

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

IN RE: SYNGENTA AG MIR162 )  
CORN LITIGATION )

This Document Relates to All Cases Except: )

*Louis Dreyfus Co. Grains* )  
*Merchandising LLC v.* )  
*Syngenta AG,* )  
No. 16-2788 )

*Trans Coastal Supply Co., Inc. v.* )  
*Syngenta AG, No. 14-2637* )

*The Delong Co., Inc. v. Syngenta AG,* )  
No. 17-2614 )

*Agribase Int’l Inc. v. Syngenta AG,* )  
No. 15-2279 )

MDL No. 2591

Case No. 2:14-md-2591-JWL-JPO

**MEMORANDUM IN SUPPORT OF  
MOTION FOR AWARD OF ATTORNEYS’ FEES  
AND REIMBURSEMENT OF EXPENSES**

NOW COMES WESTERVELT, JOHNSON, NICOLL & KELLER, LLC. and in support of its Motion for Award of Attorney’s Fees and Reimbursement of Expenses, (ECF No. 3614), the undersigned counsel submits this memorandum in support of the motion to this Court for an award of attorneys’ fees and expenses incurred in pursuing the WJNK Plaintiffs’ claims against the defendants.

**I. INTRODUCTION/STATEMENT OF NATURE**

The undersigned counsel previously worked as an attorney at the firm of Vonachen, Lawless, Trager & Slevin (hereinafter “VLTS”) in Peoria, IL. When the VLTS firm closed in 2016, the undersigned counsel joined Westervelt, Johnson, Nicoll, & Keller LLC (hereinafter “WJNK”). Every client who was represented by VLTS continued to be represented by the

undersigned counsel at her new firm, WJNK. VLTS filed complaints for three hundred twelve (312) Plaintiffs including one grain elevator (hereinafter collectively referred to as the “WJNK Plaintiffs”). Nine of these complaints were filed in the U.S. District Court for the Central District of Illinois and one was filed in the Eastern District of North Carolina. The claims were all filed as separate claims though many plaintiffs were named on each complaint. See attached Exhibit 1.

In January of 2015, undersigned counsel learned of a possible claim against Defendants for the premature market release of Agrisure Viptera ®. Since that time, counsel has performed extensive research and prepared material to pursue claims against Syngenta on this matter. This work included, but was not limited to, working with multiple attorneys to meet with and file complaints for each client. Each client entered into a binding contract for legal services with the firm.

Since 2015, the undersigned counsel has worked with more than three hundred clients in the filing of claims, the discovery process, and the updating of the clients on the status of the case. The Representation Agreements that the clients entered into set forth that the Firm would be responsible for advancing all costs and expenses. To date, the Firm has not been reimbursed for any expenses or costs advanced. The Representation Agreement had a provision for Attorneys’ fees at a rate of a one-third (33 1/3 %) of recovery plus costs. The agreement also capped the client’s total reimbursement for costs and attorney’s fees at forty (40) percent of any one client’s total recovery.

In April of 2018, this Court entered an order allowing petitions for Attorney’s Fees and Expenses. The undersigned counsel has devoted a significant portion of her practice for the past three and a half years to assisting the firm’s numerous clients. Beginning with a thorough

investigation of the claims, through acquiring clients and the filing of ten complaints, assisting and navigating the hundreds of clients through the discovery process and the submission of the discovery documents, the undersigned counsel has utilized a significant number of hours in support staff time, as well as her own. Throughout the case, the undersigned counsel has reviewed the court pleadings, answered regular phone calls and emails, and worked with each of her clients on their cases up to and continually through the class action settlement.

By assisting with the submission of the detailed Plaintiff Fact Sheets, the efforts of the undersigned counsel have benefitted the litigation as the aggregation of the information assisted in the settlement of this case. The work continues for the undersigned counsel and the staff at WJNK as the clients continue to call to discuss their claim form submissions. As agreed in the Representation Agreement, WJNK will continue to assist the clients to the best of our ability. WJNK is appreciative of the ability to represent the clients, and believe it is fair and just that the firm be compensated for the significant portion of time devoted to this litigation. While WJNK acknowledges that Class Counsel has done a tremendous amount of work for this litigation, it is imperative that all counsel who assisted in the filing of the individual claims be compensated for their contributions.

## II. ARGUMENT IN SUPPORT FOR WJNK'S MOTION FOR FEES

### A. WJNK is entitled to Attorney Fees and Reimbursement of Costs

The court is authorized to award attorney's fees and costs to attorneys under Federal Rule of Civil Procedure Rule 23. Fed. R. Civ. P. 23(h). The notes to Rule 23 further outline that the fees and costs may be assigned to non-class counsel, "[T]here may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel[.]" "In class

actions, the district court has broad authority over awards of attorneys' fees[.]” Law v. Nat'l Collegiate Athletic Ass'n, 4 F. App'x 749, 751 (10th Cir. 2001) citing Hayes v. Haushalter (*In re FPI/Agretech Sec. Litig.*), 105 F.3d 469(9th Cir.1997). Attorneys’ fees are awarded from the “common fund” of a class action settlement. Gottlieb v. Barry, 43 F.3d 474, 482 (10th Cir. 1994) “[W]e fail to see why the work of counsel later designated as class counsel should be fully compensated, while the work of counsel who were not later designated class counsel, but on whose shoulders class counsel admittedly stood, should be wholly uncompensated.” *Id.* at 489.

There is justification in awarding attorney fees to attorneys who participated in the individual representation of clients prior to the class certification. “The Court, plaintiffs, and the justice system in general have an interest in broadening the range of attorney participation in MDL cases, lest the work be confined to a specialized bar of MDL attorneys which would result in exclusivity, unfairness, and discrimination, and inure to the disadvantage of litigants and their attorneys.” In re Vioxx Products Liability Litigation, 802 F. Supp. 2d 740, 762 (2011). The significance of In re Vioxx is applicable to the Syngenta litigation. While the Court has appointed a Plaintiffs’ Steering Committee as the Court did in In re Vioxx, there has been significant amount of work performed by attorneys who were not appointed to a position of leadership in this litigation.

In Gottlieb, the court analyzes the work of Non-Designated Counsel and found that the work of Non-Designated Counsel played a significant role in the litigation. *Id.* at 488. In Gottlieb, counsel pursued cases for one year and four months before class counsel was designated. In the current litigation, the Class was certified in September of 2016 with a large number of the complaints having been filed prior to that date. A tremendous amount of work was done by Non-Designated Counsel as Plaintiff Fact Sheets and Documents were requested by

Defendants. The work of Non-Designated Counsel, in the aggregate, created additional pressure on Defendant to settle and provided a more thorough perspective into the claims of corn producers across the nation. The Court in Gottlieb further discusses that. “[I]t seems implausible that all of sixteen months of work, pursued on multiple fronts by multiple counsel, suddenly becomes worthless upon the selection of a few counsel to serve as class counsel.” *Id.* At 489. As such, this Court should recognize the utility and value of the work performed by Non-Designated Counsel in its consideration for attorney fees.

The Court in Gottlieb discussed utilizing the “hybrid” approach of allocating attorney fees which uses a percentage of the fund method with the twelve factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974). In Johnson, the Court considered “the time and labor required, the novelty and difficulty of the question presented by the case, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorneys due to acceptance of the case, the customary fee, whether the fee is fixed or contingent, any time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation and ability of the attorneys, the ‘undesirability’ of the case, the nature and length of the professional relationship with the client, and awards in similar cases.” Johnson at 717-19. Courts are allowed and should exercise their power to assign awards to attorneys who have played a role in this litigation, even if not in a leadership position in the Multi-District Litigation.

WJNK respectfully asks this Court to award attorney’s fees of one-third (33 1/3%) of the value of each of the cases for each claimant that has been represented by WJNK during the course of this litigation pursuant to the representation agreements entered with the more than 300 clients. In the alternative, if this Court allocates attorney’s fees based in proportionate shares to

the clients' acreage, WJNK asks this court grant WJNK an award which is reasonably expected to be in excess of \$1,000,000.00. Further, if this Court chooses to base the attorney fee awards on an hourly or *quantum meruit* award, WJNK respectfully seeks leave to supplement documentation of hours worked on this litigation and costs expended. If this Court chooses to apply a different method of assessing attorney fees, WJNK requests that this Court provide further direction on what information the Court will deem to be sufficient to analyze the applications for fees by non-class counsel. WJNK seeks leave of the Court to submit supplemental material with any information that the Court requests and/or deems sufficient in relation to the Motion for Fees and Costs.

**B. THE COURT'S CONSIDERATION OF WJNK'S LATE FILING IS APPROPRIATE AND EQUITABLE**

The undersigned attorney submits this memorandum and a Supplemental Motion for Attorney Fees and Costs in full acknowledgment of the late filing of WJNK Counsel's initial Motion for Attorney Fees and Costs. WJNK believes it is appropriate and fair for the Court to consider this motion and award attorney fees and costs to WJNK. Through the pendency of this litigation, the undersigned counsel has followed Federal Rules of Civil Procedure and Local Rules of Civil Procedure and has not missed any other deadlines in any of the cases that were transferred to this Court. Thus, the first mistake made before the court should not cost the undersigned counsel the entirety of her fees for the last three years' worth of work that she put into this litigation.

If the Court were to decide against allowing WJNK Counsel's Motion for Fees, there is tremendous harm to be suffered by WJNK Counsel in that more than 1,000 hours of attorney time would go without compensation. In this instance, the penalty of not filing by the deadline set forth in a previous order grossly outweighs the mistake of missing the first deadline for fees.

Further, pursuant to this Court's order ECF Doc. No. 3613, each attorney who filed a Motion for Fees has been required to complete a spreadsheet categorizing their time on this matter. It should be recognized that once the undersigned counsel realized that the deadline was missed, the undersigned counsel immediately filed WJNK's Motion and has since complied with the most recent order from this Court regarding categorizing time and submitting the time to both the Court and the Special Master.

Further, it appears that approximately twenty (20) Motions for Attorney Fees filed were filed prior to the deadline and at least three (3) were filed after the July 10, 2018 deadline but before a substantive ruling has been made on the fees. Because this Court has requested supplemental information (ECF No. 3613) and because WJNK has prepared and submitted their supplement to provide to the Court, there is no disadvantage or unfairness if this Court allows WJNK's Motion for Fees and Costs.

The filing of WJNK's Motion for Fees and Costs should still be considered to be timely filed as there has not been a substantive ruling on the issue of Attorney Fees. To allow the Motion is appropriate and fair as the undersigned counsel has contributed more than one thousand hours to this case and has not missed a deadline or been reprimanded by this Court for any reason prior to this late filing.

As the Court is aware, the claims process is ongoing with claims to be submitted by October 12, 2018. (ECF No. 3532). Thus, the Fee and Expense deadline has fallen before all of the work of counsel can be completed. With the order approving the award in April and the deadline in October, WJNK has been assisting the more than 300 clients they represent in filing their claims. With more than 300 clients to assist in this process, the undersigned counsel represents that she has been actively working with clients in this litigation and has been working

on these matters before and after the July 10<sup>th</sup> deadline. WJNK asks that this Court consider WJNK's motion to be filed timely and consider the Motion as if it were filed by the deadline in accordance with the concept of fairness and equity.

C. THERE IS NO PREJUDICE TO THE CLASS IN ALLOWING WJNK'S MOTION FOR ATTORNEY FEES AS CLASS RECEIVED SUFFICIENT NOTICE OF WJNK'S MOTION FOR FEES AND REIMBURSEMENT

Under Federal Rules of Civil Procedure Rule 23(h) class members are required to receive notice of the motion and an opportunity to object. Fed. R. Civ. P. 23(h). In Cassese v. Williams, 503 F. App'x 55, 57 (2d Cir. 2012), the Court found that there was sufficient notice under Fed. R. Civ. P. 23(h) despite the class objections becoming due before the fee deadline.

WJNK's Motion for Fees has been filed with adequate time for class members to review the motion. Thus, there is no prejudice against class members or against Defendants in allowing WJNK's Motion to proceed. Thus, WJNK requests that this Court utilize its discretion to allow WJNK's Motion for Attorney Fees and Costs to be considered timely filed and for further consideration of the content of the motion.

In support of this Memorandum, WJNK incorporates fully by reference the following:

1. WJNK's Motion for Attorney Fees and Reimbursement of Expenses filed July 26, 2018 and its accompanying exhibits. (ECF No. 3614)
2. Exhibit 1, submitted with this Memorandum, Spreadsheet of categorized time pursuant to ECF No. 3613.
3. Exhibit 2, submitted with this Memorandum, the first pages of each complaint filed by the undersigned counsel.
4. Exhibit 3, submitted with this Memorandum, additional representation agreements that were not included with the initial Motion.
- 5.



### III. CONCLUSION

In conclusion, the undersigned counsel respectfully requests that this Court consider WJNK's Motion for Fees and Expenses as a timely filed motion and consider the motion as if it were filed by the deadline. Further, WJNK respectfully requests attorney's fees and reimbursement as requested in the previously filed motion. This award is appropriate due to the extensive research, the filing of claims for more than three hundred clients, the discovery process for every client, the continual communication with each client, and the work that will continue through the claims process until the clients receive their award. WJNK requests that the award of attorney's fees and reimbursement reflect the language that the clients agreed to in their representation agreement. If this Court finds that this is not the most appropriate manner to assess fees, WJNK requests that the payment of attorney's fees be in a proportional share to the acreage represented in the ten complaints filed by the undersigned counsel. In another alternative, WJNK requests the attorney's fees be assigned in accordance with the lodestar method where a *quantum meruit* method is applied and for any further relief that this Court deems fair and just.

Dated: August 3, 2018

Respectfully Submitted,

s/ Kerrianne L. Waters\_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 3, 2018, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to all counsel of record.

/s/ Kerrienne L. Waters

**Westervelt, Johnson, Nicoll & Keller, LLC's List of Complaints**

Plaintiffs on complaint	Location of Filing	Initial Case Number	Case number after transfer to Kansas City	Date Initial Complaint Filed	Finalized Date Transferred
Aten et. al	Central District of Illinois, Peoria Division	1:15-cv-01464-JES-JEH	15-cv-09876-JWL-JPO	11/18/15	12/3/2015
McCrea et. Al	Central District of Illinois, Peoria Division	1:15-cv-01465-JES-JEH	15-cv-09877-JWL-JPO	11/18/15	12/3/2015
Schmidgall et. Al	Central District of Illinois, Peoria Division	1:15-cv-01468-JES-JEH	15-cv-09899-JWL-JPO	11/19/15	12/9/2015
France et. Al	Central District of Illinois, Peoria Division	1:15-cv-01470-JES-JEH	15-cv-09901-JWL-JPO	11/20/15	12/9/2015
Anderson et. Al	Central District of Illinois, Rock Island Division	4:15-cv-04161-SLD-JEH	15-cv-09880-JWL-JPO	11/13/15	12/1/2015
Knowles et. Al	Central District of Illinois, Rock Island Division	4:15-cv-04169-SLD-JEH	15-cv-09878-JWL-JPO	11/18/15	12/3/2015
Heike et al	Central District of Illinois, Rock Island Division	4:15-cv-04202-SLD-JEH	16-cv-02008-JWL-JPO	12/4/15	1/5/2016
Basco	Central District of Illinois, Rock Island Division	1:15-cv-01462-JES-JEH	15-cv-09875-JWL-JPO	11/18/15	12/3/2015
Jimmy Jackson Ward, filed by co-counsel Janet Ward Black	Eastern District of North Carolina	5:15-cv-00605-D	2:15cv-09884-JWL-JPO	11/18/15	1/11/2016
Kuppler et al	Central District of Illinois, Peoria Division	1:16-cv-01109-JBM-JEH	16-cv-2282-JWL-JPO	4/8/16	4/21/2016