

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

IN RE: SYNGENTA LITIGATION

Case Type: Civil Other
Hon. Laurie J. Miller

This Document Relates to:
All Cases

FILE NO. 27-CV-15-12625
and FILE NO. 27-CV-15-3785

**MEMORANDUM IN SUPPORT OF MOTION OF BORGESS LAW, LLC FOR AWARD
OF ATTORNEY FEES AND REIMBURSEMENT OF COSTS**

Pursuant to ¶17 of the 4/10/18 MDL-2591 Order Preliminarily Approving the Settlement, as well as ¶¶2.25, 7.2.1, 7.2.2 and/or 7.2.3.2 of the Agrisure Viptera/Duracade Class Settlement Agreement (the “Settlement Agreement”) in *In Re: Syngenta AG MIR 162 Corn Litigation* (MDL-2591) and *In Re: Syngenta Litigation*, (Fourth Judicial District Court, Hennepin County, Minnesota, File Nos. 27-CV-15-3785 & 27-cv-15-12625), Borgess Law, LLC on behalf of itself and its local co-counsel (herein collectively referred to as “Movant”) respectfully seeks 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 arising out of the recent preliminarily approved class action in the Syngenta Litigation.

In the alternative, Movant understands that some individual claimant attorneys may request payment from the Fund based on an hourly fee for reasonable time and costs incurred in the prosecution of the actions, including non-approved common benefit time. To the extent the Court awards attorneys representing individual claimants based on a reasonable hourly fee for time and costs incurred in the prosecution of the action (instead of ratification of their contingency fee agreements), Movant requests leave to supplement this request with detailed

time reports of the Firm and associated co-counsel, which total over 250 hours of time, and any other information or documentation the Court may require.

BORGESS LAW, LLC CLIENTS

Borgess Law, LLC represents the following claimants (herein collectively referred to as “Clients”) in litigation against Syngenta on a contingency basis:

- Bierman, Charles (27-CV-15-20148 Hennepin County);
- Bierman, Franklyn (27-CV-15-20148 Hennepin County);
- Bierman, Shane (27-CV-15-20148 Hennepin County);
- Plocek, Matt (not pending);
- Sendelbach, Kenneth (17-CV-00320 IL);
- Weber Beef, Inc. (27-CV-15-20149 Hennepin County);
- Weber, David and associated entities including David P. Weber Living Trust, DC Affinity, LLC (27-CV-15-20149 Hennepin County);
- Weber, Jeffrey and associated entities including Jeffrey L. Weber Living Trust and Weber Road Farms Inc. (27-CV-15-17265 Hennepin County);
- Weber, Justin and associated entities including JW AG, LLC (27-CV-15-20149 Hennepin County)

Local co-counsel who assisted in the prosecution of the Borgess Law, LLC cases includes Kosieradzki Smith Law Firm, LLC (for Bierman and Weber) and Winne Law Firm (for Sendelbach).¹ Copies of these retainer agreements have not been filed but are available for inspection upon request. Background regarding Attorney Pamela Borgess is set forth in the supporting Declarations of counsel attached hereto.

In the written fee agreements, counsel agreed to advance all court costs and litigation expenses in this matter. If and when clients received a recovery, the clients agreed to pay one third (33.33%) (except for the Biermans who agreed to pay 30%) of any recovery as a contingent fee, as well as expenses. With the exception of Sendelbach retained in 2017, said clients were

¹These local co-counsel firms may have also acted as lead, local and/or co-counsel for other non-Borgess Law Group clients not included in this fee/expense application, which may be addressed in separate petitions filed by said firms. However, this application, the expenses submitted on behalf of this application, and the over 250 hours of attorney time referenced herein pertain solely to these Borgess Law, LLC clients.

retained in 2015 well before the MDL Court certified the case as a class action in September, 2016 and the preliminary approval of the certified class settlement in April, 2018.

PROSECUTION OF CLAIMS ON BEHALF OF BORGESS LAW, LLC CLIENTS

Movant incurred and continues to incur substantial costs and litigation expenses in pursuit of its clients' claims. Specifically, Movant incurred over 250 hours of attorney time and expenses totaling \$1,703.25. (*See* attached expenses spreadsheet and Declaration of counsel.)

Movant investigated each individual case, filed lawsuits on behalf of Clients, and dealt with client specific issues and concerns. In pursuit of Clients' claims, to comply with the Court's order for discovery, and to advance each client's individual case and the litigation as a whole, Movant also spent numerous hours obtaining various relevant documents from 2011 to present necessary to prove each Client's claim, including from third parties such as the FSA, corn seed suppliers, corn purchasers, and crop insurers. For example, necessary discovery obtained by Movant for said clients included documents reflecting the number and location of all corn acres, variety of corn grown and/or seed purchased, ownership/lease of the land, contracts for the sale of corn, the number of bushels produced, how the bushels were priced (seasonal pool, pricing pool, booking contract, basis contract, hedged to arrive contract, case sale, or other contract), date the corn was priced, the price per bushel, the name and location of the buyer, the FSA # of the farm the corn was grown on, terms and condition of all sales contracts, and any and all crop insurance data. These documents, often totaling hundreds of pages, not only had to be obtained from various 3rd parties, but then sorted and carefully reviewed to identify and extract the necessary and relevant data. In many cases, this information was not obvious from the documents themselves and required additional investigation and communication the producing third party. For example seed receipts/invoices might only reflect an internal numeric

description which required investigation and/or follow up with the supplier regarding the seed type, or sales documents might not necessarily reflect how exactly the corn was priced and/or the terms. Often times produced documents would also be missing certain information or data for various years, again requiring follow up to obtain the necessary information. Once obtained, reviewed, sorted and relevant data extracted and verified by the client, this data had to be produced to Defendants.

In addition to advancing claims over the past three years, Movant has kept its Clients regularly informed and answered any and all questions, concerns or requests for information.

Despite the apparent lack of clarity and information from leadership as to fees (as described herein), Movant continues to expend time and resources on behalf of its Clients. Even though their Clients are part of the class, Movant continues in good faith to answer questions and give guidance on the proposed settlement and claim form, point out deficiencies in their answered claim forms, and ensure the proper submission of the claim forms in accordance with the requirements of the settlement. As the settlement process continues to advance in the following months or even years, Movant's clients will likely continue to turn to the counsel it hired and has relied upon for three years for ongoing assistance, updates, questions and/or concerns.

TIME AND EXPENSES INCURRED ON BEHALF OF BORGESS LAW CLIENTS

For over three years, Movant has prosecuted and advanced its Clients' claims in good faith and devoted substantial time and expense. When individual cases are prosecuted and advanced it maintains pressure on defendants benefiting the entire litigation and all members as a whole. In addition, the discovery process, such as the completion of Plaintiff Fact Sheets,

provides critical information, including information necessary to understand the size, scope and extent of the litigation and assists in settlement discussions.

An award of reasonable attorney's fees and reimbursement of expenses is authorized pursuant to Rule 23.08 of the Minnesota Rules of Civil Procedure and Federal Rule of Civil Procedure 23(h) even if Movant was not designated as Class Counsel. *See e.g.* Fed. Civ. Proc. R. 23, comment to subdivision (h) ("This subdivision...applies when such awards are authorized by law or by agreement of the parties. Against that background, it 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. In some situations, there 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, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.") *See also Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Tr.*, 912 N.W.2d 652 (Minn. 2018), (Holding that a contingent fee agreement is a factor to be considered when awarding reasonable attorney fees.)

Movant requests payment of its agreed upon contingency fee of one-third (33 1/3%) (and 30% for the Biermans) plus expenses of \$1,703.25 be paid from the Fund to be created from the preliminarily approved class action settlement.

In the alternative, Movant understands that some individual claimant attorneys may request payment from the Fund based on an hourly fee for reasonable time and costs incurred in the prosecution of the actions, including non-approved common benefit time. To the extent the Court awards attorneys representing individual claimants based on a reasonable hourly fee for

time and costs incurred in the prosecution of the action (instead of ratification of their contingency fee agreements), Movant requests leave to supplement this request with detailed time reports of the Firm which total over 250 hours of attorney time, and any other information or documentation the Court may require.

A. Common Benefit Time for Plaintiff Fact Sheet Work

On 3/23/18, Movant was first informed by Minnesota plaintiffs' leadership that time and expenses complying with the Minnesota Plaintiff Fact Sheet ("PFS") Order would be considered Common Benefit Work and that said time should be submitted for review and submission by said leadership as part of its common benefit petition. No further details concerning the process, procedure or criteria were provided by plaintiffs' leadership.

Therefore, Movant submitted time incurred solely in complying with the PFS order for the Borgess Law Clients. This time and expense submission did not include any other time spent on the individual case files, including for example, the hours or expenses spent for calls with clients, update letters, dealing with client-specific issues.

On July 4, 2018 Movant received the results of an audit of the submitted PFS time and expenses for the Borgess Law clients and were advised in a cover letter that any objections would need to be provided in writing by July 8, 2018. Movant immediately tried to reach plaintiffs' leadership in an attempt to advise of inconsistencies and errors in their audit and its need to file an objection. However, on July 5, 2018, plaintiffs' leadership advised that firms did not need to provide their objections (or declarations in support) by July 8, 2018 but may still need to do so at an unidentified date in the future, (which Movant intends to do).

As such, it remains unclear at the time of this filing if Movant's time and expenses associated with complying with the PFS order for the Borgess Law Clients is or will be approved or submitted by leadership, or what portion, if any, will ultimately be approved by the Court(s).

Irrespective, Movant is not seeking double recovery. Instead, if Movant's time for PFS work is approved and submitted by plaintiffs' leadership for common benefit consideration and if such common benefit work is approved and awarded by the Court(s), Movant would request that the Court deduct any approved common benefit award from any total requested or awarded pursuant to this fee/expense application.

CONCLUSION

For the foregoing reasons, Movant respectfully asks this Court for payment of fees and reimbursement of expenses of \$1,703.25 based on their clients' gross recoveries from any fund created to pay attorneys' fees and expenses arising out of the recently preliminarily approved class action in the Syngenta Litigation.

Date: 7/10/18

Respectfully Submitted,

/s/ Pamela A. Borgess
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the Clerk and an electronic copy served upon all counsel of record this 10th day of July, 2018.

/s/ Pamela A. Borgess
Pamela A. Borgess

**STATE OF MINNESOTA
COUNTY OF HENNEPIN**

**DISTRICT COURT
FOURTH JUDICIAL DISTRICT**

IN RE: SYNGENTA LITIGATION

Case Type: Civil Other
Hon. Laurie J. Miller

This Document Relates to:
All Cases

FILE NO. 27-CV-15-12625
and FILE NO. 27-CV-15-3785

**DECLARATION OF PAMELA BORGESS IN SUPPORT OF THE BORGESS LAW,
LLC FEE AND EXPENSE APPLICATION**

I, PAMELA BORGESS, declare as follows:

1. I am over the age of twenty-one years old and make this declaration based on my personal knowledge. If called as a witness, I could and would testify competently to the facts contained herein, which are true and correct.

2. I am the licensed attorney and founding partner of Borgess Law, LLC (hereinafter “the Firm”) and am authorized to submit this declaration on the Firm’s behalf.

3. I was admitted to the Ohio bar in 2000 and at all times have remained in good standing. I have been admitted to numerous Courts including the Ohio Supreme Court, the U.S. District Court for the Northern District of Ohio, the U.S. Court of Appeals for the 6th Circuit, the U.S. District Court for the Southern District of Ohio, the U.S. District Court for the Northern District of Illinois, the U.S. District Court for the Central District of Illinois and the U.S. District Court for the Southern District of Illinois. I have also been admitted pro hac vice or allowed under special order to appear in the California Central District Court, Indiana Northern District, Louisiana Eastern District, Massachusetts District, Mississippi Northern District, New York Southern District, Texas Northern District, and West Virginia Southern District.

4. I was appointed to leadership in *In re Heparin Products Liability Litigation*, MDL 1953 and have also been involved with many other national, mass tort, or class action litigations involving toxic torts, medical drugs, medical devices, product defects, consumer fraud and/or other misconduct.

5. I submit this declaration in further support of the Firm's Motion and Memorandum in Support pursuant to ¶17 of the 4/10/18 MDL-2591 Order Preliminarily Approving the Settlement, as well as ¶¶2.25, 7.2.1, 7.2.2 and 7.2.3.2 of the Agrisure Viptera/Duracade Class Settlement Agreement in *In Re: Syngenta AG MIR 162 Corn Litigation* (MDL-2591) and *In Re: Syngenta Litigation*, (Fourth Judicial District Court, Hennepin County, Minnesota, File Nos. 27-CV-15-3785 & 27-cv-15-12625).

6. The Firm, together with associated co-counsel, represents clients identified in the Memorandum in Support.

7. With the exception of Sendelbach retained in 2017, said clients were retained in 2015 before the MDL Court certified the case as a class action in September, 2016 and the preliminary approval of the certified class settlement in April, 2018.

8. The written fee agreements were on a contingency basis. The Firm agreed to advance all court costs and litigation expenses in this matter. If and when clients received a recovery, the clients agreed to pay one third (33.33%) (except for the Biermans who agreed to pay 30%) of any recovery as a contingent fee, as well as expenses, and further agreed to division of those between the Firm and associated co-counsel.

9. The Firm is and remains lead counsel on these cases and is authorized to request payment of the contractually agreed upon fees & expense reimbursement based on its clients' gross recoveries from any fund created to pay attorneys' fees and expenses arising out of the recent

preliminarily approved class action in the Syngenta Litigation (the “Fund”) and to submit all time and expenses for Borges Law clients.

10. The Firm submitted time and expenses associated with complying with the Minnesota Plaintiff Fact Sheet (“PFS”) order for the Borgess Law Clients as suggested by Minnesota plaintiffs’ leadership in March, 2018 conference call. This submission did *not* include any time or expenses spent on behalf of any individual clients other than time spent complying with the Plaintiff Fact Sheet requirements. However, as described in the Firm’s memorandum in support, at the present time it remains unclear whether the time and expenses associated with complying with the Minnesota Plaintiff Fact Sheet order for Borgess Law clients is or will be approved or submitted by Minnesota plaintiffs’ leadership, or what portion, if any, will ultimately be approved by the Court. Neither the Firm, nor local co-counsel, are seeking double recovery. Instead, if time and expenses for Plaintiff Fact Sheet work for Borgess Law Clients is approved and submitted by plaintiffs’ leadership for common benefit consideration and if such common benefit work is approved and awarded by the Court, the Firm requests that the Court deduct any approved common benefit award from any total requested or awarded pursuant to this Application.

11. Through its representation thus far, over 250 hours of attorney time has been expended and \$1,703.25 in client costs have been incurred for the Firm’s clients.

12. If additional information is required from the Court in order to consider the Firm’s motion and/or supporting materials, including but not limited to detailed time reports of the Firm and associated co-counsel, the Firm requests leave to amend or supplement its motion as may be necessary.

I declare under penalty of perjury that everything I have stated in this document is true and correct.

Executed this 10th day of July, 2018 in Toledo, Ohio.

/s/ Pamela A. Borgess
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BORGESS LAW, LLC CLIENT EXPENSES

Firm	Date of Expense	Detailed Description	Amount of Expense
Borgess Law, LLC	12/3/2015	Client Filing and Service Fees	\$1,259.60
Borgess Law, LLC	6/14/2016	Photocopying of PFS documentation (total of 781 pages at \$.15 per page)	\$117.15
Borgess Law, LLC	9/6/2016	Postage Charge for Client letter	\$0.47
Borgess Law, LLC	12/9/2016	Postage Charge for Client letter	\$0.47
Borgess Law, LLC	3/22/2017	Ethicist Consult for Weber Beef Inc.	\$245.00
Borgess Law, LLC	6/6/2017	Postage Charge for sending out record requests (3 letters at \$.465)	\$1.40
Borgess Law, LLC	6/15/2017	Postage Charge for client letters	\$1.86
Borgess Law, LLC	6/23/2017	Postage Charge for client letters	\$1.86
Borgess Law, LLC	10/6/2017	Postage Charge for client letters	\$1.86
Borgess Law, LLC	10/9/2017	Postage Charge for sending out record requests (12 letters at \$.465)	\$5.58
Borgess Law, LLC	10/11/2017	Postage Charges for sending out records requests (10 letters at \$.465)	\$4.65
Borgess Law, LLC	10/17/2017	Postage Charges for sending out record requests (5 letters at \$.465)	\$2.33
Borgess Law, LLC	12/9/2017	Photocopying of PFS documentation (total of 78 pages at \$.15 per page)	\$11.70
Borgess Law, LLC	4/25/2018	Postage Charge for sending out client letters with attachments	\$9.40
Borgess Law, LLC	4/25/2018	Photocopying attachments for 4/25/18 letters	\$5.00
Borgess Law, LLC	5/31/2018	Photocopying of attachments for 5/31/18 letters	\$9.75
Borgess Law, LLC	5/31/2018	Postage Charge for client letters with attachments	\$11.16
Borgess Law, LLC	6/7/2018	Postage Charge for client letters	\$2.33
Borgess Law, LLC	6/8/2018	Photocopying of attachments for 6/8/18 client letter	\$0.75
Borgess Law, LLC	6/8/2018	Postage Charge of sending out client package with attachments	\$3.11
Borgess Law, LLC	6/27/2018	Postage charge for client follow up	\$4.19
Borgess Law, LLC	6/27/2018	Photocopying of 6/26/18 attachment to letter	\$3.65
Borgess Law, LLC		TOTAL:	\$1,703.25