equity or quantum meruit or class action procedures or [a court’s] inherent authority”).

II. SCOPE OF THIS ORDER

This Order governs the use of Common Benefit Work, as defined below, by: (1) MDL Counsel; (2) Participating Counsel; (3) certain attorneys and their firms seeking leadership in the Minnesota state court coordinated proceedings (the “Remele/Sieben Group”), their clients (the “Remele/Sieben Group Client”), and, with respect to such clients, the Remele/Sieben Group’s co-counsel (the “Remele/Sieben Group Co-Counsel”), as described in the Remele/Sieben Group’s and Co-Lead Counsel’s Amended and Restated Joint Prosecution Agreement dated June 18, 2015 (the “Remele Agreement”); and, (4) Martin J. Phipps, his firm Phipps Anderson Deacon LLP and, with respect to certain jointly represented clients, certain co-counsel of that firm, as described in more detail in the separate agreements Martin J. Phipps reached with Co-Lead Counsel.

A. MDL Counsel

For purposes of this Order, the term “MDL Counsel” includes each attorney who represents one or more plaintiffs in a case that at any time has been pending in this MDL or in any case later filed in, transferred to, or removed to this Court, unless all of that attorney’s cases are remanded back to state court, and continues to apply as to any case dismissed from this Court or to any case remanded back to a federal transferor court. The obligations of this Order follow any such cases to their ultimate disposition. The assessment amounts described below as applicable to MDL counsel do not apply to cases outside the MDL, including cases remanded to state court.

B. Participating Counsel

All counsel who are not MDL Counsel, as defined above, or who are MDL Counsel but who also have cases outside the MDL, including cases remanded to state courts, are eligible to sign the Participation Agreement, attached hereto as Exhibit A (the “Participation Agreement”).

All counsel who execute the Participation Agreement are hereinafter referred to as “Participating Counsel” and all Participating Counsel are subject to this Order and the jurisdiction of this Court relating to this Order. Solely in their respective capacities as counsel for the Cargill and ADM plaintiffs, counsel for the Cargill and ADM plaintiffs have agreed to execute Participation Agreements and, solely for purposes of this Order, these counsel are included in the definition of Participating Counsel, and are not MDL Counsel.

The Participation Agreement is a voluntary agreement between Lead Counsel and executing plaintiffs’ attorneys allowing the Participating Counsel access to Common Benefit Work. Counsel who sign the Participation Agreement shall be entitled to receive and to use for their cases all Common Benefit Work performed by or for Lead Counsel and other counsel at Lead Counsel’s direction in this MDL.

Any plaintiff’s attorney who wants to and is eligible to become a Participating Counsel and who currently has at least one Corn case on file in any state or federal court outside of this MDL shall execute the Participation Agreement within 45 days of the entry of this Order or within 45 days of notification by Lead Counsel of this Order, whichever date is later. Any plaintiffs’ attorney who at the time this Order is entered does not have a case pending in any state or federal court and who wants to become a Participating Counsel shall execute the Participation Agreement within 45 days of the date their first Corn client is engaged or within 120 days of entry of this Order, whichever date is later. The failure to execute a Participation Agreement within the time frame set forth in the preceding paragraph will result in higher assessment percentages as a result of later execution. *Accord In re: Testosterone Replacement Therapy Prods. Liab. Litig.*, No. 14-cv-1748, MDL No. 2545, ECF No. 488 (Corrected Case Management Order No. 16 (Establishing Common Benefit Fee and Expense Funds)) at 3 (N.D.

Ill. Nov. 25, 2014) (ordering an increase in the fee assessment from 8% to 16% if the participation agreement is not timely executed). These higher percentages are set forth in Section IV(B)(3)(c)-(d).

C. Remele/Sieben Group

The Remele/Sieben Group and the Remele/Sieben Group Co-Counsel shall not be considered MDL Counsel or Participating Counsel under this Order. Rather, their rights and obligations in connection with this Order shall be governed by the Remele Agreement, which rights and obligations, in pertinent part, may be summarized as follows¹:

1. They shall be entitled to use Common Benefit Work;
2. They shall pay fee and cost assessments identical to those paid by MDL Counsel for clients who: (a) filed their Syngenta claims at any time in the past or at any time in the future in federal court; or (b) choose to have their state cases go to federal court;
3. They shall pay fee and cost assessments of fifty percent (50%) of the level ordered by this Court for MDL Counsel for all other clients; and
4. They shall not be eligible to seek Common Benefit payments from the Common Benefit fund established by this Court (except for members of the Group who are already members of the Executive Committee appointed by this Court) and the Federal MDL Co-Leads shall not be eligible to seek Common Benefit payments from a Common Benefit Fund that may be established by the Minnesota court.

¹ The Remele/Sieben Group's, the Remele/Sieben Group Client's, and the Remele/Sieben Group Co-Counsel's rights and obligations are governed by the specific language in the Remele Agreement, which was provided *in camera* to the Court, and not by the summaries contained in this Order.

The Remele/Sieben Group and the Remele/Sieben Group Co-Counsel are uniquely situated in this litigation. They have agreed to undertake significant efforts to promote appropriate federal-state cooperation and coordination. They also have agreed to seek from the Minnesota state court overseeing coordinated proceedings common benefit assessments that are identical in percentage to the MDL assessment percentages, and to take steps to avoid duplicate assessments in federal and state courts. This step should discourage assessment based forum selection decisions. Given these and other undertakings to which the Remele/Sieben Group and the Remele/Sieben Group Co-Counsel have agreed, as described in the Remele Agreement submitted to and reviewed *in camera* by the Court, the Court finds that treating the Remele/Sieben Group, the Remele/Sieben Group Clients, and the Remele/Sieben Group Co-Counsel separately is in the best interests of all plaintiffs in this litigation, and that the provisions of the Remele Agreement governing common benefit assessments are approved and are so ordered by this Court.

D. Martin J. Phipps

In accordance with a separate agreement voluntarily negotiated between Co-Lead Counsel and Martin J. Phipps and his firm, Phipps Anderson Deacon, LLP, Martin J. Phipps and, with respect to clients they jointly represent with Phipps, his co-counsel, all as defined in the agreement, (“Phipps”), will not be considered MDL Counsel or Participating Counsel under this Order. Rather, their rights and obligations will be governed by terms of the voluntary agreement Martin J. Phipps signed. Those rights and obligations that are material to this Order are

summarized below.² Essentially, Phipps:

1. Shall be entitled to use Common Benefit Work.
2. Shall pay fee and cost assessments identical to those paid by MDL Counsel for clients who: (a) first filed in federal court; (b) first filed in state court but whose case is removed and remand is denied; or (c) settled through an MDL settlement.
3. Shall pay fee and cost assessments of fifty percent (50%) of the level ordered by this Court for MDL Counsel for clients who: (a) never had a case pending in federal court; (b) never filed in any jurisdiction; (c) first filed in state court and the case remained in state court; or (d) filed in state court, and the case was removed to federal court and (i) remand was granted or (ii) remand has not yet ruled upon at the time of recovery.
4. Shall not be eligible to seek Common Benefit payments from the Common Benefit Fund established by this Court, and federal MDL leadership, shall not be eligible to seek Common Benefit payments from a Common Benefit Fund that may be established by any state court.

Phipps is uniquely situated in this litigation. He has agreed to undertake significant efforts to promote appropriate federal-state coordination and cooperation. He also has agreed to seek from any state court overseeing coordinated state court proceedings common benefit assessments that are identical in percentage to the MDL assessment percentages, and to take steps to avoid duplicate assessments in federal and state courts. This step should discourage assessment-based forum selection decisions. Given these and other undertakings to which Phipps has agreed with MDL Co-Lead Counsel, as reflected in a joint prosecution agreement

² Phipps' rights and obligations are governed by the specific language in the agreements with MDL Co-Lead Counsel, which was provided *in camera* to the Court, and not by the summaries contained in this Order.

submitted *in camera* to the Court, the Court finds that treating Phipps separately is in the best interests of all plaintiffs, and that the provisions of the agreement with Phipps, submitted to the Court *in camera*, relevant to this Order and thus requiring review and approval by this Court are approved.

E. Counsel to Whom Common Benefit Work May Be Shared

Without the express written consent of each of the Co-Lead Counsel, MDL Counsel and Participating Counsel are prohibited from sharing Common Benefit Work Product with counsel who do not execute a Participation Agreement. As described in the Remele Agreement, the Remele/Sieben Group and Remele/Sieben Group Co-Counsel will not disclose such work product to other plaintiff counsel, unless such other counsel's clients are subject to payment of a Common Benefit Assessment to the Federal MDL Funds; provided, the Remele/Sieben Group and Remele/Sieben Group Co-Counsel may use such Syngenta work product when taking oral depositions or during hearings or trials, but may not provide or authorize others to provide any deposition or trial transcript to any counsel that is not subject to payment of a Common Benefit Assessment to the Federal MDL Funds.. Further, Phipps is prohibited from sharing Common Benefit Work Product with counsel who do not execute a Participation Agreement, except when taking depositions or during hearings or trials, but no transcripts containing such work product will be disclosed.

III. ADOPTION OF CASE MANAGEMENT PROTOCOLS

The Court hereby adopts the following guidelines for the management of case-staffing, timekeeping, expense reimbursement, and related Common Benefit issues, and instructs Lead Counsel to distribute additional guidelines as may be necessary to ensure the efficient prosecution of this litigation. The recovery of Common Benefit attorneys' fees and expenses will be limited to MDL Counsel and Participating Counsel (together with necessary staff of their

respective firms).

MDL Counsel and Participating Counsel shall be eligible to receive Common Benefit attorneys' fees and reimbursement of expenses only if the time expended, expenses incurred, and activity in question were: (a) for the Common Benefit of all producer and/or non-producer plaintiffs; (b) conducted by Lead Counsel and their respective firms or otherwise appropriately authorized by Lead Counsel in writing; (c) timely submitted; (d) reasonable; and (e) verified by a partner or shareholder in the submitting firm. Lead Counsel is empowered to engage a Certified Public Accountant ("CPA") to review these submissions.

As further detailed below, all counsel who seek to recover Court-awarded Common Benefit fees and expenses shall keep a daily, contemporaneous record of their time and expenses, noting with specificity the amount of time, billing rate, and activities, along with a brief note indicating which Lead Counsel authorized the activity in question. All counsel who seek to recover Court-awarded Common Benefit fees and expenses agree to the terms and conditions herein, including submitting to this Court's jurisdiction and agreeing that this Court has plenary authority regarding the assessment award and allocation of Common Benefit fees and expenses. The Court will determine at a later date, if needed, the methodology for allocating any Common Benefit assessments among those who performed approved work and incurred approved expenses. There is no guaranty that all of the time submitted by any counsel or firm will be compensated and the submitted hourly rate for the work that is compensated is not guaranteed.

A. Common Benefit Work

1. Authorization for Compensable Common Benefit Work

"Common Benefit Work" means services performed for the benefit of all producer and/or all non-producer plaintiffs ("Common Benefit") and specifically authorized by Lead Counsel.

Common Benefit Work includes, but is not limited to, investigation, discovery (whether documents, interrogatories, depositions or otherwise), coding or other analytical work relating to documents or evidence, research, motions and responses to motions, exhibits, bellwether trials and transcripts, all other work performed under the direction of Lead Counsel for the benefit of all producer and/or all non-producer plaintiffs, and orders on substantive matters involving Common Benefit Work. Authorization to perform Common Benefit Work shall be obtained from Lead Counsel under a procedure that they will determine.

Unless specifically and explicitly authorized in writing, no time spent on developing or processing individual issues in any case for an individual client, no time spent on the solicitation of potential clients and no time spent on any unauthorized work, will be considered or should be submitted. No client-related time, save certain time relating to cases which in the future may be selected as bellwether cases or time related to class representatives in a Master or Consolidated Class Complaint, shall be considered Common Benefit Work. Examples of authorized Common Benefit Work and unauthorized work include, but are not limited to:

a) Depositions: Lead Counsel shall exercise discretion, judgment, and prudence to designate only that number of attorneys to participate in any given deposition that is commensurate with the nature of that deposition so as to avoid over-staffing. Time and expenses for counsel not designated as one of the authorized questioners or otherwise authorized to attend the deposition by Lead Counsel shall not be considered Common Benefit Work but, rather, as attending on behalf of such counsel's individual clients.

b) Conference Calls and Meetings: Conference calls and meetings held at the direction of Lead Counsel for discussion of case management, coordination, and litigation activity are generally considered Common Benefit Work. Calls and meetings solely to

impart status information generally are not Common Benefit Work as to those listening. Attorneys designated by Lead Counsel to run or participate in those calls, on the other hand, are working for the Common Benefit by keeping other attorneys educated about the litigation and their time is Common Benefit Work. During such telephone or conference calls and meetings, there is a presumption that only the authorized active participants' time will qualify as Common Benefit Work, although exception may be made for good cause as determined by Lead Counsel.

c) MDL Status Conferences: Status conferences will be held so that the litigation moves forward and legal issues are resolved with the Court. Counsel may attend any status conference held in open court, but mere attendance at or listening to a status conference will not be considered Common Benefit Work, and expenses incurred in relation thereto will not be considered Common Benefit Expenses. Attorneys designated by Lead Counsel to prepare agendas, confer with opposition counsel and otherwise address issues that will be raised at a given status conference or requested by Lead Counsel to be present at a status conference are considered to be performing Common Benefit Work. Similarly, any attorney whose attendance at a status conference is specifically requested by the Court to address a common issue may submit his or her time for evaluation as Common Benefit Work.

d) Identification and Work-Up of Experts: Identification, interview, discussions, preparation of reports and all other matters involving experts on common issues, experts relating to cases selected as bellwether cases or experts related to a Master or Consolidated Class Complaint are considered Common Benefit Work. All services and expenses related to experts retained without authorization by Lead Counsel are not eligible for Common Benefit fees or expenses.

e) Attendance at Seminars: Attendance at seminars or Continuing Legal Education programs shall not qualify as Common Benefit Work, or the expenses pertaining thereto as Common Benefit Expenses.

f) Trial Consultants and Preparation: Trial consultants and participation in trial preparation, mock trials or focus group activity for bellwether trials may qualify as Common Benefit Work and Common Benefit Expense as authorized by Co-Lead Counsel.

g) Document Discovery: All work performed and expenses incurred in connection with document discovery (including meet-and-confers with opposing counsel and any motions to compel) relating to common issues and authorized by Lead Counsel qualify as Common Benefit Work and Common Benefit Expense. If an attorney elects to review documents without prior authorization by Lead Counsel, that review is not considered Common Benefit Work. It is the Court's expectation that counsel will minimize the number of individual timekeepers from a single law firm to ensure the efficiency of time spent on this litigation. Descriptions associated with "document review" must contain sufficient detail to allow those reviewing the time entry to generally ascertain what was reviewed.

h) Motions: All research, drafting, and presentation of motions and responses to motions on common issues and authorized by Lead Counsel are considered Common Benefit Work.

i) Review of Filings and Orders: Mere review of filings and orders generally does not qualify as Common Benefit Work. It is anticipated that there will be a large number of filings in this case and mere review of these filings will not be approved as Common Benefit Work. Those attorneys working on assignments by Lead Counsel requiring them to

reasonably review, analyze, or summarize certain filings and substantive orders of this Court in connection with their assignments are doing so for the Common Benefit. In addition, it is expected that Lead and Liaison Counsel, as well as members of the Executive Committee, will review case management and substantive orders of the Court as part of their leadership responsibilities. Reasonable time spent reviewing these court rulings and orders by court-appointed leadership will be considered Common Benefit Time.

j) Emails and Correspondence: Except for Lead and Liaison Counsel, their assigned attorneys and staff working on this MDL and those designated by Lead Counsel to work on assignments requiring them to review emails and correspondence, time recorded for reviewing emails and other correspondence is not compensable as Common Benefit Work. For example, review of an email or other correspondence sent to dozens of attorneys to keep them informed on a matter on which they are not specifically working would not be compensable as Common Benefit Work.

k) Written Discovery: Only those attorneys designated by Lead Counsel to review discovery are working for the common benefit and their time accordingly considered Common Benefit Work. All other counsel are reviewing those discovery responses for the benefit of their own clients, and such review will not be considered Common Benefit Work.

l) Travel Time: Reasonable Travel Time may be compensable as Common Benefit Work, to the extent necessary and approved by Lead Counsel in connection with assigned Common Benefit Work or to the extent work otherwise compensable is performed while in transit. In the event that Participating Counsel or MDL Counsel are unsure if the action they are about to undertake is considered Common Benefit Work, they shall ask Lead Counsel in

advance as to whether such time may be compensable.

2. Verification

The forms detailing potential Common Benefit Work shall be certified by an attorney with authority in each firm attesting to the accuracy of the submissions.

B. Common Benefit Expenses

“Common Benefit Expenses” means expenses authorized by Lead Counsel and incurred for the benefit of all producers and/or all non-producer plaintiffs. Expense submissions shall be made to Lead Counsel on a monthly basis, by deadlines to be set by Lead Counsel, in accordance with the guidelines set forth herein. Only reasonable expenses incurred while performing work specifically authorized in writing by Lead Counsel will be eligible for consideration as common benefit expenses; any expense over \$500 must be specifically approved in advance in writing by Lead Counsel.

No client-related expenses, save certain expenses relating to cases which in the future may be selected as potential bellwether cases or those related to class representatives in a Master or Consolidated Class Complaint, shall be considered Common Benefit Expenses, unless exceptional circumstances exist and are approved by later order of this Court.

1. Travel Limitations: Only reasonable expenses will be reimbursed. Except in extraordinary circumstances approved by Lead Counsel, all travel reimbursements are subject to the following limitations:

a) Airfare: Ordinarily, only the price of the lowest available, convenient coach fare seat will be reimbursed. Business/First Class Airfare will not be reimbursed. In the event that non-coach air travel is utilized, including economy plus or premium economy, the attorney shall be reimbursed only to the extent of the lowest available,

convenient coach fare, which must be contemporaneously documented. If non-coach, private or charter travel is elected, the applicant is required to document what the lowest available, convenient coach fare in effect at that time was, and that is all that can be reimbursed.

b) Hotel: Hotel room charges for the average available room rate of a business hotel, such as the Hyatt, Hilton, Westin, and Marriott hotels, in the city in which the stay occurred, will be reimbursed. Liaison Counsel shall attempt to negotiate a reduced rate for a hotel located near their offices for the benefit of all counsel. Luxury hotels will not be fully reimbursed but, rather, will be reimbursed at the average available rate of a business hotel.

c) Meals: Meal expenses must be reasonable. Expenses that significantly exceed the meal allowances for federal employees may not be approved for reimbursement. There will be no reimbursement for alcoholic beverages, room service, mini-bar items, or movies.

d) Cash Expenses: Miscellaneous cash expenses for which receipts generally are not available (*e.g.*, tips, luggage handling) will be reimbursed up to \$50.00 per trip, as long as the expenses are properly itemized.

e) Automobile Rental: Luxury automobile rentals will not be fully reimbursed, unless only luxury automobiles are available. Counsel must submit evidence of the unavailability of non-luxury vehicles. If luxury automobiles are selected when non-luxury vehicles are available, then the difference between the luxury and non-luxury vehicle rates must be shown on the travel reimbursement form and only the non-luxury rate may be claimed.

f) Mileage: Mileage claims must be documented by stating origination point, destination, total actual miles for each trip and rate per mile paid by the attorney's firm. The rate will be the IRS Standard Business Mileage Rate for the period in which

the mileage was driven.

2. Non-Travel Limitations

a) Long Distance, Conference Call, and Cellular Telephone

Charges: Common Benefit long distance, conference call, and cellular telephone charges must be documented as individual call expenses in order to be compensable. Such charges are to be reported at actual cost.

b) Shipping, Overnight, Courier, and Delivery Charges:

All claimed Common Benefit shipping, overnight, courier, or delivery expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package. Such charges are to be reported at actual cost.

c) Postage Charges:

A contemporaneous postage log or other supporting documentation must be maintained and submitted for Common Benefit postage charges. Such charges are to be reported at actual cost.

d) Facsimile Charges:

Contemporaneous records should be maintained and submitted showing faxes sent and received. The per-fax charge shall not exceed \$0.50 per fax.

e) In-House Photocopy:

A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is \$0.10 per page for in-firm photocopies and any necessary vendor photocopies shall be at actual cost.

f) Computerized Research: Lexis, Westlaw, or Bloomberg:

Claims for Lexis, Westlaw, Bloomberg, or other computerized legal research expenses should be in the exact amount charged to the firm and appropriately allocated for these research services.

3. Verification

The forms detailing expenses shall be certified by an attorney with authority in each firm attesting to the accuracy of the submissions. Attorneys shall maintain all receipts for all expenses, which shall be available upon request.

4. Shared Costs and Capital Contributions

Each Lead Counsel and other counsel as designated by Lead Counsel shall pay a monetary amount, as directed below, which shall be used to pay reasonable and necessary Common Benefit Expenses on an ongoing basis (the “Shared Costs”). The timing and amount of each contribution will be determined by Lead Counsel and must be paid within 30 days of the date of written request by Lead Counsel. Failure to timely pay capital contributions as may be requested by Lead Counsel throughout this litigation will be grounds for barring counsel from submitting Common Benefit Work or Common Benefit Expenses for reimbursement.

All costs that fall under the following categories and/or other expenses incurred for the benefit of all producer and/or all non-producer plaintiffs as determined by Lead Counsel shall be considered Shared Costs and shall qualify for submission and payment:

- a)** court, filing and service costs related to common issues;
- b)** service costs, including translation fees, for service of the consolidated complaints on all domestic and foreign defendants named in those complaints;
- c)** deposition and court reporter costs for depositions (excluding those that are client-specific);
- d)** document depository creation, operation, staffing, equipment and administration;

- e)** translation costs related to the above;
- f)** Lead Counsel, Liaison Counsel, or Executive Committee administration matters;
- g)** legal, financial institutional and accountant fees relating to expenses;
- h)** expert witness and consultant fees and expenses for experts whose opinions, advice and testimony would be generic and for the common benefit of all producers or all non-producers covered by a consolidated or master complaint. There shall be no reimbursement for case specific experts, except for liability and causation experts in class or bellwether cases, at the discretion of the Lead Counsel;
- i)** printing, copying, coding, scanning related to the above (out-of-house or extraordinary firm costs);
- j)** research by outside third-party vendors/consultants/attorneys, approved by Lead Counsel;
- k)** investigative services, approved by Lead Counsel; and
- l)** mediator costs.

No client-related costs, save certain costs relating to cases selected in the future as potential bellwether cases or those related to class representatives in a Master or Consolidated Class Complaint, shall be considered Shared Costs, unless exceptional circumstances exist. All Shared Costs must be approved by Lead Counsel prior to payment.

Lead Counsel shall prepare and be responsible for distributing additional reimbursement

procedures. Requests for payment shall include sufficient information to permit Lead Counsel and a CPA, if engaged by Lead Counsel, to account properly for expenses and to provide adequate detail to the Court.

5. Held Costs

“Held Costs” are Common Benefit Expenses carried by counsel in this MDL or by Participating Counsel and reimbursed as and when Lead Counsel determines to do so. Held Costs are those that do not fall into the above Shared Cost categories but are incurred for the common benefit of all producers or non-producers covered by a consolidated complaint. No client-specific costs can be considered Held Costs, other than certain Common Benefit Expenses relating to class representative or potential bellwether plaintiffs at the discretion of Lead Counsel.

Held Costs shall be recorded in accordance with the guidelines set forth herein and in additional procedures as prepared by Lead Counsel.

C. Timekeeping and Submission of Time and Expense Records

All time and expenses must be accurately and contemporaneously maintained and tracked. In order to qualify for Common Benefit fees or expenses, MDL Counsel and Participating Counsel shall keep contemporaneous billing records of the time spent in connection with Common Benefit Work on this MDL, indicating with specificity the hours and billing rate, along with a brief note indicating the source of authorization for the activity in question and a brief description of the particular activity. Time and expense submissions shall be made to Lead Counsel on a monthly basis, by deadlines to be set by Lead Counsel, in accordance with the guidelines set forth herein and using monthly reports to be distributed by Lead Counsel so that Lead Counsel may retain those forms for later submission to this Court if and when necessary.

The first submission is due on May 31, 2015, and should include all time and expense through April 30, 2015. Thereafter, all time and expense reports shall be submitted on the last calendar day of each month and shall cover the time period through the end of the preceding month (*i.e.*, the June 30, 2015 submission should include all time and expenses incurred during the month of May 2015).³ Generally, only time and expense incurred after the Court's January 22, 2015 Order appointing Plaintiffs' Leadership shall be submitted and considered as potential Common Benefit Work.⁴

Time and expense entries that are not sufficiently detailed will not be considered for payment of Common Benefit fees. All time for Common Benefit Work by each firm shall be recorded and maintained in tenth-of-an-hour increments. The failure to secure authorization from Lead Counsel to incur Common Benefit time and expenses, or to maintain and timely provide such records or to provide a sufficient description of the activity, will be grounds for denying the recovery of attorneys' fees or expenses in whole or in part. Lead Counsel must maintain all time submissions in a format so that the Court may review any application for fees.

³ Although counsel should submit all Common Benefit Expenses incurred in a certain month in the submission made on the last calendar day of the next month, some third party billing and credit card statement schedules may make such expense submission difficult. In such circumstances and in compliance with guidelines developed by Lead Counsel, counsel may submit expenses incurred in the previous two months that – because of circumstances outside the submitting counsel's control – could not have been submitted by the Court-ordered deadline. Any common benefit expenses submitted more than two months in arrears shall not be considered as Common Benefit Expenses absent good cause as determined by Lead Counsel.

⁴ In their discretion, Lead Counsel may consider time and expense incurred before the Court's January 22, 2015 Order as Common Benefit Work and Common Benefit Expense if the time or expense benefitted all producer and/or all non-producer plaintiffs in a material and direct way. Time and expense incurred in client solicitation, efforts to secure a leadership appointment, pre-appointment attendance at meetings of plaintiffs' counsel, attendance at the JPML hearing, attendance at the initial court hearing and similar tasks shall not be approved.

IV. PLAINTIFFS' COMMON BENEFIT FEE AND EXPENSE FUNDS

A. Establishing the Fee and Expense Funds

Plaintiffs' Liaison Counsel is directed to establish two interest-bearing accounts to receive and disburse funds (the "Funds") as provided in this and subsequent Orders. The first fund shall be designated the "Corn Common Benefit Fee Fund" and the second fund shall be designated the "Corn Common Benefit Expense Fund." These funds will be held subject to the direction of this Court.

By subsequent Order of this Court, the Court will appoint a Special Master who is a qualified certified public accountant (the "Special Master") to serve as Escrow Agent over the Funds and to keep detailed records of all deposits and withdrawals and to prepare tax returns and other tax filings in connection with the Funds, if needed. Such subsequent Order may specify the hourly rates to be charged by the Special Master and for the Special Master's assistants, who shall be utilized where appropriate to control costs. The Special Master shall submit quarterly detailed bills to Plaintiffs' Liaison Counsel and the Court, at the Court's request. Upon approval by the Court, the Special Master's bills shall be paid from the Corn Common Benefit Expense Fund and shall be considered Shared Costs. Plaintiffs' Liaison Counsel shall provide a copy of this Order to the Special Master. The parties may jointly propose a Special Master for the Court's consideration. If the parties are unable to agree on a proposed Special Master, the Court will select a neutral Special Master to serve in this role.

B. Payments into the Corn Common Benefit Fee and Corn Common Benefit Expense Funds

1. General Standards

All counsel and plaintiffs who are subject to this Order who agree to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for

monetary damages or other monetary relief, including compensatory and punitive damages, with respect to Corn claims or a Corn case are subject to an assessment on the Gross Monetary Recovery, as provided herein.

2. Gross Monetary Recovery

Gross Monetary Recovery includes any and all amounts paid by defendants through settlement or pursuant to a judgment. In measuring the “Gross Monetary Recovery,” the parties are to (a) exclude any court costs that are to be paid by the defendant, but include any attorneys’ fee awards under any fee-shifting statute or rule; (b) include any payments to be made by the defendant to a third party; (c) include the present value of any fixed and certain payments to be made in the future; and (d) if applicable, subtract any recovery paid by the plaintiff to a defendant through settlement or pursuant to a judgment for counterclaim(s) asserted in a Corn case by a defendant.

3. Assessment Amounts

In the event that there is a class settlement, recovery or judgment in favor of the class, no assessment pursuant to this Section will be made, either for attorneys’ fees or for expenses, individually from any class member or his/her/its individual attorney as to the portion of any class recovery distributed to that individual class member if the class member remains in the class (i.e., does not opt-out of the class). Instead, all fees and expenses for that class member will come out of the overall class recovery funds provided by defendants, as approved by the Court, or as otherwise Ordered by the Court. The relationship between class counsel fees and costs obtained through any class settlement or judgment and the Common Benefit Fund will be addressed, if necessary, by later order of the court.

The assessments in this Order represent a holdback (*see, e.g., In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256 (E.D.N.Y. 2006)) and shall not be altered absent further order of the Court. The obligations in this Section shall follow the case to its final disposition, including a court having jurisdiction in bankruptcy.

Defendants shall hold back⁵ and set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund the following amounts in this Section.

a) For recoveries by any client whose attorney falls within the definition of MDL Counsel, as defined above, (excluding cases outside the MDL, including cases remanded to state court), the assessments are:

- for each producer client, a total 11% assessment amount (8% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 9% assessment amount (7% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.⁶

⁵ In the event any defendant fails to hold back the assessments required by this Section, plaintiffs' counsel has an equal duty to pay the appropriate holdback amounts to the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund. Under all scenarios (except to the extent the attorney is being paid an hourly rate), the fee assessment shall be paid from the attorney's portion of the recovery and shall not be borne by the client.

⁶ As indicated above, the fee and expense assessment percentages contained in this subsection (a) apply to the Remele/Sieben Group Clients who filed at any time in the past or who file at any time in the future their Syngenta claims in federal court or choose to have their state cases go to federal court (all as described in the Remele Agreement). Defendant shall hold back and set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund the percentages contained in this subsection (a) for the Remele/Sieben Group Clients in these categories. With respect to all other Remele/Sieben Group Clients, the fee and expenses assessment percentages shall be fifty percent (50%) of the amount ordered herein in this subsection (a) (all as described in the Remele Agreement). Defendants shall hold back and set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund 50% of the percentages contained in this subsection (a) for this group of the Remele/Sieben Group Clients.

b) For recoveries by any client (whether the client's case is filed in a federal or state court or is unfiled) whose attorney is either not an MDL Counsel or whose attorney is an MDL Counsel but whose case is outside the MDL, and whose attorney becomes a Participating Attorney by voluntarily executing the Participation Agreement within 45 days of entry of this Order or notice by Lead Counsel if the attorney has at least one Corn case on file in any court as of the entry of this Order, whichever date is later and as defined in Section II(B) above, or within 45 days of the date the attorney's first Corn client is engaged or 120 days of entry of this Order, whichever date is later, the assessments are:

As indicated above, the fee and expense assessment percentages contained in this subsection (a) apply to Phipps' producer and non-producer Clients (as defined in his respective agreement) who:

1. first filed in federal court;
2. first filed in state court but whose case is removed and remand was denied by this Court; or
3. settled through an MDL settlement.

Defendants shall hold back and set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund the percentages contained in this subsection (a) for Phipps' Clients in these categories.

With respect to Phipps' producer and non-producer clients who fall within the categories below, the fee and expense assessment percentages shall be fifty percent (50%) of the amount ordered herein in this subsection (a):

1. never had a case pending in federal court;
2. never filed in any jurisdiction;
3. filed first in state court and the case remanded in state court; or
4. filed in state court, was removed to federal court and (a) remand was granted or (b) remand was not yet ruled upon at the time of recovery.

Defendants shall hold back and set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund 50% of the percentages contained in this subsection (a) for Phipps' respective Clients in these categories.

- for each producer client, a total 7% assessment amount (4% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 5.5% assessment amount (3.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

c) For recoveries by any client (whether the client's case is filed in a federal or state court or is unfiled) whose attorney is either not an MDL Counsel or whose attorney is an MDL Counsel but whose case is outside the MDL, whose attorney has at least one Corn case on file in any court, and whose attorney becomes a Participating Attorney by voluntarily executing the Participation Agreement more than 45 days but less than 90 days of entry of this Order, filing of the Participating Counsel's first Corn case in any court or notice by Lead Counsel, as defined in Section II(B) above, whichever date is later, the assessments are:

- for each producer client, a total 9% assessment amount (6% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 7.5% assessment amount (5.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

d) For recoveries by any client (whether the client's case is filed in a federal or state court or is unfiled) whose attorney is either not an MDL Counsel or whose attorney is an MDL Counsel but whose case is outside the MDL, and whose attorney becomes a Participating Attorney by voluntarily executing the Participation Agreement 90 or more days after entry of this Order or notice by Lead Counsel if the attorney has at least one Corn case on file in any court as of the entry of this Order, whichever is later and as defined in Section II(B) above, or more than 45 days after the date the attorney's first Corn client is engaged or more than 120 days after entry of this Order if the attorney does not have at least one Corn case on file in

any court as of the entry of this Order, the assessments are:

- for each producer client, a total 13% assessment amount (10% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 11.5% assessment amount (9.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

4. Defendants' Obligations to Pay Common Benefit Assessments

Defendants and their counsel shall not distribute any proceeds, whether by settlement or in satisfaction of a judgment, to any plaintiff's counsel (or directly to a plaintiff) in cases covered by this Order until after: (1) defendants' counsel notifies Plaintiffs' Liaison Counsel in writing of the existence of a settlement or judgment and the name of the individual plaintiff's attorney, and (2) Plaintiffs' Liaison Counsel has advised defendants' counsel of the amount (stated as a percentage of the recovery) of the assessment pursuant to this Order. Plaintiffs' Liaison Counsel shall share this information with Plaintiffs' Lead Counsel, who shall otherwise keep this information confidential.

For cases subject to an assessment, defendants are directed to withhold an assessment from any and all amounts paid to plaintiffs and their counsel and to pay the assessment directly into the Funds as a credit against the settlement or judgment. No notice or order of dismissal of any plaintiff's claim, subject to this Order, shall be entered unless accompanied by a certificate of plaintiff's and defendants' counsel that the assessment, if applicable, will be withheld and will be deposited into the Funds at the same time the settlement proceeds are paid to settling counsel. If, for any reason, the assessment is not or has not been so withheld, the plaintiff's counsel whose case is being resolved is responsible for paying the assessment into the Funds promptly. The Special Master shall provide Plaintiffs' Lead and Liaison Counsel with written verification that

defendants have made full and complete payments to the Funds (or to the Escrow Account) in accordance with this Order and with all procedures established by the Special Master. The full and complete payments and the required verification from the Special Master shall discharge defendants' and defendants' counsel's obligations and responsibilities with respect to the deposited funds, including any disputes between or among plaintiffs and plaintiffs' counsel as to the allocation of such funds.

To preserve the confidentiality of settlement amounts, if such confidentiality is agreed to by the settling parties in their settlement agreement(s), details of any individual settlement agreement, individual settlement amount, and/or amounts deposited into escrow by any particular defendant shall be confidential and shall not be disclosed by the Special Master to anyone other than the Court, upon request or by Order of the Court. Monthly statements from the Special Master shall be provided to Plaintiffs' Lead and Liaison Counsel (and, if the Court so requests, to the Court) showing only the total quarterly deposits from all defendants, any disbursements, interest earned, and financial institution charges, if any, and the current balance.

5. Reporting Obligations

Upon learning of a Corn case being filed in any state court or any federal court outside of this MDL, Defendants' Liaison Counsel shall notify Plaintiffs' Liaison Counsel of such filing within 60 days of service of the complaint/petition upon any defendant. Such notice shall include the case name, the name, firm name, and firm address of the plaintiff's attorney(s) and the date of such filing or, if the plaintiff's attorney is already a Participating Counsel, just the case name, the name of the plaintiff's attorney and the date of such filing.

Plaintiffs' Liaison Counsel shall provide Defendants' Liaison Counsel, the Special Master, and the Court, if requested, with a list of cases, if filed, and counsel who are subject to

signed Participation Agreements. This same list shall be made available to all plaintiffs' counsel with cases in this MDL, as well as any other plaintiffs' counsel who signs the Participation Agreement, upon request. In the event there is a dispute as to whether a case should be on the list, Plaintiffs' Lead Counsel shall seek to resolve the matter with the particular plaintiff's counsel informally, and if that is unsuccessful, upon motion to the Court. The parties' reporting obligations shall continue quarterly until the conclusion of this MDL.

V. DISTRIBUTIONS

A. Court Approval

The amounts deposited into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund shall be available for distribution to MDL Counsel and Participating Counsel who have performed professional services or incurred expenses for the Common Benefit of all producer and/or all non-producer plaintiffs as authorized by Lead Counsel. No amounts will be disbursed without review and approval by the Court, or such other mechanism as the Court may order. This Court retains jurisdiction over any common benefit award or distribution.

To the extent the funds collected from the holdbacks exceed the amounts ultimately approved by the Court for distribution to attorneys performing Common Benefit Work, that excess shall be refunded to those who have paid assessments on a *pro rata* basis.

B. Application for Distribution

Each MDL Counsel or Participating Counsel performing Common Benefit Work has the right to present a claim(s) for compensation and/or reimbursement through a procedure directed by Lead Counsel prior to any distribution approved by this Court. Counsel who are not MDL Counsel or Participating Counsel shall not be eligible to receive common benefit payments for any work performed or expenses incurred.

Plaintiffs' Lead Counsel shall make recommendations to this Court for distributions to

MDL Counsel and Participating Counsel performing Common Benefit Work and/or incurred Common Benefit Expenses. In the event that there is not unanimous agreement among Plaintiffs' Lead Counsel, each Lead Counsel shall only have one vote and each vote shall bear the same weight. A decision about the recommendation to the Court by the Lead Counsel need only be made by a majority of votes. Lead Counsel shall determine on their own the most fair and efficient manner by which to evaluate all of the time and expense submissions in making its recommendation to this Court. This Court will give due consideration to the recommendation of Lead Counsel in making its ruling on the award of common benefit fees and common benefit cost reimbursement.

IT IS SO ORDERED.

Dated this ____ day of _____, 2015 at Kansas City, Kansas.

JOHN W. LUNGSTRUM
UNITED STATES DISTRICT JUDGE

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

In Re: Syngenta AG MIR162	)	
Corn Litigation	)	
	)	MDL No. 2591
	)	
This document relates to:	)	Case No. 2:14-md-2591-JWL-JPO
All Cases	)	

**EXHIBIT A TO CMO NO. _____
(Common Benefit Participation Agreement)**

THIS COMMON BENEFIT PARTICIPATION AGREEMENT is made this ____ day of _____, 201__, by and between the Plaintiffs’ Co-Lead Counsel, as appointed by the United States District Court for the District of Kansas in MDL 2591, and _____ **[Name of the Law Firm Executing the Agreement]** (the “Participating Counsel”), on behalf of all of their clients having claims for claims relating to or arising from genetically modified Syngenta corn, the commercialization of Agrisure Viptera or Agrisure Duracade or of any corn including genetically modified traits MIR162 or Event 5307 (“Corn”), or if Participating Counsel is also an MDL Counsel, on behalf of his clients with cases outside the MDL, including cases that are remanded to state court.

WHEREAS, the United States District Court for District of Kansas has appointed Don Downing, William Chaney, Scott Powell and Patrick Stueve to serve as Co-Lead Counsel (“Lead Counsel”) and Patrick Stueve to serve as Liaison Counsel (“Liaison Counsel”) to facilitate the conduct of pretrial proceedings in the Corn actions; and

WHEREAS, the Lead Counsel, in association with other attorneys working for the common benefit of plaintiffs, have developed or are in the process of developing work product

that will be valuable in all proceedings and benefit all producer and/or all non-producer plaintiffs alleging injury or damages caused by this Corn (“Common Benefit Work Product”); and

WHEREAS, Participating Counsel is desirous of acquiring the Common Benefit Work Product for the benefit of his or her client(s).

NOW THEREFORE, in consideration of the covenants and promises contained herein, and intending to be legally bound hereby, the parties agree as follows:

I. SCOPE OF AGREEMENT

A. Purpose

This Participation Agreement (the “Agreement”) is a private cooperative agreement between plaintiffs’ attorneys to share Common Benefit Work Product pursuant to the Court’s Order Establishing Protocols for Common Benefit Work and Expenses and Establishing the Common Benefit Fee and Expense Funds (the “Order”), which is incorporated herein. By signing this Participation Agreement, the Participating Counsel who executes this Agreement is entitled to receive and use Common Benefit Work Product, regardless of the venue in which Participating Counsel’s cases are pending.

B. Rights and Obligations of Participating Counsel

Participating Counsel shall be provided access to the Common Benefit Work Product, including access to the document depository. Participating Counsel agrees that all Corn cases and/or claims in which Participating Counsel has any fee interest, including unfiled cases, tolled cases, and/or cases filed in any state or federal court, are all subject to the terms of this Participation Agreement.

Participating Counsel shall produce a list that correctly sets forth the name of each client represented by them and/or in which they have an interest in the attorney fee, regardless of what that interest is, who has filed a Corn civil action. Such list shall include the court and docket

number of each such case. Participating Counsel shall also produce a list that contains the name of each client represented by them and/or in which they have an interest in the attorney fee, regardless of what that interest is, who has not yet filed a civil action. Participating Counsel shall supplement the lists on a quarterly basis and provide the lists to Plaintiffs' Liaison Counsel via electronic mail at Syngenta@stuevesiegel.com. The initial list shall be provided within 14 calendar days of signing this Agreement and must be supplemented every 90 days thereafter.

II. AGREEMENT TO PAY AN ASSESSMENT ON GROSS RECOVERY

Subject to the terms of this Agreement and the terms of the Order, Participating Counsel who agrees to settle, compromise, dismiss, or reduce the amount of a claim, or with or without trial, recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, for any Corn claims on behalf of any client are subject to an assessment of the Gross Monetary Recovery, as provided herein, regardless of whether Participating Counsel has actually accessed or used Common Benefit Work prior to any resolution.

A. Gross Monetary Recovery Defined

"Gross Monetary Recovery" includes any and all amounts paid to plaintiffs' and/or their counsel by defendant(s) through a settlement or pursuant to a judgment. In measuring the Gross Monetary Recovery, the parties are to (a) exclude court costs that are to be paid by the defendant, but include any attorneys' fee awards under any fee-shifting statute or rule; (b) include any payments to be made by the defendant to a third party; (c) include the present value of any fixed and certain payments to be made in the future; and (d) if applicable, subtract any recovery paid by the plaintiff to a defendant through settlement or pursuant to a judgment for counterclaim(s) asserted in a Corn case by a defendant.

B. Assessment Amount

This assessment herein represents a holdback (*see, e.g., In re Zyprexa Prods. Liab. Litig.*,

467 F. Supp. 2d 256 (E.D.N.Y. 2006)). The obligations in this Section shall follow all cases to their final disposition, including a court having jurisdiction in bankruptcy. The following assessment shall be set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund.

For recoveries by Your clients who never had a case pending in the MDL or whose federal case was remanded to state court (whether the client's case is first filed in a federal or state court or is unfiled) if You are voluntarily executing the Participation Agreement within 45 days of entry of the Order or notice from Lead Counsel if you have at least one Corn case on file in any court as of the entry of this Order, whichever date is later and as defined in the Court's Order, Sections II(B), IV(B)(3)(b), or within 45 days of the date Your first Corn client is engaged or 120 days of entry of the Court's Order, whichever date is later, the assessments are:

- for each producer client, a total 7% assessment amount (4% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 5.5% assessment amount (3.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

For recoveries by Your clients who never had a case pending in the MDL or whose federal case was remanded to state court (whether the client's case is first filed in a federal or state court or is unfiled) if you have at least one Corn case on file in any court as of the entry of the Court's Order and You are voluntarily executing the Participation Agreement more than 45 days but less than 90 days of entry of the Order or notice from Lead Counsel, as detailed in the Court's Order, Sections II(B), IV(B)(3)(c), whichever date is later, the assessments are:

- for each producer client, a total 9% assessment amount (6% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 7.5% assessment amount (5.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

For recoveries by Your clients who never had a case pending in the MDL or whose federal case was remanded to state court (whether the client's case is first filed in a federal or state court or is unfiled) if You are voluntarily executing the Participation Agreement 90 or more days after entry of the Order or notice from Lead Counsel if you have at least one Corn case on file in any court as of the entry of the Court's Order, whichever is later and as detailed in the Court's Order, Sections II(B), IV(B)(3)(d), or more than 45 days after the date Your first Corn client is engaged or more than 120 days after entry of the Court's Order if You do not have at least one Corn case on file in any court as of the entry of this Order, the assessments are:

- for each producer client, a total 13% assessment amount (10% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 11.5% assessment amount (9.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

In the event any defendant fails to hold back the assessments required by this Section, it is Your duty to pay the appropriate holdback amounts to the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund. Under all scenarios (except to the extent You are being paid an hourly rate), the fee assessment shall be paid from Your portion of the recovery and shall not be borne by Your client.

C. Covered Cases

By signing this Agreement, the Participating Counsel agrees that the assessment percentages set forth above shall apply to all of his or her law firm's cases that never were pending in the MDL or that were pending but were remanded to state court, including un-filed cases, tolled cases, federal cases not transferred to the MDL, and/or cases filed in any state court in which they have a fee interest, regardless of the size of that fee interest, and that the assessment percentages for MDL Counsel set forth in the Court's Order will apply to any cases

that have been, are or will become part of this MDL, except those cases that are remanded to state court. To the extent there are one or more MDL global settlements entered into or approved by Plaintiffs' Co-Lead Counsel that include assessment percentages, the assessment percentages in the settlement will control for any client who elects to participate in the settlement.

D. Attorneys' Fee Lien

With respect to each client represented in connection with Corn related claims that are filed or pending in any federal or state court, are un-filed, or are subject to a tolling agreement, Participating Counsel agrees to have defendants deposit or cause to be deposited in the Corn Common Benefit Fee and Expense Funds established by the District Court in the MDL a percentage of the Gross Monetary Recovery recovered by each such client that is equal to the assessment amount. In the event defendants do not deposit the assessed percentage into the Funds, Participating Counsel shall deposit or cause to be deposited in the Corn Common Benefit Fee and Expense Funds a percentage of the Gross Monetary Recovery recovered by each such client that is equal to the assessment amount. Participating Counsel, on behalf of themselves, their affiliated counsel, and their clients, hereby grant and convey to Plaintiffs' Lead Counsel a lien upon and/or a security interest in any fee (a) generated as a result of any recovery by any client who they represent in connection with any Corn-related claims and (b) they have any interest in, to the full extent permitted by law, in order to secure payment in accordance with the provisions of this Agreement. Participating Counsel will undertake all actions and execute all documents that are reasonably necessary to effectuate and/or perfect this lien and/or security interest.

III. COMMON BENEFIT WORK AND EXPENSES

A. Common Benefit Expenses Eligible for Reimbursement

In order to be eligible for reimbursement as Common Benefit Expenses, said expenses

must be: (a) for the common benefit of all producer and/or non-producer plaintiffs; (b) appropriately authorized by Lead Counsel in writing; (c) timely submitted using the monthly reports created by Lead Counsel; (d) reasonable; (e) verified by a partner or shareholder in the submitting firm; and (f) in compliance with the Order. Attorneys shall keep all receipts for all expenses, which shall be made available upon request. Examples of authorized and unauthorized expenses are listed in the Order.

B. Common Benefit Work Eligible for Reimbursement

In order to be eligible for reimbursement as Common Benefit Work, time expended must be: (a) for the common benefit of all producer and/or non-producer plaintiffs; (b) appropriately authorized by Lead Counsel in writing; (c) timely submitted using the monthly reports created by Lead Counsel; (d) reasonable; (e) verified by a partner or shareholder in the submitting firm; and (f) in compliance with the Order. Moreover, if counsel is a member of Plaintiffs' Executive Committee or other firm authorized by Lead Counsel to perform Common Benefit Work and fails to timely submit capital contributions as may be requested by Lead Counsel throughout this litigation, such counsel and members of his/her firm shall not be allowed to submit common benefit time or expenses for reimbursement.

"Common Benefit Work" means services performed for the benefit of all producer and/or all non-producer plaintiffs ("Common Benefit") and specifically authorized by Lead Counsel. Unless specifically and explicitly authorized in writing, no time spent on developing or processing individual issues in any case for an individual client, no time spent on the solicitation of potential clients and no time spent on any unauthorized work, will be considered or should be submitted. No client-related time, save certain time relating to cases which may be selected in the future as bellwether cases or time related to class representatives in a Master or Consolidated

Class Complaint, shall be considered Common Benefit Work. Examples of authorized and unauthorized work are listed in the Order.

C. Counsel to Whom Common Benefit Work May Be Shared

Without the express written consent of each of the Co-Lead Counsel, MDL Counsel and Participating Counsel are prohibited from sharing Common Benefit Work Product with counsel who do not execute a Participation Agreement. As described in the Remele Agreement, the Remele/Sieben Group and Remele/Sieben Group Co-Counsel will not disclose such work product to other plaintiff counsel, unless such other counsel's clients are subject to payment of a Common Benefit Assessment to the Federal MDL Funds; provided, the Remele/Sieben Group and Remele/Sieben Group Co-Counsel may use such Syngenta work product when taking oral depositions or during hearings or trials, but may not provide or authorize others to provide any deposition or trial transcript to any counsel that is not subject to payment of a Common Benefit Assessment to the Federal MDL Funds. Further, Phipps is prohibited from sharing Common Benefit Work Product with counsel who do not execute a Participation Agreement, except when taking depositions or during hearings or trials, but no transcripts containing such work product will be disclosed.

D. Submission of Time and Expense Records

All time must be accurately and contemporaneously maintained. Participating Counsel shall keep a daily record of time spent in connection with Common Benefit Work on this litigation, indicating with specificity the hours, location, and particular activity. Time entries that are not sufficiently detailed may not be considered for common benefit payments and time submissions may be audited by a CPA. All common benefit time shall be maintained in tenth-of-an-hour increments.

Participating Counsel must follow the guidelines set forth in the Court's Order and in other written guidelines as established by Lead Counsel. All time and expense submissions must use the forms provided by Liaison Counsel and must be submitted electronically by the end of each calendar month, beginning on May 31, 2015. Failure to provide submissions in a timely manner shall result in a waiver of attorneys' fees and expenses claimed for the time period that is the subject of the submission. Failure to submit time and expense records in the electronic format on forms approved by Plaintiffs' Lead Counsel may also result in the waiver of attorneys' fees and expenses. Time spent compiling the data for the time and expense submissions is not considered common benefit time.

The undersigned Participating Counsel understands, acknowledges and agrees that there is no guaranty that all of the time submitted by any counsel or law firm will be compensated and that the hourly rate for the work that is compensated is not guaranteed (*e.g.*, that Lead Counsel may award different hourly rates for different work and for the same work performed by different attorneys or law firms). The undersigned also understands, acknowledges, and agrees that all hours are not going to be viewed equally and awarded at the same rate (*e.g.*, document review time and deposition/trial time may not be treated and awarded at the same rate).

E. Distribution of Fees

1. No Individual Right to the Funds: No party or attorney has any individual right to any common benefit funds except to the extent directed by order of the MDL Court. Common benefit funds will not constitute the property of any party or attorney or be subject to garnishment or attachment for the debts of any party or attorney except when and as directed by court order.

2. Court Approval: The amounts deposited in the Corn Common Benefit Fee Fund shall be available for distribution to attorneys who have performed professional services or incurred expenses for the common benefit. The MDL Court retains jurisdiction over any common benefit award. The undersigned Participating Counsel, on behalf of themselves, their law firm, their affiliated counsel, and their clients, hereby consents to the jurisdiction of the MDL Court in connection with any common benefit award.

[Participation Agreement continues on the next page]

I _____ [name of attorney] hereby represent that I have the authority to execute this Agreement on behalf of my law firm, _____ [insert name of law firm], and on behalf of all of my Corn clients. I hereby represent that I have the authority to bind my law firm and all of my Corn clients to the terms of this Participation Agreement.

My law firm's first Corn case was filed in any state or federal court on _____, 201____. I hereby certify that my law firm DID or DID NOT [please circle] have a Corn case on file in any state or federal court as of _____, 2015, the date the MDL Court entered the Order.

PLEASE INITIAL ONLY ONE OF THE FOLLOWING:

_____ [please initial] I hereby certify that I am executing this Participation Agreement within 45 days of entry or notice as defined in the Court's Order, Sections II(B), IV(B)(3)(b), if I had at least one Corn case on file in any court as of the entry of the Court's Order, or within the 45 or 120 days as defined in the Court's Order, Sections II(B), IV(B)(3)(b), if I did not have at least one Corn case on file in any court as of the entry of the Court's Order, and the assessments on all recoveries by my clients (whether the client's case is filed in a federal or state court or is unfiled) are:

- for each producer client, a total 7% assessment amount (4% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 5.5% assessment amount (3.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

_____ [please initial] I hereby certify that I had at least one Corn case on file in any court as of the entry of the Court's Order and I am executing this Participation Agreement more than 45 days and less than 90 days after entry or notice as defined in the Court's Order, Sections

II(B), IV(B)(3)(c), and the assessments on all recoveries by my clients (whether the client's case is filed in a federal or state court or is unfiled) are:

- for each producer client, a total 9% assessment amount (6% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 7.5% assessment amount (5.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

_____ [please initial] I hereby certify that I had at least one Corn case on file in any court as of the entry of the Court's Order and I am executing this Participation Agreement 90 or more days after entry or notice as detailed in the Court's Order, Sections II(B), IV(B)(3)(d), or I did not have at least one Corn case on file in any court as of the entry of the Court's Order and I am executing this Participation Agreement more than 45 or 120 days as defined in the Court's Order, Sections II(B), IV(B)(3)(b), and the assessments on all recoveries by my clients (whether the client's case is filed in a federal or state court or is unfiled) are:

- for each producer client, a total 13% assessment amount (10% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 11.5% assessment amount (9.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

I further agree that the fee assessment portion will be deducted from my attorney's fee and not from my client's portion of the recovery (except to the extent I am being paid an hourly rate).

These assessments shall apply to all Corn claims against any defendant by persons or entities represented by my law firm, whether such claims are filed, unfiled or tolled, that have not been asserted in a filed state Corn case.

[Continued on the next page]

Dated: _____

Law Firm Name:

Attorney's Name:

[Signatures continue on the next page]

Dated: _____

Patrick J. Stueve
CO-LEAD COUNSEL AND LIAISON COUNSEL FOR
PLAINTIFFS

Dated: _____

Don M. Downing
CO-LEAD COUNSEL FOR PLAINTIFFS AND
INTERIM RULE 23 CLASS COUNSEL

Dated: _____

William B. Chaney
CO-LEAD COUNSEL FOR PLAINTIFFS

Dated: _____

Scott Powell
CO-LEAD COUNSEL FOR PLAINTIFFS

Respectfully Submitted by:

/s/ Patrick J. Stueve

Patrick J. Stueve—KS Bar #13847

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CO-LEAD COUNSEL FOR PLAINTIFFS

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

In Re: Syngenta AG MIR162 Corn Litigation	)))))))	MDL No. 2591
This document relates to: All Cases		Case No. 2:14-md-2591-JWL-JPO

**ORDER ESTABLISHING PROTOCOLS FOR COMMON BENEFIT WORK
AND EXPENSES AND ESTABLISHING THE COMMON
BENEFIT FEE AND EXPENSE FUNDS**

On January 22, 2015, the Court entered an order appointing Co-Lead Counsel, the Executive Committee, Interim Class Counsel and Liaison Counsel. ECF No. 67 (the “Leadership Order”). The Leadership Order permits Co-Lead Counsel (“Lead Counsel”) to assess other plaintiffs’ counsel for the expenses of the litigation and requires parties to maintain contemporaneous records of their time and expenses devoted to this matter. *Id.* at ¶¶ 4(m), 6.

The Leadership Order also defines the authority, duties and responsibilities of counsel appointed to leadership roles in this multidistrict proceeding (the “MDL”) and supplements the guidelines and rules for staffing, fees, expenses and billing records by attorneys acting for the common benefit of all producer and/or all non-producer plaintiffs in this multidistrict litigation for claims relating to or arising from genetically modified Syngenta corn, the commercialization of Agrisure Viptera or Agrisure Duracade or of any corn including genetically modified traits MIR162 or Event 5307 (“Corn”). This Order additionally provides for the fair and equitable sharing among plaintiffs’ counsel of the burden of services performed and expenses incurred by attorneys acting for the common benefit of all producer and/or all non-producer plaintiffs in this complex litigation.

I. GOVERNING PRINCIPLES AND THE COMMON BENEFIT DOCTRINE

The common benefit governing principles are derived from the United States Supreme Court’s common benefit doctrine, as initially established in *Trustees v. Greenough*, 105 U.S. 527 (1881) and as refined throughout the last century in cases including *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1884), *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *see also* Manual for Complex Litigation, § 14.215 (4th ed. 2004) (noting that “Lead and liaison counsel may have been appointed by the court to perform functions necessary for the management of the case but not appropriately charged to their clients” and encouraging an order early in the litigation that “establish[es] the arrangements for their compensation, including setting up a fund to which designated parties should contribute in specified proportions.”); Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 374 (2014) (“Because the work that the PSC performs inures to the common benefit of all plaintiffs and their primary counsel (the counsel that they employed), MDL transferee courts usually establish a procedure for creating a common benefit fee to compensate the members of the PSC and the members of any subcommittees who have done common benefit work.”).

The Court’s authority to establish a fund and to order contributions also derives from its equitable authority and its inherent managerial power over this consolidated and multidistrict litigation. *See, e.g., In re Diet Drugs*, 582 F.3d 524, 546-47 (3rd Cir. 2009); *In re Air Crash Disaster at Fla. Everglades*, 549 F.2d 1006, 1008 (5th Cir. 1977); Manual for Complex Litigation, § 20.312 (“MDL judges generally issue orders directing the defendants who settle MDL-related cases contribute a fixed percentage of the settlement to a general fund to pay national counsel.”); Fallon, *supra*, at 378 (the common benefit doctrine is justified “on principles of equity or quantum meruit or class action procedures or [a court’s] inherent authority”).

II. SCOPE OF THIS ORDER

This Order governs the use of Common Benefit Work, as defined below, by: (1) MDL Counsel; (2) Participating Counsel; and (3) certain attorneys and their firms seeking leadership in the Minnesota state court coordinated proceedings (the “Remele/Sieben Group”), their clients (the “Remele/Sieben Group Client”), and, with respect to such clients, the Remele/Sieben Group’s co-counsel (the “Remele/Sieben Group Co-Counsel”), as described in the Remele/Sieben Group’s and Co-Lead Counsel’s Amended and Restated Joint Prosecution Agreement dated June 18, 2015 (the “Remele Agreement”).

A. MDL Counsel

For purposes of this Order, the term “MDL Counsel” includes each attorney who represents one or more plaintiffs in a case that at any time has been pending in this MDL or in any case later filed in, transferred to, or removed to this Court, unless all of that attorney’s cases are remanded back to state court, and continues to apply as to any case dismissed from this Court or to any case remanded back to a federal transferor court. The obligations of this Order follow any such cases to their ultimate disposition. The assessment amounts described below as applicable to MDL counsel do not apply to cases outside the MDL, including cases remanded to state court.

B. Participating Counsel

All counsel who are not MDL Counsel, as defined above, or who are MDL Counsel but who also have cases outside the MDL, including cases remanded to state courts, are eligible to sign the Participation Agreement, attached hereto as Exhibit A (the “Participation Agreement”). All counsel who execute the Participation Agreement are hereinafter referred to as “Participating Counsel” and all Participating Counsel are subject to this Order and the jurisdiction of this Court relating to this Order. Solely in their respective capacities as counsel for the Cargill and ADM

plaintiffs, counsel for the Cargill and ADM plaintiffs have agreed to execute Participation Agreements and, solely for purposes of this Order, these counsel are included in the definition of Participating Counsel, and are not MDL Counsel.

The Participation Agreement is a voluntary agreement between Lead Counsel and executing plaintiffs' attorneys allowing the Participating Counsel access to Common Benefit Work. Counsel who sign the Participation Agreement shall be entitled to receive and to use for their cases all Common Benefit Work performed by or for Lead Counsel and other counsel at Lead Counsel's direction in this MDL.

Any plaintiff's attorney who wants to and is eligible to become a Participating Counsel and who currently has at least one Corn case on file in any state or federal court outside of this MDL shall execute the Participation Agreement within 45 days of the entry of this Order or within 45 days of notification by Lead Counsel of this Order, whichever date is later. Any plaintiffs' attorney who at the time this Order is entered does not have a case pending in any state or federal court and who wants to become a Participating Counsel shall execute the Participation Agreement within 45 days of the date their first Corn client is engaged or within 120 days of entry of this Order, whichever date is later. The failure to execute a Participation Agreement within the time frame set forth in the preceding paragraph will result in higher assessment percentages as a result of later execution. *Accord In re: Testosterone Replacement Therapy Prods. Liab. Litig.*, No. 14-cv-1748, MDL No. 2545, ECF No. 488 (Corrected Case Management Order No. 16 (Establishing Common Benefit Fee and Expense Funds)) at 3 (N.D. Ill. Nov. 25, 2014) (ordering an increase in the fee assessment from 8% to 16% if the participation agreement is not timely executed). These higher percentages are set forth in Section IV(B)(3)(c)-(d).

C. Remele/Sieben Group

The Remele/Sieben Group and the Remele/Sieben Group Co-Counsel shall not be considered MDL Counsel or Participating Counsel under this Order. Rather, their rights and obligations in connection with this Order shall be governed by the Remele Agreement, which rights and obligations, in pertinent part, may be summarized as follows¹:

1. They shall be entitled to use Common Benefit Work;
2. They shall pay fee and cost assessments identical to those paid by MDL Counsel for clients who: (a) filed their Syngenta claims at any time in the past or at any time in the future in federal court; or (b) choose to have their state cases go to federal court;
3. They shall pay fee and cost assessments of fifty percent (50%) of the level ordered by this Court for MDL Counsel for all other clients; and
4. They shall not be eligible to seek Common Benefit payments from the Common Benefit fund established by this Court (except for members of the Group who are already members of the Executive Committee appointed by this Court) and the Federal MDL Co-Leads shall not be eligible to seek Common Benefit payments from a Common Benefit Fund that may be established by the Minnesota court.

The Remele/Sieben Group and the Remele/Sieben Group Co-Counsel are uniquely situated in this litigation. They have agreed to undertake significant efforts to promote appropriate federal-state cooperation and coordination. They also have agreed to seek from the Minnesota state court overseeing coordinated proceedings common benefit assessments that are

¹ The Remele/Sieben Group's, the Remele/Sieben Group Client's, and the Remele/Sieben Group Co-Counsel's rights and obligations are governed by the specific language in the Remele Agreement, which was provided *in camera* to the Court, and not by the summaries contained in this Order.

identical in percentage to the MDL assessment percentages, and to take steps to avoid duplicate assessments in federal and state courts. This step should discourage assessment based forum selection decisions. Given these and other undertakings to which the Remele/Sieben Group and the Remele/Sieben Group Co-Counsel have agreed, as described in the Remele Agreement submitted to and reviewed *in camera* by the Court, the Court finds that treating the Remele/Sieben Group, the Remele/Sieben Group Clients, and the Remele/Sieben Group Co-Counsel separately is in the best interests of all plaintiffs in this litigation, and that the provisions of the Remele Agreement governing common benefit assessments are approved and are so ordered by this Court.

D. Counsel to Whom Common Benefit Work May Be Shared

Without the express written consent of each of the Co-Lead Counsel, MDL Counsel and Participating Counsel are prohibited from sharing Common Benefit Work Product with counsel who do not execute a Participation Agreement. As described in the Remele Agreement, the Remele/Sieben Group and Remele/Sieben Group Co-Counsel will not disclose such work product to other plaintiff counsel, unless such other counsel's clients are subject to payment of a Common Benefit Assessment to the Federal MDL Funds; provided, the Remele/Sieben Group and Remele/Sieben Group Co-Counsel may use such Syngenta work product when taking oral depositions or during hearings or trials, but may not provide or authorize others to provide any deposition or trial transcript to any counsel that is not subject to payment of a Common Benefit Assessment to the Federal MDL Funds.

III. ADOPTION OF CASE MANAGEMENT PROTOCOLS

The Court hereby adopts the following guidelines for the management of case-staffing, timekeeping, expense reimbursement, and related Common Benefit issues, and instructs Lead Counsel to distribute additional guidelines as may be necessary to ensure the efficient

prosecution of this litigation. The recovery of Common Benefit attorneys' fees and expenses will be limited to MDL Counsel and Participating Counsel (together with necessary staff of their respective firms).

MDL Counsel and Participating Counsel shall be eligible to receive Common Benefit attorneys' fees and reimbursement of expenses only if the time expended, expenses incurred, and activity in question were: (a) for the Common Benefit of all producer and/or non-producer plaintiffs; (b) conducted by Lead Counsel and their respective firms or otherwise appropriately authorized by Lead Counsel in writing; (c) timely submitted; (d) reasonable; and (e) verified by a partner or shareholder in the submitting firm. Lead Counsel is empowered to engage a Certified Public Accountant ("CPA") to review these submissions.

As further detailed below, all counsel who seek to recover Court-awarded Common Benefit fees and expenses shall keep a daily, contemporaneous record of their time and expenses, noting with specificity the amount of time, billing rate, and activities, along with a brief note indicating which Lead Counsel authorized the activity in question. All counsel who seek to recover Court-awarded Common Benefit fees and expenses agree to the terms and conditions herein, including submitting to this Court's jurisdiction and agreeing that this Court has plenary authority regarding the assessment award and allocation of Common Benefit fees and expenses. The Court will determine at a later date, if needed, the methodology for allocating any Common Benefit assessments among those who performed approved work and incurred approved expenses. There is no guaranty that all of the time submitted by any counsel or firm will be compensated and the submitted hourly rate for the work that is compensated is not guaranteed.

A. Common Benefit Work

1. Authorization for Compensable Common Benefit Work

“Common Benefit Work” means services performed for the benefit of all producer and/or all non-producer plaintiffs (“Common Benefit”) and specifically authorized by Lead Counsel. Common Benefit Work includes, but is not limited to, investigation, discovery (whether documents, interrogatories, depositions or otherwise), coding or other analytical work relating to documents or evidence, research, motions and responses to motions, exhibits, bellwether trials and transcripts, all other work performed under the direction of Lead Counsel for the benefit of all producer and/or all non-producer plaintiffs, and orders on substantive matters involving Common Benefit Work. Authorization to perform Common Benefit Work shall be obtained from Lead Counsel under a procedure that they will determine.

Unless specifically and explicitly authorized in writing, no time spent on developing or processing individual issues in any case for an individual client, no time spent on the solicitation of potential clients and no time spent on any unauthorized work, will be considered or should be submitted. No client-related time, save certain time relating to cases which in the future may be selected as bellwether cases or time related to class representatives in a Master or Consolidated Class Complaint, shall be considered Common Benefit Work. Examples of authorized Common Benefit Work and unauthorized work include, but are not limited to:

a) Depositions: Lead Counsel shall exercise discretion, judgment, and prudence to designate only that number of attorneys to participate in any given deposition that is commensurate with the nature of that deposition so as to avoid over-staffing. Time and expenses for counsel not designated as one of the authorized questioners or otherwise authorized to attend the deposition by Lead Counsel shall not be considered Common Benefit Work but, rather, as attending on behalf of such counsel’s individual clients.

b) Conference Calls and Meetings: Conference calls and meetings

held at the direction of Lead Counsel for discussion of case management, coordination, and litigation activity are generally considered Common Benefit Work. Calls and meetings solely to impart status information generally are not Common Benefit Work as to those listening. Attorneys designated by Lead Counsel to run or participate in those calls, on the other hand, are working for the Common Benefit by keeping other attorneys educated about the litigation and their time is Common Benefit Work. During such telephone or conference calls and meetings, there is a presumption that only the authorized active participants' time will qualify as Common Benefit Work, although exception may be made for good cause as determined by Lead Counsel.

c) MDL Status Conferences: Status conferences will be held so that the litigation moves forward and legal issues are resolved with the Court. Counsel may attend any status conference held in open court, but mere attendance at or listening to a status conference will not be considered Common Benefit Work, and expenses incurred in relation thereto will not be considered Common Benefit Expenses. Attorneys designated by Lead Counsel to prepare agendas, confer with opposition counsel and otherwise address issues that will be raised at a given status conference or requested by Lead Counsel to be present at a status conference are considered to be performing Common Benefit Work. Similarly, any attorney whose attendance at a status conference is specifically requested by the Court to address a common issue may submit his or her time for evaluation as Common Benefit Work.

d) Identification and Work-Up of Experts: Identification, interview, discussions, preparation of reports and all other matters involving experts on common issues, experts relating to cases selected as bellwether cases or experts related to a Master or Consolidated Class Complaint are considered Common Benefit Work. All services and expenses related to experts retained without authorization by Lead Counsel are not eligible for Common

Benefit fees or expenses.

e) Attendance at Seminars: Attendance at seminars or Continuing Legal Education programs shall not qualify as Common Benefit Work, or the expenses pertaining thereto as Common Benefit Expenses.

f) Trial Consultants and Preparation: Trial consultants and participation in trial preparation, mock trials or focus group activity for bellwether trials may qualify as Common Benefit Work and Common Benefit Expense as authorized by Co-Lead Counsel.

g) Document Discovery: All work performed and expenses incurred in connection with document discovery (including meet-and-confers with opposing counsel and any motions to compel) relating to common issues and authorized by Lead Counsel qualify as Common Benefit Work and Common Benefit Expense. If an attorney elects to review documents without prior authorization by Lead Counsel, that review is not considered Common Benefit Work. It is the Court's expectation that counsel will minimize the number of individual timekeepers from a single law firm to ensure the efficiency of time spent on this litigation. Descriptions associated with "document review" must contain sufficient detail to allow those reviewing the time entry to generally ascertain what was reviewed.

h) Motions: All research, drafting, and presentation of motions and responses to motions on common issues and authorized by Lead Counsel are considered Common Benefit Work.

i) Review of Filings and Orders: Mere review of filings and orders generally does not qualify as Common Benefit Work. It is anticipated that there will be a large number of filings in this case and mere review of these filings will not be approved as Common

Benefit Work. Those attorneys working on assignments by Lead Counsel requiring them to reasonably review, analyze, or summarize certain filings and substantive orders of this Court in connection with their assignments are doing so for the Common Benefit. In addition, it is expected that Lead and Liaison Counsel, as well as members of the Executive Committee, will review case management and substantive orders of the Court as part of their leadership responsibilities. Reasonable time spent reviewing these court rulings and orders by court-appointed leadership will be considered Common Benefit Time.

j) Emails and Correspondence: Except for Lead and Liaison Counsel, their assigned attorneys and staff working on this MDL and those designated by Lead Counsel to work on assignments requiring them to review emails and correspondence, time recorded for reviewing emails and other correspondence is not compensable as Common Benefit Work. For example, review of an email or other correspondence sent to dozens of attorneys to keep them informed on a matter on which they are not specifically working would not be compensable as Common Benefit Work.

k) Written Discovery: Only those attorneys designated by Lead Counsel to review discovery are working for the common benefit and their time accordingly considered Common Benefit Work. All other counsel are reviewing those discovery responses for the benefit of their own clients, and such review will not be considered Common Benefit Work.

l) Travel Time: Reasonable Travel Time may be compensable as Common Benefit Work, to the extent necessary and approved by Lead Counsel in connection with assigned Common Benefit Work or to the extent work otherwise compensable is performed while in transit. In the event that Participating Counsel or MDL Counsel are unsure if the action

they are about to undertake is considered Common Benefit Work, they shall ask Lead Counsel in advance as to whether such time may be compensable.

2. Verification

The forms detailing potential Common Benefit Work shall be certified by an attorney with authority in each firm attesting to the accuracy of the submissions.

B. Common Benefit Expenses

“Common Benefit Expenses” means expenses authorized by Lead Counsel and incurred for the benefit of all producers and/or all non-producer plaintiffs. Expense submissions shall be made to Lead Counsel on a monthly basis, by deadlines to be set by Lead Counsel, in accordance with the guidelines set forth herein. Only reasonable expenses incurred while performing work specifically authorized in writing by Lead Counsel will be eligible for consideration as common benefit expenses; any expense over \$500 must be specifically approved in advance in writing by Lead Counsel.

No client-related expenses, save certain expenses relating to cases which in the future may be selected as potential bellwether cases or those related to class representatives in a Master or Consolidated Class Complaint, shall be considered Common Benefit Expenses, unless exceptional circumstances exist and are approved by later order of this Court.

1. Travel Limitations: Only reasonable expenses will be reimbursed. Except in extraordinary circumstances approved by Lead Counsel, all travel reimbursements are subject to the following limitations:

a) Airfare: Ordinarily, only the price of the lowest available, convenient coach fare seat will be reimbursed. Business/First Class Airfare will not be reimbursed. In the event that non-coach air travel is utilized, including economy plus or

premium economy, the attorney shall be reimbursed only to the extent of the lowest available, convenient coach fare, which must be contemporaneously documented. If non-coach, private or charter travel is elected, the applicant is required to document what the lowest available, convenient coach fare in effect at that time was, and that is all that can be reimbursed.

b) Hotel: Hotel room charges for the average available room rate of a business hotel, such as the Hyatt, Hilton, Westin, and Marriott hotels, in the city in which the stay occurred, will be reimbursed. Liaison Counsel shall attempt to negotiate a reduced rate for a hotel located near their offices for the benefit of all counsel. Luxury hotels will not be fully reimbursed but, rather, will be reimbursed at the average available rate of a business hotel.

c) Meals: Meal expenses must be reasonable. Expenses that significantly exceed the meal allowances for federal employees may not be approved for reimbursement. There will be no reimbursement for alcoholic beverages, room service, mini-bar items, or movies.

d) Cash Expenses: Miscellaneous cash expenses for which receipts generally are not available (*e.g.*, tips, luggage handling) will be reimbursed up to \$50.00 per trip, as long as the expenses are properly itemized.

e) Automobile Rental: Luxury automobile rentals will not be fully reimbursed, unless only luxury automobiles are available. Counsel must submit evidence of the unavailability of non-luxury vehicles. If luxury automobiles are selected when non-luxury vehicles are available, then the difference between the luxury and non-luxury vehicle rates must be shown on the travel reimbursement form and only the non-luxury rate may be claimed.

f) Mileage: Mileage claims must be documented by stating origination point, destination, total actual miles for each trip and rate per mile paid by the

attorney's firm. The rate will be the IRS Standard Business Mileage Rate for the period in which the mileage was driven.

2. Non-Travel Limitations

a) Long Distance, Conference Call, and Cellular Telephone

Charges: Common Benefit long distance, conference call, and cellular telephone charges must be documented as individual call expenses in order to be compensable. Such charges are to be reported at actual cost.

b) Shipping, Overnight, Courier, and Delivery Charges:

All claimed Common Benefit shipping, overnight, courier, or delivery expenses must be documented with bills showing the sender, origin of the package, recipient, and destination of the package. Such charges are to be reported at actual cost.

c) Postage Charges:

A contemporaneous postage log or other supporting documentation must be maintained and submitted for Common Benefit postage charges. Such charges are to be reported at actual cost.

d) Facsimile Charges:

Contemporaneous records should be maintained and submitted showing faxes sent and received. The per-fax charge shall not exceed \$0.50 per fax.

e) In-House Photocopy:

A contemporaneous photocopy log or other supporting documentation must be maintained and submitted. The maximum copy charge is \$0.10 per page for in-firm photocopies and any necessary vendor photocopies shall be at actual cost.

f) Computerized Research: Lexis, Westlaw, or Bloomberg:

Claims for Lexis, Westlaw, Bloomberg, or other computerized legal research expenses should be

in the exact amount charged to the firm and appropriately allocated for these research services.

3. Verification

The forms detailing expenses shall be certified by an attorney with authority in each firm attesting to the accuracy of the submissions. Attorneys shall maintain all receipts for all expenses, which shall be available upon request.

4. Shared Costs and Capital Contributions

Each Lead Counsel and other counsel as designated by Lead Counsel shall pay a monetary amount, as directed below, which shall be used to pay reasonable and necessary Common Benefit Expenses on an ongoing basis (the “Shared Costs”). The timing and amount of each contribution will be determined by Lead Counsel and must be paid within 30 days of the date of written request by Lead Counsel. Failure to timely pay capital contributions as may be requested by Lead Counsel throughout this litigation will be grounds for barring counsel from submitting Common Benefit Work or Common Benefit Expenses for reimbursement.

All costs that fall under the following categories and/or other expenses incurred for the benefit of all producer and/or all non-producer plaintiffs as determined by Lead Counsel shall be considered Shared Costs and shall qualify for submission and payment:

- a)** court, filing and service costs related to common issues;
- b)** service costs, including translation fees, for service of the consolidated complaints on all domestic and foreign defendants named in those complaints;
- c)** deposition and court reporter costs for depositions (excluding those that are client-specific);
- d)** document depository creation, operation, staffing, equipment and

administration;

- e)** translation costs related to the above;
- f)** Lead Counsel, Liaison Counsel, or Executive Committee administration matters;
- g)** legal, financial institutional and accountant fees relating to expenses;
- h)** expert witness and consultant fees and expenses for experts whose opinions, advice and testimony would be generic and for the common benefit of all producers or all non-producers covered by a consolidated or master complaint. There shall be no reimbursement for case specific experts, except for liability and causation experts in class or bellwether cases, at the discretion of the Lead Counsel;
- i)** printing, copying, coding, scanning related to the above (out-of-house or extraordinary firm costs);
- j)** research by outside third-party vendors/consultants/attorneys, approved by Lead Counsel;
- k)** investigative services, approved by Lead Counsel; and
- l)** mediator costs.

No client-related costs, save certain costs relating to cases selected in the future as potential bellwether cases or those related to class representatives in a Master or Consolidated Class Complaint, shall be considered Shared Costs, unless exceptional circumstances exist. All Shared Costs must be approved by Lead Counsel prior to payment.

Lead Counsel shall prepare and be responsible for distributing additional reimbursement procedures. Requests for payment shall include sufficient information to permit Lead Counsel and a CPA, if engaged by Lead Counsel, to account properly for expenses and to provide adequate detail to the Court.

5. Held Costs

“Held Costs” are Common Benefit Expenses carried by counsel in this MDL or by Participating Counsel and reimbursed as and when Lead Counsel determines to do so. Held Costs are those that do not fall into the above Shared Cost categories but are incurred for the common benefit of all producers or non-producers covered by a consolidated complaint. No client-specific costs can be considered Held Costs, other than certain Common Benefit Expenses relating to class representative or potential bellwether plaintiffs at the discretion of Lead Counsel.

Held Costs shall be recorded in accordance with the guidelines set forth herein and in additional procedures as prepared by Lead Counsel.

C. Timekeeping and Submission of Time and Expense Records

All time and expenses must be accurately and contemporaneously maintained and tracked. In order to qualify for Common Benefit fees or expenses, MDL Counsel and Participating Counsel shall keep contemporaneous billing records of the time spent in connection with Common Benefit Work on this MDL, indicating with specificity the hours and billing rate, along with a brief note indicating the source of authorization for the activity in question and a brief description of the particular activity. Time and expense submissions shall be made to Lead Counsel on a monthly basis, by deadlines to be set by Lead Counsel, in accordance with the guidelines set forth herein and using monthly reports to be distributed by Lead Counsel so that

Lead Counsel may retain those forms for later submission to this Court if and when necessary. The first submission is due on May 31, 2015, and should include all time and expense through April 30, 2015. Thereafter, all time and expense reports shall be submitted on the last calendar day of each month and shall cover the time period through the end of the preceding month (*i.e.*, the June 30, 2015 submission should include all time and expenses incurred during the month of May 2015).² Generally, only time and expense incurred after the Court's January 22, 2015 Order appointing Plaintiffs' Leadership shall be submitted and considered as potential Common Benefit Work.³

Time and expense entries that are not sufficiently detailed will not be considered for payment of Common Benefit fees. All time for Common Benefit Work by each firm shall be recorded and maintained in tenth-of-an-hour increments. The failure to secure authorization from Lead Counsel to incur Common Benefit time and expenses, or to maintain and timely provide such records or to provide a sufficient description of the activity, will be grounds for denying the recovery of attorneys' fees or expenses in whole or in part. Lead Counsel must maintain all time submissions in a format so that the Court may review any application for fees.

² Although counsel should submit all Common Benefit Expenses incurred in a certain month in the submission made on the last calendar day of the next month, some third party billing and credit card statement schedules may make such expense submission difficult. In such circumstances and in compliance with guidelines developed by Lead Counsel, counsel may submit expenses incurred in the previous two months that – because of circumstances outside the submitting counsel's control – could not have been submitted by the Court-ordered deadline. Any common benefit expenses submitted more than two months in arrears shall not be considered as Common Benefit Expenses absent good cause as determined by Lead Counsel.

³ In their discretion, Lead Counsel may consider time and expense incurred before the Court's January 22, 2015 Order as Common Benefit Work and Common Benefit Expense if the time or expense benefitted all producer and/or all non-producer plaintiffs in a material and direct way. Time and expense incurred in client solicitation, efforts to secure a leadership appointment, pre-appointment attendance at meetings of plaintiffs' counsel, attendance at the JPML hearing, attendance at the initial court hearing and similar tasks shall not be approved.

IV. PLAINTIFFS' COMMON BENEFIT FEE AND EXPENSE FUNDS

A. Establishing the Fee and Expense Funds

Plaintiffs' Liaison Counsel is directed to establish two interest-bearing accounts to receive and disburse funds (the "Funds") as provided in this and subsequent Orders. The first fund shall be designated the "Corn Common Benefit Fee Fund" and the second fund shall be designated the "Corn Common Benefit Expense Fund." These funds will be held subject to the direction of this Court.

By subsequent Order of this Court, the Court will appoint a Special Master who is a qualified certified public accountant (the "Special Master") to serve as Escrow Agent over the Funds and to keep detailed records of all deposits and withdrawals and to prepare tax returns and other tax filings in connection with the Funds, if needed. Such subsequent Order may specify the hourly rates to be charged by the Special Master and for the Special Master's assistants, who shall be utilized where appropriate to control costs. The Special Master shall submit quarterly detailed bills to Plaintiffs' Liaison Counsel and the Court, at the Court's request. Upon approval by the Court, the Special Master's bills shall be paid from the Corn Common Benefit Expense Fund and shall be considered Shared Costs. Plaintiffs' Liaison Counsel shall provide a copy of this Order to the Special Master. The parties may jointly propose a Special Master for the Court's consideration. If the parties are unable to agree on a proposed Special Master, the Court will select a neutral Special Master to serve in this role.

B. Payments into the Corn Common Benefit Fee and Corn Common Benefit Expense Funds

1. General Standards

All counsel and plaintiffs who are subject to this Order who agree to settle, compromise, dismiss, or reduce the amount of a claim or, with or without trial, recover a judgment for

monetary damages or other monetary relief, including compensatory and punitive damages, with respect to Corn claims or a Corn case are subject to an assessment on the Gross Monetary Recovery, as provided herein.

2. Gross Monetary Recovery

Gross Monetary Recovery includes any and all amounts paid by defendants through settlement or pursuant to a judgment. In measuring the “Gross Monetary Recovery,” the parties are to (a) exclude any court costs that are to be paid by the defendant, but include any attorneys’ fee awards under any fee-shifting statute or rule; (b) include any payments to be made by the defendant to a third party; (c) include the present value of any fixed and certain payments to be made in the future; and (d) if applicable, subtract any recovery paid by the plaintiff to a defendant through settlement or pursuant to a judgment for counterclaim(s) asserted in a Corn case by a defendant.

3. Assessment Amounts

In the event that there is a class settlement, recovery or judgment in favor of the class, no assessment pursuant to this Section will be made, either for attorneys’ fees or for expenses, individually from any class member or his/her/its individual attorney as to the portion of any class recovery distributed to that individual class member if the class member remains in the class (i.e., does not opt-out of the class). Instead, all fees and expenses for that class member will come out of the overall class recovery funds provided by defendants, as approved by the Court, or as otherwise Ordered by the Court. The relationship between class counsel fees and costs obtained through any class settlement or judgment and the Common Benefit Fund will be addressed, if necessary, by later order of the court.

The assessments in this Order represent a holdback (*see, e.g., In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256 (E.D.N.Y. 2006)) and shall not be altered absent further order of the Court. The obligations in this Section shall follow the case to its final disposition, including a court having jurisdiction in bankruptcy.

Defendants shall hold back⁴ and set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund the following amounts in this Section.

a) For recoveries by any client whose attorney falls within the definition of MDL Counsel, as defined above, (excluding cases outside the MDL, including cases remanded to state court), the assessments are:

- for each producer client, a total 11% assessment amount (8% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 9% assessment amount (7% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.⁵

⁴ In the event any defendant fails to hold back the assessments required by this Section, plaintiffs' counsel has an equal duty to pay the appropriate holdback amounts to the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund. Under all scenarios (except to the extent the attorney is being paid an hourly rate), the fee assessment shall be paid from the attorney's portion of the recovery and shall not be borne by the client.

⁵ As indicated above, the fee and expense assessment percentages contained in this subsection (a) apply to the Remele/Sieben Group Clients who filed at any time in the past or who file at any time in the future their Syngenta claims in federal court or choose to have their state cases go to federal court (all as described in the Remele Agreement). Defendant shall hold back and set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund the percentages contained in this subsection (a) for the Remele/Sieben Group Clients in these categories. With respect to all other Remele/Sieben Group Clients, the fee and expenses assessment percentages shall be fifty percent (50%) of the amount ordered herein in this subsection (a) (all as described in the Remele Agreement). Defendants shall hold back and set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund 50% of the percentages contained in this subsection (a) for this group of the Remele/Sieben Group Clients.

b) For recoveries by any client (whether the client's case is filed in a federal or state court or is unfiled) whose attorney is either not an MDL Counsel or whose attorney is an MDL Counsel but whose case is outside the MDL, and whose attorney becomes a Participating Attorney by voluntarily executing the Participation Agreement within 45 days of entry of this Order or notice by Lead Counsel if the attorney has at least one Corn case on file in any court as of the entry of this Order, whichever date is later and as defined in Section II(B) above, or within 45 days of the date the attorney's first Corn client is engaged or 120 days of entry of this Order, whichever date is later, the assessments are:

- for each producer client, a total 7% assessment amount (4% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 5.5% assessment amount (3.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

c) For recoveries by any client (whether the client's case is filed in a federal or state court or is unfiled) whose attorney is either not an MDL Counsel or whose attorney is an MDL Counsel but whose case is outside the MDL, whose attorney has at least one Corn case on file in any court, and whose attorney becomes a Participating Attorney by voluntarily executing the Participation Agreement more than 45 days but less than 90 days of entry of this Order, filing of the Participating Counsel's first Corn case in any court or notice by Lead Counsel, as defined in Section II(B) above, whichever date is later, the assessments are:

- for each producer client, a total 9% assessment amount (6% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 7.5% assessment amount (5.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

d) For recoveries by any client (whether the client's case is filed in a federal or state court or is unfiled) whose attorney is either not an MDL Counsel or whose attorney is an MDL Counsel but whose case is outside the MDL, and whose attorney becomes a Participating Attorney by voluntarily executing the Participation Agreement 90 or more days after entry of this Order or notice by Lead Counsel if the attorney has at least one Corn case on file in any court as of the entry of this Order, whichever is later and as defined in Section II(B) above, or more than 45 days after the date the attorney's first Corn client is engaged or more than 120 days after entry of this Order if the attorney does not have at least one Corn case on file in any court as of the entry of this Order, the assessments are:

- for each producer client, a total 13% assessment amount (10% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 11.5% assessment amount (9.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

4. Defendants' Obligations to Pay Common Benefit Assessments

Defendants and their counsel shall not distribute any proceeds, whether by settlement or in satisfaction of a judgment, to any plaintiff's counsel (or directly to a plaintiff) in cases covered by this Order until after: (1) defendants' counsel notifies Plaintiffs' Liaison Counsel in writing of the existence of a settlement or judgment and the name of the individual plaintiff's attorney, and (2) Plaintiffs' Liaison Counsel has advised defendants' counsel of the amount (stated as a percentage of the recovery) of the assessment pursuant to this Order. Plaintiffs' Liaison Counsel shall share this information with Plaintiffs' Lead Counsel, who shall otherwise keep this information confidential.

For cases subject to an assessment, defendants are directed to withhold an assessment

from any and all amounts paid to plaintiffs and their counsel and to pay the assessment directly into the Funds as a credit against the settlement or judgment. No notice or order of dismissal of any plaintiff's claim, subject to this Order, shall be entered unless accompanied by a certificate of plaintiff's and defendants' counsel that the assessment, if applicable, will be withheld and will be deposited into the Funds at the same time the settlement proceeds are paid to settling counsel. If, for any reason, the assessment is not or has not been so withheld, the plaintiff's counsel whose case is being resolved is responsible for paying the assessment into the Funds promptly. The Special Master shall provide Plaintiffs' Lead and Liaison Counsel with written verification that defendants have made full and complete payments to the Funds (or to the Escrow Account) in accordance with this Order and with all procedures established by the Special Master. The full and complete payments and the required verification from the Special Master shall discharge defendants' and defendants' counsel's obligations and responsibilities with respect to the deposited funds, including any disputes between or among plaintiffs and plaintiffs' counsel as to the allocation of such funds.

To preserve the confidentiality of settlement amounts, if such confidentiality is agreed to by the settling parties in their settlement agreement(s), details of any individual settlement agreement, individual settlement amount, and/or amounts deposited into escrow by any particular defendant shall be confidential and shall not be disclosed by the Special Master to anyone other than the Court, upon request or by Order of the Court. Monthly statements from the Special Master shall be provided to Plaintiffs' Lead and Liaison Counsel (and, if the Court so requests, to the Court) showing only the total quarterly deposits from all defendants, any disbursements, interest earned, and financial institution charges, if any, and the current balance.

5. Reporting Obligations

Upon learning of a Corn case being filed in any state court or any federal court outside of this MDL, Defendants' Liaison Counsel shall notify Plaintiffs' Liaison Counsel of such filing within 60 days of service of the complaint/petition upon any defendant. Such notice shall include the case name, the name, firm name, and firm address of the plaintiff's attorney(s) and the date of such filing or, if the plaintiff's attorney is already a Participating Counsel, just the case name, the name of the plaintiff's attorney and the date of such filing.

Plaintiffs' Liaison Counsel shall provide Defendants' Liaison Counsel, the Special Master, and the Court, if requested, with a list of cases, if filed, and counsel who are subject to signed Participation Agreements. This same list shall be made available to all plaintiffs' counsel with cases in this MDL, as well as any other plaintiffs' counsel who signs the Participation Agreement, upon request. In the event there is a dispute as to whether a case should be on the list, Plaintiffs' Lead Counsel shall seek to resolve the matter with the particular plaintiff's counsel informally, and if that is unsuccessful, upon motion to the Court. The parties' reporting obligations shall continue quarterly until the conclusion of this MDL.

V. DISTRIBUTIONS

A. Court Approval

The amounts deposited into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund shall be available for distribution to MDL Counsel and Participating Counsel who have performed professional services or incurred expenses for the Common Benefit of all producer and/or all non-producer plaintiffs as authorized by Lead Counsel. No amounts will be disbursed without review and approval by the Court, or such other mechanism as the Court may order. This Court retains jurisdiction over any common benefit award or distribution.

To the extent the funds collected from the holdbacks exceed the amounts ultimately

approved by the Court for distribution to attorneys performing Common Benefit Work, that excess shall be refunded to those who have paid assessments on a *pro rata* basis.

B. Application for Distribution

Each MDL Counsel or Participating Counsel performing Common Benefit Work has the right to present a claim(s) for compensation and/or reimbursement through a procedure directed by Lead Counsel prior to any distribution approved by this Court. Counsel who are not MDL Counsel or Participating Counsel shall not be eligible to receive common benefit payments for any work performed or expenses incurred.

Plaintiffs' Lead Counsel shall make recommendations to this Court for distributions to MDL Counsel and Participating Counsel performing Common Benefit Work and/or incurred Common Benefit Expenses. In the event that there is not unanimous agreement among Plaintiffs' Lead Counsel, each Lead Counsel shall only have one vote and each vote shall bear the same weight. A decision about the recommendation to the Court by the Lead Counsel need only be made by a majority of votes. Lead Counsel shall determine on their own the most fair and efficient manner by which to evaluate all of the time and expense submissions in making its recommendation to this Court. This Court will give due consideration to the recommendation of Lead Counsel in making its ruling on the award of common benefit fees and common benefit cost reimbursement.

IT IS SO ORDERED.

Dated this ____ day of _____, 2015 at Kansas City, Kansas.

JOHN W. LUNGSTRUM
UNITED STATES DISTRICT JUDGE

EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

In Re: Syngenta AG MIR162	)	
Corn Litigation	)	
	)	MDL No. 2591
	)	
This document relates to:	)	Case No. 2:14-md-2591-JWL-JPO
All Cases	)	

**EXHIBIT A TO CMO NO. _____
(Common Benefit Participation Agreement)**

THIS COMMON BENEFIT PARTICIPATION AGREEMENT is made this ____ day of _____, 201__, by and between the Plaintiffs’ Co-Lead Counsel, as appointed by the United States District Court for the District of Kansas in MDL 2591, and _____ **[Name of the Law Firm Executing the Agreement]** (the “Participating Counsel”), on behalf of all of their clients having claims for claims relating to or arising from genetically modified Syngenta corn, the commercialization of Agrisure Viptera or Agrisure Duracade or of any corn including genetically modified traits MIR162 or Event 5307 (“Corn”), or if Participating Counsel is also an MDL Counsel, on behalf of his clients with cases outside the MDL, including cases that are remanded to state court.

WHEREAS, the United States District Court for District of Kansas has appointed Don Downing, William Chaney, Scott Powell and Patrick Stueve to serve as Co-Lead Counsel (“Lead Counsel”) and Patrick Stueve to serve as Liaison Counsel (“Liaison Counsel”) to facilitate the conduct of pretrial proceedings in the Corn actions; and

WHEREAS, the Lead Counsel, in association with other attorneys working for the common benefit of plaintiffs, have developed or are in the process of developing work product

that will be valuable in all proceedings and benefit all producer and/or all non-producer plaintiffs alleging injury or damages caused by this Corn (“Common Benefit Work Product”); and

WHEREAS, Participating Counsel is desirous of acquiring the Common Benefit Work Product for the benefit of his or her client(s).

NOW THEREFORE, in consideration of the covenants and promises contained herein, and intending to be legally bound hereby, the parties agree as follows:

I. SCOPE OF AGREEMENT

A. Purpose

This Participation Agreement (the “Agreement”) is a private cooperative agreement between plaintiffs’ attorneys to share Common Benefit Work Product pursuant to the Court’s Order Establishing Protocols for Common Benefit Work and Expenses and Establishing the Common Benefit Fee and Expense Funds (the “Order”), which is incorporated herein. By signing this Participation Agreement, the Participating Counsel who executes this Agreement is entitled to receive and use Common Benefit Work Product, regardless of the venue in which Participating Counsel’s cases are pending.

B. Rights and Obligations of Participating Counsel

Participating Counsel shall be provided access to the Common Benefit Work Product, including access to the document depository. Participating Counsel agrees that all Corn cases and/or claims in which Participating Counsel has any fee interest, including unfiled cases, tolled cases, and/or cases filed in any state or federal court, are all subject to the terms of this Participation Agreement.

Participating Counsel shall produce a list that correctly sets forth the name of each client represented by them and/or in which they have an interest in the attorney fee, regardless of what that interest is, who has filed a Corn civil action. Such list shall include the court and docket

number of each such case. Participating Counsel shall also produce a list that contains the name of each client represented by them and/or in which they have an interest in the attorney fee, regardless of what that interest is, who has not yet filed a civil action. Participating Counsel shall supplement the lists on a quarterly basis and provide the lists to Plaintiffs' Liaison Counsel via electronic mail at Syngenta@stuevesiegel.com. The initial list shall be provided within 14 calendar days of signing this Agreement and must be supplemented every 90 days thereafter.

II. AGREEMENT TO PAY AN ASSESSMENT ON GROSS RECOVERY

Subject to the terms of this Agreement and the terms of the Order, Participating Counsel who agrees to settle, compromise, dismiss, or reduce the amount of a claim, or with or without trial, recover a judgment for monetary damages or other monetary relief, including compensatory and punitive damages, for any Corn claims on behalf of any client are subject to an assessment of the Gross Monetary Recovery, as provided herein, regardless of whether Participating Counsel has actually accessed or used Common Benefit Work prior to any resolution.

A. Gross Monetary Recovery Defined

"Gross Monetary Recovery" includes any and all amounts paid to plaintiffs' and/or their counsel by defendant(s) through a settlement or pursuant to a judgment. In measuring the Gross Monetary Recovery, the parties are to (a) exclude court costs that are to be paid by the defendant, but include any attorneys' fee awards under any fee-shifting statute or rule; (b) include any payments to be made by the defendant to a third party; (c) include the present value of any fixed and certain payments to be made in the future; and (d) if applicable, subtract any recovery paid by the plaintiff to a defendant through settlement or pursuant to a judgment for counterclaim(s) asserted in a Corn case by a defendant.

B. Assessment Amount

This assessment herein represents a holdback (*see, e.g., In re Zyprexa Prods. Liab. Litig.*,

467 F. Supp. 2d 256 (E.D.N.Y. 2006)). The obligations in this Section shall follow all cases to their final disposition, including a court having jurisdiction in bankruptcy. The following assessment shall be set aside for placement into the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund.

For recoveries by Your clients who never had a case pending in the MDL or whose federal case was remanded to state court (whether the client's case is first filed in a federal or state court or is unfiled) if You are voluntarily executing the Participation Agreement within 45 days of entry of the Order or notice from Lead Counsel if you have at least one Corn case on file in any court as of the entry of this Order, whichever date is later and as defined in the Court's Order, Sections II(B), IV(B)(3)(b), or within 45 days of the date Your first Corn client is engaged or 120 days of entry of the Court's Order, whichever date is later, the assessments are:

- for each producer client, a total 7% assessment amount (4% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 5.5% assessment amount (3.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

For recoveries by Your clients who never had a case pending in the MDL or whose federal case was remanded to state court (whether the client's case is first filed in a federal or state court or is unfiled) if you have at least one Corn case on file in any court as of the entry of the Court's Order and You are voluntarily executing the Participation Agreement more than 45 days but less than 90 days of entry of the Order or notice from Lead Counsel, as detailed in the Court's Order, Sections II(B), IV(B)(3)(c), whichever date is later, the assessments are:

- for each producer client, a total 9% assessment amount (6% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 7.5% assessment amount (5.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

For recoveries by Your clients who never had a case pending in the MDL or whose federal case was remanded to state court (whether the client's case is first filed in a federal or state court or is unfiled) if You are voluntarily executing the Participation Agreement 90 or more days after entry of the Order or notice from Lead Counsel if you have at least one Corn case on file in any court as of the entry of the Court's Order, whichever is later and as detailed in the Court's Order, Sections II(B), IV(B)(3)(d), or more than 45 days after the date Your first Corn client is engaged or more than 120 days after entry of the Court's Order if You do not have at least one Corn case on file in any court as of the entry of this Order, the assessments are:

- for each producer client, a total 13% assessment amount (10% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 11.5% assessment amount (9.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

In the event any defendant fails to hold back the assessments required by this Section, it is Your duty to pay the appropriate holdback amounts to the Corn Common Benefit Fee Fund and the Corn Common Benefit Expense Fund. Under all scenarios (except to the extent You are being paid an hourly rate), the fee assessment shall be paid from Your portion of the recovery and shall not be borne by Your client.

C. Covered Cases

By signing this Agreement, the Participating Counsel agrees that the assessment percentages set forth above shall apply to all of his or her law firm's cases that never were pending in the MDL or that were pending but were remanded to state court, including un-filed cases, tolled cases, federal cases not transferred to the MDL, and/or cases filed in any state court in which they have a fee interest, regardless of the size of that fee interest, and that the assessment percentages for MDL Counsel set forth in the Court's Order will apply to any cases

that have been, are or will become part of this MDL, except those cases that are remanded to state court. To the extent there are one or more MDL global settlements entered into or approved by Plaintiffs' Co-Lead Counsel that include assessment percentages, the assessment percentages in the settlement will control for any client who elects to participate in the settlement.

D. Attorneys' Fee Lien

With respect to each client represented in connection with Corn related claims that are filed or pending in any federal or state court, are un-filed, or are subject to a tolling agreement, Participating Counsel agrees to have defendants deposit or cause to be deposited in the Corn Common Benefit Fee and Expense Funds established by the District Court in the MDL a percentage of the Gross Monetary Recovery recovered by each such client that is equal to the assessment amount. In the event defendants do not deposit the assessed percentage into the Funds, Participating Counsel shall deposit or cause to be deposited in the Corn Common Benefit Fee and Expense Funds a percentage of the Gross Monetary Recovery recovered by each such client that is equal to the assessment amount. Participating Counsel, on behalf of themselves, their affiliated counsel, and their clients, hereby grant and convey to Plaintiffs' Lead Counsel a lien upon and/or a security interest in any fee (a) generated as a result of any recovery by any client who they represent in connection with any Corn-related claims and (b) they have any interest in, to the full extent permitted by law, in order to secure payment in accordance with the provisions of this Agreement. Participating Counsel will undertake all actions and execute all documents that are reasonably necessary to effectuate and/or perfect this lien and/or security interest.

III. COMMON BENEFIT WORK AND EXPENSES

A. Common Benefit Expenses Eligible for Reimbursement

In order to be eligible for reimbursement as Common Benefit Expenses, said expenses

must be: (a) for the common benefit of all producer and/or non-producer plaintiffs; (b) appropriately authorized by Lead Counsel in writing; (c) timely submitted using the monthly reports created by Lead Counsel; (d) reasonable; (e) verified by a partner or shareholder in the submitting firm; and (f) in compliance with the Order. Attorneys shall keep all receipts for all expenses, which shall be made available upon request. Examples of authorized and unauthorized expenses are listed in the Order.

B. Common Benefit Work Eligible for Reimbursement

In order to be eligible for reimbursement as Common Benefit Work, time expended must be: (a) for the common benefit of all producer and/or non-producer plaintiffs; (b) appropriately authorized by Lead Counsel in writing; (c) timely submitted using the monthly reports created by Lead Counsel; (d) reasonable; (e) verified by a partner or shareholder in the submitting firm; and (f) in compliance with the Order. Moreover, if counsel is a member of Plaintiffs' Executive Committee or other firm authorized by Lead Counsel to perform Common Benefit Work and fails to timely submit capital contributions as may be requested by Lead Counsel throughout this litigation, such counsel and members of his/her firm shall not be allowed to submit common benefit time or expenses for reimbursement.

"Common Benefit Work" means services performed for the benefit of all producer and/or all non-producer plaintiffs ("Common Benefit") and specifically authorized by Lead Counsel. Unless specifically and explicitly authorized in writing, no time spent on developing or processing individual issues in any case for an individual client, no time spent on the solicitation of potential clients and no time spent on any unauthorized work, will be considered or should be submitted. No client-related time, save certain time relating to cases which may be selected in the future as bellwether cases or time related to class representatives in a Master or Consolidated

Class Complaint, shall be considered Common Benefit Work. Examples of authorized and unauthorized work are listed in the Order.

C. Counsel to Whom Common Benefit Work May Be Shared

Without the express written consent of each of the Co-Lead Counsel, MDL Counsel and Participating Counsel are prohibited from sharing Common Benefit Work Product with counsel who do not execute a Participation Agreement. As described in the Remele Agreement, the Remele/Sieben Group and Remele/Sieben Group Co-Counsel will not disclose such work product to other plaintiff counsel, unless such other counsel's clients are subject to payment of a Common Benefit Assessment to the Federal MDL Funds; provided, the Remele/Sieben Group and Remele/Sieben Group Co-Counsel may use such Syngenta work product when taking oral depositions or during hearings or trials, but may not provide or authorize others to provide any deposition or trial transcript to any counsel that is not subject to payment of a Common Benefit Assessment to the Federal MDL Funds.

D. Submission of Time and Expense Records

All time must be accurately and contemporaneously maintained. Participating Counsel shall keep a daily record of time spent in connection with Common Benefit Work on this litigation, indicating with specificity the hours, location, and particular activity. Time entries that are not sufficiently detailed may not be considered for common benefit payments and time submissions may be audited by a CPA. All common benefit time shall be maintained in tenth-of-an-hour increments.

Participating Counsel must follow the guidelines set forth in the Court's Order and in other written guidelines as established by Lead Counsel. All time and expense submissions must use the forms provided by Liaison Counsel and must be submitted electronically by the end of

each calendar month, beginning on May 31, 2015. Failure to provide submissions in a timely manner shall result in a waiver of attorneys' fees and expenses claimed for the time period that is the subject of the submission. Failure to submit time and expense records in the electronic format on forms approved by Plaintiffs' Lead Counsel may also result in the waiver of attorneys' fees and expenses. Time spent compiling the data for the time and expense submissions is not considered common benefit time.

The undersigned Participating Counsel understands, acknowledges and agrees that there is no guaranty that all of the time submitted by any counsel or law firm will be compensated and that the hourly rate for the work that is compensated is not guaranteed (*e.g.*, that Lead Counsel may award different hourly rates for different work and for the same work performed by different attorneys or law firms). The undersigned also understands, acknowledges, and agrees that all hours are not going to be viewed equally and awarded at the same rate (*e.g.*, document review time and deposition/trial time may not be treated and awarded at the same rate).

E. Distribution of Fees

1. No Individual Right to the Funds: No party or attorney has any individual right to any common benefit funds except to the extent directed by order of the MDL Court. Common benefit funds will not constitute the property of any party or attorney or be subject to garnishment or attachment for the debts of any party or attorney except when and as directed by court order.

2. Court Approval: The amounts deposited in the Corn Common Benefit Fee Fund shall be available for distribution to attorneys who have performed professional services or incurred expenses for the common benefit. The MDL Court retains jurisdiction over any common benefit award. The undersigned Participating Counsel, on behalf of themselves,

their law firm, their affiliated counsel, and their clients, hereby consents to the jurisdiction of the MDL Court in connection with any common benefit award.

[Participation Agreement continues on the next page]

I _____ [name of attorney] hereby represent that I have the authority to execute this Agreement on behalf of my law firm, _____ [insert name of law firm], and on behalf of all of my Corn clients. I hereby represent that I have the authority to bind my law firm and all of my Corn clients to the terms of this Participation Agreement.

My law firm's first Corn case was filed in any state or federal court on _____, 201____. I hereby certify that my law firm DID or DID NOT [please circle] have a Corn case on file in any state or federal court as of _____, 2015, the date the MDL Court entered the Order.

PLEASE INITIAL ONLY ONE OF THE FOLLOWING:

_____ [please initial] I hereby certify that I am executing this Participation Agreement within 45 days of entry or notice as defined in the Court's Order, Sections II(B), IV(B)(3)(b), if I had at least one Corn case on file in any court as of the entry of the Court's Order, or within the 45 or 120 days as defined in the Court's Order, Sections II(B), IV(B)(3)(b), if I did not have at least one Corn case on file in any court as of the entry of the Court's Order, and the assessments on all recoveries by my clients (whether the client's case is filed in a federal or state court or is unfiled) are:

- for each producer client, a total 7% assessment amount (4% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 5.5% assessment amount (3.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

_____ [please initial] I hereby certify that I had at least one Corn case on file in any court as of the entry of the Court's Order and I am executing this Participation Agreement more than 45 days and less than 90 days after entry or notice as defined in the Court's Order, Sections

II(B), IV(B)(3)(c), and the assessments on all recoveries by my clients (whether the client's case is filed in a federal or state court or is unfiled) are:

- for each producer client, a total 9% assessment amount (6% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 7.5% assessment amount (5.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

_____ [please initial] I hereby certify that I had at least one Corn case on file in any court as of the entry of the Court's Order and I am executing this Participation Agreement 90 or more days after entry or notice as detailed in the Court's Order, Sections II(B), IV(B)(3)(d), or I did not have at least one Corn case on file in any court as of the entry of the Court's Order and I am executing this Participation Agreement more than 45 or 120 days as defined in the Court's Order, Sections II(B), IV(B)(3)(b), and the assessments on all recoveries by my clients (whether the client's case is filed in a federal or state court or is unfiled) are:

- for each producer client, a total 13% assessment amount (10% for attorneys' fees and 3% for expenses) of the Gross Monetary Recovery; or
- for each non-producer client, a total 11.5% assessment amount (9.5% for attorneys' fees and 2% for expenses) of the Gross Monetary Recovery.

I further agree that the fee assessment portion will be deducted from my attorney's fee and not from my client's portion of the recovery (except to the extent I am being paid an hourly rate).

These assessments shall apply to all Corn claims against any defendant by persons or entities represented by my law firm, whether such claims are filed, unfiled or tolled, that have not been asserted in a filed state Corn case.

[Continued on the next page]

Dated: _____

Law Firm Name:

Attorney's Name:

[Signatures continue on the next page]

Dated: _____

Patrick J. Stueve
CO-LEAD COUNSEL AND LIAISON COUNSEL FOR
PLAINTIFFS

Dated: _____

Don M. Downing
CO-LEAD COUNSEL FOR PLAINTIFFS AND
INTERIM RULE 23 CLASS COUNSEL

Dated: _____

William B. Chaney
CO-LEAD COUNSEL FOR PLAINTIFFS

Dated: _____

Scott Powell
CO-LEAD COUNSEL FOR PLAINTIFFS

Respectfully Submitted by:

/s/ Patrick J. Stueve
Patrick J. Stueve—KS Bar #13847
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CO-LEAD COUNSEL FOR PLAINTIFFS

EXHIBIT 84

**FIRST ADDENDUM TO AMENDED AND RESTATED
JOINT PROSECUTION AGREEMENT
SYNGENTA LITIGATION**

This First Addendum to Amended and Restated Joint Prosecution Agreement (this “First Addendum”) is by and between the Parties to that certain Amended and Restated Joint Prosecution Agreement dated June 18, 2015 (the “Agreement”) and Additional Minnesota Counsel (as defined herein) (collectively, the “Addendum Parties”). The purpose of this First Addendum is to address and govern the Addendum Parties’ cooperative work and compensation in connection with the prosecution of certain proceedings in the Syngenta Litigation, and to allow Additional Minnesota Counsel to join in the terms of the Agreement.

RECITALS:

WHEREAS, the Parties include the Federal MDL Co-Leads and those members of the MN MDL Leadership who were signatories to the Agreement;

WHEREAS, the Parties entered into the Agreement for the purpose of creating a joint prosecution agreement to control the Parties’ work together in connection with the prosecution of the Syngenta Litigation;

WHEREAS, Footnote 1 of the Agreement contemplates that additional law firms serving in leadership with the Remele/Sieben Group will execute the Agreement;

WHEREAS, Section 2(g)(iv) of the Agreement contemplates that the Parties “will cooperate and coordinate in good faith in connection with the certification of a class of Producers and Non-Producers from Minnesota”;

WHEREAS, the MN MDL Court by order dated August 5, 2015, appointed William R. Sieben and Daniel E. Gustafson as interim class counsel in the MN MDL;

WHEREAS, the MN MDL Court further appointed Tyler Hudson, Will Kemp and Paul Byrd as members of the MN MDL Leadership.

WHEREAS, William R. Sieben and his law firm, Schwebel, Goetz & Sieben PA, are Parties to the Agreement;

WHEREAS, Daniel E. Gustafson and his law firm, Gustafson Gluek PLLC, (collectively, “Gustafson”) have not joined into the Agreement;

WHEREAS, Tyler Hudson and his law firm, Wagstaff & Cartmell, LLP (collectively, “Hudson”) have not joined the Agreement;

WHEREAS, Will Kemp and his law firm, Kemp, Jones & Coulthard, LLP (collectively, “Kemp”) have not joined the Agreement;

WHEREAS, Paul Byrd and his law firm, Paul Byrd Law Firm PLLC (collectively, “Byrd”) have not joined the Agreement;

WHEREAS, the Parties and Additional MN Counsel desire to share their respective common benefit work, cooperate and coordinate their prosecution of certain claims, and create a framework for compensation for such cooperative activities;

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Addendum Parties agree as follows:

1. Definitions

a. Unless otherwise defined in this First Addendum, all capitalized terms shall carry the meaning ascribed to such term in the Agreement.

b. “Additional Minnesota Counsel” means Gustafson, Hudson, Kemp, and Byrd and any other counsel appointed as class counsel by the MN Court and/or otherwise representing the plaintiffs in a MN MDL Class Action and/or individual actions in the MN MDL who have not executed the Agreement, but who have executed this First Addendum.

c. “Federal MDL Class Action” means any action pursued in the Federal MDL Court on behalf of a class of Producers or Non-Producers whether or not such class has been certified.

d. “MN MDL Class Action” means any action pursued in the MN MDL Court on behalf of a class of Producers or Non-Producers whether or not such class has been certified.

2. Rights and Obligations

a. MN MDL Class Actions.

- i. Use of Syngenta Work Product. Members of the Remele/Sieben Group may use Syngenta Work Product in the prosecution of any MN MDL Class Action subject to the same restrictions upon use of Syngenta Work Product set forth in Section 2(d)(i) of the Agreement; provided however, that such Syngenta Work Product may be disclosed to Additional Minnesota Counsel. Upon written request and with reasonable notice from Additional Minnesota Counsel, the Federal MDL Co-Leads will provide Additional Minnesota Counsel reasonable and continuing access to their Syngenta Work Product. Additional Minnesota Counsel will not disclose such work product, whether obtained from the Federal Co-Leads or members of the Remele/Sieben Group, to other plaintiffs’ counsel, unless such other counsel’s clients are subject to payment of a Common Benefit Assessment to the Federal MDL Funds or are themselves Additional Minnesota Counsel; provided, Additional Minnesota Counsel

may use such Syngenta work product when taking oral depositions or during hearings or trials, but may not provide or authorize others to provide any deposition or trial transcript to any counsel that is not subject to payment of a Common Benefit Assessment to the Federal MDL Funds or is otherwise Additional Minnesota Counsel.

- ii. Minnesota class motion. The Remele/Sieben Group and/or some or all of the Additional Minnesota Counsel shall have the right and obligation to represent the class of Minnesota producers in the MN MDL and shall not seek to represent, in litigation or settlement, any class including producers from any other state without the consent of the Federal MDL Co-Leads. The Federal MDL Co-Leads shall not seek certification of a Minnesota producer class in the Federal MDL unless and until a Minnesota producer class has been denied by the MN MDL Court. Nothing in this paragraph shall prevent the Federal MDL Co-Leads from seeking certification of a nationwide class of producers asserting claims under the Lanham Act; provided, however, that if the Federal MDL Co-Leads intend to seek certification of such a nationwide class, they shall confer with the Remele/Sieben Group and Additional Minnesota Counsel prior to seeking certification and, if the Remele/Sieben Group and Additional Minnesota Counsel so elect, the Federal MDL Co-Leads shall exclude Minnesota producers from such nationwide class prior to certification.

The Remele/Sieben Group, the Addendum Parties and the Federal MDL Co-Leads agree to meet and confer in good faith regarding how best to address any class of Minnesota non-producer plaintiffs.

- iii. Participation of Federal MDL Co-Leads. The Remele/Sieben Group and/or Additional Minnesota Counsel will consider in good faith, whether, at their sole discretion, to request in writing that the Federal MDL Co-Leads assist with and participate in the prosecution of any MN MDL Class Action. Upon such request, subject to reasonable restrictions based on availability and other commitments, the Federal MDL Co-Leads will provide such assistance and/or participation as is requested. To the extent that the Federal MDL Co-Leads are requested in writing to participate in the prosecution of any MN MDL Class Action, the Federal MDL Co-Leads agree to track the time and expenses incurred in such representation and to submit such information regarding time and expenses as is required for submission of any fee and expense reimbursement request as may be required by the MN MDL Court. Nothing herein shall constitute a requirement that the Remele/Sieben Group and/or Additional Minnesota Counsel seek the assistance or participation of the Federal MDL Co-Leads in the prosecution of any MN MDL Class Action.
- iv. Flat Fee Compensation to the Federal MDL Co-Leads. In consideration for access to Syngenta Work Product and the availability of the Federal

MDL Co-Leads to participate in MN MDL Class Actions, the Addendum Parties agree that the Federal MDL Co-Leads shall be entitled to a flat fee equal 33 1/3% of the attorneys' fees awarded in all MN MDL Class Actions (the "Flat Fee"). The Flat Fee shall be earned upon the granting of access to Syngenta Work Product without regard to whether or not the Federal MDL Co-Leads are asked to participate in the prosecution of any MN MDL Class Action. The Remele/Sieben Group acknowledge that they have been granted access to and have in fact already received Syngenta Work Product. Additional Minnesota Counsel have not received Syngenta Work Product but acknowledge that they will be granted access to it after signing this First Addendum and that they intend to access it.

- v. Additional Compensation for Federal MDL Co-Lead Participation. In addition to the Flat Fee, and as additional consideration for their participation or assistance in any MN MDL Class Action, the Federal MDL Co-Leads (or, to the extent asked to participate, any members of the Federal MDL Executive Committee) shall be entitled to submit a request for fees and/or reimbursement for expenses incurred to the MN MDL Court from any recovery, whether by judgment or settlement, in any MN MDL Class Action in which such counsel participated or assisted for any work requested by the Remele/Sieben Group and/or Additional Minnesota Counsel. Except for the Flat Fee, in no event shall the Federal MDL Co-Leads seek, nor shall any such person be entitled to, fees from any MN MDL Class Action solely related to use of their Syngenta Work Product in the prosecution of a MN Class Action.

b. Federal MDL Class Actions.

- i. Use of Syngenta Work Product. The Federal MDL Co-Leads may use Syngenta Work Product in the prosecution of any Federal MDL Class Action subject to the same restrictions upon such use as set forth in Section 2(d)(ii) of the Agreement; provided however, that such Syngenta Work Product may be disclosed to Additional Minnesota Counsel assisting with or otherwise participating in such the prosecution of such Federal MDL Class Action. Upon a written request and with reasonable notice from the Federal MDL Co-Leads, Additional Minnesota Counsel will provide the Federal MDL Co-Leads and members of the Federal MDL Executive Committee reasonable and continuing access to its Syngenta Work Product subject to those same restrictions set forth in Section 2(d)(ii) of the Agreement.
- ii. Participation of the Remele/Sieben Group and/or Additional Minnesota Counsel in Federal MDL Class Actions. The Federal MDL Co-Leads will consider in good faith whether, at their sole discretion, to request that members of the Remele/Sieben Group or Additional Minnesota Counsel assist with and participate in the prosecution of any Federal Class Action.

Upon such request, any such member of the Remele/Sieben Group or Additional Minnesota Counsel may agree to, but is not obligated to, assist or participate in its sole discretion. To the extent that any member of the Remele/Sieben Group or Additional Minnesota Counsel participates in the prosecution of any Federal MDL Class Action, such counsel agrees to track the time and expenses incurred in such representation and to submit such information regarding time and expenses as is required for submission of any fee and expense reimbursement request as may be required by the Federal MDL Court. Nothing herein shall constitute a requirement that the Federal MDL Co-Leads seek the assistance or participation of any member of the Remele/Sieben Group or Additional Minnesota Counsel in the prosecution of any Federal MDL Class Action, but only that Federal MDL Co-Leads shall consider seeking the participation or assistance of such counsel in good faith.

- iii. Compensation to the Remele/Sieben Group or Additional Minnesota Counsel. As sole consideration for their participation or assistance in any Federal MDL Class Action, the members of the Remele/Sieben Group and or Additional Minnesota Counsel shall be entitled to submit a request for fees to the Federal MDL Court from any recovery, whether by judgment or settlement, in the Federal MDL Class Action in which such counsel participated or assisted for any work requested in writing by the Federal MDL Co-Leads. In no event shall the Remele/Sieben Group or any Additional Minnesota Counsel seek, nor shall any such person be entitled to, fees from any Federal MDL Class Action solely related to use of their Syngenta Work Product in the prosecution of a Federal MDL Class Action.

c. Excluded Client List and Excluded Clients' FSA 578 Forms.

- i. Additional Minnesota Counsel will provide to Federal MDL Co-Leads (1) a list in Excel format of all individual Additional Minnesota Counsel who have cases filed in state court, including their names and the style of their cases, (its "Excluded Client List") and (2) copies in PDF format of their FSA 578 forms for calendar years 2013-15 and each future calendar year after 2015 through the year of the first federal court trial, as they become available (its "Excluded Clients' FSA 578 Forms"). To the extent that any Additional Minnesota Counsel Client has filed a case seeking class treatment, only the Additional Minnesota Counsel Clients serving as individual named class representatives in such case, and not the proposed putative class members, may be included on an Excluded Client List.
- ii. Starting April 15, 2016, on a rolling basis, Additional Minnesota Counsel will provide its Excluded Client List(s) to MDL Co-Lead Counsel along with its

Excluded Clients' FSA 578 Forms. This process will be completed by May 30, 2016.

- iii. No Additional Minnesota Counsel will oppose class certification in the Federal MDL and the Minnesota MDL if such certification excludes from its class definition(s) the Excluded Clients.

3. Miscellaneous.

- a. All MN MDL Class Counsel and members of the MN MDL Leadership to be Addendum Parties. It is the intent of the Addendum Parties that all counsel acting on behalf of the plaintiffs in any MN MDL Class Action as well as all members of the MN MDL Leadership be parties to this First Addendum. To the extent that the MN MDL Court appoints class counsel or members of the MN MDL Leadership who has not previously executed this First Addendum, the Remele/Sieben Group and Additional Minnesota Counsel will use their best efforts to have any such counsel execute this First Addendum as a condition precedent to being provided access to Syngenta Work Product.
- b. Additional Minnesota Counsel Individual Cases. To the extent that class certification of a MN MDL Class Action is denied and/or Additional Minnesota Counsel have been, are engaged to or otherwise decide to pursue cases for Producers or Non-Producers in one or more individual actions, Additional Minnesota Counsel hereby join in the Agreement and are subject to all of the same rights and obligations of the Remele/Sieben Group including, but not limited to, the assessments on individual cases set forth therein.
- c. ADR. The Addendum Parties agree that any dispute between one or more of the Federal MDL Co-Leads, on the one hand, and one or more of the Remele/Sieben Group and/or Additional Minnesota Counsel, on the other, arising out of the construction or enforcement of a Common Benefit Assessment Order will be resolved by the Federal MDL Court and any such dispute arising out of the construction or enforcement of any common benefit assessment order issued by the MN MDL Court will be resolved by the MN MDL Court. The Addendum Parties agree that any dispute between one or more of the Federal MDL Co-Leads, on the one hand, and one or more of the Remele/Sieben Group and/or Additional Minnesota Counsel, on the other, arising out of this First Addendum, including, without limitation, the threshold determination regarding the applicability of this ADR provision, will be resolved through binding arbitration in the same manner as set forth in Section 3(a)(ii) of the Agreement.
- d. Amendment. The Addendum Parties may by mutual agreement amend or supplement this First Addendum at any time and from time to time; provided, they must do so in writing, and such writing must be signed by the Addendum Parties.

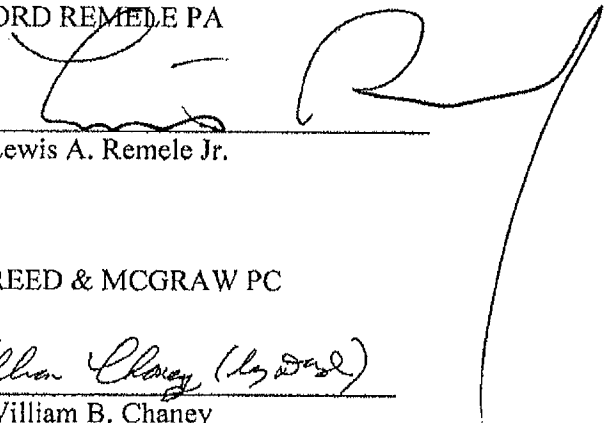
- e. No Other Modification. Except as expressly modified by this First Addendum, all terms, conditions and provision of the Agreement shall remain in full force and effect.
- f. Confidentiality. The Addendum Parties will, at all times, in all ways, and for all purposes, treat the content of this First Addendum as proprietary and confidential; and, absent each Addendum Party's consent, no Addendum Party will disclose the existence or content of this First Addendum or the Agreement to any person or entity other than (1) the Federal MDL Co-Leads and members of the Federal MDL Executive Committee, (2) the members of the Remele/Sieben Group, its clients or its co-counsel, (3) any Additional Minnesota Counsel, its clients or its co-counsel or (4) under seal to the Federal MDL Court and the MN MDL Court. The Federal Co-Leads and the Remele/Sieben Group consent to the disclosure of the Agreement to the Additional Minnesota Counsel subject to the same confidentiality terms set forth in this paragraph regarding the First Addendum.
- g. The Addendum Parties agree that this First Addendum will be construed without regard to any presumption or rule requiring construction or interpretation against the Party drafting same.
- h. This First Addendum together with those sections of the Agreement referenced and incorporated herein embodies the entire agreement between the Addendum Parties in connection with the subject matter of this Addendum.
- i. This First Addendum will be effective when signed by the Addendum Parties. This Addendum may be executed in one or more counterparts, each of which will be deemed an original and all of which will constitute one and the same document. The electronic exchange of executed copies of the signature pages of this Addendum will constitute effective execution of this First Addendum. Signatures of the Addendum Parties transmitted by electronic mail in .pdf form will be deemed to be their original signatures for all purposes.
- j. The Federal MDL Co-Leads whose signatures appear below agree that the rights, obligations, terms, and conditions of this First Addendum shall apply to them individually to the same extent they apply to the Federal MDL Co-Leads and regardless of any future disassociation from their present law firms and/or future association with a different law firm. The Federal MDL Co-Leads whose signatures appear below represent and warrant to the members of the Remele/Sieben Group and the Additional Minnesota Counsel that they have the authority to, and do in fact, execute this First Addendum as Co-Lead Counsel in the Federal MDL and on behalf of themselves and their firms.
- k. The members of the Remele/Sieben Group and Additional Minnesota Counsel whose signatures appear below agree that the rights, obligations, terms, and conditions of this First Addendum shall apply to them individually to the same extent they apply to the Remele/Sieben Group and/or their respective firms and

regardless of any future disassociation from their present law firms and/or future association with a different law firm. The members of the Remele/Sieben Group and the Additional Minnesota Counsel whose signatures appear below represent and warrant to the Federal MDL Co-Leads that they have the authority to, and do in fact, execute this First Addendum on behalf of themselves, their law firms, their respective clients and their respective co-counsel and, in the case of Lewis A. Remele, Jr. and Francisco Guerra, IV, as Co-Lead Counsel in the MN MDL.

(Signatures Appear on the Following Three Pages)

Signed as of this ____ day of January, 2016.

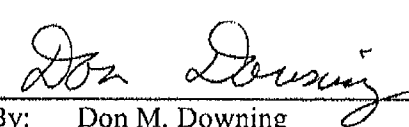
BASSFORD REMELE PA


By: Lewis A. Remele Jr.

GRAY REED & MCGRAW PC


By: William B. Chaney

GRAY, RITTER & GRAHAM PC


By: Don M. Downing

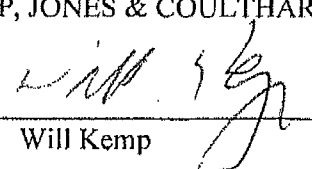
GUSTAFSON GLUEK PLLC

By: Daniel E. Gustafson

HARE WYNN NEWELL & NEWTON


By: Scott A. Powell

KEMP, JONES & COULTHARD, LLP

 1/21/16
By: Will Kemp

Signed as of this ____ day of January, 2016.

BASSFORD REMELE PA

By: Lewis A. Remele Jr.

GRAY REED & MCGRAW PC

By: William B. Chaney

GRAY, RITTER & GRAHAM PC

By: Don M. Downing

GUSTAFSON GLUEK PLLC



By: Daniel E. Gustafson

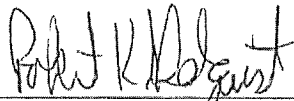
HARE WYNN NEWELL & NEWTON

By: Scott A. Powell

KEMP, JONES & COULTHARD, LLP

By: Will Kemp

LOCKRIDGE GRINDAL NAUEN PLLP


By: Robert K. Shelquist

PAUL BYRD LAW FIRM, PLLC

By: Paul Byrd

PAUL McINNES, LLP

By: Rick Paul

SCHWEBEL GOETZ & SIEBEN PA

By: William R. Sieben

STUEVE SIEGEL HANSON LLP

By: Patrick J. Stueve

WAGSTAFF & CARTMELL, LLP

By: Tyler Hudson

LOCKRIDGE GRINDAL NAUEN PLLP

By: Robert K. Shelquist

PAUL BYRD LAW FIRM, PLLC



By: Paul Byrd

PAUL McINNES, LLP

By: Rick Paul

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By: William R. Sieben

STUEVE SIEGEL HANSON LLP

By: Patrick J. Stueve

WAGSTAFF & CARTMELL, LLP

By: Tyler Hudson

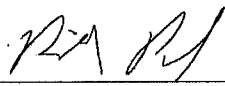
LOCKRIDGE GRINDAL NAUEN PLLP

By: Robert K. Shelquist

PAUL BYRD LAW FIRM, PLLC

By: Paul Byrd

PAUL McINNES, LLP



By: Rick Paul

SCHWEBEL GOETZ & SIEBEN PA

By: William R. Sieben

STUEVE SIEGEL HANSON LLP

By: Patrick J. Stueve

WAGSTAFF & CARTMELL, LLP

By: Tyler Hudson

LOCKRIDGE GRINDAL NAUEN PLLP

By: Robert K. Shelquist

PAUL BYRD LAW FIRM, PLLC

By: Paul Byrd

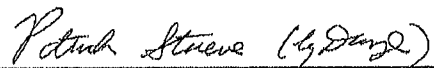
PAUL McINNES, LLP

By: Rick Paul

SCHWEBEL GOETZ & SIEBEN PA


By: William R. Sieben

STUEVE SIEGEL HANSON LLP


By: Patrick J. Stueve

WAGSTAFF & CARTMELL, LLP

By: Tyler Hudson

LOCKRIDGE GRINDAL NAUEN PLLP

By: Robert K. Shelquist

PAUL BYRD LAW FIRM, PLLC

By: Paul Byrd

PAUL McINNES, LLP

By: Rick Paul

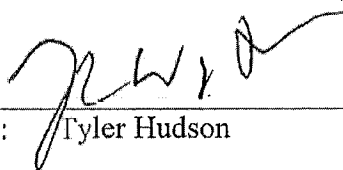
SCHWEBEL GOETZ & SIEBEN PA

By: William R. Sieben

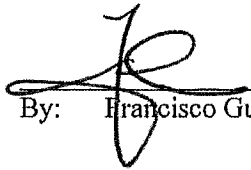
STUEVE SIEGEL HANSON LLP

By: Patrick J. Stueve

WAGSTAFF & CARTMELL, LLP

By:  Tyler Hudson

WATTS GUERRA LLP


By: Francisco Guerra IV

WATTS GUERRA LLP

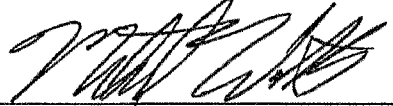

By: Mikal C. Watts

EXHIBIT 85

EXPERT SHARING AGREEMENT

This Expert Sharing Agreement (the "Agreement") is made this ___ day of April, 2016, by and between Plaintiffs' Co-Lead Counsel, as appointed by the United States District Court for the District of Kansas in MDL No. 2591 (collectively, "MDL Lead Counsel") and Plaintiffs' Co-Lead Counsel, as appointed by Hon. Thomas M. Sipkins, Judge, Fourth Judicial District, County of Hennepin, State of Minnesota (collectively, "MN Counsel").

WHEREAS, MDL Lead Counsel represent Producer and Non-Producer Plaintiffs regarding claims relating to or arising from genetically modified Syngenta corn, the commercialization of Agrisure Viptera and/or Agrisure Duracade or of any corn including genetically modified traits MIR162 or Event 5307 ("Syngenta Corn") (each such claim referred to herein as an "Underlying Claim");

WHEREAS, MN Counsel represents Producer or Non-Producer Plaintiffs with Underlying Claims pending in consolidated actions in Minnesota state court (the "MN State Proceedings") and/or with Underlying Claims not yet filed;

WHEREAS, the parties acknowledge that MDL Lead Counsel and MN Counsel have entered into an Amended and Restated Joint Prosecution Agreement and/or First Addendum to Amended and Restated Joint Prosecution Agreement;

WHEREAS, MDL Lead Counsel has acted to and will act, at considerable time and expense, to identify, retain and work with experts related to the Underlying Claims (the "Experts") who have acted or will act in consultation with and at the direction of MDL Lead Counsel to, among other things, review and create work product for use in MDL 2591 (the "MDL Proceedings"), including but not limited to expert reports (the "Expert Work Product"), so that the Experts can advise MDL Lead Counsel and provide expert opinions and other materials for use in the prosecution of the MDL Proceedings and certain Underlying Claims;

WHEREAS, MN Counsel desires to gain access to the Experts and Expert Work Product, and to be permitted to retain the Experts for use in the prosecution of Underlying Claims by MN Counsel and, in establishing procedures for the foregoing, to establish an amicable working relationship with MDL Lead Counsel for the parties mutual benefit, including through a reasonable sharing of Expert expenses and fees;

WHEREAS, the MDL Lead Counsel is willing to provide MN Counsel with access to Experts and permit MN Counsel to retain Experts only subject to the terms and conditions of this Agreement;

NOW, THEREFORE, in consideration of the covenants and promises contained herein, and intending to be legally bound hereby, the parties agree as follows:

1. Incorporation of Recitals. The parties hereby adopt as part of this Agreement each of the recital set forth in the WHEREAS clauses, and agree that such recitals are binding upon the parties by way of contract and not merely by way of recital or inducement; and such clauses are hereby confirmed and ratified as being true and accurate by each party as to itself.

2. Access to Experts and Expert Work Product. Subject to the terms and conditions of this Agreement, MN Counsel shall be provided access to all Experts for use only in prosecution of Underlying Claims. MN Counsel shall also have access to all Expert Work Product reasonably deemed by MDL Lead Counsel to benefit plaintiffs with Underlying Claims generally. MN Counsel shall not be entitled to access to Expert Work Product, including by way of example only damages calculations, specific to a plaintiff asserting Underlying Claims or any such plaintiff-specific supporting information related to such Expert Work Product.

3. Confidentiality. The Protective Order entered in the MDL Proceedings shall apply to all Expert Work Product as if originally provided therein. Any provisions of the Case Management Orders entered in the MDL Proceedings shall apply to all communications with Experts and all Expert Work Product as if originally provided therein. All communications with MDL Lead Counsel and MN Counsel related to Experts or Expert Work Product shall also be protected from disclosure under the attorney-client, work product, common interest and joint prosecution privileges. All parties understand that Expert Work Product in any form is to be treated as confidential and shall not be disclosed to third persons. MN Counsel shall not share Expert Work Product with any person who has not entered into an Expert Sharing Agreement without the written consent of MDL Lead Counsel. In the event that any third party, other than a court, seeks disclosure of any Expert Work Product or other confidential information, MN Counsel shall immediately notify MDL Lead Counsel of such fact. MN Counsel authorizes MDL Lead Counsel or their designee to take all reasonable measures to oppose such disclosure in a manner to be determined in MDL Lead Counsel's sole discretion and shall fully cooperate with MDL Lead Counsel in any such opposition action.

4. Separate Engagement of Experts. MN Counsel must reach a separate direct engagement with the Experts, including provisions for the direct obligation and payment of 100% of the fees and expenses of Experts directly and solely related to prosecution of the Underlying plaintiff-specific Claims of MN Counsel's clients. MN Counsel shall be solely responsible for payment of any Expert fees and expense directly and solely related to prosecution of MN Counsel's Underlying Claims. Any such sum paid to Experts shall not reduce the amount of Common Expert Expenses (as defined herein) due from MN Counsel under this Agreement. Notwithstanding anything in the preceding sentence to the contrary, any agreement between MN Counsel and any Expert shall either make reference to and incorporate this Agreement or incorporate the provisions of this Agreement in form and substance reasonably acceptable to MDL Lead Counsel. MDL Lead Counsel will advise Experts of the requirement of this Paragraph 4. MDL Lead Counsel shall have the right to review any Expert Work Product produced in such separate engagement for the purposes of determining if such Expert Work Product creates a conflict with any Expert Work Product produced for use by MDL Lead Counsel or in the MDL Proceedings.

5. Conflict. In the event that MDL Lead Counsel, any Expert or MN Counsel reasonably determine that there is a conflict between such Expert's retention by MDL Lead Counsel on behalf of their clients or plaintiffs in the MDL Proceedings and by MN Counsel, then MN Counsel shall not retain such Expert or shall discontinue the retention of such Expert and shall immediately return all copies of any Expert Work Product in MN Counsel's possession, and any payments made by MN Counsel to MDL Counsel shall immediately be returned.

6. Participation and Control by MDL Lead Counsel. MDL Lead Counsel retains the exclusive right to control the participation of the Experts for all Underlying Claims pursued by MN Counsel, including but not limited to the presentation of Expert Work Product, and in regard to any difference of opinion regarding the use of Experts, MDL Lead counsel's professional judgment and choice of strategy shall prevail. MDL Lead Counsel and MN Counsel shall jointly determine, the person or persons who will defend any deposition of any Expert or will proffer any Expert at trial or hearings (including but not limited to, all testimony, whether direct, cross or otherwise) before any court where MN Counsel's Underlying Claims are pending. To the extent necessary to allow for such control, individual attorneys or firms designated by MDL Lead Counsel and agreed to by MN Counsel shall be retained, for the limited purpose described, as co-counsel on behalf of the client asserting the Underlying Claim, at no additional cost to MN Counsel's client beyond the fee and expense assessments or payments applicable to MN Counsel under the Amended and Restated Joint Prosecution Agreement and/or First Addendum to Amended and Restated Joint Prosecution Agreement. MN Counsel, for itself and its clients, acknowledges that MDL Lead Counsel do not guarantee any results under this Agreement.

7. Payment of Common Expert Expenses. Within two weeks after this Agreement is signed, MDL Counsel shall disclose to MN Counsel: (1) the names and draft reports of any experts it has retained; and (2) the approximate amount of all expert fees and expenses incurred by such experts ("Common Expert Expenses"). For all expert fees and expenses incurred for work generally applicable to Underlying Claims ("Common Expert Expenses"), both before and after the effective date of this Agreement, MN Counsel agrees to pay one-half of such Common Expert Expenses with respect to said expert(s) within 14 days after being provided access. Fees and expenses related to work done by Experts or Expert Work Product related a specific plaintiff shall not be deemed to be Common Expert Expenses. For purposes of this Agreement only, the Common Expert Expenses shall include expenses paid by MDL Lead Counsel through the common fund it has created for common case expenses in the MDL Proceedings (the "Common Fund"). Common Fund expenses do not include expenses that have not been paid or reimbursed by the Common Fund such as travel expenses, attorneys' office expenses and other expenses paid by MDL Lead Counsel or other counsel acting at MDL Lead Counsel's direction not reimbursed by the Common Fund. MDL Lead Counsel will provide periodically, but at least once every three months, via electronic mail, a statement showing the Common Expert Expenses incurred and MN Counsel's share of those expenses. Payment of the amount due shall be made within 14 days of the date the statement is emailed. If payment is not received within 30 days of the date the statement is emailed, MDL Lead Counsel may withhold use of Experts or Expert Work Product and/or terminate this Agreement.

8. Additional Sharing Counsel. MDL Lead Counsel may, at its sole discretion, enter into similar agreements with additional counsel representing Non-Producer or Producer Plaintiffs with Underlying Claims (each such additional counsel, if any, referred to herein at "Additional Sharing Counsel"). Each Additional Sharing Counsel shall pay a percentage of total Common Expert Expenses to be negotiated by MDL Lead Counsel in its sole discretion. In the event that Additional Sharing Counsel enters into such agreement, the percentage of Common Expert Expenses for which MDL Lead Counsel, MN Counsel and any then-existing Additional Sharing Counsel are responsible shall be reduced proportionally with retroactive effect. In the event of any such retroactive adjustment, MDL Lead Counsel, in its reasonable discretion, may retain all or a portion of any credit in favor of MN Counsel as an assessment against future contemplated

Common Expert Expenses. Conversely, if an Additional Sharing Counsel leaves this pool after any Common Expert Expenses have been incurred, the percentages of Common Expert Expenses of the remaining parties shall be proportionally adjusted upward with prospective effect only.

9. Return of Excess Payments. To the extent a settlement or judgment results in any defendants in the MDL Proceedings or MN State Proceedings agreeing or being ordered to pay all or a portion of the Common Expert Expenses, any such payment in fact received shall be deemed a reduction in the amount of Common Expert Expenses in which the parties and any Additional Sharing Counsel will share. In the event of such a settlement or judgment, MDL Lead Counsel or MN Counsel or the client that is the beneficiary of the settlement or judgment may petition the appropriate court (either the MDL Court or the court presiding over the trial) for the identification and apportionment of Common Expert Expenses. In the event that upon the conclusion of the prosecution of Underlying Claims (or, in MDL Lead Counsel's discretion, earlier), either party has paid more than its share of Common Expert Expenses (whether pursuant to the prior sentence or Paragraph 8), then that party shall be entitled to reimbursement of the excess. To the extent a settlement or judgment results in any defendant agreeing to pay individual fees and expenses incurred by a specific plaintiff regarding an Underlying Claim, such fees and expenses shall not be deemed Common Expert Expenses nor shall such payment be deemed a reduction in the amount of Common Expert Expenses.

10. Termination of Agreement.

(a) By MN Counsel. In the event that this Agreement is terminated by MN Counsel, they shall remain responsible for their share of all Common Expert Expenses incurred up to and including the date the termination is effective without regard to whether those Common Expert Expenses have been billed by Experts.

(b) By MDL Lead Counsel. MDL Lead Counsel may terminate this Agreement only for cause by written notice of such termination to MN Counsel, which will be deemed effective upon delivery of such notice to MN Counsel. For purposes of this Paragraph 10(b), "cause" shall be defined as a failure by MN Counsel to cure any default under this Agreement within ten (10) days of written notice of such default delivered by MDL Lead Counsel to MN Counsel, provided that nonpayment of any obligation under this Agreement within 30 days as set forth in Paragraph 7 shall constitute "cause" without regard to notice. In the event that MDL Lead Counsel terminates this Agreement for cause, MN Counsel shall remain obligated to pay its share of the Common Expert Expenses incurred up to and including the effective date of the termination without regard to whether those Common Expert Expenses have been billed by the Experts.

(c) Use of Experts and Expert Work Product after Termination. In the event that this Agreement is terminated under subparagraph (a) or (b) above, MN Counsel shall immediately return all Expert Work Product and shall immediately cease using any Expert in any manner in prosecution of the Underlying Claims. A termination of this Agreement shall be deemed an automatic termination of any engagement of Experts under Paragraph 4.

11. Common Benefit Fund Reimbursement for Expert Fees and Expenses. MDL Lead Counsel may request reimbursement for their share of Common Expert Expenses from the Common Benefit Expense Fund in the MDL Proceedings, when and if such reimbursements are available. Nothing in this Agreement shall prevent MN Counsel from seeking reimbursement from any similar fund established in the MN Proceedings but agree not to seek reimbursement from the MDL Common Benefit Expense Fund for either their share of Common Expert Expenses or any Expert expenses incurred through a separate engagement under Paragraph 4. Likewise, for any payments made by MN Counsel to MDL Counsel under this agreement, MN Counsel shall be entitled to a deduction of the common benefit expense assessment otherwise due to be paid under Paragraph 2(a)(2)(ii) of the Amended and Restated Joint Prosecution Agreement entered into in June, 2015 by MDL Counsel and MN Counsel.

12. Client Consent and Acknowledgment. Prior to engaging any Expert pursuant to Paragraph 4 or receiving any Expert Work Product under this Agreement, MN Counsel shall obtain the consent and acknowledgment of the terms and conditions of this Agreement from the particular bellwether Non-Producer Plaintiff clients for whom the expert(s) shall be utilized. Such Non-Producer Plaintiff's acknowledgment shall include that it has no individual right to Expert Work Product beyond that of MN Counsel and that, should the client terminate MN Counsel and retain other counsel, that such client shall not be entitled to use Experts or Expert Work Product, and shall immediately return any such Expert Work Product in its possession to MDL Lead Counsel, unless such client's new counsel separately enters into a similar Expert Sharing Agreement with MDL Lead Counsel. A Non-Producer Plaintiff client's signature on this Agreement indicating its acknowledgment and agreement, with copy provided to MDL Lead Counsel, shall be deemed sufficient to satisfy MN Counsel's obligations under this Paragraph 12.

13. General Provisions.

(a) Jurisdiction/Choice of Law. The administration of this Agreement shall be subject to the jurisdiction of the MDL Court, except as provided in Subparagraph 13(d) with respect to arbitration, and shall be construed under the laws of the state of Missouri without regard to choice of law analysis. MN Counsel hereby consent to jurisdiction in the United States District Court for the District of Kansas for all issues related to this Agreement.

(b) Counterparts. This Agreement may be executed in one or more counterparts, each of which when executed shall be deemed to be an original, and all of which taken together shall constitute one and the same agreement. Multiple copies of the signature pages of this Agreement may be added to or substituted into this Agreement so that a single copy bears all signatures. Signatures on this Agreement that are transmitted by email, telecopy or electronic means shall be deemed to be originals for purposes of this Agreement.

(c) Captions/Construction. Headings contained in this Agreement have been inserted for reference purposes only and shall not be considered part of this Agreement. The language in all parts of this Agreement shall be in all cases construed according to its fair meaning, and not strictly for or against any party.

(d) Arbitration. All disputes arising out of or relating to this Agreement or the relationship between the parties created by this Agreement shall be submitted to binding

arbitration conducted by and under the Commercial Rules of the American Arbitration Association. The arbitrators shall determine and allocate responsibility for their fees and expenses and the administration fees and expenses as part of any arbitration award.

(e) Survival. The confidentiality provisions of Paragraph 3, all subparagraphs of Paragraph 10, the consent to jurisdiction in Subparagraph 13(a) and the arbitration provision of Subparagraph 13(d) shall survive any termination of this Agreement.

[Signature Pages to Follow]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date and year first above written.

THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

MDL LEAD COUNSEL

By: Don Dousay

MN COUNSEL

By: Lewis Remele
Name: Lewis Remele
Title: Bassford Remele

Counsel for: Plaintiffs

CLIENT ACKNOWLEDGMENT AND AGREEMENT

The undersigned has engaged MN Counsel to represent it regarding Underlying Claims. The undersigned has reviewed this Agreement and hereby consents, acknowledges and agrees to its terms including, but not limited to, the undersigned's rights to Expert and Expert Work Product as set forth in Paragraph 14 of the Agreement.

By: _____

Name:

Title:

EXHIBIT 86

Did Syngenta follow what other biotech companies were doing?

				
Did not fully launch new GMO seeds without China approval <i>DroughtGard Corn</i> <i>Intacta Soybean</i>	Did not fully launch new GMO seeds without China approval <i>LL55 Soybean</i>	Did not fully launch new GMO seeds without China approval <i>Enlist Corn</i> <i>Enlist Soybean</i>	Did not fully launch new GMO seeds without China approval <i>Plenish Soybean</i>	2007 Fully launched new GMO seed without Japan approval (RW) 2011 Fully launched new GMO seed without China approval (Viptera) 2014 Launched new GMO seed without China approval (Duracade)

FOR THE DISTRICT OF KANSAS**IN RE SYNGENTA AG MIR162 CORN
LITIGATION****Master File No. 2:14-MD-02591-JWL-JPO****THIS DOCUMENT RELATES TO
ALL CASES EXCEPT:****MDL No. 2591**

*Louis Dreyfus Company Grains
Merchandising LLC v. Syngenta AG, et
al.*, No. 16-2788-JWL-JPO

*Trans Coastal Supply Company, Inc. v.
Syngenta AG, et al.*, No. 2:14-cv-02637-
JWL-JPO

*The Delong Co., Inc. v. Syngenta AG, et
al.*, No. 2:17-cv-02614-JWL-JPO

*Agribase International Inc. v. Syngenta
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