IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

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

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

OBJECTIONS OF WATTS GUERRA LLP TO
THE SPECIAL MASTER'S NOVEMBER 21, 2018 REPORT & RECOMMENDATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Secondary Authorities

INTRODUCTION

The Special Master was correct to recognize that individually retained attorneys' fees should be paid from the settlement fund. The mass action component of this case played a critical role in bringing Syngenta to the settlement table, creating the sort of liability risk necessary to secure a $1.51 billion settlement.

That settlement, and the $503.33 million aggregated attorneys' fee approved by the Court, resulted from the combined effort of multiple groups. Retained counsel prosecuted tens of thousands of individual cases in mass actions—the vast majority of which were consolidated in Minnesota state court—while putative class representatives pursued class cases principally in Minnesota and Kansas. The undertaking was enormous. Minnesota, in particular, invested heavily. By the Special Master's count, its attorneys accounted for almost half of all attorney time (48%), yielding a lodestar well over $155 million. Kansas also invested heavily; attorneys from that jurisdiction accounted for 38% of all attorney time and a lodestar just shy of $100 million. Work performed in Illinois accounted for the remaining 14% of attorney time.[1]

Preliminary claims data indicates that class member recoveries are ***highly*** correlated with representation by "individually retained private attorneys," or "IRPAs." Settlement class members who joined the litigation as individual plaintiffs in the mass action component of the case—mostly clients of Watts Guerra or other firms that litigated in Minnesota—stand to recover more than half of the settlement fund. This is unsurprising: Watts Guerra alone represented 23% of the ***total*** corn harvest in the United States and made substantial efforts to educate its clients about

[1] Total lodestar figures for counsel in all three jurisdictions—including attorney and non-attorney time, and aggregated based on the Special Master's groupings (*see* ECF No. 3816-2)—are provided in Table 2, *infra* A-2. Roughly the same as the attorney-only figures provided by the Special Master, the proportion of *total* work between jurisdictions is 35% in Kansas, 48% in Minnesota, and 17% in Illinois.

the settlement to ensure they submitted claims. As a result, while only about 20-25% of unrepresented class members filed claims, about 75% of all IRPA clients filed claims—including more than 94% of Watts Guerra's clients (at least 54,879). Watts Guerra thus expects that its clients, who by themselves submitted more than 24% of all claims, will recover more than 25% of the $1.51-billion settlement fund—likely ***much*** more.

The Special Master's proposed allocation, regrettably, does not reflect those realities. It is both legally flawed and factually deficient. In an action never before taken in a mass tort litigation, the Special Master here allocated 90% of the total attorneys' fees toward payment of common-benefit counsel, reserving only 10% of the available fees for retained counsel. The Special Master meant this to reflect a contingency-fee cap of 10%, but the math is simply wrong. The actual fee cap amounts to no more than 7%, less than any figure we can find in a comparable settlement. That is unjustified by the facts of this case and the contributions that retained counsel made. It also defies the logic and reasoning of other cases that have capped retained counsel's fees—including the very cases upon which the Special Master purports to rely. Indeed, in terms of contingency caps (7%), division between common-benefit and retained-counsel fees (90/10), and common-benefit assessments from retained counsel (30%), the Special Master's proposal is not just an outlier; it is entirely unprecedented.

The suggestion that all retained counsel's fees be supervised and set by the district court in Kansas, moreover, contradicts the express terms of the Settlement Agreement. If the overall allocation of attorneys' fees in this case were fair and reasonable nonetheless—that is, if retained counsel in Minnesota in total would recover in proportion to their investment and contributions—that defect could be overlooked. But the Special Master's proposed allocation is not. It wildly overcompensates common-benefit counsel at the expense of retained counsel; it also

overcompensates Kansas and Illinois at the expense of Minnesota.

Finally, even setting aside the inadequacy of a 90/10 split between common-benefit and individually retained counsel, the Special Master allocated far too little for attorneys in Minnesota who fought just as hard and contributed just as much to the successful resolution of this case as the Kansas Leadership, yet would receive less than half as much in attorneys' fees—a 24% allocation compared to Kansas's 50%. Minnesota counsel, moreover, contributed ***far more*** than the attorneys in Illinois, some of whom did little other than to file cases in a new jurisdiction for the purpose of avoiding the common-benefit assessments that retained counsel in Kansas and Minnesota had agreed to pay. Yet the Special Master allocated Illinois a full 16%. That allocation simply cannot be squared with the relative contributions of attorneys in each jurisdiction, whether measured quantitatively by client recoveries, quantitatively by lodestar, or qualitatively by considering the impact of each jurisdiction's contributions to the litigation. A lodestar comparison says it all:

	AWARD		WORK	
	(%)	(million $)	Multiplier	$/hr
Overall fee	100%	$ 503.3	**1.44**	**$ 423**
Kansas	51.9%	$ 261.1	**2.15**	**$ 1,009**
Minnesota	30.4%	$ 152.9	**0.91**	**$ 203**
Illinois	17.7%	$ 89.3	**1.48**	**$ 500**

Table: Lodestar Crosscheck—Special Master Proposal[2]

[2] These figures, and those on the table below (at 5), include allocations to retained counsel in each jurisdiction per December 3, 2018 claims data (number of claims filed, not bushels of corn). *See* Table 1, *infra* A-1. Calculations for "CB WORK" are based on "common benefit" designations made by counsel. *See also* Table 2, infra A-2 (summary of aggregate submissions by counsel in each jurisdiction); *but see infra* 21-22 n.15 (questioning designations made by certain counsel in Illinois).

Other factors only underscore the unreasonableness of the Special Master's allocation:

- It relies heavily on the February 23, 2018 fee-sharing agreement, which was signed and executed by only three of the attorney groups in this case. But it fails to provide a tenable explanation for favoring that agreement over an agreed-upon proposal—from mere ***hours*** before—which would have provided 32.5% to all Minnesota counsel, including 20% for the Watts Guerra Group alone.

- It completely disregards the Joint Prosecution Agreement. Even if that agreement does not apply by its terms (which it does), it nonetheless ***must*** at least be ***considered*** by the Court under first principles of restitution law. It was signed by the entire Kansas and Minnesota leadership, was endorsed by the Kansas and Minnesota common benefit orders, squarely addressed the central issues now before the Court (*i.e.*, the proper division between contract and common-benefit fees, and between Kansas and Minnesota counsel), and provides the best *ex ante* evidence of what the parties believed to be a fair allocation of fees in this case.

- It ignores the substantial contributions of the Minnesota attorneys—and Watts Guerra in particular—in ensuring that Syngenta could not walk away simply by defeating class certification; putting punitive damages in play; developing a more favorable compensatory damages model; eliciting and leveraging damaging testimony in the Minnesota Class trial to increase Syngenta's litigation risk; and in actually getting class members paid.

The Court must make an equitable division of fees, yet the Special Master does not mention much of this evidence, much less weigh it appropriately.

As the largest IRPA (by far) and one of the leading attorneys in Minnesota, Watts Guerra—together with its 330 associate counsel—would bear the brunt of both misallocations. For all common-benefit counsel in Minnesota ***other than*** the Watts Guerra Group, Mr. Gustafson has steadfastly sought 12.5% of the available fees. *E.g.*, ECF No. 3662-1 at 46. Thus, under the Special Master's proposal, the most that the Watts Guerra Group could possibly receive is around 16.5%—half the IRPA pool (5% of the overall fees), plus the balance of the Minnesota allocation after Mr. Gustafson's 12.5% (11.5% of the overall fees). But Watts Guerra may receive less, insofar as the Special Master's framework might indicate that PFS and non-common-benefit work is being excluded from the jurisdictional "Common Benefit" pools—a matter the Court should clarify. Further, even in that best case, 16.5% scenario, the Watts Guerra Group

would receive a fractional multiplier of 0.80 for its work. And, at the jurisdictional level, all Minnesota counsel would receive a fractional multiplier of 0.91, while Kansas counsel and Illinois counsel collectively would receive multipliers of 2.19 and 1.48, respectively, on their work—including PFS and non-common-benefit work. The average hourly rates are equally striking: The $503.3 million overall fee could provide for an average hourly rate—across all hours, in all jurisdictions—of $423. The Special Master's proposal would provide average hourly rates of $1009 to Kansas counsel, $203 to Minnesota counsel, and $500 to Illinois counsel.

These figures—collected on the table above (and at Table 4, *infra* A-4)—demonstrate that the Special Master's proposed allocation simply cannot be squared with the relative contributions of the attorneys in each jurisdiction. A fair and equitable allocation that adequately compensates all interested attorneys would look much different. A fair allocation would fund and cap contingency fees for retained counsel at a true 25% of the gross settlement amount achieved for those clients—still toward the low end of the range of caps that other courts have imposed—reflecting the substantial contributions and significant efforts of those attorneys in bringing about this settlement. The allocation of the remaining funds would be split among the jurisdictions in a manner that accurately reflects their contributions, both in terms of hours invested and in terms of each jurisdiction's impact on inducing Syngenta to settle. Minnesota would receive nearly as much as Kansas, and over twice as much as Illinois:

	AWARD		**WORK**	
	(%)	**(million $)**	**Multiplier**	**$/hr**
Overall fee	100%	$ 503.3	**1.44**	**$ 423**
Kansas	43.5%	$ 218.8	**1.80**	**$ 845**
Minnesota	41.2%	$ 207.3	**1.23**	**$ 276**
Illinois	15.3%	$ 77.3	**1.28**	**$ 433**

Table: Lodestar Crosscheck—WG Proposal

That is the allocation this Court should aim for when allocating attorneys' fees. That is the allocation that is most fair and reasonable. That is the allocation that would survive appellate scrutiny.[3]

OBJECTIONS[4]

I. The Treatment Of Retained Counsel Fees Is Contrary To Law And Unworkable

The Special Master's attempt to divide attorneys' fees between retained counsel and common-benefit counsel cannot be sustained. The Special Master proposes that 10% of available fees be allocated to compensate retained counsel so as to cap contingency fees at 10%. That is factually incorrect: It produces an actual contingency cap of at most 7%. The Special Master's reasoning, moreover, ignores *Drywall*, the single case most on-point. And the proposal that this Court oversee the allocation of individual attorneys' fees defies the Settlement Agreement. Rather than this problematic 90/10 split, the Court should adopt a 55/45 division of the overall fee, with the IRPA pool divided among jurisdictions and awarded based on the claims process.

---

[3] Citations are as follows: ECF No. 3816, the Report & Recommendation of Special Master Ellen Reisman ("R&R"); ECF No. 3507-2, the Agrisure Viptera/Duracade Class Settlement Agreement ("SA"); ECF No. 3611, Watts Guerra's Memorandum in Support of Its Fee & Expenses Application ("WG Mem."); ECF No. 3692, the Omnibus Response of Watts Guerra LLP ("WG Resp."); ECF No. 3722, the Reply of Watts Guerra LLP in Support of Its Application for Attorneys' Fees ("WG Reply"); ECF No. 3580-2, the Report of Professors Arthur R. Miller, Geoffrey P. Miller, Charles Silver, Brian T. Fitzpatrick, and Alexandra Lahav ("Fitzpatrick Report"); ECF No. 3692-2, the Response Report of Professors Arthur R. Miller, Geoffrey P. Miller, Charles Silver, Brian T. Fitzpatrick, and Alexandra Lahav ("Fitzpatrick Resp. Report"); ECF No. 3580-3, the Report of Professors Andrew Kull and Charles Silver ("Kull-Silver Report"); ECF No. 3692-1, the Response Report of Professors Andrew Kull and Charles Silver ("Kull-Silver Resp. Report"); ECF No. 3580-4, the Declaration of Mikal Watts ("Watts Decl."); ECF No. 3722-4, the Reply Declaration of Mikal Watts ("Watts Reply Decl."); ECF No. 3722-3, the Supplemental Docket Analysis of The Settlement Alliance ("Supp. TSA Report"); ECF No. 3693, the Consolidated Response of Kansas MDL Co-Lead Counsel ("Kansas CLC Resp."); ECF No. 3568, Bassford Remele, P.A.'s Memorandum of Law Regarding the Allocation of Attorneys' Fees ("Bassford Remele Mem."); and the Memorandum in Support of Minnesota Co-Lead Class Counsel's Joint Motion for Approval of Common Benefit Awards, filed in Case No. 27-cv-15-12625 (Minn. Dist. Ct. July 10, 2018) ("MN Class Counsel Mem.").

[4] As were its prior filings, these Objections are submitted by Watts Guerra on behalf of itself and its hundreds of associate counsel—the entire "Watts Guerra Group." *See* ECF Nos. 3580, 3580-11 to -27, 3686; Watts Decl., App. B.

A. The proposed $50.3 million allocation for IRPA fees is legally insufficient

1. A basic math error capped IRPA fees at an unprecedented 7%

With $503 million in total attorneys' fees to work with, the Special Master began by allocating 10% of that amount to compensate individually retained private attorneys (the "IRPA pool"). R&R 67. The Special Master concluded that the $50.3 million IRPA pool would amount to a ***10%*** cap on individual contingency fees. *Id*. That was wrong, for two reasons.

First, in calculating the contingency cap, the Special Master used the wrong denominator. With 48% of the claims submitted by represented class members, she assumed those class members would receive $456 million from the settlement—48% of the $950 million ***remaining after fees and expenses are paid.*** R&R 67. A contingency fee of 10%, she reasoned, would pay retained counsel an aggregate fee of $45.6 million. In other words, the Special Master calculated contingency fees as a percentage of ***net*** recovery. But that is not how contingency fees work. A contingency fee is calculated based off ***gross*** recovery. *See In re Marion Merrell Dow Inc., Sec. Litig.*, 965 F. Supp. 25, 28 (W.D. Mo. 1997); *see also* ECF No. 3580-9 (Watts Guerra contracts stating "**Attorneys' fees will be calculated based on the gross recovery**").[5]

Calculated properly, the Special Master's $50.3 million IRPA pool actually amounts to a maximum contingency fee cap of ***7%***.[6] As explained below, that is unprecedented; even 10% is. To define the contingency-fee cap properly, the Special Master needed to look at the total gross recovery. A subsidiary mistake, addressed below, is that individually represented farmers' re-

[5] Ultimately, whether the Court chooses to cap the contingency on the basis of gross or net recoveries, the "end result" must be "reasonable." *Powers v. Eichen*, 229 F.3d 1249, 1258 (9th Cir. 2000). "If twenty-five percent of gross is reasonable, perhaps thirty-five percent of net would be reasonable." *Id.* Either way, the proposed cap here is unreasonable.

[6] The settlement fund is valued at $1.51 billion. If individually represented class members recover 48% of that amount, they would receive $724.8 million. A $50 million IRPA pool results in a 7% cap ($50 million / $724.8 million). On a more realistic assumption (discussed below), IRPA clients receive 59% of the fund, and a $50 million IRPA pool results in a 5.6% cap ($50 million / $890.9 million).

coveries will be higher than the average class member's. But even looking at the number of ***claims*** filed, as the R&R does, any cap should be a percentage of $724.8 million—48% of the $1.51 billion settlement fund ***before*** fees and expenses. Ten percent of this amount would be about $72.48 million, or about 14.4% of available fees. And if one uses a realistic estimate of individual versus class recoveries, rather than the number of claims, the number changes from $72.48 million to $89.09 million, or 17.7%.[7]

The Special Master assumed that the Settlement fund would be "distributed on a relatively equal basis" between represented class members and unrepresented class members. R&R 67. The Special Master recognized that assumption may not be correct. *Id.* at 67 n.178. It is almost certainly wrong. Under the settlement, class members recover in proportion to their ***corn harvest***. SA §§ 3.7.2.1, 3.7.3.1. Individually represented class members represent a higher-than-average share of the harvest. As of August 31, 2018, Watts Guerra's clients represented 39% of the submitted claims, but an estimated 48.6% of the corn harvest accounted for by those claims. Supp. TSA Report 3.[8] That is just Watts Guerra's clients—not all the other represented class members. But it makes sense that farmers with a larger harvest, who have suffered a larger injury, would seek the expertise of counsel and pursue their claims against Syngenta individually.

[7] Earlier in the claims process, when Watts Guerra clients represented 39% of all claims, The Settlement Alliance calculated that they represented 48.6% of the corn harvest—an increase by a factor of 1.24 (48.6% / 39%). Supp. TSA Report 3. If Watts Guerra's clients are representative of all represented class members, individual recoveries could total as much as 59% of the settlement. (That number is calculated by multiplying represented class members' share of the claims—48%—by 1.24 to obtain their share of the harvest—59%.) A settlement recovery based on 59% of the corn harvest would total $890.9 million ($1.51 billion * 0.59), yielding a 10% contingency fee of $89.09 million.

[8] As of December 3, 2018, class members self-identifying as represented by Watts Guerra or one of its associate counsel represented 24.2% of the submitted claims. Declaration of Mikal C. Watts ("Watts Obj. Decl.") at ¶ 7, Exhibit 1 hereto. Many Watts Guerra clients submitted their claims early in the claims period. The decrease has also resulted from Brown Greer's decision to process paper claims after electronic claims, regardless of the order of receipt, which has facilitated poaching by unscrupulous firms and effectively nullified electronic corrections to representation records. *See id.* ¶¶ 8-9. Although the Court should be aware of this issue, Watts Guerra will be attempting to resolve it directly with Brown Greer. *Id*.

By contrast, farmers with smaller claims lack those incentives and are more likely to remain absentee class members. *See, e.g.*, *Phillips Petro. Co. v. Shutts*, 472 U.S. 797, 809 (1985).

Watts Guerra's clients alone account for 23% of the total corn harvest ***in the United States***. Thus, assuming that ***every member of the class*** files a claim, Watts Guerra's clients would receive 23% of the settlement. But Watts Guerra's clients are participating at a relatively high rate. Overall, 35% of the class submitted a claim—a result the Special Master applauds, R&R 29-30, as do we. But nearly ***half*** those responses consisted of claims by represented individuals—an outsized response. Indeed, having an attorney made it ***three times more likely*** that a class member filed a claim: While 20-25% of absent class members filed claims, the claims rate was 75-80% among represented clients, and ***94%*** among Watts Guerra clients. The magnitude of the represented class members' response itself is a meaningful fact that the Special Master should have, but did not, consider in setting the IRPA pool. Moreover, given that 65% of class members are not participating, and the fact that Watts Guerra clients represent a larger percentage of the claims than the class as a whole, Watts Guerra's clients will almost certainly recover more than 23% of the settlement.[9] And if Watts Guerra's clients are typical of represented farmers, then the farmers submitting those 48% of claims will likely recover 59% of the settlement, or $890.9 million. *Supra* 7 n.6. A 10% contingency fee on that amount would pay retained counsel $89.09 million. A $50.3 million IRPA pool is thus too small. It cannot fund a 10% contingency fee based on any reasonable calculation.

[9] Represented class members also submitted a majority of the subclass 1 claims, which receive the bulk of settlement funds. *See* Ex. 2 hereto (Brown Greer summary report dated Dec. 3, 2018). That fact—which the Special Master also elided (*see* R&R 30)—further demonstrates that the average recovery of a represented class member will exceed that of an absentee class member.

2. Even a true 10% contingency-fee cap is too low

For the reasons above, the Special Master's proposed 10% cap will, in reality, be far below 10%. But even a ***true*** 10% cap is inadequate—indeed, unprecedented. In the vast majority of cases involving a similar settlement, the courts have not capped individual attorneys' fees. *See* Fitzpatrick Report 17-18 tbl. 1. Where courts have capped contingency fees, they did so at levels far higher than 10%. *See id.* To justify the admittedly "significant reduction" to 10%, the Special Master noted that ***most*** individually retained counsel "did little more than recruit clients and in some cases fill out PFSs." R&R 68. That is legally and factually incorrect.

It is legally wrong: In *In re Vioxx Products Liability Litigation*, 650 F. Supp. 2d 549 (E.D. La. 2009), for example, the court imposed a contingency-fee cap of 32%, less a common benefit assessment of 6.5%, even though many retained counsel "simply wait[ed] while a $4.85 billion settlement was negotiated and then d[id] no more than enroll their clients in the settlement and monitor their progress through the claims valuation process." *Id.* at 563. Likewise, in *In re Oil Spill by the Oil Rig "Deepwater Horizon"*, MDL No. 2179, 2012 WL 2236737 (E.D. La. June 15, 2012), the court relied heavily on *Vioxx* to impose a 25% contingency-fee cap. *Id.* at *2. And in *In re National Football League Players' Concussion Injury Litigation*, No. 2:12-md-2323, 2018 WL 1658808 (E.D. Pa. Apr. 5, 2018), the court imposed a 22% cap where retained counsel did no more than "shepherd[ ] . . . their clients through the claims process." *Id.* at *3.

The R&R makes almost no attempt to distinguish these cases. While the R&R invokes *Deepwater Horizon* and *Vioxx* to support the authority to cap attorneys' fees, the R&R gives no reason why retained counsel's efforts in this case are so different that a cap so far below the cap in those cases is warranted here. *See* R&R 47-49. The Special Master does attempt to distinguish *NFL*, suggesting that the *NFL* settlement's "claims process require[ed] complex medical proof," helping justify fees for retained counsel in that case. *Id.* at 52 n.145. But the claims pro-

cess in *NFL* "was 'reasonable in light of the substantial monetary awards . . . and impose[d] no more requirements than necessary.'" *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 441 (3d Cir. 2016). Regardless, neither the court in *Vioxx* nor the court in *Deepwater Horizon* invoked such a complexity rationale; the R&R ignores this. Moreover, as the Special Master acknowledges, "in *NFL*, the court's expert, Professor Rubenstein, justified the caps in part on the grounds that plaintiffs alleging cognitive impairment were uniquely vulnerable to overreaching, ***unlike Producers in this case***." R&R 52 (emphasis added).

The cases just discussed are, in all events, unusual for imposing any cap at all. The clear heartland of precedent—covering nearly all cases—imposes little or no cap on contingency fees, coupled with a common-benefit assessment of 6% to 12%. *See* Fitzpatrick Report 17-18 tbl. 1, 35-36 tbl. 2. The precedents are summarized in reports by *five* of the country's leading experts on attorney fees and class actions.[10] Yet the Special Master's analysis goes no farther than concluding that the Court has the power to cap (itself an open question, which the Tenth Circuit has yet to address), without grappling with the fact that no comparable case—at least, none of which we are aware—has ***ever*** imposed anything approaching a 7% contingency cap.[11]

The Special Master admitted that "none of [the contingency-fee cap cases] provides a methodology that fits exactly the unique circumstances of this case." R&R 64. But the Special Master ignored the one case that does fit these circumstances: *In re Chinese-Manufactured Drywall Products Liability Litigation*, Dkt. 21168, MDL No. 2047 (E.D. La. Jan. 31, 2018) (pro-

[10] *See generally* Reports of Professors Arthur R. Miller, Geoffrey P. Miller, Charles Silver, Brian T. Fitzpatrick, & Alexandra Lahav, ECF Nos. 3580-2, 3692-2, 3722-1.

[11] The Special Master also appears to be guiding this Court towards reversible error in concluding that "[c]ontingency fee agreements in diversity cases are to be treated as matters of procedure governed by federal law." R&R 47 n.125 (quotation in parenthetical); *see also id.* at 56 n.151 (rejecting argument that fee agreements are governed by, and may not be capped under, Texas law). The Tenth Circuit has held otherwise. *Chieftain Royalty Co. v. Enervest Energy Inst. Fund*, 888 F.3d 455, 460-62 (10th Cir. 2017).

vided by Watts Guerra at ECF No. 3580-31). That case, like this one, involved both a mass action and a class action. The court determined that a "fair and appropriate division of the total [attorneys'] fee" was a 52/48 split between common-benefit and retained counsel. *Id.* at 20. Common-benefit counsel received the larger share because retained counsel's "services were mostly administrative." *Id.* at 22. Kansas CLC distinguished *Drywall* for one reason—their position that the *Drywall* settlement provided for payments to IRPAs, and the settlement here did not. The Special Master properly rejected that position (at 66)—yet did not even cite, much less discuss, *Drywall*. That case most directly parallels this situation and makes clear a 90/10 split between common-benefit fees and retained-counsel fees is unprecedented and inequitable.[12]

The Special Master's conclusion that most retained counsel did little work is also factually wrong: It ignores Watts Guerra's substantial efforts and the excellent results for its clients. *See* WG Mem. 50-55; WG Resp. 19-24; WG Reply 32-39. The Special Master cannot abrogate Watts Guerra's recovery because ***some other*** lawyers at ***some other*** law firm did less. That is wholly arbitrary. It is wholly unexplained. ***Performance*** is a critical factor for assessing attorney entitlements under valid fee agreements, WG Mem. 31-35, and it cannot be disputed (nor is it) that Watts Guerra has performed. The R&R lacks the requisite reasoned analysis.

The Special Master downplays the efforts of retained counsel, mostly by suggesting that some retained counsel's efforts were limited to "recruit[ing] clients and in some cases fill[ing] out PFSs." R&R 68. But that was not Watts Guerra. *Infra* 27-33. Furthermore, the PFS work was an immensely difficult and expensive undertaking, was court-ordered, and had a substantial

[12] The Special Master similarly ignores *In re Sulzer Hip Prosthesis & Knee Prosthesis Liability Litigation*. In that case, the court paid retained counsel from the settlement fund, *see* 268 F. Supp. 2d 907, 926-27 (N.D. Ohio 2003), and imposed a 23% cap, which had been agreed to by the parties and approved as reasonable by the court. *See* No. 1:01-cv-9000, 2002 WL 31472781, at *18. The R&R never explains why a 23% contingency-fee cap was appropriate in *Sulzer*, but a 10% cap is needed here.

impact. Counsel in this case invested over $80 million in PFS work (roughly half by attorneys), with over $70 million worth of that work taking place in Minnesota where more than 60,000 PFS forms were completed and served. *See* Table 2, *infra* A-2. A $50.3 million allocation for retained counsel that does not even cover the costs of PFS work is not objectively reasonable.[13]

The PFS work played a critical role in bringing Syngenta to heel. The Special Master recognized that "individual counsel representation played a substantial role in producing the class-wide benefit of a $1.51 billion nationwide class settlement." R&R 65. The individual Minnesota cases—which represented the vast majority of individual cases in the mass action—could not go forward without the PFS work. *See* ECF No. 3722-6 (Sipkins Order dated Jan. 11, 2016). The Special Master herself recognized the "argument that completing PFSs, and thus keeping the individual Minnesota litigation moving, helped to push Syngenta toward settlement." R&R 75. And Minnesota leadership ***agreed*** that PFS work was common-benefit work, Watts Reply Decl. ¶88, a fact the Special Master ignores.

Retained counsel—Watts Guerra in particular—litigated this case vigorously, trying bellwether and class cases. Watts Guerra negotiated and implemented the bellwether selection order, among other management orders in the case. Watts Decl. ¶¶96-104. Watts Guerra also worked with other Minnesota counsel to draft the written discovery propounded on Syngenta as well as plaintiffs' responses and objections to Syngenta's written discovery. *Id.* ¶¶105-107.

[13] And here too, even if there might be legitimate concern with other counsel's PFS submissions, Watts Guerra submitted only $1.15 million of attorney PFS time as common-benefit work. It handled the PFS effort principally using non-attorneys—to the tune of over 300,000 hours, which it submitted at the very reasonable rate of $100 per hour. ECF No. 3686-1 at 1 (Watts Guerra's court-ordered spreadsheets); Kansas CLC Resp. 24; Watts Decl. ¶¶124-131. The most important part of the PFS effort is not even the dollars per se; it is the proof that Watts Guerra lived and breathed the Syngenta Corn litigation for years, and did what was necessary to serve its clients. This work might sound ministerial in the cold context of this attorney fee dispute, but in real life, it involved tens of thousands of real farmers with real questions and real concerns about their claims. Watts Guerra staffed the phones, answered those questions, attended to those people, managed their claims, and ultimately got its clients paid.

Moreover, after 40 of Watts Guerra's clients were selected as bellwether discovery plaintiffs, Watts Guerra predictably took the lead in responding to Syngenta's discovery requests directed at those plaintiffs and defending their depositions. *Id.* ¶¶136-138. And, of course, Watts Guerra was heavily involved in preparing the bellwether and class cases for trial, including a substantial amount of work with experts to develop strong damages models that maximized the potential recovery. *Id.* ¶¶138-174, 180-205, 211-253.

Even for the retained counsel who (unlike Watts Guerra) may have done nothing beyond assist clients in filing claims, a 10% cap is low. The effectiveness of retained counsel in assisting their clients speaks for itself. The Special Master celebrates the 35% claims rate. But ***75% of all class members with retained counsel*** (including 94% of all Watts Guerra clients) submitted claims. By contrast, only 20% to 25% of absentee class members submitted claims. *Supra* 9. That data shows retained counsel have done a remarkable job of getting their clients compensation and earning the fees that they seek.

In sum, retained counsel here performed more work than in *Vioxx*, *Deepwater Horizon*, and *NFL*. If "shepherding their clients through the claims process of the Settlement Agreement" justified contingency fees ranging from 22% to 32% in those cases, retained counsel are entitled to at least as much here. This is especially true for a firm such as Watts Guerra, whose efforts for represented clients went well beyond filing claims and completing Plaintiff Fact Statements.

3. The JPA is the appropriate measure for allocating fees between retained counsel and common-benefit counsel

The Special Master's allocation is legally deficient for another reason: the Special Master refused to honor—indeed, to even consider—the JPA. The attorney leadership groups executed the JPA in June 2015. Under the JPA, Watts Guerra and other retained counsel in Minnesota agreed that, if their clients became "entitled to ***any payment from Syngenta in connection with***

the settlement of or judgment on such clients' Syngenta Claims," retained counsel would pay to common-benefit counsel 27.5% of any fee award collected by retained counsel. That is 11% of the client's recovery on a 40% contingency fee, or about 9% on Watts Guerra's reduced 33.33% contingency fee. JPA § 2.a.i-ii; WG Reply 21-22.

Under Minnesota law, the Special Master was obligated to enforce the JPA. Unambiguous "contract language must be given its plain and ordinary meaning, and shall be enforced by the courts even if the result is harsh." *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346-47 (Minn. 2003). The terms of the JPA are clear. A settlement payment is "any payment from Syngenta in connection with the settlement of or judgment on" farmers' claims. JPA § 2.a.i-ii. The JPA applies and its terms govern the allocation of attorneys' fees between retained and common-benefit counsel. *See* WG Reply 21-23. While the Special Master insists that "the JPA was clear that it did not govern . . . in the event of a class recovery," R&R 62, the Special Master cites nothing in the JPA's text.

The Special Master concluded that the JPA was superseded by the merger clause in the Settlement Agreement. R&R 60. That clause provides that the Settlement Agreement is "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" the Settlement Agreement. SA § 9.24.1 (emphasis added). The Special Master concluded that the JPA was superseded because it addressed "attorneys' fees," which relate to the subject matter of the Settlement Agreement. R&R 60. But that ignores the agreement's stated scope. The merger clause applies ***only*** to previous agreements "by and between ***the Parties***." The "Parties" are defined as "the Representative Plaintiffs . . . and Syngenta." SA at 1. The JPA, by contrast, was entered into by plaintiffs' ***counsel***—the law firms that represented plain-

tiffs. *See* JPA at 1. It did not involve the Parties to the Settlement Agreement and is not within the merger clause. The February 23, 2018 fee-sharing agreement confirms as much. That agreement—which Watts Guerra did not sign—expressly purported to supersede and cancel the JPA. ECF No. 3587-8 at 3; WG Mem. 44 n.18. If the merger clause had superseded the JPA, that language would have been unnecessary. *See* WG Reply 27. Watts Guerra explained all this. The Special Master considered none of it. That failure would be reversible error.

Moreover, the Special Master's argument proves too much. If the settlement's merger clause is triggered by ***any agreement*** that relates to attorneys' fees, as the Special Master suggested, then the Settlement Agreement must also have abrogated the large number of referral fee agreements among counsel in this case. Indeed, the Settlement Agreement—signed on February 26—would have abrogated the February 23 fee-sharing agreement itself. *See* WG Reply 26 n.12. *Compare* ECF No. 3587-8 at 5, *with* ECF No. 3507-2 at 70.

The Special Master also dismissed the JPA on the theory that it had "been 'overtaken by events,' namely a nationwide class action settlement." R&R 60-61. When the parties agreed to the JPA, the R&R explained, they "did not contemplate a world in which Watts Guerra LLP and the entire Minnesota Leadership, along with the Clark/Phipps group, would sign on to a nationwide class action settlement." *Id.* at 62. But contracts exist to address such developments—not to be tossed aside because of them. "[O]ne of the principle purposes of a contract is to assign the risk of the unforeseen to one party or another." *See, e.g.*, *United States v. Andis*, 333 F.3d 886, 896 (8th Cir. 2003) (en banc) (Arnold, J., concurring). Besides, the suggestion that no one foresaw class settlement is supported by zero evidence and directly contradicts Kansas CLC. They have argued that "at the end of the day, as ***Co-Lead Counsel predicted in January 2015***, Watts recommended that their clients participate in a class settlement." Kansas CLC Resp. 52 (empha-

sis altered). Thus, Kansas CLC contemplated a nationwide class action settlement as early as January 2015—***before*** they signed the JPA. If Kansas CLC did not want the JPA's terms to apply to a class recovery, they would have drafted the JPA clearly to say so. The Special Master cannot discard the JPA on a changed-circumstances theory with no law or facts to support it.

Unable to identify any language in the JPA that excludes class recoveries, the Special Master invoked putative parol evidence. Minnesota law forbids that. "If the language of a contract is unambiguous, parol evidence regarding the parties' intent is not admissible, and courts must enforce the plain language." *Kroona v. Dunbar*, 868 N.W.2d 728, 740 (Minn. Ct. App. 2015). That is precisely the case here. *Supra* 14-15. For example, the Special Master credits Kansas CLC's assertion that "during the negotiation of the JPA neither Watts Guerra LLP nor Bassford Remele, P.A. 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." R&R 62. But they did not need to say that during negotiation. The language of the JPA was clear that it did. *See Savela v. City of Duluth*, No. A09-2093, 2010 WL 3632313, at *3 (Minn. Ct. App. Sept. 21, 2012) (refusing to consider negotiations because contract language was clear).

The Special Master pointed to the Common Benefit Orders, saying the text of those orders "makes clear that 'assessments' only applied to individual recoveries and not to any class recovery." R&R 61-62. But the orders say the "rights and obligations" of Watts Guerra "shall be governed by the specific language in the" JPA "and not by the summaries" in the order. Federal CBO at 5 n.1, ECF No. 936; *see also* Minnesota CBO, ECF No. 3570-3, at 6, 14.

The Special Master's reliance (at 63) on the JPA Addendum fares worse still. The JPA Addendum simply provides that if a state-court class action settled in Minnesota, Kansas CLC would receive one-third of any class attorneys' fees. JPA Addendum § 2.a.iv. The Special Mas-

ter argued that provision indicates the original JPA did not cover class recoveries. To the contrary, that counsel amended the JPA to explicitly address Minnesota class cases ***underscores*** that the original JPA did, in fact, cover class actions. If it did not, amendment is unnecessary. Moreover, to modify a contract, a later agreement must be "inconsistent with the terms of the written contract." *Bolander v. Bolander*, 703 N.W.2d 529, 542 (Minn. Ct. App. 2005). Nothing in the JPA Addendum—which governed any class settlement in ***Minnesota state*** court—is inconsistent with applying the JPA to a class settlement in ***Kansas federal*** court. Because the JPA Addendum is silent on fee-sharing from a federal class settlement in Kansas, the terms of the original JPA apply. Finally, even if the Court were to apply the JPA Addendum here, that would require Watts Guerra to pay Kansas counsel 11% of its clients' recoveries (one third of Watts Guerra's 33.33% contingency). That is essentially the same result as if the Court applied the original JPA—or, for that matter, its Common Benefit Order.

Even if the JPA does not govern by its terms—and it does—the Special Master should have given it equitable consideration. *See* Kull-Silver Report 13-16. All agree that the JPA governed until December 2017. For over two years, the parties performed their obligations under the JPA. WG Mem. 45-46; WG Reply 28-29. They shared discovery and assisted each other in preparing for trial. When *Mensik* settled, Watts Guerra made the JPA-required payments. *Id.*; Watts Decl. ¶207. And Class Counsel received the benefit of the bargain, too—they labored to advance a putative class action with a guaranteed recovery under the JPA even if their own efforts failed and no class was certified. WG Reply 29; Watts Reply Decl. ¶64; *see also* R&R 55. To give no consideration to the JPA whatsoever, after the parties had performed and received the benefit of their bargain, cannot be reconciled with the law of contracts and restitution. *See* WG Reply 29-30. From that "perspective, the JPA and the common benefit orders incorporate the

valid price term of the parties' negotiated agreement." Kull-Silver Report 16. To the extent the JPA is not enforceable, "nothing in the reasons for its unenforceability detracts from its validity as a measure of Watts Guerra's liability in restitution for a common benefit assessment." *Id*.

B. Consolidating the administration of IRPA fees in Kansas violates the Settlement Agreement and would prove unworkable

The Special Master has recommended that this Court administer the IRPA fee pool, regardless of where each individual case was filed. R&R 69. But the Settlement Agreement provides that "matters arising from client fee contracts . . . involving the law firm of Clark, Love, & Hutton" and "involving Class Members with claims pending at any time in" Minnesota state court "shall be subject to the jurisdiction" of the Southern District of Illinois and the Minnesota state court, respectively. SA §§7.2.3.1-7.2.3.2. The agreement further provides that those courts have "exclusive and continuing jurisdiction to [a]pprove fee disbursements" under the client fee contracts. *Id.* Any award of attorneys' fees from the IRPA pool necessarily qualifies as a "matter arising from client fee contracts." As a result, those awards of attorneys' fees cannot be centralized in the district of Kansas as the Special Master proposes. To do so would rewrite the Settlement Agreement. *See, e.g.*, *Sundown Energy, L.P. v. Haller*, 773 F.3d 606, 613-14 (5th Cir. 2014) (reversing district court where it "enforced a settlement agreement which differed from the actual agreement" among the parties); *Justine Realty Co. v. Am. Nat'l Can Co.*, 976 F.2d 385, 388 (8th Cir. 1992) (similar). Another plain-language issue, overlooked by the R&R.

More fundamentally, consolidating the IRPA pool in Kansas would prove unworkable. An attorneys' fee award must be fair and reasonable—both to the client and to the attorney. *Cf.* Fed. R. Civ. P. 23(h); R&R 54 (recognizing "need for attorneys representing individual clients to receive fair compensation"). Where many firms performed both common-benefit work and individual work, applying that standard requires an assessment of the overall fee from both common-

benefit and IRPA sources. That assessment cannot occur if common-benefit awards are determined in one jurisdiction and IRPA awards in another. Appeal would be complicated too. A firm like Watts Guerra would have to bring two appeals to challenge any fee award it deems legally deficient—one in Minnesota challenging the common-benefit award, and one in the Tenth Circuit challenging the IRPA award. And each court's decision would, in some sense, be contingent on the decision of the other. The inadequacy of the IRPA pool only makes the likelihood of appeal—and the difficulties associated with it—greater.

II. By Any Measure, The Proposed Jurisdictional Allocation Is Unreasonable

Like the proposed allocation between retained counsel and common-benefit counsel, the proposed allocation among jurisdictions is also unreasonable.[14] The allocation overvalues contributions of attorneys in Kansas and, especially, in Illinois. In allocating fees among the jurisdictions, the Special Master purported to account for "the available data regarding attorney hours incurred" and gave "significant weight" to the February 23, 2018 fee-sharing agreement. R&R 73-74. But by those metrics—or any other—the proposed allocation is objectively unreasonable.

A. The lodestar analysis condemns the proposed allocation

The Special Master allocated 50% of the total common-benefit fees to Kansas, 24% to Minnesota, and 16% to Illinois. Thus, Minnesota received less than half of Kansas and only marginally more than Illinois. That allocation is completely untethered from the relative invest-

[14] In grouping the Minnesota firms, the Special Master appears to have excluded from the "Gustafson Class" and "Hybrid" groupings most firms that submitted only PFS, Other, or Individual time. *See* R&R Ex. 2, ECF No. 3816-2. Although the Special Master disclaimed that these groupings reflected any entitlement to common-benefit compensation, Watts Guerra nonetheless objects if and to the extent that exclusion of these firms—many of whom are Watts Guerra's associated counsel—from the Gustafson Class and Hybrid lists indicates that they should be compensated only from the IRPA pool. Indeed, overall the Minnesota groupings do not appear to reflect any particular rationale. Paul LLP, for example, is one of the Minnesota leaders and performed significant common-benefit work, but is also an IRPA with 1,110 clients who made claims. He is on the "Gustafson Class" list rather than the "Hybrid" list.

ments of the attorneys in those jurisdictions and objectively unreasonable. WG Reply 50-59.

By the Special Master's own count, the Minnesota group devoted more attorney time to this case than either Kansas or Illinois, comprising 48.12% of all attorney time. R&R 74. Kansas accounted for only 38.13%, and Illinois for 13.74%. *Id.* The magnitude of Minnesota's investment is unsurprising. After all, those attorneys prepared for two trials and settled one individual case (*Mensik*). WG Resp. 18-24; R&R 21-22. Minnesota attorneys also worked alongside attorneys in Kansas to complete discovery, develop expert analysis, and identify theories of damages. *See, e.g.*, R&R 10-11, 76-77; WG Mem. 14-21. They worked to settle this case too. No rational allocation could compensate attorneys in Minnesota—who invested the most time in this case—with less than half the fees awarded to Kansas and only marginally more than Illinois.

As the Special Master repeatedly recognized, the mass action "provided significant consolidated litigation and settlement pressure on Syngenta" and "provided a benefit to the entire Class." R&R 65. Thus, total time is the appropriate metric against which the fee allocation should be measured. *Accord id.* 73 n.184 (concluding "it is appropriate to consider . . . total hours in evaluating contributions to the result here"). But even considering only attorney "common-benefit" time, the allocation is still irrational. Minnesota contributed 45.15% of attorney common-benefit hours while Kansas accounted for 40.58%. *Id.* at 74. Illinois, meanwhile, was responsible for only 14.27% of attorney common-benefit time. *Id.* Under that metric, too, Minnesota should receive at least as much as Kansas and over three times as much as Illinois.[15]

[15] The foregoing assessment does not even consider the fact that a single firm in Illinois—Phipps Anderson Deacon—claims to have provided more than $32 million in "common-benefit" work. ECF No. 3659-1. That amount: represents fully ***two-thirds*** of the total "common-benefit" work in Illinois; has been unilaterally designated as such by Mr. Phipps alone; and is more than ***three times*** as much as any other firm in the entire Corn litigation, including all Leadership firms in Minnesota and Kansas, with only one exception. *See* ECF No. 3641-40. Notwithstanding the obvious problems with accepting Mr. Phipps' "common-benefit" designations (*see also* WG Resp. 25-31), the calculations in these Objections respect

The Special Master attempted to justify the reduced allocation to Minnesota by discounting the time Minnesota attorneys spent on PFS work. R&R 75. But even discounting cannot justify that result. The Special Master noted that 15% of all attorney time (over 50,000 hours) involved PFS work in Minnesota and concluded that "these hours cannot be treated as equivalent to hours spent in trial, successfully litigating dispositive motions, or doing expert work or fact discovery against Syngenta." *Id.* But the Special Master did not reduce Minnesota's allocation proportionately; the allocation effectively cut Minnesota's fees in half. That is unreasonable.[16]

PFS work, moreover, cannot be discounted to ***zero***. The PFS requirement was negotiated by Kansas CLC, not Minnesota. Watts Decl. ¶¶ 119-121. Having negotiated that requirement, Kansas CLC cannot now discount its significance. Moreover, the PFS process advanced the settlement and contributed to the class recovery (and, for Watts Guerra at least, is already discounted through lower billing rates as explained below). As one commentator has explained, "[t]o avoid trouble in the form of dispositive motions, providing compliant plaintiff fact sheets is perhaps the most important function of individual counsel." Fred S. Longer, *The Federal Judiciary's Supermagnet*, 45-JUL Trial 18, 22 (2009). In Minnesota, PFS work was ***ordered*** by the court and required to avoid dismissal. *Supra* 13. Without the substantial PFS effort, dismissal of tens of thousands of individual cases would have dramatically reduced the settlement pressure on Syngenta. The Special Master recognized as much, acknowledging the argument that "completing PFSs, and thus keeping the individual Minnesota litigation moving, helped to push Syngenta toward settlement." R&R 75. Given the concession that PFS work had value, even a one-for-

---

them—and thus certainly cannot be accused of selling Illinois short.

[16] Even deducting all 50,000 hours of that PFS time from Minnesota's calculation would leave Minnesota with 38.8% of all attorney time ((48.12%-15%) / (100%-15%)). Kansas and Illinois would account for 44.9% and 16.1%, respectively.

one, ***15%*** reduction in Minnesota's allocation as compared to Kansas is unreasonable. Cutting Minnesota's allocation by ***50%***, on the grounds that ***15%*** of Minnesota's hours were less valuable—but concededly important to maintaining the mass action—is beyond the pale.

The Special Master ignored the traditional lodestar analysis—calculated by multiplying the number of hours by a reasonable hourly rate. That method demonstrates that Minnesota's investment in this case matches—indeed, exceeds—that of Kansas and actually far outpaces Illinois. For example, the lodestar of all Minnesota counsel exceeds $167 million, with 61% of that amount attributable to Watts Guerra and its 330 associated counsel. Kansas counsel, by contrast, invested about $121 million in time, and Illinois invested $60 million. *See* Table 2, *infra*, A-2. Those figures inherently account for the nature of PFS work. Without prejudice to smaller shops or solo attorneys who handled this work personally, Watts Guerra relied heavily on non-attorneys for this work, submitting over 95% of its PFS time at a rate of $100 per hour. *Supra* 13 n.13. Given those relative lodestars, the Special Master's allocation results in lopsided lodestar multiples, with Minnesota receiving only a fraction on the dollar of what it invested in the case, while Kansas and Illinois receive at least twice their investment.

For example, the Special Master's proposal would result in a lodestar multiple of 2.15 and a $1,009 average hourly rate for Kansas. Minnesota would receive a lodestar multiple of 0.91 and an hourly rate of only $203. Under Watts Guerra's proposal, by contrast, Kansas's multiplier would be 1.80 with an average hourly rate of $845, while Minnesota would receive a more balanced multiplier of 1.23 and a rate of $276. *Compare* R&R 79, *with* Table 4, *infra* A-4; *also compare* Table 5, *infra* A-5 (if 10% IRPA pool is sole compensation for all PFS and non-common benefit work, the multiplier for all retained counsel is 0.30).

Finally, nothing about the likely allocation of settlement recoveries justifies the Special

Master's fee allocation. For example, ***represented*** class members in Minnesota alone constitute 30% of claims by number. *See* Table 1, *infra* A-1. They thus would receive ***at least*** 30% of the settlement fund, likely more. *Supra* 8-9 & nn. 7, 9. Once one adds in the recoveries of absentee class members in Minnesota, Minnesota's recovery will far exceed 30% of the settlement fund. That cannot be reconciled with an allocation of less than 25% of available common-benefit fees.

No matter how one calculates the investment of attorney time in this case, or the distribution, the numbers do not justify the R&R's allocation. By any objective measurement, the Special Master's proposed allocation offers inflated payments to Kansas and, especially, Illinois, and depressed payments to Minnesota. A more equitable distribution would award Minnesota as much as Kansas and at least three times what Illinois receives.

B. The February 23 fee-sharing agreement is entitled to no weight

The Special Master also invoked the February 23, 2018 fee-sharing agreement. Recognizing the fee-sharing agreement is not binding (R&R 57), she nonetheless asserted that the "relative proportions of the Fee-Sharing Agreement among its signatories are reasonable," affording the agreement "significant weight." R&R 74. In doing so, the Special Master credited the agreement because it was negotiated by Mr. Seeger, Mr. Clark, and Mr. Gustafson, who "were crucial members of the Court-appointed PSNC" and who "work[ed] cooperatively for the benefit of the Producers and other plaintiffs whom they all represented." *Id.* at 57, 59. But Watts Guerra, which represented 23% of the nation's corn harvest, did not sign on.

It is hornbook contract law that an agreement cannot bind those who do not sign it. *See Jacks v. CMH Homes, Inc.*, 856 F.3d 1301, 1304 (10th Cir. 2017); WG Resp. 9-10. Yet that was the effect of the Special Master's decision to credit the February 23, 2018 fee-sharing agreement and impose its terms—with only modest modification—on ***all*** counsel seeking fees, signatories and non-signatories alike. At a minimum, the Special Master should have ***independently*** deter-

mined an appropriate allocation among all counsel, and only ***then*** considered whether the fee-sharing agreement required an adjustment to the allocation among ***those who signed the agreement***. WG Resp. 5-13. Rather than conduct that independent analysis based on the results of the claims process and the current claims data, the Special Master appears simply to have reverted to her earlier assumptions about what the claims data would show.

Moreover, if the Court is to consider any fee-sharing agreement, it should consider the proposed fee-sharing agreement that included Watts Guerra. That proposed agreement gave Minnesota 32.5% of the fees (20% to Watts Guerra and 12.5% to Minnesota Class Counsel). The chronology here is material, and the contemporaneous correspondence (*see* ECF Nos. 3580-28, -29, -30) telling: Mere ***hours*** before Seeger, Gustafson, and Clark executed the fee-sharing agreement on which the Special Master relies, Mr. Seeger sent a proposal to Mr. Watts that would have allocated 20% of available fees to Watts Guerra and its associate counsel. ECF No. 3580-28; *see also* WG Reply 51-52. With the 12.5% for Minnesota Class Counsel, that version of the agreement would have allocated 32.5% to Minnesota. If any fee-sharing agreement represents a "reasonable" allocation of fees among the jurisdictions, it is ***that agreement***.

The Special Master gave no reason why that agreement—which allocated 32.5% to Minnesota, with 20% specifically allocated to Watts Guerra—was not the best evidence of what the parties other than Watts Guerra believed was reasonable. The Special Master justified her reliance on the executed February 23 agreement by noting it had the support of three "crucial members of the" Plaintiffs Negotiating Committee. R&R 57. That argument defeats itself: The earlier agreement that allocated 20% to Watts Guerra was supported by ***all*** of the PNC, including Watts. *See* WG Resp. 7-8; WG Reply 51-53. The Special Master stated that Watts "decided not to sign" and "withdrew" from that earlier agreement, R&R 56-57, suggesting he would not agree

to its terms because the 20% allocation was inadequate, *id.* at 56. That is clear error.

Watts Guerra did not sign the proposed fee-sharing agreement because it lacked authority from its associated counsel to abrogate their fees. That was a special concern in light of the proposed 20%-17.5% split with Illinois, given that Watts Guerra's 57,000 clients to Clark-Phipps' 17,000 clients would have justified a proportional division of fees of at least 3 to 1 in Watts Guerra's favor. The completed claims data, which shows Watts Guerra's clients completing settlement claims at a rate three times higher, justified that concern. *See* Table 1, *infra* A-1.

Nonetheless, as Watts Guerra explained, Watts was ***ready to sign the fee-sharing agreement*** anyway and ***to reluctantly accept the 20% allocation that came with it***. WG Resp. 7-8. But because that fee allocation would be well below his group's proportion of the total clients and expected claims, he could not compromise the fee rights of his associate counsel without their consent. *See* Watts Decl. ¶330; ECF No. 3580-29. Watts explained all this to Mr. Seeger, asking for time to obtain those consents. *See* ECF No. 3580-28; ECF No. 3580-29. Instead of giving Watts time, the other three parties to the agreement cut Watts Guerra out and signed the agreement themselves. ECF No. 3580-30. None of that should be disputed or disputable. Watts Guerra explained all this and provided evidence in support. *See, e.g.*, WG Resp. 7-8. The Special Master simply ignored it.[17]

If any fee-sharing agreement reflects the best evidence of what allocation the PNC

[17] The Special Master stated that Watts's colleague, John Cracken, "consistently disputed the proposed 20% allocation to Watts Guerra LLP and argued for more." R&R 56 n.152. But all parties to the agreement, at various points, sought more for themselves as well. Kansas CLC laid claim to a piece of the 20% allocation that would have gone to Watts Guerra. And Mr. Cracken's positions have been vindicated by the claims process—a significant fact mentioned nowhere in the R&R. In any event, Watts's ***willingness to sign*** the fee-sharing agreement renders irrelevant whatever arguments Watts, Cracken, or anyone else might have made earlier in negotiations. That is no reason to penalize Watts Guerra now. The R&R also had nothing to say about embarrassingly unreasonable positions taken by Kansas CLC and Mr. Seeger in fee briefing over the summer, including that the 12.5% for Mr. Gustafson in the executed agreement was intended to compensate all Minnesota counsel, including the Watts Guerra Group. *See* WG Reply 50-53.

members thought to be fair and reasonable ***before the claims data came in***, it is the earlier agreement allocating ***32.5%*** to all of Minnesota and 20% for Watts Guerra. The most recent claims data, however, shows that even those allocations are understated. Nearly all of Watts Guerra's clients have filed claims, representing about 25% of all claims submitted and 30% or more of the harvest. *Supra* 8-9. Other Minnesota retained counsel represent another 6.0% of claims. Meanwhile, Class and Illinois counsel have significantly underdelivered on their actual claims compared to their prospective assertions during fee negotiations. Watts Reply Decl. ¶¶18-23. The ***actual*** claims data supports an allocation of no less than 25% for Watts Guerra, and at least 40% for all of Minnesota. These facts—the actual agreement among counsel and the actual data—should have been the Special Master's starting point, not an agreement that at the eleventh hour excluded one of the most significant contributors and that was based on since-disproven speculation about expected claims rates.

III. The Special Master Persistently Minimized The Results That Watts Guerra And Its Minnesota Colleagues Achieved For Their Clients And The Class

Watts Guerra's role in this litigation was substantial. It represented more individual clients than any other counsel, and its clients represented 23% of the total U.S. corn harvest. WG Mem. 5-7. Watts Guerra leveraged that influence to achieve two especially critical victories for its clients and the class. Watts Guerra and others in Minnesota broke the logjam with Syngenta, dealing the final blow to Syngenta's resolve. And Watts Guerra was also the driving force behind adoption of the claims process, which made settlement possible by acceptably allocating settlement proceeds. The Special Master undervalued, and often ignored, those victories.

A. The 90,000 individual claims in the Minnesota mass action exerted substantial pressure on Syngenta by limiting class certification risk

The Special Master acknowledged that retained counsel "played a substantial role in producing the class-wide benefit of a $1.51 billion nationwide class settlement through their work in

litigation and settlement." R&R 65. She fully recognized the significant risk that class certification presented in this case: "[G]iven the experience in the *In re Genetically Modified Rice Litigation*, where a class was not certified, there was a significant question whether a class would be certified in this litigation." *Id.* at 55. But the R&R neglects that the mass-action redressed those risks. Whether or not a class was certified, Syngenta faced ***billions of dollars*** in potential liability from the mass action in Minnesota, placing overwhelming settlement pressure on Syngenta and increasing the settlement value of even the class claims. *See* WG Resp. 23-24.

B. The threat of billions of dollars in punitive damages in the cases brought by Watts Guerra and its Minnesota colleagues made settlement possible

Watts Guerra's advocacy—along with that of other counsel in Minnesota—also helped break the logjam with Syngenta. The Special Master generally recognized the role Minnesota played in pressuring Syngenta to settle. R&R 10-11, 76-77. She noted the extensive and cooperative effort that Minnesota attorneys put into discovery while working with Kansas CLC. She credited Minnesota's efforts to develop expert testimony. *Id.* at 77. And she acknowledged that Minnesota fully prepared the *Mensik* bellwether trial, ultimately settling that case, as well as the Minnesota Class trial, which was in progress when the term sheet was signed. *Id.* at 76-77.

The Special Master nonetheless ***completely*** ignored the single biggest pressure point that Minnesota exerted on Syngenta—the threat of potentially massive damages, both compensatory and punitive. Led by Watts Guerra and Bassford Remele, retained counsel in Minnesota explored and developed a compensatory damages model that yielded ***higher*** compensatory damages than the model used by the class attorneys. *See* Bassford Remele Mem. 16-17; MN Class Counsel Mem. 16-17. Thus, a compensatory damages verdict in Minnesota stood to exceed on a per-bushel basis the $217 million verdict in Kansas.

The threat of punitive damages in Minnesota loomed larger still. In granting leave for the

Minnesota plaintiffs to pursue punitive damages (under state law, they could not do so as of right, *see* WG Reply 37), Judge Sipkins' explosive ruling concluded that the plaintiffs had made a *prima facie* showing that punitive damages were warranted. WG Reply 37-38. The evidence, he said, revealed that "Syngenta was willing [to] risk a trade disruption in order to advance their own interests and agenda with . . . disregard for the effect this would have on U.S. farmers." ECF No. 3570-4 at 32; *see generally* WG Reply 37-28.

It is no coincidence that, when that evidence started to come out before the jury at the Minnesota Class trial, Syngenta agreed to settle rather than proceed to verdict. In the first week of trial, Syngenta's senior executives had given up damning admissions in live testimony under Watts's withering cross-examination. Those admissions made punitive damages all but inevitable, revealing that Syngenta knew of and was aware of the risks of commercializing genetically modified corn, but did so anyway. WG Resp. 22-23; WG Mem. 52-53; Watts Decl. ¶¶239-253. That was the testimony that broke Syngenta. Watts Decl. ¶¶ 270-276.

The Special Master ignored this testimony completely. She downplayed the significance of the Minnesota Class trial by suggesting that, "prior to the start of the trial, the parties were very close on a dollar amount for a settlement." R&R 25. But the PNC's bottom line was $1.5 billion, and only ***after*** Watts's devastating cross-examination did Syngenta meet the PNC's demand. Watts Decl. ¶270; Watts Reply Decl. ¶53. Moreover, the Special Master's discussion of the contributions of each forum made no mention of punitive damages. She rightly acknowledged the significance of the $217 million jury verdict in the Kansas Class trial. But the Kansas Class jury had ***denied*** punitive damages. It was ***Minnesota*** that gave Syngenta reason to fear punitive damages, reason to settle, and reason to put another $1.3 ***billion*** on the table.

The starkest contrast, however, is ***Illinois***. The most the Special Master can say about the

efforts of counsel in Illinois is that Clark convinced Phipps to agree to the settlement and that Phipps cooperated as a result. R&R 78. She mentioned some discovery and briefing work. But the Special Master never explained why a 1.48 multiplier is appropriate for Illinois, but a fraction of that (0.91) is appropriate for the Minnesota counsel that brought Syngenta to the table. *See also supra* 23; WG Resp. 25-31.

A comparison of the extensive and fruitful efforts of Minnesota with the limited contributions from Illinois betrays the complete lack of rationality and reasonableness in the Special Master's proposed allocation. Minnesota's contributions to the litigation and the settlement were the equal of ***Kansas's*** in nearly every way—and by some metrics exceeded the contributions of Kansas, such as the impact of potential punitive damages. No reasonable allocation would award Minnesota so much less than Kansas and only marginally more than Illinois—and a punishingly small lodestar by comparison.

C. Watts Guerra made global settlement possible and fair by requiring a claims process

One of the biggest victories that Watts Guerra achieved for both its clients and the class was the claims process. It was the claims process that made this settlement possible as a single, nationwide class settlement. All agree, this case was unprecedented in scope and complexity—factors that presented unique challenges to a global resolution. As the Special Master explained:

> If class action plaintiffs were not treated comparably to plaintiffs in other pending class actions, or to individual contingent fee plaintiffs, the courts before which the class actions were pending would have had difficulty finding the settlement fair, reasonable, and adequate. Conversely, if significant groups of individual contingent fee plaintiffs, or plaintiffs in certain class actions, could not support the settlement as fair and opted out, the settlement would fail because it would not provide Syngenta with the broad peace that was the consideration for the settlement.

R&R 25. In other words, resolving this case on a global scale required a delicate balancing of many different considerations and the interests of many different constituencies.

Initially, the parties achieved that balance through the term sheet's two-tiered settlement structure.[18] That structure would have ensured that represented plaintiffs, like Watts Guerra's clients, were adequately compensated. *See* WG Reply 33-36. Class Counsel refused to agree, pushing for a unified, nationwide class settlement instead. Watts Guerra resisted—but only ***until Class Counsel agreed to Watts Guerra's demands to include a claims process***, which protected the recoveries of represented class members. *See, e.g.*, Watts Decl. ¶¶320-322; Watts Reply Decl. ¶¶12-14. Thus, it was the ***claims process*** that achieved the delicate balance necessary to settle this case on a global scale. And it was Watts Guerra (among others) that demanded, negotiated, and achieved that claims process. In other words, Watts Guerra's efforts simply reflected the reality that, in any class action, the class consists of sub-groups with divergent interests, and that attorneys representing each subgroup have a responsibility to their clients to advocate for that subgroup's interests. *See Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 625-28 (1997) (intra-class conflict defeats adequacy-of-representation requirement).

The claims process wasn't just a benefit for the represented class members. It made the settlement fairer for all class members and increased the likelihood of final approval. The direct-pay settlement sought by Class Counsel would have treated many class members unfairly by overcompensating class members who used some or all of their corn harvest as feed. *See* WG

[18] The R&R stated (at 26) that the parties immediately began negotiating a nationwide class settlement in September 2017. That is not true. The parties began negotiating a two-tiered settlement—the deal they agreed to in the term sheet, and the deal that allowed Judge Miller to release the Minnesota Class jury. The R&R speculated that concern over attorneys' fees drove demands for a two-tiered settlement. R&R 26. That is not true, at least for Watts Guerra. The interests of Watts Guerra's clients drove those demands. Watts Decl. ¶322. There is no small irony in the R&R's suggestion: *First*, Class Counsel argued the class structure completely foreclosed retained counsel from collecting any attorneys' fees under the settlement. *See, e.g.*, Kansas CLC Resp. 45-47. *Second*, term sheet negotiations stalled on counsel's inability to agree on an allocation between separate pools for represented plaintiffs and absent class members. Watts Reply Decl. ¶¶12-16. The mechanism Watts and others found to overcome that impasse—a class settlement, but with a non-negotiable claims process—protected the Watts Guerra Plaintiffs (who stand to recover now as much as they would have under the two-track term sheet). *Id*. ¶16.

Resp. 28-29 & n.16. The claims process thus made the settlement fairer for all class members.

The Special Master failed to credit Watts Guerra for these efforts. To the contrary, the Special Master seemed to penalize Watts Guerra for ***insisting*** on the claims process. For example, the Special Master repeatedly noted Watts Guerra's opposition to a class resolution. *See* R&R 19, 24, 28, 56 & n.152. The Special Master commended Clark—who opposed a nationwide class at least as vociferously as Watts Guerra—for having "modified his initial notions about structure of a settlement" and for having "worked collegially with Mr. Seeger to structure a settlement that he knew would benefit his many clients." *Id.* at 58. ***But Watts did that, too.*** *See* Watts Decl. ¶¶69-80. Yet the Special Master nowhere mentioned that fact.

The only difference between Clark and Watts in this respect is that Clark agreed to the fee-sharing deal, while Watts raised concerns. With the benefit of hindsight, it is easy to see why Clark was happy with 17.5%, while Watts was concerned about getting sued by his associate counsel if he accepted 20%. One group represents 11.3% of all work in the case, and 7.2% of claims; the other, 29.6% of all work, and 24.2% of claims. *See* Tables 1, 2, *infra* A-1, 2; ECF Nos. 3686 (WGG spreadsheets), 3659 (Clark/Phipps spreadsheets).

At bottom, the claims process proved to be the breakthrough that brought about this settlement in its present form. Syngenta had already agreed to settle, so long as it disposed of all claims by one mechanism or another. The Special Master essentialized the class action framework. But the claims process was the mechanism that divided recovery between absentee class members and individual plaintiffs in a manner that champions for both constituencies could accept. Watts Guerra's advocacy effected that result—to the benefit of its own clients and to the benefit of the class. A fee allocation that does not account for that reality, and that does not adequately compensate retained counsel for that success, cannot be fair and reasonable. Zealous ad-

vocacy—particularly ***successful*** zealous advocacy—warrants praise, not criticism. It is a justification for attorneys' fees, not a reason to cap them. *Cf. McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 660-62 (E.D. Pa. 2015) (awarding objector attorneys' fees where, rather than increasing fund, objector caused fund to be reallocated more favorably).

IV. The Court Should Increase The Global IRPA Allocation, Create Jurisdictional IRPA Pools, And/Or Allocate A Fee Directly To The Watts Guerra Group

Any number of solutions would cure the deficiencies described above. Most importantly, a fair and equitable allocation of attorneys' fees that takes account of the contributions of each attorney group, as well as their investment, will help smooth over any other problems inherent in the award and administration of fees in this unusually complex case.

A. The Court should increase the global IRPA allocation to 45% or adopt Watts Guerra's original approach to attorney fees

The IRPA pool is fatally deficient. Even a 10% contingency-fee cap is too low, and the $50 million that the Special Master allocated to the IRPA pool is too little to pay even that. *Supra* 7-9. That deficiency—one of the more glaring—is fixed by increasing the contingency-fee cap to a true 25% and adequately funding the IRPA pool with $225 million (or, in other words, allocating slightly less than 45% of the total attorneys' fees to the IRPA pool).[19]

A 25% cap provides a reasonable attorneys' fee for retained counsel, who made major contributions to the success of this litigation. *Supra* 27-33. It still falls toward the lower end of the range of caps that courts have imposed in other cases, and leaves plenty—at least $275 mil-

[19] The Special Master assumed that individually represented class members will recover only 48%; a $225 million IRPA pool anticipates they will recover approximately 59%. Not only is 59% a more reasonable assumption (*supra* 8-9 & nn. 7, 9), but using that as a basis for allocation should ensure that the IRPA pool is sufficient. At the same time, common-benefit counsel would suffer no prejudice if the allocation is excessive ***because no payments would be made above the 25% cap***. Anything that remains would be distributed to common-benefit counsel, as the Special Master suggested.

lion, probably more—for common-benefit counsel in all jurisdictions.[20] And, if the Court believes that a 25% contingency fee might overcompensate any attorney, it can always retain the discretion to impose a common-benefit assessment on that attorney to ensure any free-riding attorneys pay their fair share. WG Resp. 15-17; WG Reply 59-60; Kull-Silver Report 4.

Alternatively, the Court may wish to simply adopt the original proposal that Watts Guerra advocated. *See* WG Mem. 29-56 (requesting effective 24% contingency-fee payment). As Watts Guerra proposed, retained counsel would receive a one-third contingency fee for their clients' recoveries, and Class Counsel would receive the same for absentee class members' recoveries. *See, e.g.*, WG Mem. 29-39. Then, to ensure that retained counsel pay their fair share, each retained counsel's fee would be reduced by a common-benefit assessment that would fund the common-benefit effort. WG Resp. 15-17; WG Reply 59-60; Kull-Silver Report 4. For Watts Guerra and the other firms that signed the JPA, the JPA would determine the common-benefit assessment. *See, e.g.*, WG Mem. 39-56.

That approach would give effect to contractual agreements, not abrogate them, WG Resp. 16-17, while still giving the Court needed flexibility to ensure that attorneys who have done little real work do not take advantage of class members or free-ride off the hard work of Class Counsel and MDL Leadership. Watts Guerra's original proposal would also more precisely align attorneys' fees with actual recovery, and honor traditional principles of attorney compensation. *See, e.g.*, *id.*; Fitzpatrick Resp. Report 7-10; Kull-Silver Resp. Report 6.

[20] Admittedly, that does require a decrease in the fees awarded to each jurisdiction. Of course, many attorneys in the other jurisdictions would benefit from the increased cap, which would justify lowering the common-benefit allocation to those jurisdictions. For example, the Clark/Phipps group stood to receive 17.5% of the total available attorneys' fees under the February 23, 2018 fee-sharing agreement. With a large stable of individual clients, however, Clark/Phipps would benefit from the increased cap and would not need a full 17.5% in Illinois to receive an equitable attorneys' fee. And a 25% contingency-fee cap would obviate the need for Watts Guerra to partake of the Minnesota common-benefit allocation.

Whether the Court increases the contingency-fee cap or adopts Watts Guerra's original proposal, the fact remains: The allocation for retained counsel must rise.

B. The Court should create IRPA pools in each jurisdiction

The Court may also choose to eliminate the global IRPA pool entirely. That does not mean retained counsel should go uncompensated. They should be paid for their efforts. But eliminating the global IRPA pool would allow each jurisdiction to award IRPA fees from its jurisdictional allocation, eliminating the difficulties associated with splitting certain firms' fee allocations among jurisdictions. If the Court does eliminate the global IRPA pool, it should nonetheless specify a presumptive contingency-fee percentage—25%, for all the reasons described above. And the court in each jurisdiction would, of course, have authority to make further adjustments via common-benefit assessment to ensure a fair and equitable distribution of attorneys' fees—exactly as provided in the Settlement Agreement's jurisdictional provisions. SA §§ 7.2.3.

If the Court eliminates the existing 10% IRPA pool, that money, and more, should be allocated to Minnesota. As explained above, the Special Master's proposed jurisdictional allocation to Minnesota is inadequate, failing to account for Minnesota attorneys' investment in this case and undervaluing their contributions. *Supra* 20-24. Additionally, Minnesota represents, by a wide margin, the largest faction of individually represented class members. As of December 3, 2018, Watts Guerra and the other Minnesota counsel represented 63.7% of the claims submitted by class members who had retained counsel. By contrast, Illinois represented 17.4% of those claims, and Kansas only 12.2%. Table 1, *infra* A-1.[21]

Given the contributions of Minnesota counsel in settling this case, and Minnesota's status

[21] The remaining 6.6% of claims were submitted by represented class members whose counsel are not on the Special Master's counsel list. For present purposes, we have allocated those claims to Kansas.

as the heavyweight in the mass action, reallocating all of that 10% to Minnesota would be fair and equitable. It would help balance the allocation between Kansas and Minnesota, reflecting the relatively equal contributions those jurisdictions made to the settlement. *Supra* 20-24, 27-30. In fact, given the relative contributions of Minnesota as compared to Kansas and Illinois, an equitable allocation among the jurisdictions would ***require*** increasing the allocation to Minnesota from 24% to at least 40%—with ten percentage points of that increase drawn from the IRPA pool and the remaining four percentage points drawn from Illinois and/or Kansas.

C. In the alternative, the Court should allocate an IRPA fee directly to the 331-law-firm Watts Guerra Group in the amount of 25% of the overall fee award

Finally, the Court could adopt the approach originally contemplated by the parties when they were negotiating the fee-sharing agreement; it can allocate fees directly to Watts Guerra and its associated counsel. As the Special Master recognized, the fee-sharing agreement that counsel executed on February 23, 2018 originally included a 20% allocation for Watts Guerra. The Court can address the deficiencies above by allocating a portion of the attorneys' fees in this case—25% of the available attorneys' fees would be justified—to Watts Guerra.

Had Watts Guerra been allowed to obtain the consents of its associated counsel and had it signed the fee-sharing agreement, Watts Guerra certainly would abide by the 20% allocation that the agreement would have provided. But Watts Guerra did not receive that opportunity, and under the facts now known, a 25% allocation of the available attorneys' fees is more appropriate. Indeed, nothing has changed since February 23, 2018 ***except*** that all of Watts Guerra's predictions have come true. Watts Guerra clients comprise a very large percentage of the claims submitted under the settlement—as Watts Guerra predicted—and those clients stand to recover a large percentage of the settlement fund. *Supra* 8-9; *see also* WG Resp. 11-12. Watts Guerra's fees should be proportionate.

CONCLUSION

The Court should modify the Special Master's proposed allocation as detailed herein, and in Watts Guerra's Memorandum in Support of Its Fee Application, its Omnibus Response, and its Reply.

Dated: December 5, 2018

Respectfully submitted,

/s/ Mikal C. Watts

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

Counsel for the Watts Guerra Plaintiffs

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

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

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

Counsel for Watts Guerra LLP

MATH APPENDIX

TABLE 1

12/3/2018 claims data

Number of claims filed, not bushels of corn

	All class members	#	% of all
1	**TOTAL**	226,434	100.0%
2	**Represented class members**	107,401	47.4%
3	**Absentee class members**	119,033	52.6%

	Represented class members	#	% of all	% of rep'd
4	**TOTAL**	107,401	47.4%	100.0%
5	**Kansas**	13,133	5.8%	12.2%
6	**Minnesota**	68,463	30.2%	63.7%
7	**Illinois**	18,734	8.3%	17.4%
8	**Uncategorized**	7,071	3.1%	6.6%

		#	% of all	% of rep'd
9	**Watts Guerra Group**	54,879	24.2%	51.1%
10	**Clark/Phipps Group**	16,336	7.2%	15.2%

* Sources: All figures are from Brown Greer reports dated 12/3/2018, Exs. 2 and 3 hereto; figures do not account for issues with paper claim processing.

* Lines 5-7: Jurisdictional assignments for represented class member claims follow the Special Master's groupings. R&R Ex. 2, ECF No. 3618-2. Seven firms were listed in both KS and MN, including five MN leadership firms and two WG associate counsel; all seven have been assigned to Minnesota.

* Line 8: "Uncategorized" includes 7,039 claimants represented by counsel not listed on ECF No. 3816-2, and 32 claims in Brown Greer's "Represented" total (Ex. 2 hereto) that are not assigned in Brown Greer's "List of Law Firms" report (Ex. 3 hereto). For award and lodestar tables, these are allocated to KS.

* Line 9: Includes Watts Guerra and its 330 associate counsel. See ECF No. 3686; see also Watts Obj. Decl. ¶7,Exhibit 1 hereto.

* Line 10: Includes the Clark, Phipps, and Meyers firms. See ECF No. 3659.

TABLE 2
Work by Counsel in Each Jurisdiction

		ALL WORK (hours)	ALL WORK (million $)	ALL WORK (%)
1	**KANSAS**	**258,843**	**$ 121.49**	**34.8%**
2	MDL Class	184,962	$ 94.89	
3	Beasley	489	$ 0.19	
4	Benjamin Marshall	3,856	$ 1.34	
5	Coffman	69,536	$ 25.07	
6	**MINNESOTA**	**752,358**	**$ 167.87**	**48.0%**
7	Gustafson Class	112,532	$ 47.23	
8	Hybrid, Remele Watts	639,825	$ 120.64	
9	**ILLINOIS**	**178,523**	**$ 60.23**	**17.2%**
10	Clark Phipps	138,467	$ 43.71	
11	Eiland	13,254	$ 4.94	
12	HGD	26,802	$ 11.58	
13	**TOTAL**	**1,189,723**	**$ 349.59**	**100%**

* All figures are as reported by counsel on Court-ordered spreadsheets.

* Counsel grouped and designated per R&R Ex. 2, ECF No. 3816-2.

* All figures reflect an attempt to de-duplicate for counsel with multiple sets of numbers in the record.

		CB WORK hours	CB WORK dollars	CB WORK (%)	OTHER WORK hours	OTHER WORK dollars	OTHER WORK (%)
14	**KANSAS**	**146,444**	**$ 83.09**	**36.9%**	**112,398**	**$ 38.40**	**30.9%**
15	MDL Class	143,391	$ 82.07		41,571	$ 12.82	
16	Beasley	-	$ -		489	$ 0.19	
17	Benjamin Marshall	3,053	$ 1.02		803	$ 0.32	
18	Coffman	-	$ -		69,536	$ 25.07	
19	**MINNESOTA**	**261,978**	**$ 94.13**	**41.8%**	**490,468**	**$ 73.88**	**59.4%**
20	Gustafson Class	64,684	$ 30.28		47,937	$ 17.16	
21	Hybrid, Remele Watts	197,294	$ 63.85		442,531	$ 56.72	
22	**ILLINOIS**	**149,810**	**$ 48.23**	**21.4%**	**28,713**	**$ 12.00**	**9.7%**
23	Clark Phipps	128,961	$ 39.72		9,506	$ 3.98	
24	Eiland	-	$ -		13,254	$ 4.94	
25	HGD	20,849	$ 8.51		5,953	$ 3.07	
26	**TOTAL**	**558,233**	**$ 225.45**	**100%**	**631,579**	**$ 124.28**	**100%**

* CB WORK: figures are as-reported by counsel on Court-ordered spreadsheets. But see R&R 73 n.184.

* PFS work reported as OTHER WORK includes -- but is not limited to -- $30.02 million (300,204 hours) of WG non-attorney time on Line 21. See ECF No. 3686-1.

* PFS work reported as COMMON BENEFIT WORK:
-- Kansas: $1.86 million (4,991 hours) (Line 14)
-- Minnesota: $40.81 million (162,326 hours) (Line 21)
-- Illinois: $2.80 million (11,647 hours) (Line 22)

TABLE 3
Comparison of Proposals

R&R Proposal		AWARD (% of overall fee)			AWARD (millions of $)		
		Total	CB	IRPA	Total	CB	IRPA
1	**Overall fee**	**100%**	90.0%	10.0%	**$ 503.3**	$ 453.0	$ 50.3
2	**Kansas**	**51.9%**	50.0%	1.9%	**$ 261.1**	$ 251.7	$ 9.5
3	**Minnesota**	**30.4%**	24.0%	6.4%	**$ 152.9**	$ 120.8	$ 32.1
4	**Illinois**	**17.7%**	16.0%	1.7%	**$ 89.3**	$ 80.5	$ 8.8

WG Proposal		AWARD (% of overall fee)			AWARD (millions of $)		
		Total	CB	IRPA	Total	CB	IRPA
5	**Overall fee**	**100%**	55.0%	45.0%	**$ 503.3**	$ 276.8	$ 226.5
6	**Kansas**	**43.5%**	35.0%	8.5%	**$ 218.8**	$ 176.2	$ 42.6
7	**Minnesota**	**41.2%**	12.5%	28.7%	**$ 207.3**	$ 62.9	$ 144.4
8	**Illinois**	**15.3%**	7.5%	7.8%	**$ 77.3**	$ 37.7	$ 39.5

* IRPA pool allocated to each jurisdiction based on 12/3/2018 claims data (number of claims filed, not bushels of corn).

* Contingency caps: The Special Master's proposal is a 7% fee cap; WG's is a 25% fee cap. If represented class members have higher than average claims in terms of bushels (e.g., 48% of claims by number, but 60% of claims by bushel), then --
-- 10% IRPA pool provides a 5.6% contingency fee;
-- 45% IRPA pool provides a 25.0% contingency fee.

* Excess: Under both proposals, any excess in IRPA pool, if represented class members recover less than projected, would be distributed to common-benefit counsel.

TABLE 4
Lodestar Crosscheck -- Overall

R&R Proposal		AWARD (%)	AWARD (million $)	WORK Multiplier	WORK $/hr
1	**Overall fee**	100%	$ 503.3	**1.44**	**$ 423**
2	**Kansas**	51.9%	$ 261.1	**2.15**	**$ 1,009**
3	**Minnesota**	30.4%	$ 152.9	**0.91**	**$ 203**
4	**Illinois**	17.7%	$ 89.3	**1.48**	**$ 500**

WG Proposal		AWARD (%)	AWARD (million $)	WORK Multiplier	WORK $/hr
5	**Overall fee**	100%	$ 503.3	**1.44**	**$ 423**
6	**Kansas**	43.5%	$ 218.8	**1.80**	**$ 845**
7	**Minnesota**	41.2%	$ 207.3	**1.23**	**$ 276**
8	**Illinois**	15.3%	$ 77.3	**1.28**	**$ 433**

* IRPA pool allocated to each jurisdiction based on 12/3/2018 claims data (number of claims filed, not bushels of corn).

* Source: Calculations based on figures collected in TABLE 2, supra.

* CB Work: Calculations based on "common benefit" designations by counsel, some of which (particularly in MN and IL) are contested

TABLE 5

Lodestar Crosscheck -- IRPA pool

If all PFS, Individual, and "Other" time is compensated exclusively through IRPA pool

R&R Proposal		IRPA POOL AWARD (%)	IRPA POOL AWARD (million $)	PFS and OTHER WORK Multiplier	PFS and OTHER WORK $/hr
1	**Overall fee**	**10.0%**	**$ 50.3**	**0.30**	**$ 62**
2	**Kansas**	1.9%	$ 9.5	0.24	$ 81
3	**Minnesota**	6.4%	$ 32.1	0.28	$ 49
4	**Illinois**	1.7%	$ 8.8	0.59	$ 218

WG Proposal		IRPA POOL AWARD (%)	IRPA POOL AWARD (million $)	PFS and OTHER WORK Multiplier	PFS and OTHER WORK $/hr
5	**Overall fee**	**45.0%**	**$ 226.5**	**1.33**	**$ 279**
6	**Kansas**	8.5%	$ 42.6	1.06	$ 363
7	**Minnesota**	28.7%	$ 144.4	1.26	$ 221
8	**Illinois**	7.8%	$ 39.5	2.67	$ 979

* IRPA pool allocated to each jurisdiction based on 12/3/2018 claims data (number of claims filed, not bushels of corn).

* Source: Calculations based on figures collected in TABLE 2, supra, providing following inputs:
  -- Overall: $169.75 million (810,453 hours)
  -- Kansas: $40.26 million (117,7389 hours)
  -- Minnesota: $114.69 million (652,794 hours, including 300,000 hours of WG non-attorney time, at $100/hr.). See also ECF No. 3686-1.
  -- Illinois: $14.80 million (40,359 hours)

CERTIFICATE OF SERVICE

I certify that on December 5, 2018, I caused the foregoing Objections to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record in the Federal proceeding.

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

/s/ Mikal C. Watts
Mikal C. Watts