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STATE OF MINNESOTA	**DISTRICT COURT**
COUNTY OF HENNEPIN	**FOURTH JUDICIAL DISTRICT**
In re: Syngenta Litigation and Syngenta Class Action Litigation This Document Relates to: **INDIVIDUAL CLAIMS CLASS ACTION**	Case Type: Civil Other Honorable Laurie J. Miller Court File Nos.: 27-CV-15-3785 and 27-CV-15-12625 **MINNESOTA CLASS COUNSEL'S RESPONSE TO VARIOUS ATTORNEYS' FEE APPLICATIONS**

I. INTRODUCTION

Despite the fact that a small number of firms clearly led this multi-venued litigation and an even smaller number negotiated the settlement which produced a spectacular result for the class members, dozens and dozens of other firms petitioned for approval of their fee contracts. Both the number and variety of these fee submissions demonstrates the important, complicated task facing the Courts (and Special Masters) to reach a fair resolution for both the firms involved and the settlement classes. The law required nothing less. "An award of attorneys' fees is a matter uniquely within the discretion of the trial judge," but the "fee the trial court establishe[s] must be reasonable." *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 453 (10th Cir. 1988).

Without question, many firms invested tens of thousands of hours and expended millions of dollars. But the question before the Court is not so limited. The question before the Courts is what attorneys took the risk (in terms of hours and dollars committed) and what attorneys produced the result for the class. Simply working or

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spending money to collect clients does not benefit the ultimate settlement class nor does simply working on the litigation on behalf of certain clients. In the class context, the work (time) and resources (money) must be for the benefit of the settlement classes to justify the award of fees.

As a starting point to this analysis, several general propositions can be laid out. First, time before the appointment of Federal MDL or Minnesota leadership has little if any benefit to the classes because that work was for the attorneys' individual clients or classes. Secondly, work done after the settlement (with the exception work done on settlement approval (including drafting agreements) and work with the Special Masters and work done administering the settlement) has no common benefit because the outstanding result has already been achieved. Thus, for example, working to assist individual farmers file claims (and then touting that number of claims) makes no difference to the $1.51 billion result. Third, although individual counsels' work on Plaintiffs' Fact Sheets ("PFSs") normally would not be considered common benefit time in large complex litigation such as this, the dynamic it created – in Minnesota – as we discussed in our original petition, forced Syngenta to face the fact that there was no knockout punch (such as defeating class) that could get them around the tens of thousands of cases in the pipeline in Minnesota state court and the appellate system they would face on those cases.

Finally, because of the hybrid nature of this case – multiple classes alleged for both of producers and non-producers plus tens of thousands of individual cases, the record is replete with various Joint Prosecution Agreements, Common Benefit Orders, a

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settlement Term Sheet, subsequent Attorneys' Fee Agreements and finally a global, class-only Settlement Agreement. The Courts (and Special Masters) facing the question of what reasonable class action settlement fee should be awarded will have to untangle all these agreements and their effect on the ultimate decisions.

On all these issues, as Co-Lead Class Counsel for the Minnesota Producer Class, we respectfully provide our proposed guidance below. Regardless how those allocation issues may resolve, we strongly support that the Courts award 1/3 of the settlement for the payment of attorneys' fees plus expenses[1] and continue to involve the Special Masters in the more specific allocation process.

II. BACKGROUND

The Courts know very well the background of this litigation both from a discovery and prosecution of trials perspective and from the critical settlement negotiations perspective. As such, we will not belabor the detail but instead, remind the Courts of the importance of several key components of that background.

First, as to the litigation, the MDL and Minnesota imposed tremendous pressure on Syngenta. As we discussed in our first petition, prevailing on the duty issue, avoiding early losses on economic loss doctrine, preemption and causation, pursuing an expansive

[1] Some courts award a percentage of the settlement to include out-of-pocket expenses. If the Courts choose to do that here, Minnesota Co-Lead Class Counsel respectfully request that such an approach require that expenses be paid to individual firms first – before division of the attorneys' fees – to avoid unfairly diluting the smaller percentages. For example, if two groups both have six million in expenses but are awarded different fee percentages, the group with the smaller fee percentage would have its fee award disproportionately diluted.

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and comprehensive discovery battle, plus obtaining critical class certification rulings all positioned the MDL and Minnesota cases to impose significant liability on Syngenta. This work was accomplished nearly exclusively by the MDL and Minnesota leadership.[2]

Second, the Minnesota leadership added another front in the litigation war against Syngenta; filing cases on behalf of tens of thousands of individual producer plaintiffs not subject to any of the class risks and thousands more of non-producers not covered by the MDL classes. Moreover, they prevailed on Judge Sipkins to apply Minnesota law nationally (contrary to the MDL Court's decision) to deceptive trade practices claims thus providing a forum for individual producers and non-producers.

Third, the Minnesota leadership stood tall and met the challenge of being ordered to complete vast bellwether discovery (over 40 cases) and to complete tens of thousands of Plaintiff Fact Sheets in the individual cases. No other group of attorneys can make the claim – in a separate non, MDL proceeding – that they won on the motion to dismiss, they won on the class, they won the battle over PFSs, they complied with Court's orders on bellwether discovery and they three times prepared for trial – starting twice. All in a separate appellate system that the parties believed would be more favorable to the farmers and non-producers.

[2] As we have said many times, the Minnesota leadership worked hand in hand with the Federal MDL counsel (who clearly took the lead) to complete the liability discovery, and to work up and present the class experts. But the Minnesota leadership took the lead in the bellwether process adding nearly a dozen additional liability and damages experts and preparing the first bellwether trial.

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Fourth, the Federal MDL obtained a $217 million verdict in Kansas trial, the Minnesota leadership resolved the first bellwether trial and the Minnesota class trial (involving a class nearly twice the size of Kansas) was well underway. These trials put more pressure on Syngenta and at least among the Negotiating Committee and Syngenta's counsel, the perception was shared: if Plaintiffs reached a verdict in Minnesota, the case may not be able to be settled.

Finally, there is no real dispute about the importance of the ultimate settlement negotiations. The Courts-appointed Negotiation Committee[3], Syngenta's chief negotiator,[4] the tireless assistance of the Special Masters Reisman and Stack and the continued oversight of the Courts produced this monumental, class-wide resolution of nearly every case. Before this final settlement process began in the summer of 2017, the previous settlement discussions involving the MDL and other counsel – despite meeting many times – never went anywhere. The simple fact remains: if this settlement was not reached by the negotiating parties, there would be no $1.51 billion to seek attorneys' fees and reimbursement of expenses from.

III. THE ATTORNEYS' FEES PETITIONS FILED

As directed by the Courts, dozens of firms and individual counsel filed attorneys' fee petitions and requests for reimbursement of expenses in early July 2018. The MDL Court ordered responses by August 17, 2018, with reply briefing due on September 17, 2018.

[3] Chris Seeger (chair), Clayton Clark, Daniel Gustafson, and Mikal Watts
[4] Leslie M. Smith

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Although the attorneys' fee requests vary in methodology and amount, the petitions fall into two broad categories: (1) common benefit requests; and (2) contingent fee contract requests. Because of the hybrid nature of the leadership – particularly in the Minnesota court, there are certain firms that have submitted petitions in both camps.[5]

A. Common Benefit

As the Courts well know, "Common Benefit" describe those fee applications that request fees on the basis of their time and efforts in this litigation benefitting Plaintiffs as a whole. The common benefit doctrine has long been held as an equitable exception to the "American Rule" of fees that allows attorneys to collect reasonable fees for work deemed "beneficial to persons other than a particular client, thus spreading the cost of the litigation to all beneficiaries." *In re Vioxx Prod. Liab. Litig.*, 760 F.Supp.2d 640, 647 (E.D. La. 2010). And, while the common benefit doctrine is most often employed in the class context, it has been more recently invoked in mass-action litigation. *Id.* Notably, however, courts have recognized the difference between application of the common-benefit doctrine in class actions versus application of the common-benefit doctrine in mass actions. Succinctly put, "[i]n class actions the beneficiary of the common benefit is the claimant; in MDLs the beneficiary is the primary attorney." *Id.*

Three main sets of attorneys submitted fee petitions requesting the Courts use the common benefit method. Those include the Federal MDL (on behalf of 44 firms), the

[5] As we have said before, no firms or individual attorneys should be paid twice for the same work. Thus, the allocation process must assure that duplicative requests should be offset in some fashion.

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Minnesota Leadership (on behalf of 12 firms) and the Illinois Leadership (on behalf of 170 firms). Each of these three petitions propose that the Court award 33 and 1/3 percent of the settlement for attorneys' fees plus the reimbursement of expenses.

The MDL Leadership requests that the Court allocate the total fee awarded based on an earlier fee sharing agreement: 50% to the MDL Leadership; 17.5% to the Illinois Leadership; 12.5% to Minnesota Leadership; and the remaining 20% be used to award $388,005 in attorneys' fees to the Subclass counsel (this represents their lodestars as well as a 1.5 multiplier) and "to any other counsel who makes a timely and valid request for fees that the court deems appropriate under the common-benefit doctrine principles." The MDL leadership also seeks reimbursement of $6,695,350.05 in expenses.

Similarly, the Illinois Leadership seeks 17.5% of the fees for themselves; 50% of the fees awarded to the MDL and 12.5% of the fees to the Minnesota team; with the remaining 20% to be referred to the Special Masters for consideration and recommendation from anyone submitting further application. The Illinois Leadership also seeks reimbursement of $7,665,415.73 in expenses.

The Minnesota Leadership sought an award of 33 and 1/3 percent of the settlement for total attorneys' fees plus expenses. The Minnesota Leadership also supported the previous fee agreement (based on the Reisman/Stack mediators' proposal) among the MDL (50%), Clark (17.5%) and Minnesota (12.5%) but added the fact that Watts promised to contribute his common benefit time to the Minnesota leadership (over $8 million) and forfeited his right to recover any of those Minnesota common benefit fees. Instead of collecting on his common benefit time, Watts agreed to collect fees only from

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his private contracts. This promise and agreement between Watts and the other groups came about because Minnesota agreed to include the Remele firm and Rick Paul in the list of firms allowed to collect common benefit fees under the Minnesota fund. Prior to that (in the mediators' proposal from which the 12.5% was derived), Remele and Paul were in the Watts group. Ultimately, Watts refused to execute the fee agreement and has now backed away from his promise to contribute his common benefit work to the Minnesota group without seeking reimbursement. Nonetheless, the Minnesota Leadership group continues to support the fee agreement and now requests that the Courts' adjust that agreement (using the remaining unallocated 20%) to compensate the Minnesota group fairly based on its actual lodestar[6], its important contributions, and the Watts situation described above. Minnesota requests an additional 5-7.5% of the remaining unallocated 20% fees percentage for a total of 17.5-20.5% of the total fee allocated.

Recognizing the various issues that need to be resolved with respect to the JPAs, the Common Benefit Orders and the like, the Minnesota Leadership also suggested that the Courts refer the allocation issues that remain to the Special Masters previously appointed in these matters.

[6] The approved Minnesota common benefit lodestar is $41M, and with the addition of PFS and bellwether discovery time, that increases to $56M. The Minnesota Leadership also requests reimbursement of $5,975,839.70 for expenses.

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B. Contingent

The remaining fee petitions generally advocate for the award of fees based on individual-contingency fee contracts but of course, they differ in their complexity, amounts and specific justifications as set out below:

Bassford Remele: Bassford Remele suggests: (1) awarding one-third of the total settlement be used for the payment of attorneys' fees and expenses; (2) delaying the ultimate allocation of the fees until the final claims data is compiled and analyzed; and (3) that any non-common benefit fees or expenses be offset by the common benefit fees and expenses. Bassford Remele also seeks to enforce the JPAs and the individual contingent fee contracts in harmony and requests that any reduction in the contingent fee of counsel, should be tiered based on where the case was filed—as plaintiffs in certain jurisdictions were required to complete Plaintiff Fact Sheets.

Borgess Law: Borgess Law, LLC, for itself and its co-counsel (identified as Kosieradzki Smith Law Firm LLC, and Winne Law Firm), request that the Courts allow them to seek their individual contractual fees as well as a total expense reimbursement of $1,703.25. In the alternative, Borgess Law requests leave to file a supplement and provide detailed time reports in which they assert will evidence hundreds of hours of attorney time.

Nolan Law Group: Nolan Law Group, for itself and its co-counsel (identified as Kosieradzki Smith Law Firm LLC, Winne Law Firm, and Borgess Law), requested that the Courts allow them to seek their individual contractual fees as well as a total expense reimbursement of $3,503.92. In the alternative, Nolan Law Group requests leave to file a

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supplement and provide detailed time reports in which they will evidence over 1,000 hours of attorney time.

Paul LLP: Paul LLP is uniquely situated in this litigation as a Federal MDL PEC member, a Minnesota PEC member, and as representing 1,641 individually retained clients. Thus, Paul LLP submitted an MDL and Minnesota petition seeking their common benefit time and expenses and a petition to collect on individual contracts with 1,641 clients. To be clear, the applications submitted by Paul LLP under the umbrella for the Federal and Minnesota MDL common benefit petitions were subjected to their respective audit processes to ensure that individual time was segregated out and not included in those petitions.

Toups/Coffman: The Toups/Coffman group seeks fees for its "over 9,400 individual clients in 44 states" and requests that the Courts award them attorneys' fees calculated using their contingent fee percentages set forth in each of their client contracts. The Toups/Coffman group estimates that "based on their clients' contractual contingent fee percentages…[their] Plaintiffs' settlement claims will comprise at least 10% of the value of the claims filed" which would equal about $34,000,000 and reimbursement of $374,532.19 of litigation expenses. Alternatively, should the Courts not allow contingent fees, Toups/Coffman requests $30,000,000 with a 1.5 minimum multiplier as well as the above expenses. In a second alternative, Toups/Coffman requests 10% of the "set aside" to pay attorneys' fees plus the expenses outlined above.

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Johnson Becker: requests an award of $8,000,000 in attorneys' fees and $138,130.94 in expenses for its 3,257 farmers each with a 40% contingency fee contract. Johnson Becker suggests that the estimate of their clients' awards will be between $25,000,000 and $34,000,000, and thus a corresponding fee estimate would be $10,000,000 to $13.6,000,000.

Pavlack Law: Pavlack Law seeks fees based on private fee agreements with forty-nine clients. Pavlack presents a few alternative proposals: first, Pavlack requests that the agreed-upon contingent fee and expenses as to each of the Firm's clients be paid from the fund to be created from the preliminarily approved class action settlement; second, Pavlack proposes that fees equal to 33 1/3% "of all amounts recovered by [Pavlack] (along with its expenses);" finally, Pavlack suggests that they be compensated from the fund for their hourly time and costs which is approximately $81,955 in attorneys' fees and $3,154.17 in expenses.

*Shields Law Group LLC: T*he Shields Law Group LLC seeks fees based on its private fee contracts for over 2,500 clients each at 30% of their claim. Alternatively, Shields Law seeks $9,851,683.25 in attorneys' fees and $402,285.74 in expenses.

Brad Morris Law Firm PLLC: The Brad Morris Law Firm seeks fees under in four separate alternatives: (1) the agreed-upon contingent fee and expenses as to each of [the firm's] clients be paid from the Fund to be created from the preliminarily approved class action settlement; (2) payment of fees equal to 33 1/3 % of all amounts recovered by the firm's clients (along with expenses from the fund); (3) if the Courts determines to "set aside" the contingency fee agreements between the Firm and its clients, the firm

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seeks payment from the Fund based on its clients' proportionate share of acreage compensated in the settlement (which they estimate to be in excess of $500,000); or (4) if the Courts base the approval of attorney fees on an hourly or quantum meruit format, the firm request leave to submit supplemental materials detailing hourly billing and expenses upon direction from the Court.

Eiland Law Firm: The Eiland law firm seeks private contract fees for 1146 producers and landlords (834 of which are pending in Williamson County, Ill). The Eiland Law Firm requests payment of the contractually agreed upon fees and expense reimbursement from any fund created to pay attorneys' fees and expenses arising out of the settlement. In the alternative, the firm requests the Courts to award it attorneys' fees in the amount of $7,300,937 as well as $53,685 in expenses.

Hossley Embry LLP: Hossley-Embry seeks fees for the 650 individual corn farmer cases in the MDL based on individual 33 and 1/3 contingency fee contracts but not additional expenses. Hossley-Embry requests that the Courts honor their contingent fee contracts and award Hossley-Embry their contractual contingency fees.

Law Offices of James Rogers: The Law Offices of James Rogers became involved in the litigation in July 2017, pursuing a putative Washington State Class which was transferred to the MDL Court on October 24, 2017. The Law Offices of James Rogers requests an award of $36,225 in attorneys' fees and $19,709.12 in costs and expenses.

Paul Byrd Law Firm PLLC: In addition to the common benefit fees submitted by the Minnesota Co-Lead Counsel for their work as members of the Minnesota PEC, the Paul Byrd Law Firm PLLC submits a fee request on its own behalf and on behalf of its

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team which include: The Kelly Law Firm PA; James J. Thompson, Jr. Firm; The Awbrey Firm; and the Clark Mason Law Firm. The Paul Byrd Law Firm represents more than 2,500 individual corn farmers in this litigation and was appointed to the Minnesota PEC. The Paul Byrd Law Firm requests attorneys' fees equal to 30% of the gross recovery attributable to their individual clients with their lodestar of $6,567,464.75 as the "floor" for such an award. Alternatively, the Paul Byrd Law Firm requests an award of their lodestar with a 3.0 multiplier.

Pendley, Baudin & Coffin LLP; Saeed & Little LLP; and Benjamin Marshall, Esq.: This group of law firms filed cases in Kansas, Indiana, Arkansas, Alabama, and Louisiana. They have contingency-fee contracts with their clients that range from 33 1/3% - 40% plus expenses. This group requests "that each be compensated from the settlement fund for their hourly time and costs in this litigation based upon their common benefit effort."

Wright and Schulte LLC: Wright and Schulte represent 1049 individual clients and have engaged in contingent fee contracts with those clients that range from 33 1/3% to 40% plus expenses. Wright and Schulte have submitted common-benefit time to leadership and are not seeking double compensation for the same. Specifically, Wright and Schulte request that the agreed upon contingent fee and expenses as to each of the firms' clients be paid from the Fund to be created from the preliminarily approved settlement; alternatively, Wright and Schulte request payment of fees equal to 33 1/3% of all amounts recovered by the firm (along with its expenses) from the fund; a second alternative has Wright and Schulte seeking compensation for their hourly time and costs

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in this litigation along with all requested, but unreimbursed common benefit time. Currently the firm has a lodestar of $1,875,470 and has expenses of $62,936.82.

Beasley Allen: Beasley Allen submits a fee application on behalf of the thirty-six plaintiffs who all agreed to 40% contingent fees with the firm. Beasley Allen asserts an application only seeking a reasonable attorney fee and costs pursuant to the private fee contract with the clients they have.

Douglas Murch/Conmy Feste Ltd: Conmy Feste filed a fee application out of an abundance of caution. Conmy Feste has an agreement to undertake joint representation of clients with Clark, Love, Hutson and Phipps Anderson Deacon. Thus, it appears that this firm falls within the Clark group.

Dunk Law Firm PLLC: Dunk law firm has filed a fee application out of an abundance of caution but does not include particular specifics at this time.

Hodge Law Firm PLLC: The Hodge Law Firm represents eighty-three individual producers in this action and seeks payment of their contractually based fees and expenses from the settlement fund. In the alternative, they seek payment for the fund for the Firm's reasonable hourly fees and costs incurred in the prosecution of this action which total to date: $565,887.50 in attorneys' fees and $46,897.87.

O'Hanlon, Demerath & Castillo: The attorneys at O'Hanlon Demerath & Castillo represent individual clients on a contingency basis in joint representation with Clark, Love, & Hutson; and Phipps Anderson Deacon and file this motion out of an abundance of caution. The firm is included in the list of referring counsel attached to Mr. Phipps' submission. (Doc. 3598-1).

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Wagstaff & Cartmell: Wagstaff & Cartmell, in addition to the work they performed on the Minnesota PEC, also represented 704 individual clients. They tracked their time separately from their common benefit time and incurred $1,194,663.50 in attorneys' fees and $14,977.50 in expenses (these figures do not include time spent compiling and completing the PFS).

Kemp Jones Coulthard: In addition to the common benefit fees submitted by the Minnesota Co-Lead Counsel for their work as members of the Minnesota PEC, Kemp Jones Coulthard (KJC) requests an award of attorney fees equal to their contracts with individual clients. Each of these contracts was 40% of the gross recovery. If the 40% fee does not equal their lodestar of $885,863.50, KJC requests a multiplier to reach that point. Alternatively, if the Court is unable to calculate the gross recovery of each of KJC's individual clients, then KJC requests an award of their lodestar with a reasonable multiplier of 1.5 to account for the risks related to this litigation which they have calculated at $1,328,795.25.

Vonachen, lawless, Trager, & Slevin; Westervelt, Johnson, Nicoll & Keller: The Vonachen firm requests the contractually agreed upon fees and expenses for each of the clients (one-third of recovery) be paid from the fund. Alternatively, if the Courts sets aside contingency fee agreements, the firm seeks payment from the fund based on its clients' proportionate "share of acreage" compensated in the settlement which is "expected to be a fee in excess of $1,000,000.

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Meshbesher & Spence: The Meshbesher firm seeks 30% contingent fees for the 121 farmers and four grain elevators it represents in the instant litigation plus expenses of $36,578.52.

Watts Guerra: Watts Guerra applies for a fee and expense award from the Courts of 24.16% of the gross, aggregate recoveries of their individual clients plus an additional $12.85 million for expenses.

Watts Guerra supports the request of the common benefit group for the direction of one-third of the settlement to be set aside for attorneys' fees. Watts Guerra proposes a two-prong approach. First, class counsel would be awarded fees from a common benefit fund that is constituted by one-third of the value of the claims filed by absent class members. Second, retained counsel would receive fees "attributable to representation of individual clients." Watts Guerra further suggests that after the fees have been attributed based on claims-made, the "Courts can impose a counsel-specific common benefit assessment on retained counsel to increase the amount available for common benefit awards." As to potential assessment on counsel with retained clients, Watts Guerra asks that the JPA be enforced – though at a rate compression due to the fact that they would only take a one-third contingency award rather than forty percent.

Watts Guerra further notes that, should the Courts adopt this plan, Watts Guerra will "forgo" any additional fee award from the Minnesota common benefit pool to which

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it would otherwise be entitled. Alternatively, should Watts Guerra be "awarded less than it bargained for with respect to contract fees" it would then seek a common benefit fee.[7]

IV. ARGUMENT

The decision to award or deny attorneys' fees rests within the sound discretion of the district court. *See e.g., Wescott Agri–Products, Inc. v. Sterling State Bank, Inc.,* 682 F.3d 1091, 1094 (8th Cir. 2012). As discussed above, many of the submissions to the Courts (indeed from both groups) rely heavily on arguments of earlier agreements being enforced or recognized including the JPAs, [as amended], the common benefit orders from the MDL and Minnesota Courts, the Term Sheet and the February 23, 2018 fee sharing agreement plus literally thousands of various individual contingency fee contracts made with producers and non-producers in nearly every state in the U.S. Although these agreements were surely entered into in good faith at the time of their execution, the landscape of this litigation changed when the Negotiating Parties settled the case (contrary to the term sheet's plan for both class and individual settlements) as a global class action with 4 subclasses.

A. Joint Prosecution Agreements

The JPAs were executed by certain counsel in Minnesota and the MDL early in the case. Some class counsel and some individual counsel joined these JPAs through the execution of Participation Agreements. Many other individual counsel had the

[7] As discussed above, this is contrary to the agreement Watts made with the Minnesota leadership to forgo common benefit fees from the Minnesota fund.

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opportunity to join the JPAs but declined. The JPAs and the subsequent Participation Agreements were amended from time to time as the litigation progressed.[8]

The Watts Guerra petition advocates for the enforcement of the JPA on a compressed scale – in other words – Watts Guerra suggests that because their individual contingency fee contracts were set at 40%, that is necessarily what drove the negotiations and resultant 11% assessment for producers – now that Watts Guerra has suggested moving to an award of 33.33% (rather than the original 40% they contracted with clients) the 11% should be compressed in a similar fashion. While it is certainly possible that the original negotiation that arrived at the 11% assessment benchmark was based in part on the existence of the contingency contracts at 40%, that is not mentioned at any point in any of the iterations of the JPA, and thus Watts Guerra's reliance and following modification of this amount is not summarily supported in the language of the JPAs.

Similarly, the Bassford Remele petition advocates for the use of the JPA as a guide in the Courts' ultimate determination of attorneys' fees. Bassford Remele suggests that the Courts should rely on the JPA to set a benchmark common benefit fee percentage (e.g. 11% for producer claimants) and subsequently apply an appropriate multiplier for common benefit fees – meanwhile also enforcing the contingent fee contracts with clients.

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[8] While silent with respect to the JPA in their memorandum in support of their fee petition, the MDL Leadership does acknowledge that the JPAs "were important to our successful efforts in meeting the short fact ad expert discovery deadlines established by the Court." (Stueve July 10, 2018 (ECF 3587-1) declaration at para. 184).

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There are several reasons that the JPAs cannot be the measure of fee allocation now. First, the JPAs were meant to allocate fees as between lawyers and not as between lawyers and the class members. As the Courts well know, in a class context (as we now have here because of the global class settlement), it is incumbent upon the Court to protect the interests of the class members. *See, e.g., In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liab. Litig,* 895 F.3d 597, 610 (9th Cir. 2018) ("we impose upon district courts a fiduciary duty to look after the interests of absent class members.") (citations omitted).

Second, the JPAs, by its express terms, contemplate that the signatories' clients would not be a part of a nationwide settlement class. *See* JPA at §2.a (setting common benefit assessment levels that Syngenta should withhold from payment to Watts Guerra clients in event of settlement); §2.f (providing that Federal MDL will exclude Watts Guerra clients or provide easy opt-out process), cf. §4 (noting that the parties to the two groups are allowed to independently settle their clients' claims). The various rights, duties and obligations arising under the JPA, all flow from the satisfaction of the condition precedent that signatories to the JPA representing individual clients, opt their clients out of any nationwide settlement class, and separately settle their clients claims. This possibility no longer exists.

Third, the Federal MDL and Minnesota Court entered Common Benefit Orders that were, in part, predicated on the JPAs. (Doc. 936; Common Benefit Order, (Dist. Ct. Minn. Dec. 7, 2015). In those orders, the Federal MDL court stated: "[i]n the event that there is a class settlement, recovery or judgment in favor of the class, no assessment

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pursuant to this Section will be made, either for attorneys' fees or for expenses…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." (Doc. 936 at p. 20).

Similarly, the Minnesota Court stated: "In the event that there is a class settlement, recovery or judgment in favor of a class covered by this Order, no assessment pursuant to this Section will be made, either for attorneys' fees or for expenses…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. Nothing in this section is intended to be inconsistent with the JPA or the Federal MDL Common Benefit Order – but nothing in the JPA shall be deemed to bind or otherwise impose obligations on the Defendants." Common Benefit Order, (Dist. Ct. Minn. Dec. 7, 2015, at p. 6).

Fourth, the Settlement Agreement contains an integration clause that voids any prior agreements within the scope of the [Settlement] Agreement which includes discussions and agreements related to petitioning for and allocating attorneys' fees so the JPAs fall within the scope of that integration clause. Specifically, section 9.24.1 of the Settlement Agreement states: "This Agreement, including its exhibits and the Parties' side agreement referenced in Section 8.3.1 above that is to be filed with the Court under seal, contains an entire, complete, and integrated statement of the terms agreed to by and between the Parties, and supersedes all prior proposals, negotiations, agreements, and understandings relating to the subject matter of this Agreement."

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Since we now have a settlement that is entirely encompassed within a class, the Common Benefit Orders and the JPAs no longer apply. We must shift our previous view of the attorneys' fees structure while holding the best interests of the class members firmly in mind and continuing to recognize the laudable goals of fair and reasonable compensation for the attorneys who legitimately worked on this matter and aided in the final resolution.

B. The Fee Sharing Agreement

Just prior to the execution of the Settlement Agreement, members of the Negotiating Plaintiffs' Committee agreed on language for a Fee-Sharing Agreement based in large part on the prior Reisman/Stack mediators' proposal. Mikal Watts originally agreed to join this Fee Agreement and accept 20% as his exclusive share of fees and further agreedto contribute his common benefit time to the Minnesota group. Ultimately, at the last minute, Mr. Watts decided not to execute the Fee Sharing Agreement and as you can see from the initial Watts Guerra fee petition, no longer agrees to release his claim for common benefit fees in Minnesota.

Subsequently, on February 23, 2018, Stueve, Gustafson, and Clark entered into a similar agreement which assigned percentages to different "groups" for the division of any attorney's fees and expenses awarded by the Court in this action. (Doc. 3587-8). The MDL Leadership would receive 50%, the Minnesota Leadership would receive 12.5%, and the Illinois Leadership would receive 17.5 %. "The remaining 20% of any attorneys' fees awarded by the Court was to be allocated by the Courts taking into consideration the recommendation by the Special Masters." *Id.* at p. 2.

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Subject of course to approval of the Settlement by the MDL Court (which has not yet happened), the Fee Agreement expressly states that its contractual terms supercede all previous contracts between the signatories, including any JPAs. *Id.* at 3. This agreement was negotiated by some members of the Negotiation Committee with the Special Masters and forms the basis for the MDL, Minnesota, and Illinois fee petitions.

Because of the Watts decision not to sign the original fee sharing agreement, Watts' current refusal to honor the agreement not to seek Minnesota common benefit fees and because of its important contributions – particularly its work on the negotiation committee – to the spectacular outcome here, the Minnesota Leadership now seek further allocation of a portion of the 20% to Minnesota.

To implement the allocation of the remaining 20%, the Minnesota Leadership strongly suggests that the matter be referred to the Special Masters for an efficient implementation of a process to review requests and ultimately recommend allocating the remaining 20% that has not been previously allocated.

C. The Master Settlement Agreement

On February 26, 2018, the Parties executed the master settlement agreement. With respect to attorneys' fees, the settlement agreement contemplates that Settlement Class Counsel "and other counsel representing Class Members for the award of attorneys' fees costs, and expenses" may apply to the Court for an award. Section seven of the agreement controls Administrative Expenses and Attorneys' Fees. Specifically, it allows counsel "who performed work for the benefit of Class Members" to make an application for fees. Moreover, the Settlement Agreement provides for any "matters" arising from

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client fee contracts and referring counsel referral agreements to be heard in the jurisdiction in which those cases were filed (Federal MDL, Minnesota, or Illinois). The Settlement Agreement also recognizes the existence of the JPA in section 7.1.2, where it specifically notes that Syngenta has no liabilities with respect to any disputes among plaintiffs' counsel relating to fees. Further, the Settlement Agreement contains an "integration clause" at section 9.24 which states that the Settlement Agreement "supersedes all prior proposals, negotiations, agreements, and understandings related to the subject matter of this Agreement."

D. The Private Contingency Fee Agreements

Contingency fee contracts between an attorney and client are private contracts. *In re Sulzer Hip Prosthesis and Knee prosthesis Liab. Litig.,* 290 F.Supp. 2d 840, 848 (N.D. Ohio 2003). These contracts and have long been recognized and accepted because they provide a practical means for litigants to access the Courts. *See, In re Vioxx Prod. Liab. Litig.,* 574 F. Supp. 2d 606, 610–11 (E.D. La. 2008), *on reconsideration in part,* 650 F. Supp. 2d 549 (E.D. La. 2009), citing *Cappel v. Adams,* 434 F.2d 1278, 1280 (5th Cir.1970). Despite this acceptance, "[c]ontingent fees may be disallowed as between attorney and client in spite of contingent fee retainer agreements, where the amount becomes large enough to be out of all proportion to the value of the professional services rendered." *Id.* citing *Gair v. Peck,* 160 N.E.2d 43, 48 (N.Y.1959).

In the matter at hand, the contingent fee contracts are many and varied in their terms. They appear to range from 20%-40%, some inclusive of expenses and others not. Several attorneys express the commitment, work, and risk they took on behalf of their

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clients in this matter and some of it – including the PFSs and Bellwether discovery work was important and should be compensated. Without a doubt, some portion of this work was important and added value to the claims of their individual clients and as discussed above, put pressure on Syngenta in Minnesota. Others work (collecting clients but not litigating) has less, if any, value. And of course, some of these attorneys actually opposed class and sought to impede a global settlement. The Courts (and Special Masters) need to place a value on this work but the Minnesota Leadership strongly argues that whatever amount is award the individual counsel, it should come out of the remainder of the 20% left after Minnesota's additional allocation.

V. CONCLUSION

Minnesota Co-Lead Counsel recognizes the complex and unruly task that has been presented to the Courts in terms of the determination of appropriate attorneys' fees from this large-scale litigation. Wading through the multitude of submissions, competing arguments on the validity of previous agreements, and ultimately weighing the equitable determination with the factors of which applicants did work to advance the litigation and how that work should be valued is not a simple equation. Thus, the Minnesota Co-Lead Counsel have attempted to synthesize and condense the relevant issues for the Court in this response and respectfully suggest that the purpose of these agreements – the equitable compensation of the attorneys for the work they provided – be the guide in this determination. Ultimately, the Minnesota Leadership renews the proposal it suggested in its initial application – that the Court set aside 1/3 of the settlement for attorneys' fees plus the payment of expenses and refer the more specific allocation of the remaining

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funds (the 20%) to a process established by the Special Masters and, ultimately the Courts.

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Respectfully Submitted,

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