IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE SYNGENTA AG MIR162 CORN LITIGATION	Master File No. 2:14-MD-02591-JWL-JPO
THIS DOCUMENT RELATES TO ALL CASES EXCEPT: *Louis Dreyfus Company Grains Merchandising LLC v. Syngenta AG, et al.*, No. 16-2788-JWL-JPO *Trans Coastal Supply Company, Inc. v. Syngenta AG, et al.*, No. 2:14-cv-02637-JWL-JPO *The Delong Co., Inc. v. Syngenta AG, et al.*, No. 2:17-cv-02614-JWL-JPO *Agribase International Inc. v. Syngenta AG, et al.*, No. 2:15-cv-02279-JWL-JPO	MDL No. 2591

CONSOLIDATED RESPONSE OF KANSAS MDL CO-LEAD COUNSEL AND SETTLEMENT CLASS COUNSEL CHRISTOPHER SEEGER TO ALL OBJECTIONS TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATION

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INTRODUCTION

More than 25 applicants moved for attorneys' fees pursuant to the Settlement Agreement and the Court's order of preliminary approval. The Special Master carefully considered their applications, and her Report and Recommendation (the "Report", ECF No. 3816, is the product of due regard for their arguments. Only nine of the original movants now object.[1] Of those, some are only partial objections that do not challenge the recommendation to the Kansas group.[2] That a majority of applicants did *not* object evidences the admirable job of the Special Master in carrying out her difficult assignment. The principal argument of the current objectors is that the recommended allocations leave insufficient monies for individually retained private counsel (the "IRPAs"). But, even as to that group, many of the original IRPA applicants have filed no objection to the $50 million IRPA allocation.[3] Those who have objected fail to justify modification of the Special Master's recommendations – and certainly fail to demonstrate that any increase to the IRPA allocation should come from the recommended allocation to Kansas ("Kansas allocation"). In fact, the Special Master's framework for dividing attorneys' fees provides *very substantial* compensation to even the most vociferous of the present objectors.

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[1] There were 11 total objections filed, but two of the objectors identify themselves as counsel affiliated with Watts Guerra. They did not independently petition the Court for attorneys' fees, but were part of the consolidated Watts' petition. *See* Kirk Law Firm Obj., ECF No. 3842; Hecker Law Group Obj., ECF No. 3833.

[2] For example, Bassford Remele argues the IRPA allocation should be larger, but supports the recommended Kansas and Minnesota allocations. The self-styled Clark/Phipps group does not directly object to the Kansas allocation, but argues Heninger Garrison ("Heninger") should be paid from the Kansas allocation. *See* Bassford Obj., ECF No. 3823; Clark/Phipps Obj., ECF No. 3832.

[3] *See, e.g.,* Wagstaff Fee Supp., ECF No. 3651; Beasley Fee Supp., ECF No. 3658; O'Hanlon Demerath, ECF No. 3656; Westervelt Johnson Fee Supp., ECF No. 3655; Pendley Fee Supp., ECF No. 3653; Brad Morris Fee Supp., ECF No. 3652; Maggio Thompson Fee Supp., ECF No. 3649; Wilcox Williams Fee Supp., ECF No. 3648; Eiland Fee Supp., ECF No. 3647; Nolan Fee Supp., ECF No. 3645; Borgess Fee Supp., ECF No. 3638; Hodge Fee Supp., ECF No. 3636; Meshbesher Fee Supp., ECF No. 3634; Lyon Fee Supp., ECF No. 3632; Douglas Fee Supp., ECF No. 3631; Dunk Fee Supp., ECF No. 3630; Pavlack Fee Supp., ECF No. 3625.

Take Watts Guerra ("Watts"), which filed a 49-page objection. *See* ECF No. 3836. Watts acknowledges that, under the Special Master's recommendation, they "could possibly receive … around 16.5%" of the overall attorneys' fees. To be sure, their ultimate share of the 24% recommended allocation to Minnesota ("Minnesota allocation") will be subject to adjudication in the Minnesota court. But if the arguments they present here about their unique contributions to the Minnesota litigation hold water (some of which are dubious, *see* ECF No. 3693 at 91), they *admit* they could receive up to $83 million in total fees. If so, the Watts Guerra firm alone (independent of their referral counsel) stands to make over $52 million, plus $12.8 million in expenses for which they seek reimbursement. *See, e.g.,* Watts Fee. Pet., ECF No. 3611 at 37 n.13 ("Watts Guerra itself is entitled to retain roughly 63%"); Watts Fee Reply, ECF No. 3722 at 55. This would be one of the very highest, if not the highest, fee-and-expense recoveries by any firm in the litigation. Thus, Watts' protestations that the Special Master undervalued their firm's work is untenable.

Similarly, Clark/Phipps object around the edges of the Report, contending that the IRPA allocation is too low and that the Kansas MDL leadership should be responsible for Heninger's contributions to the litigation. But Clark/Phipps stand to share (with Heninger) in a recommended allocation of over $80 million ("Illinois allocation"). Moreover, with 15.2% of the represented claimants, they can likely expect $7.6 million of the IRPA allocation (a fact they do not even acknowledge in their objection), providing them with as much as $87.6 million for obtaining the fewest actual results of any leadership counsel in the three jurisdictions.

There are other objections, each of which is discussed below, but the central facts supporting the Kansas allocation remain. Only the Kansas MDL leadership secured a trial verdict – $217.7 million on behalf of a class of over 7,000 producers. Only the Kansas MDL

leadership led the plaintiffs' side in the MIR162-related litigation through complete discovery against Syngenta and numerous third parties, developed trial experts shared with Minnesota, led the defense against all of Syngenta's experts used or designated at both trials, provided a roadmap for winning class certification, led the settlement negotiations in concluding the $1.51 billion settlement, and was first to secure most of the key legal victories that were beneficial to all of the subsequent litigation outside the federal MDL, including the threshold order denying Syngenta's motion to dismiss (which as the MDL court recognized, involved cutting-edge issues concerning duty and the scope of the economic-loss doctrine) and the certification of nine litigation classes.

Moreover, two of the three Settlement Class Counsel are members of the Kansas MDL leadership, and they have worked tirelessly for over a year to consummate the settlement, obtaining preliminary and final approval, deposing objectors and responding to objections, obtaining and defending the aggregate fee award, and supervising implementation of the settlement. And, they will continue to defend the settlement and aggregate fee award on appeal and implement this nationwide settlement long after the IRPAs have moved on to other cases.

The work described above was performed alongside their colleagues in Minnesota (and Louisiana), but as has been acknowledged, Kansas MDL leadership went first on several important issues and led the litigation in important respects. These are facts that the Special Master's recommendations appropriately take into account.

Finally, only Kansas put Syngenta into a box where it faced not only the existing Kansas class judgment, but also four additional class trials (covering seven additional certified class actions that were scheduled for 2018) that presented potential crippling liability of nearly $3 billion in actual damages (plus punitive damages). And only in Kansas were there 12 additional

state-wide producer classes likely to be certified, creating even more actual-and-punitive damages exposure to Syngenta. Although the Special Master concluded that filing-and-maintaining individual cases brought additional pressure on Syngenta through even more consolidated litigation, it cannot be disputed that the Kansas MDL leadership exposed Syngenta to the *greatest* aggregate liability in the *most immediate* timeframe and with the *only* history of a proven trial result.

This record thus resoundingly supports the Kansas allocation equal to 50% of the attorney's fees because the Kansas MDL leadership secured (at least) half of the results and brought to the table (more than) half of the plaintiffs for this historic agricultural settlement. Nor can it be said that the Special Master rubber-stamped the views of the Kansas MDL leadership. She departed from some of the arguments raised by the Kansas MDL leadership. For example, the Special Master assigned some firms to the Kansas group despite their substantial involvement in other jurisdictions (like Toups/Coffman who filed nearly nine times as many cases in Illinois); yet, an allocation to which Kansas MDL leadership did not object.

For these reasons, the courts should adopt the Special Master's recommendation that 50% of the total attorneys' fees be allocated to the Kansas MDL leadership for allocation to the Kansas-designated firms that performed substantial litigation and settlement work. Except for Watts, none of the lead counsel in the other three jurisdictions object to the Kansas allocation. To the extent the courts make any modifications to the Report (such as increasing the IRPA allocation), no reduction should be made to the Kansas allocation, given that it is fully justified under the facts and the law here. Finally, the Kansas MDL leadership also request that the MDL court enter an order delegating to Kansas Co-Lead Counsel determination of the individual distribution to each firm in the Kansas group from the Kansas allocation, to be communicated to

each firm within 30 days of the courts' order adopting the Report and then set a 14-day deadline for the filing of any objections thereto.

ARGUMENT

Rule 23(h)(4) provides that the court "may refer issues related to the amount of the award [of fees and nontaxable costs] to a special master … as provided in Rule 54(d)(2)(D)." In turn, Rule 54(d)(2)(D) provides that the "court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1)." "The court must decide de novo all objections to findings of fact made or recommended by a master," Fed. R. Civ. P. 53(f)(3), and must likewise review objections to any legal conclusions de novo, *id.* at 53(f)(4). "In acting on a master's order, report, or recommendations, the court … may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions." *Id.* at 53(f)(1). Here, the Court should overrule all objections and adopt the Report.

I. ONE-SIXTH OF THE SETTLEMENT FUND IS A REASONABLE FEE TO THE KANSAS ATTORNEYS WHOSE WORK DROVE THE SETTLEMENT.

As part of the overall settlement discussions, the Special Masters made a mediators' proposal for a potential division of attorneys' fees. Although they believed that the percentage allocated to their group of 44 law firms (and their unnamed referral counsel) was too low relative to the comparable value brought by the work from these attorneys, the Kansas MDL leadership accepted the proposal that was ultimately rejected by other counsel. As further encouraged by the Special Master and in an effort to resolve disputes about attorneys' fees, Kansas MDL leadership ultimately agreed in the Fee-Sharing Agreement to take an even *lower* percentage of

the fund, or 16⅔ percent of the overall Fund, than the Special Master had originally proposed for the 44 law firms that provided common-benefit work in the Kansas MDL.[4]

While the Special Master's proposed allocation to the Kansas MDL group remains 16⅔ percent of the overall Fund, this allocation now compensates a substantially-expanded number of law firms. In addition to the 44 law firms that performed common benefit work in the MDL, this 16⅔ percent additionally covers: the three Subclass Counsel who represent Agrisure/Viptera growers, grain handling facilities and ethanol production facilities; law firms, like Toups/Coffman, who were placed in the MDL group despite having the majority of their cases filed in Illinois; and a series of law firms that performed no approved common-benefit work in the MDL, but which had cases that were either originally filed or transferred to the MDL. Despite the 16 ⅔ percent now covering an expanded number of firms, many of which have as strong or stronger ties to other jurisdictions, the Kansas MDL leadership did not contest the Special Master's recommendations.

Nonetheless, other counsel have attacked the Special Master's allocation to the Kansas MDL as "objectively unreasonable." ECF No. 3836 at 26. These same attorneys fault the Special Master for purportedly failing to "independently determine[] an appropriate allocation among all counsel," *id.* at 29-30, and instead relying wholesale on the Fee-Sharing Agreement. Others have suggested revisions to the proposed allocations, advocacy that either directly or

[4] This percentage additionally included all "Referring Counsel" for the Kansas MDL. Many of the Objectors to the Special Master's Report include time spent by their referral counsel and list these additional law firms. Again, while many of the law firms involved in the Kansas MDL additionally had substantial referral networks, Kansas MDL leadership limited their fee application to solely those law firms that performed approved common-benefit time in the MDL. If Kansas MDL leadership had included all of their referral firms, as many Objectors have, the number of law firms in the Kansas MDL would have been far greater than the 44 law firms that performed common-benefit work. In fact, the four Kansas Co-Lead firms alone have 83 referral firms.

indirectly dilutes the Kansas MDL allocation.[5] Such arguments are wholly discredited by the plain language of the Report and unwarranted because of the quality and quantity of work on behalf of all Plaintiffs undertaken by the Kansas MDL Counsel and the unparalleled results they actually obtained.

By recommending that the "Courts give significant weight to this Fee-Sharing Agreement," ECF No. 3816 at 60, the Special Master's Report explains in substantive detail why the allocation to the Kansas MDL group is objectively reasonable and fully justified by the unequaled work undertaken by these attorneys in steering the prosecution of the litigation. The Special Master repeatedly lauded the work performed by the Kansas MDL leadership in leading all facets of fact and expert discovery, trailblazing pretrial briefing on all substantive issues in the litigation, obtaining the only jury verdict in any jurisdiction, and spearheading the settlement discussions.

While the Special Master summarized some of the accomplishments and work led by Kansas MDL Counsel, the Special Master had before her an extensive record of Kansas MDL leadership's contributions and accomplishments. *See, e.g.,* Report, ECF No. 3816 at 62 ("The negotiation of the Fee-Sharing Agreement did not take place in a vacuum. At the time it was negotiated, the litigation was sufficiently advanced (including class certification, optouts, and the class trials) that the entire PSNC had a reasonable sense of both the amount and value of work done by the various groups of lawyers and the numbers of clients they represented."), 71 (discussing the "history of this litigation"), 78 (recommended allocations were based on the

[5] *See, e.g.,* ECF No. 3836 at 10 (advocating for a reduction of the Kansas MDL allocation to 43.5%); ECF No. 3832 at 11 (advocating for an increase to the IRPA allocation, which could "be accomplished in a variety of ways" and seeking to move Illinois counsel into the Kansas MDL allocation); ECF No. 3835 at 24 (requesting an increase in the Illinois allocation to 20%); ECF No. 3840 at 3-4 (requesting that the IRPA allocation "be substantially increased").

"submitted data, as well [as] the Special Master's knowledge of the various roles in the litigation and settlement process"); *see also* Ks. Fee Pet., ECF No. 3587.

Discovery-related Work

With respect to discovery, the Special Master expressly recognized that Kansas MDL leadership "conducted and coordinated massive fact and expert discovery against both Syngenta and third parties spanning multiple countries and at substantial expense." ECF No. 3816 at 79. KS MDL Leadership:

- "reviewed more than 2.5 million pages of documents";
- "took or defended 200 depositions," which "required travel in the United States, Great Britain, Australia, and China";
- "prepared 126 Rule 30(b)(6) deposition topics for Syngenta and later deposed all 32 Syngenta witnesses . . . [e]ighteen of those depositions were later shown in the June 2017 Kansas class action trial before Judge Lungstrum";
- "produced eight expert reports" and "cross-examined 11 defense experts"; and
- participated in "over 49 depositions in the Louisiana, Kansas MDL and Minnesota litigation" related to "third-party discovery against Louis Dreyfus Commodities LLC ("Louis Dreyfus"); Bunge North America, Inc. ("Bunge"); Gavilon Grain, LLC ("Gavilon"); CHS Inc.; the American Soybean Association; and CropLife America."

ECF No. 3816 at 12-13. These accomplishments alone are without equal as compared with all of the objecting counsel.

In addition, the Special Master was well aware of the additional discovery-related work undertaken and led by Kansas MDL leadership, including: drafting all of the discovery that led to Syngenta's massive document production of 2.5 million pages; conducting all of the meet and confer conferences with Syngenta regarding these written discovery requests, negotiating the search terms and custodians for these requests and all briefing of disputed issues before the Court regarding these requests and the attendant privilege log issues; setting up and managing the MDL

Document Depository and managing the document review and coding; successfully obtaining an order compelling production of documents that led to the withdrawal of Syngenta's standard-of-care expert; and locating and developing the experts used to obtain class certification and all experts that testified at the Kansas and Minnesota class trials. Ks. Fee Pet., ECF No. 3587 at 103.

In contrast, many of the attorneys who object to the Special Master's report can—at most—point to discovery work limited solely to completing plaintiff fact sheets for individual cases. *See* Report, ECF No. 3816 at 71 ("Most IRPAs did little more than recruit clients and in some cases fill out PFSs."). But the Special Master appropriately found that PFS work has far less valuable to the overall pressure on Syngenta than the wide-ranging substantive work led by the Kansas MDL leadership. *Id.* at 78 ("While there is certainly an argument that completing PFSs, and thus keeping the individual Minnesota litigation moving, helped to push Syngenta toward settlement, 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. In those important categories, the Kansas lawyers spent substantially more time than those in Minnesota or Illinois.").

Pretrial Briefing

The Special Master also took note of the Kansas MDL leadership's unique leadership role in "obtain[ing] significant rulings on complex legal issues, including removal issues that cleared the path for state court litigation and responses to Syngenta's motions to dismiss and for summary judgment." Report, ECF No. 3816. MDL leadership counsel performed "extensive preliminary pleading and motion practice," including "[o]ppositions to motions to dismiss on various grounds, including that Syngenta did not owe any duty to plaintiffs, that plaintiffs'

claims were preempted under FIFRA, and that the claims were barred by the economic loss doctrine" and "[s]uccessful opposition" to "Syngenta's third-party claims against various Grain Trade entities." *Id.* at 11, 79. In total, MDL leadership counsel "filed 36 substantive motions" and "responded to 19 substantive motions." *Id.* at 12. They alone "pursued and obtained certification of both a nationwide class and eight statewide classes, again surmounting complicated legal hurdles," rulings that paved the way for the certification of this nationwide settlement class. *Id.* at 79.

The Court acknowledged these legal challenges, particularly noting that MDL leadership counsel led these efforts without the assistance of an ongoing government investigation.[6] Instead, they researched and crafted the key legal arguments—such as establishing Syngenta's duty and explaining why the economic loss doctrine in 22 states did not bar Plaintiffs' claims—that were subsequently cited to and relied upon by all other counsel. While some objectors claim that they too responded to motions from Syngenta, the Special Master appropriately recognized that this work only followed the trailblazing research and writing undertaken by MDL Counsel. ECF No. 3816 at 11 (noting that successful briefing, while undertaken by "plaintiffs' counsel in the various jurisdictions, beg[an] with the Kansas MDL"). Much like prosecuting a civil case on the heels of a successful government investigation, it is far easier to respond to Syngenta's arguments with a roadmap (and supporting research) provided and a favorable order from the MDL court in hand than to start from scratch, as Kansas MDL leadership did.

[6] *See* Nov. 12, 2018 Hr'g Tr. at 49 ("But this case, I think the legal issues were far dicier, far closer, far debatable, more debatable than in *Urethane*. . . . So both on the law and on the facts, this was not a slam dunk where the government had come in and laid the groundwork with some investigation or where we're dealing with established legal principles and it was just a matter of counting up how many people got to recover because they were within some category. This was an exceptionally difficult case, and it was very well tried on both sides. There were wonderful argument[s] on legal questions and excellent work at trial.").

Experts

It is undisputed that the Kansas MDL leadership took the lead in developing many of the experts shared between the jurisdictions. *See* Ks. Fee Pet., ECF No. 3587 at 34-35. They defended these experts against Syngenta's *Daubert* attacks, work that was shared among jurisdictions, and proved their usefulness at trial. *Id.*; *see also* ECF No. 3693-1 at 7. Also, they developed cross-examinations and attacks on Syngenta's twelve experts, most of whom were also disclosed in Minnesota. *See* Ks. Fee Pet., ECF No. 3587 at 35-36. Finally, they spearheaded the significant effort attacking Syngenta's standard-of-care expert, leading to his withdrawal, and successfully struck Syngenta's alternative damages model. *Id.* at 36.

The Kansas Class Trial and Verdict

The Special Master recognized that "[p]erhaps most significantly," MDL Counsel "tried the Kansas class litigation to a $217.7 million verdict." ECF No. 3816 at 79. Although other counsel boast that they were ready to try cases or how successful they would have been, the Kansas MDL leadership stand alone in actually having tried a case to verdict and receiving full compensatory damages. As the Court recognized (and in contrast to many of the bold predictions of inevitable trial success made by some of the objectors), the trial was anything but a "slam dunk" and "there was plenty of room to prevail in a trial before a jury under the rules that I had established. I thought that could've gone either way at a trial of this case." Nov. 12, 2018 Hr'g Tr. at 49.

Threat of Additional MDL Class Trials

In discussing what eventually brought Syngenta to the settlement table, the Special Master cites the work primarily accomplished by Kansas and Minnesota *class* counsel: "Syngenta had suffered a loss in the Kansas class action trial, and it was facing the risk of a

similar loss in the Minnesota class trial"; and the risks of the additional "trials that had been set to take place in 2017 and 2018," which included the four class trials scheduled for 2018 in the Kansas MDL. ECF No. 3816 at 9. The class trials scheduled in the Kansas MDL alone sought over $3 billion in just compensatory damages. ECF No. 3712 at 10 (citing the additional MDL class trial scheduled for 2018, which exposed "Syngenta to approximately $3 billion in compensatory damages"). Twelve additional classes were likely to be certified and then tried starting in 2019, presenting even more actual and punitive damage exposure to Syngenta. *See* ECF No. 3436.

Although the Special Master found that Syngenta faced additional risk from the individually-filed lawsuits, ECF No. 3816 at 9, even the collective weight of these individual trials (never actually taken to a jury and over the course of an unknown timeframe) can by no stretch approach the risk posed by class trials with firm trial dates. No individual trial—or even hundreds of individual trials—posed risks to Syngenta comparable to the compensatory damages sought in the four Kansas MDL 2018 class trials alone. Instead, the overwhelming majority of the individually filed lawsuits were negative-value cases that were unlikely to go to trial. *See, e.g.,* ECF No. 3693-4 at 27-28 (discussing that because the individual lawsuits were negative value suits, they were unlikely to go to trial because the cost "would greatly exceed the potential benefits"). Boastful suggestions to the contrary have to be taken with a grain of salt. After witnessing the Kansas MDL leadership take the Kansas class trial all the way to a successful verdict, Syngenta knew that Kansas MDL leadership were fully-prepared to go forward with the four additional class trials scheduled for 2018 and planning for those trials was well underway. *See, e.g.,* ECF No. 3368 (the District's Pretrial Order and Pretrial Conference were completed for

the trial of the Arkansas and Missouri classes, which was at that time scheduled to begin trial on January 22, 2018).

Settlement Leadership

Nor did MDL Counsel's substantive leadership end with the Kansas class trial verdict. The Special Master recognized the critical contributions from Mr. Seeger in his role as the "leader of the PSNC." ECF No. 3816 at 79. As the Kansas MDL leadership pointed out in their preliminary and final settlement approval motion papers, the negotiations here were quite spirited, intense and complex, given the multiple jurisdictions and interests that had to be balanced. At the request of the Special Master, Co-Lead and Settlement Class Counsel Patrick Stueve also joined the Plaintiff's Settlement Negotiation Committee and committed substantial time and efforts to help secure the global settlement that benefited all plaintiffs. *Id.* at 30.

While she specifically noted that this settlement has a "simple claims form that requires minimal information from claimants" because the "Claims Administrator will be using U.S. Department of Agriculture data to calculate compensation amounts, ECF No. 3816 at 55 n.145, 71, Kansas MDL counsel's role in obtaining that data for the benefit of the Class needs to be noted. It was Kansas Co-Lead Counsel who reached out and negotiated an agreement with the USDA's Farm Service Agency to obtain electronic access to the data reported to the FSA on FSA 578 forms, which included corn acreage. ECF No. 3587-1 at 121 (¶ 598).

This alleviated a great burden (advocated by some IRPAs, like Watts) on class members to file claims. *Id.* at 121-22 (¶¶ 599-602). The months of discussions with the FSA, involving multiple meetings with FSA staff in Washington D.C. and Kansas City, were undertaken on Kansas MDL leadership's initiative. As the Court stated: "The use of the government data has greatly streamlined the process, which likely contributed to the very high claim rate, and it is

eminently reasonable to allow for the use of data that has already been reported by 99 percent of claimants." ECF No. 3849 at 14. This vastly improved the process contemplated by the Term Sheet. *See, e.g.,* ECF No. 3514-1 at 3 (§ 2.f) (original Term Sheet, contemplating a claim form that would require farmers to individually provide documentation such as FSA data).

Kansas MDL Leadership's Lodestar

Although not required under the *Johnson* factors, the Kansas MDL leadership fully supported a cross-check of their requested 16⅔ percent of the overall fund with their submitted lodestar. ECF No. 3587 at 91-98. In recognizing the "rigorous controls" exercised by only the Kansas MDL and Minnesota class attorneys to ensure that submitted time was in compliance with the Common Benefit Order ("CBO"), the Court expressly declined to discount any of these hours. Fee & Expense Award, ECF No. 3849 at 34 n.12, 33. These rigorous controls distinguish the time submitted by Kansas MDL leadership from time submitted by firms that object to the Kansas MDL allocation. Each attorney in the Kansas MDL submitted a declaration certifying compliance with the CBO. These hours were maintained contemporaneously and provided to Co-Lead Counsel on a monthly basis with a declaration submitted to the Court that the hours were independently reviewed by the law firm and that the submission was in compliance with the CBO. Problems with these monthly time and expense submissions were addressed throughout the course of the litigation, often resulting in revised submissions. That aside, this was just the first layer of review. Prior to submitting their fee application, all law firms were asked to re-review their previously-submitted time to exercise billing judgment. Once that billing judgment was exercised, Co-Lead Counsel then re-reviewed every single law firm's revised submission and these submissions were revised again, ensuring that every law firm's submission was scrutinized by an attorney outside of their firm.

No similar controls can be traced to other firms' claimed time, making an hour-by-hour comparison between groups inapt. Other counsel (including Watts) simply tout their purported lodestar without providing any analogous representations about the nature and reliability of the non-CBO submitted lodestar. Most counsel failed to maintain contemporaneous time records and there were no documented review processes and no representations that time records were independently vetted by an attorney outside of one's own law firm. Despite hundreds of pages of briefing, there is no basis from which to conclude that the hours purportedly undertaken by other counsel, including Watts, are similar in quality or accuracy to those spent by the Kansas MDL leadership. The Kansas MDL leadership excluded marketing time; their extensive work with their non-bellwether, non-class representative clients; and, all of the other time expressly excluded by the CBO, all of which is part of Watts's asserted lodestar.

Some fault the Special Master's Report for allocating a higher percentage to Kansas than to Minnesota when Minnesota purportedly has a higher number of attorney hours. *See, e.g.*, ECF No. 3836 at 45. Such calculations, however, are inherently misleading because the inputs are not the same for Kansas and Minnesota.[7] As the Special Master noted, Minnesota's time included 50,000 hours of attorney time spent on plaintiff fact sheets. *See* Minn. Fee. Pet., ECF No. 3626-1 at 57 (acknowledgment by Minnesota leadership that such time "might not be normally the type of time considered common benefit work"); Report, ECF No. 3816 at 77 (noting that Minnesota has 48.12% of the total attorney time, which includes the PFS time for non-bellwether

[7] As stated in their Supplement, "MDL Co-Lead Counsel did not ask or require Kansas Common Benefit firms to track or submit time and/or expenses that fall outside of the Common Benefit Order, ECF No. 936. Moreover, MDL Co-Lead Counsel did not ask or require any Referring Counsel for any of the Kansas Common Benefit firms, including the Co-Lead Counsel firms, to track or submit time and/or expenses that fall outside of the Common Benefit Order." ECF No. 3641 at 3. To provide context as to how much non-common benefit time was excluded by the four Co-Lead Counsel firms alone, Co-Lead Counsel provided their non-common benefit time. *Id.* at 4. "Again, MDL Co-Lead Counsel did not include this non-common benefit time and expenses as a basis for any relief sought in the Petition for Attorneys' Fees." *Id.*

and non-class representatives). If that time is excluded, the Kansas MDL lodestar is nearly double that of the Minnesota lodestar. *See, e.g.*, ECF No. 3587-1 at 131 (reflecting approximately $81.7 million in lodestar for Kansas MDL leadership); ECF No. 3662-1 at 22 (reflecting approximately $41.1 million in lodestar for Minnesota leadership).

Overall Reasonableness of the Kansas MDL Allocation

The Special Master's allocation appropriately recognizes that the work by Kansas MDL leadership is of a different kind, quality, and importance to the class than time spent by other attorneys. The time submitted by the Kansas MDL leadership was essential to the prosecution of the litigation through trial, which is fundamentally different than time spent marketing, drafting update letters to clients (which largely summarized the ongoing work accomplished by leadership) or meeting the most basic requirements to avoid an individual dismissal, such as completing a PFS. When viewed under the *Johnson* factors, the Special Master's proposed allocation is fully supported not merely by her personal knowledge of the contributions by each jurisdiction, but on the voluminous data submitted to the Court. ECF No. 3816 at 78. The Court should overrule the objections to this proposed allocation and award the Kansas MDL leadership not less than the requested 50% of the one-third aggregate fee.

II. THE IRPA FUND SHOULD *NOT* BE INCREASED, AT LEAST NOT AT THE EXPENSE OF THE KANSAS ALLOCATION.

Several objectors argue that the IRPA fund is insufficient and should be increased. *See* Watts Obj., ECF No. 3836 at 11-19, 38-41; Bassford Obj., ECF No. 3823 at 8-9; Shields Obj., ECF No. 3840 at 3; Paul Byrd Obj., ECF No. 3826; Hecker Law Group Obj., ECF No. 3833; Clark/Phipps, ECF No. 3832 at 10-11. As an initial matter, objections to the Special Master's framework for compensating IRPAs from the Settlement Fund are sparse and legally undeveloped. Most of the objectors (including the largest, Watts) have *asked* to be paid from the

Settlement Fund. *See* Watts Fee Pet., ECF No. 3611 at 39. It is true that they want to be treated as though they were seeking fees under their private fee contracts (without actually enforcing those contracts), *id.*, but it has been adequately explained that:

- a private fee contract alone does not justify an award from the common fund;
- such a contract does not dictate how fees should be allocated when non-retained counsel performed the vast majority of the most beneficial work in the case; and,
- any fees awarded from the fund must meet the reasonableness standards governed by Rule 23 and the *Johnson* factors.

See Ks. Fee. Resp., ECF No. 3693 at 57-65.

The $50 million allocated to IRPAs (10% of the overall fee award) is more than generous under the controlling case law. The lodestar method (that some objectors now latch onto) is not the required (or even the preferred) means of allocating attorneys' fees. *See Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994) ("district court abused its discretion in rejecting the special master's selection of [the percentage] method and replacing it with the lodestar plus multiplier method"). Rather, the Tenth Circuit follows a "hybrid approach, combining the percentage fee method with the specific factors" enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Gottlieb*, 43 F.3d at 483-84 (marks omitted). Not a single objector has attempted to show that the Special Master's recommendation is inconsistent with an analysis of the *Johnson* factors.

Nor can they genuinely make such a showing. Other than the "time and labor" they purport to have expended updating their clients, completing fact sheets, and perfecting claims (time almost entirely reconstructed and inaptly compared by some objectors to CBO-compliant,

contemporaneous time),[8] all of the most important factors that supported the aggregate fee here are applicable *exclusively* to the work of leadership counsel.[9] The Special Master found some value in the filing of cases and, in some instances, completing fact sheets to prevent those cases from being dismissed. *See* Report, ECF No. 3816 at 3816 at 67. No objector, though, has articulated any other IRPA work that "contributed to the class settlement," which is a pre-requisite to awarding fees under the common-fund doctrine. Fee & Expense Award, ECF No. 3849 at 25.[10] Furthermore, to the extent an IRPA performed other litigation work that contributed to the class settlement, the Special Master acknowledged that such work could be compensable from one of the other three allocations. Report, ECF No. 3816 at 71. Thus, IRPAs who did more and contributed more have at least two sources of compensation. No objector can legitimately show this allocation is unreasonable for the work it is intended to compensate or for

[8] *See, e.g.,* Ks. Fee Resp., ECF No. 3693 at 35 (analyzing time submission of non-leadership counsel: 46.2% of all time spent on plaintiff fact sheets, 12.56% on perfecting claims, 15.45% on pre-settlement communications).

[9] *See, e.g.,* Fee & Expense Award, ECF No. 3849 at 27-32 ("novel factual and legal theories," "massive efforts … in discovery," "numerous experts," "*Daubert* motions," "extensive" motion practice, two trials, "class certification was not assured," "significant time limitations," absence of "government investigation or prosecution of the defendant," unprecedented "imposition of liability," numerous "difficult" legal issues "fully contested by the parties," "[l]itigation that demanded expertise in a variety of areas," "defenses that implicated international politics and economics," required "a great deal of skill from plaintiffs' counsel [–] a high standard that was met in this case, as the Court finds that the most prominent and productive plaintiffs' counsel … were very experienced, had very good reputations, were excellent attorneys, and performed excellent work," "plaintiffs' counsel was consistently excellent, as evidence at least in part by plaintiffs' significant victories with respect to dispositive motion practice, class certification, and trial," "precluded other employment" especially "for lead counsel," a settlement that is "one of the largest known settlements in any kind of case").

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

the value that the mere filing-and-maintaining of individual cases brought to the settlement – particularly where (unlike objectors' comparator cases) the defendant would have faced enormous exposure from certified class actions *even if there had been no individual cases.*

The objections to the recommended allocation should be overruled. First, Watts argues that the Special Master committed a mathematical mistake in determining the size of the IRPA allocation. Watts Obj., ECF No. 3836 at 12. Second, Watts and others argue that the size of the IRPA allocation is too small. *Id.* at 15. Third, Watts argues that assigning administration of the IRPA allocation to the federal MDL court violates the Settlement Agreement. *Id.* at 40.

A. There Was No Computational Error because the Special Master Clearly Intended to Cap IRPA Fees at 10% of Each Client's Net Recovery.

Only Watts complains about the methodology resulting in the 10 percent allocation. But there is no evidence that the Special Master committed a "basic math error." Watts Obj., ECF No. 3836 at 12. In setting a 10% cap, she clearly intended to base her percentage on the amount that each represented claimant would receive *after* fees, expenses, and administration costs. Report, ECF No. 3816 at 70 & n.177. This is not an uncommon (or impermissible) method for calculating contingency fees, even under a contract. *See, e.g.,* Kan. R. Prof. Conduct 1.5(d) (under contingent fee agreement, "[a]ll such expenses shall be deducted before the contingent fee is calculated."). In complaining, Watts also ignores that the Special Master recommends that IRPAs be permitted to seek reimbursement for all of their expenses (Report, ECF No. 3816 at 67-68), something that Watts' own contingent contracts required be paid from Watts' own fees. *See* ECF No. 3580-9 at 2 ("The Firm will repay the expenses advanced out of its forty percent (40%) fee.").

Furthermore, the Special Master did not intend to find that a fee of less than 10% is unreasonable; she acknowledged that $50 million may not be enough to permit the IRPA to

recover 10% of the client's recovery. Report, ECF No. 3816 at 70 n.178. Under these circumstances, however, it is more appropriate to judge the fee against the overall fee award, not as a percentage of the client's recovery. Because of the certification of multiple litigation classes, even absent class members who filed no claim under the settlement brought (at least) as much value to the litigation as those who filed a claim. Class counsel pursued damages on their behalf, and those damages made a very substantial contribution to the settlement, even if some did not file a claim. *See, e.g., Boeing,* 444 U.S. at 477, 480 (attorneys who created a fund are entitled to a fee based on both the claimed and "unclaimed portion of the judgment"). Under these circumstances, the $50 million is reasonable, even if it does not ultimately equal 10% of each client's recovery because that recovery is enhanced by the fact that IRPAs were permitted to participate in a class settlement where their clients would share equally in the distribution of the fund based on claims filed.

B. The IRPA Allocation is Reasonable Given the Substantial Fees IRPAs MayReceive from the Other Allocations.

Contrary to the objectors' complaints, the size of the IRPA allocation is quite reasonable. Objectors (such as Watts) misleadingly state that 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." Watts Obj., ECF No. 3836 at 7. After citing *In re Chinese-Manufactured Drywall Products Liab. Litig.,* MDL No. 2047 (E.D. la. Jan. 31, 2018) (available at ECF No. 3580-31), as the case most applicable to the facts here, Watts then states that the "90/10 split between common-benefit fees and retained-counsel fees is unprecedented and inequitable." ECF No. 3580-31 at 17. That argument fails, however, because: (1) this litigation is distinguishable from *Drywall* and (2) Watts ignores that under the Special Master's

framework, there is substantial overlap between IRPAs and those entitled to share in the other allocations.

First, *Drywall* was a pure "mass tort" that merely settled as a class action in which the defendant agreed to pay attorneys' fees separately, for both common-benefit and contract attorneys (because much of the relief being offered was property remediation). *Drywall,* ECF No. 3580-31 at 18. That case did not involve common-benefit counsel who successfully certified and litigated several class actions and tried one to judgment; and, thus, the court was only compensating common-benefit counsel for the work assisting in the prosecution of individual cases. *See id.* at 10-11 (describing work of common-benefit counsel). Here, however, the allocation must take into account *both* common-benefit counsel's assistance (as in *Drywall*) in prosecuting the individual cases (coordination, discovery, developing experts, prosecuting the bellwether pools, etc.) *and* the substantial (indeed, overriding) value that the litigation classes in Kansas and Minnesota brought to the settlement. If 52% was reasonable just for the former, then another 38% is eminently reasonable for the latter, particularly in light of Kansas judgment. Tellingly, in touting their accomplishments, Watts emphasizes their group's contributions to the Minnesota *class* trial the most. *See* Watts Fee Pet., ECF No. 611 at 58; ECF No. 3692 at 26-27.

Drywall is distinguishable for other reasons too. Unlike here, in *Drywall*, the court did not have to fashion a fee award that would fairly compensate common-benefit counsel employed across *three* different jurisdictions. Ultimately, it was large IRPAs (like Watts, Heninger, and Clark/Phipps) who made the strategic decision to move from the federal MDL (where they initially filed cases) to Minnesota and then Illinois. While these additional forums purportedly supplemented the pressure on Syngenta, a corresponding consequence was the increase in

common-benefit counsel; and, accordingly, a justifiable increase in aggregate allocation to those counsel.

Watts also cites the *NFL Concussion* and *Vioxx* decisions. Those decisions, though, have been exhaustively distinguished (on terms Watts largely ignores). *See* Ks. Fee. Resp., ECF No. 3693 at 108-11. Watts tries in vain to compare the claims processes here with those in *NFL Concussion* and *Vioxx* (both personal injury cases). ECF No. 3836 at 16. But the only thing he cites is a statement by the court in *NFL Concussion* that the process had "no more requirement[s] than necessary." *Id.* (quoting *NFL*, 821 F.3d 410, 441 (3d Cir. 2016)). That misses the point that the nature of the claims to be compensated under the 65-year lifespan of the *NFL Concussion* settlement (entailing certain neurocognitive and neuromuscular ailments that must satisfy a Qualifying Diagnoses under a complex matrix) *necessarily required* a much more complicated claims process than the one Kansas MDL leadership and Settlement Class Counsel fashioned here. *See* Ks. Fee. Resp., ECF No. 3693 at 108-11. Watts also ignores that the *Vioxx* court expressly found that IRPAs had to navigate a "complicated opt-in resolution" to make that settlement possible – something else that was not required by IRPAs here. *See Vioxx*, 760 F. Supp. 2d 640, 653 (E.D. La. 2010); *Vioxx*, No. MDL 1657, 2008 WL 3285912, at *3 (E.D. La. Aug. 7, 2008) (85% of claimants had to opt-in).[11]

Watts' arguments find even less support in *Deepwater Horizon,* 2012 WL 2236737 (E.D. La. June 15, 2012). There (like *NFL Concussion*) the district court awarded all of the fees

[11] Watts also points to *In re Sulzer Hip Prosthesis & Knww Prosthesis Liability Litigation*. *See* ECF No. 3836 at 17. In that case, an initial settlement was reached before the first case management conference in the MDL. *In re Sulzer Hip Prosthesis & Knee Prosthesis Liab. Litig.*, 268 F. Supp. 2d 907, 914 (N.D. Ohio 2003). Following two-rounds of revisions, the settlement reached a few months after the cases were filed was preliminarily and then finally approved. *Id.* at 914-18. The agreement itself provided that common-benefit counsel would receive $50 million in attorneys' fees. *See id.* at 919. Approving fees agreed upon by common-benefit counsel in an MDL that required a fraction of the substantive litigation work that occurred here is plainly inapposite.

requested by common-benefit counsel, which were paid by the defendants, and did not make an allocation determination between IRPAs and such counsel. *Id.* at *2. Moreover, although Watts puts great stock in the fact that the court capped IRPA fees at 25%, they ignore that the court made clear that selecting that percentage was not "intended to allow or encourage attorneys to charge more than a reasonable fee." To the contrary, the court appears to have anticipated that IRPAs would exercise their judgment to charge much smaller fees for simple claims:

> Attorneys have an ethical responsibility to charge only reasonable fees. *See* Model Rules of Prof'l Conduct R. 1.5(a). In many cases, a reasonable fee may be less than 25%, particularly for a relatively simple claim by an individual.

Deepwater Horizon, 2012 WL 2236737 at *2. Thus, not only is *Deepwater Horizon* inapposite for reasons similar to *NFL Concussion*, *Vioxx*, and *Drywall*, it undermines Watts' central premise that getting a client to complete a simple claim form is entitled to generous remuneration.

Next, Watts argues that the Special Master "ignores Watts Guerra's substantial efforts and the excellent results for its clients," Watts Obj., ECF No. 3836 at 17, but that is disingenuous. Watts' efforts were expended in Minnesota, and the Special Master nearly *doubled* the Minnesota allocation. Moreover, with 50% of the represented claims, Watts is expected to receive (at least) 50% of the IRPA allocation. Collectively, then, Watts acknowledges that the group as a whole "could possibly receive … around 16.5%" of the overall attorneys' fees, which is $83 million. Watts Obj., ECF No. 3836 at 9. The fee to *Watts Guerra alone* (sans referral counsel)[12] would be $52 million, and that does not include the $12.8 million in expenses for which they seek reimbursement. Watts Guerra stands to receive one of the

[12] *See, e.g.*, Watts Fee. Pet., ECF No. 3611 at 37 n.13 ("Watts Guerra itself is entitled to retain roughly 63%"); Watts Fee Reply, ECF No. 3722 at 55.

highest individual fees in all the litigation.[13] Consequently, it is specious for Watts to argue the Special Master undervalued their group's contributions inasmuch as she adopted a framework that gives the group a fair opportunity to recover as much or more than $95.8 million (particularly considering that Watts and the other IRPAs contributed little or nothing to discovery, relied heavily on the work of others, and secured no verdicts).

Watts' work (as well as that of Clark/Phipps and Heninger) was done (predominantly) to advance their own large inventories of clients. If the Court wanted to view this litigation in terms similar to *Drywall*, it would therefore be appropriate to total: (i) the entire IRPA allocation ($50 million); (ii) Watts' potential fee recovery ($83 million); and, (ii) the Illinois allocation ($80.5 million). Collectively, that produces the same 58/42 split used in *Drywall*, despite the fact that the court in *Drywall* did not also have to compensate common-benefit counsel in multiple jurisdictions and class counsel for the global benefits that the class litigation bought to all plaintiffs.

As Watts' admissions as to their total potential fee reveal, it does indeed provide a reasonable fee to IRPAs "who did little more than recruit clients and in some cases fill out PFSs," while also providing for a significant fee to firms who performed substantial work litigating and settling the case. *See* Report, ECF No. 3816 at 71.[14]

[13] To be sure, Watts will have to persuade the Minnesota court that its contributions warrant such an allocation (and may face opposition from others in Minnesota who disagree), but given that Watts' efforts were spent entirely in Minnesota, Judge Miller is best suited to evaluate the relative benefits among the leadership there. It must be noted that *all* of the other leadership attorneys will be required work out (or submit to the courts) a distribution of their allocations. There is no fact Watts can point to that justifies their insistence on special treatment among this select group of contributors.

[14] The courts need not take seriously Watts arguments that 10% is too low even "for the retained counsel who … have done nothing beyond assist clients in filing claims" Watts Obj., ECF No. 3836 at 19. By design, the claim form was incredibly simple; the work haranguing clients to sign the form was not complex; and, the effort was essentially risk free.

C. The Special Master's Recommendation Does Not Violate the Settlement Agreement.

The courts should also overrule Watts' arguments that the MDL court's administration of the IRPA allocation (in consultation with the other two courts) violates the Settlement Agreement, which provides that "matters arising from client fee contracts" involving certain firms, including Watts, are subject to the exclusive jurisdiction of the Minnesota courts. ECF No. 3836 at 24.[15] Even if the courts were bound by such a stipulation among the attorneys, it is not violated because the IRPA allocation does not arise from "client fee contracts," but, rather, is based on the Special Master's finding that the "IRPA lawyers … provided significant consolidated litigation and settlement pressure on Syngenta [and] [t]o that extent, they provided a benefit to the entire Class." Report, ECF No. 3816 at 68; *accord* Fee and Expense Award, ECF No. 3849 at 25.

Moreover, because the issue involves allocation of the settlement proceeds and the aggregate fee award, the exception in section 7.2.3 of the Settlement Agreement applies even if the issue also arises from client fee contracts.[16] Attempting to divide the IRPA allocation between jurisdictions would be "unwieldy" and lead to possible inconsistencies. Report, ECF No. 3816 at 72. That conclusion is sound, and Watts has not offered a more workable solution.

[15] Clark, Love, & Hutson did not object to this recommendation, despite a similar provision related to Illinois. Nor did anyone else whose clients' "claims [were] pending at any time in" Minnesota. *See* ECF No. 3507-2 at 59 (§ 7.2.3.2).

[16] *See* ECF No. 3507-2 at 58 (§ 7.2.3) ("Nothing in this Section is intended to interfere with the claims administration process *or the allocation process* as it relates to the national class settlement to be filed before and overseen by the Honorable John W. Lungstrum." (emphasis added). The Special Master has not recommended that the MDL court retain jurisdiction over disputes between referral counsel and there is no reason why those disputes cannot still be subject to sections 7.2.3 of the Settlement Agreement.

D. The Kansas Allocation Should Not Be Reduced to Increase the IRPA Allocation.

Finally, Watts offers a number of ideas for increasing the IRPA allocation. *See* Watts Obj., ECF No. 3836 at 38-41. Since the Special Master's recommendation is sound, there is no need to address each one. However, to the extent the Court considers an increase to the IRPA allocation, it should not be at the expense of the Kansas MDL leadership, whose work is unmatched in terms of producing actual results and advancing favorable nationwide resolution of the MIR162 litigation. The Kansas litigation had the fewest individual cases, all but one of the certified classes, created the greatest damages exposure, and led the prosecution of the claims in a number of areas – including producing much of the evidence that individual litigants would need to use to prove their claims. Illinois (and to a much lesser extent Minnesota) followed, and were predominantly (or in the case of Illinois, exclusively) jurisdictions composed of individual cases (even if some were packaged as mass actions for the purpose of avoiding MDL centralization). Thus, any increase to the IRPA allocation disproportionately benefits those jurisdictions (potentially at the expense of Kansas). Consequently, any adjustments to the "ratio" of allocation between common-benefit counsel and IRPAs should be made (if made at all) without reducing the Kansas allocation.

III. WATTS OFFERS NO LEGITIMATE BASIS TO MODIFY THE REPORT.

Watts raises other objects to the Special Master's recommendations. *See* Watts Obj., ECF No. 3836. First, they contend that the IRPA allocation is too small. These arguments are addressed *supra* at § II. Second, they contend that JPA assessments on individual cases apply or should be used as a "price term" in dividing the fee. Third, they maintain that the Minnesota allocation is too small based on the relative lodestar multipliers among jurisdictions. Fourth, they assert the Special Master gave too much weight to the Fee-Sharing Agreement or should

have given greater weight to what Watts was offered (but rejected) under that agreement. Finally, they argue that the Special Master minimized Watts' contribution by failing to make a special allocation just for Watts. To the extent these arguments seek to reduce the Kansas allocation (as they all do) they should be overruled.

A. The Special Master Correctly Found that the Joint Prosecution Agreements Do Not Govern the Fee Allocation in this Class Settlement.

The Special Master correctly concluded that the Joint Prosecution Agreements ("JPA") do not limit what the Kansas MDL leadership are entitled to seek from the common fund. Report, ECF No. 3816 at 63.[17] She found that "[t]he responses by Class Counsel and the Kansas MDL Leadership correctly state the law and facts applicable here and should be adopted by the Courts." *Id.* Rather than repeat all of our prior, lengthy arguments, we refer the Court to the prior briefing. *See* Ks. Fee Resp., ECF No. 3693 at 71-90; Ks. Fee Reply, ECF No. 3712 at 18-23. Here, we address specifically Watts' objections. *See* Watts Obj., ECF No. 3836 at 19-24.

1. Nothing in the JPA evidences its signatories agreed on how attorneys' fees would be allocated in the event Watts' clients participated in a class recovery, including a settlement class recovery. *See* ECF No. 3693 at 73-77. To the contrary, the JPAs say just the opposite.

Watts argues nonetheless that the JPA is clear that "a settlement payment is 'any payment from Syngenta in connection with the settlement of or judgment on' [a] farmer's claims." ECF No. 3836 at 19-20 (quoting JPA § 2.a.i-ii). But that quote is plucked out of context. The complete sentence imposes no obligation on Kansas MDL leadership, but rather obligates Watts and their cohorts to pay common-benefit assessments on certain of their clients' recoveries.

[17] Only two movants for attorneys' fees continues to press the erroneous argument that the JPA's assessments control allocation of fees here. The first is, of course, Watts. The second is Byrd, whose arguments are cursory. *See* Byrd Obj., ECF no. 3826 at 7. Tellingly, the other movant who previously aruged the JPA should control, did not object on this basis and no longer objects to the recommended Kansas allocation. *See* Bassford Remele Obj., ECF No. 3823 at 1.

Such "assessments" are tied specifically to the MDL court's "then-applicable" common-benefit orders. Specifically, "such clients will be subject to 100% of the *then-applicable* Benchmark Common Benefit Assessment." JPA § 2.a.i.1 (ECF No. 3611-1 at 7) (emphasis added).[18] Consequently, the parties intentionally and unambiguously tethered the assessments to whether such an assessment was applicable under the CBO, as entered at the time of a recovery.

Here, no "assessment" is applicable to Watts' clients because they did not opt out of the class settlement, and the CBO specifically provided there would be no such assessments in the event of a class settlement. *See* CBO, ECF No. 936 at 20 ("In the event that there is a class settlement, recovery or judgment in favor of the class, no assessment pursuant to this Section will be made, either for attorneys' fees or for expenses, individually from any class member or his/her/its individual attorney as to the portion of any class recovery distributed to that individual class member if the class member remains in the class (i.e., does not opt-out of the class)."). Rather, the CBO provided the MDL court would award attorneys' fees from the "overall class recovery funds provided by defendants, as approved by the Court," *id.*, and, in fact, the MDL court has now done so "under the common fund doctrine" and Rule 23(h) – *not* through the imposition of common-benefit assessments. Fee and Expense Award, ECF No. 3849 at 24.

Moreover, this should come as no surprise to Watts. The relevant CBO at the time the JPA was executed contained the same language as the current CBO. That CBO (submitted April 15, 2015) also made clear that no assessment was applicable in the event of a class recovery. *See* Ks. Fee Resp., ECF No. 3693 at 25-26. That proposed CBO was the one the MDL court ordered modified in part with its May 8, 2015 Memorandum and Order approving the assessment on

[18] Section 2.a.ii.1 contains identical language applicable to Watts' non-federal cases, but sets the assessment at 50% of the benchmark. ECF No. 3611-1 at 8.

federal cases (ECF No. 403 at 3), which the JPA specifically cited (ECF No. 3611-1 at 5). In fact, Watts points to no contrary evidence that either the JPA or any relevant CBO ever intended "assessments" to govern division of fees in a class action. *See id.*[19]

To avoid the clear inapplicability of the JPA, Watts now argues that such evidence is barred by the parol evidence rule. *See* Watts Obj., ECF No. 3836 at 22. But, as explained above, it is impossible to perform the JPA without determining what common-benefit assessments, if any, are applicable under the CBO. *See* JPA § 1.a (ECF No. 3611-1 at 5) ("'Benchmark Common Benefit Assessment' means the benchmark common benefit fee and expense assessment ordered by the Federal MDL Court in connection with the Federal MDL."). Thus, the parties obviously intended for the current CBO to be part of the contract,[20] and Watts acknowledges the two are interrelated and must be read together. *See* Watts Fee Pt., ECF No. 3611 at 48; *accord* Bassford Fee Pet., ECF No. 3568 at 3, 10-11.

Furthermore, evidence of the parties' subsequent conduct is not barred by the parol evidence rule. *Nord*, 305 N.W.2d at 340 ("We have held that the parol evidence rule is not

[19] Such "evidence is admissible to explain the circumstances surrounding the execution of the documents." *Anderson v. Kammeier*, 262 N.W.2d 366, 370 (Minn. 1977). Moreover, the relevant CBOs are referenced by the JPA. *Infra* note 20.

[20] *See Short v. Van Dyke*, 52 N.W. 643, 643 (Minn. 1892) ("In a written contract, a reference to another writing, if the reference be such as to show that it is made for the purpose of making such writing a part of the contract, is to be taken as a part of it just as though its contents had been repeated in the contract."); *Datalink Corp. v. Perkins Eastman Architects, P.C.*, No. 13-CV-2978SRN, 2015 WL 3607784, at *4 (D. Minn. June 8, 2015) ("Even a mere reference, within a signed document, to an unsigned document is 'sufficient as a legal matter to incorporate the attached [document].'"). Similarly, "[p]arol evidence may be considered in determining whether a condition precedent exists." *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981) ("The trial court erred as a matter of law when it held that no parol evidence was admissible."). Here, the parties cannot determine if an assessment applies without consideration of the MDL Court's then-applicable CBO. Moreover, it was also not improper for the Special Master to credit Kansas MDL leadership's evidence of the negotiations leading up to execution of the JPA. ECF No. 3836 at 22. Furthermore, to the extent there is ambiguity about whether the JPA's "Common Benefit Assessments" covered a class recovery, the evidence unilaterally supports Kansas MDL leadership's position. *See* Ks. Fee Resp., ECF No. 3693 at 25-29.

violated by testimony of subsequent discussions in transactions relating to alterations of the original contract."). The CBO was entered a month *after* the JPA was executed. Watts did not object or oppose it, even though the JPA specifically permitted Watts to do so if Kansas MDL leadership proposed a CBO not "consistent with" the JPA. *See* JPA § 2.a.vii (ECF No. 3611-1 at 9). By not objecting, and thus waiving their arguments to the CBO, Watts' conduct is compelling evidence that, in the event their clients participated in a class recovery, the MDL court would award fees from the overall recovery, not by imposing common-benefit assessments.

Watts asserts that language in the CBO regarding applicability of assessments to a class recovery (§ IV.B.3) does not apply to the recoveries of Watts' clients, citing a footnote in section II.C. The footnote appears following a sentence that states Watts' "rights and obligations in connection with this Order shall be governed by the Remele Agreement, which rights and obligations, in pertinent part, may be summarized as follows." CBO, ECF No. 936 at 5. A non-exhaustive summary does, in fact, follow. *Id.* The footnote states only that Watts "rights and obligations are governed by the specific language in the Remele Agreement … not by the summaries contained in this Order." *Id.* at 5 n.1. But the language in section IV.B.3 rendering all assessments inapplicable in a class settlement is not a summary of the JPA. The intent of the footnote is obviously directed at the actual summaries of JPA terms contained in section II.C, where the footnote was placed after the word "summarized." Moreover, there is no "right" or "obligation" in the JPA precluding application of section IV.B.3 of the CBO because, as explained, the JPA incorporates the CBO's definition of common-benefit assessments.

Importantly, the operative paragraph of the JPA that Watts contends requires application of the 11% assessment percentage says this:[21]

> The collective exposure of the applicable member(s) of the Remele/Sieben Group, its Federal Court Client, and its Co-Counsel, if any, in connection with such client ***for payment of a Common Benefit Assessment*** to one or more of the ***Federal MDL Funds*** in connection with such client will be capped at the lesser of (1) 100% of then-applicable Benchmark Common Benefit Assessment or (2) a common benefit fee assessment payable to the Federal MDL Funds of 8% for Producers and 7% for Non-Producers and a common benefit expense assessment payable to the Federal MDL Funds of 3% for Producers and 2% for Non-Producers.

JPA § 2.a.i.2 (ECF No. 3611-1 at 7-8) (emphasis added). That limitation (the "collective exposure") is unambiguously and textually limited to "payment of a Common Benefit Assessment." *Id.* But neither the Court's Fee and Expense Award nor the Special Master's recommendation on how to allocate that award imposes "a Common Benefit Assessment," which the JPA defines as a "common benefit fee and expense assessment ordered by a state or federal MDL court." JPA § 1.b (ECF No. 3611-1 at 5).

To the contrary, the CBO is crystal clear that all attorneys' fees will *not* be based on any such an assessment in the event of a class recovery. CBO, ECF No. 936 at 20 ("no assessment … will be made … as to any portion of any class recovery"). And, it is equally clear that the fees here are not being paid into the "Federal MDL Funds" as required by the JPA, which is defined as the "common benefit fee fund and expense fund formed in connection with the Federal MDL in which Syngenta will deposit money in satisfaction of the Common Benefit Assessment Order." JPA § 1.f (ECF No. 3611-1 at 7-8); *see also* CBO, ECF No. 936 at 20 (requiring establishment of such funds for common-benefit assessments). Rather, the Settlement

[21] Watts also argues that the 11% should be proportionately reduced since Watts anticipated receiving 40% of their clients gross recoveries, which is now limited to 33%; but, even if the JPA controlled (which it does not), Watts points to no language in the JPA that permits such a discount.

Agreement (which Watts signed) provides that any fees awarded by the court as part of the class settlement be paid from the "Gross Settlement Proceeds," which are held in an "Escrow Account," S.A. §§ 2.20, 232 (ECF No. 3507-2 at 15, 17), not in the Federal MDL Funds. *See also* S.A. § 7.2.2 (*id.* at 57) ("Any Fee and Expense Award in conjunction with this Settlement … shall be paid from the Settlement Fund."), § 2.59 (*id.* at 22) ("Settlement Fund means the Gross Settlement Proceeds deposited into the Escrow Account.") Of course, this too is consistent with the CBO, and inconsistent with Watts' arguments.

Finally, any doubt is erased by the JPA Addendum, whereby the parties (among other things) extended the JPA assessments to additional counsel. In doing so, they jointly characterized "the assessments" as applicable "on individual cases as set forth therein [*i.e.,* in the original JPA]." JPA Addendum, ECF No. 3611-2 at 7. *See* Ks. Fee Resp., ECF No. 3693 at 28-29, 74; Ks. Fee Reply, ECF No. 3712 at 20-22. Watts misconstrues the relevance of this evidence. ECF No. 3836 at 23. It is not proof that the parties modified the original JPA (aside from adding additional Minnesota counsel). Rather, it is proof that "as set forth" in the JPA, those assessments applied only to individual cases, not to class recoveries. In other words, the additional parties added to the JPA were brought in under the same terms as Watts and the original parties – which is the only sensible reading.

Watts then contends that if the Addendum applies, it requires fees be allocated in accordance with the agreement in the Addendum for allocation of Minnesota class fees. ECF No. 3836 at 23. But that ignores that this division was applicable *only* to a class certified in Minnesota state court. *See* Addendum to JPA § 2.a.iv, ECF No. 3611-2 at 4-5 ("the Addendum Parties agree that the Federal MDL Co-Leads shall be entitled to a flat fee equal to 33 1/3% of the attorneys' fees awarded in all MN MDL Class Actions."). The agreement further *prohibited*

Watts (or other JPA attorneys) from seeking *any* fee from a class certified in the MDL, except for work "requested in writing by the Federal MDL Co-Leads." Addendum to JPA § 2.b.iii (*id.* at 6) ("In no event shall the Remele/Sieben Group or any Additional Minnesota Counsel seek, nor shall any such person be entitled to, fees from any Federal MDL Class Action solely related to use of their Syngenta Work Product in the prosecution of a Federal MDL Class Action."). Thus, under the Addendum, Watts (and the rest of Minnesota leadership) would not be entitled to any allocation from a federal class settlement—a position that Kansas MDL leadership has clearly taken here. *See also* Ks. Fee Reply, ECF No. 3712 at 21 n.14.[22] Watts' arguments, thus, find no support in the Addendum, but are further defeated by it.

Moreover, even if the JPAs' terms were ambiguous on their applicability to a class settlement, the un-rebutted evidence regarding negotiations between the parties would clearly demand Kansas MDL leadership's interpretation. *See* Report, ECF No. 3816 at 67.

2. Watts also criticizes the Special Master for not according the JPA's assessments "equitable consideration" as a valid "price term" for Kansas MDL leadership's contributions

[22] The Special Master was also correct that the Settlement Agreement's merger clause would have superseded the JPA, if it had applied to class actions. Watts was clearly a party and a signatory to the settlement. S.A., ECF No. 3507-2 at 5 (Parties defined to include "Plaintiffs' Negotiating Committee"). And the Settlement plainly covered the subject matter of attorneys' fees, including who would approve them, how they should be applied for, and where they would be paid from. *See, e.g.,* S.A. §§ 2.25, 2.32, 7, 9.21 (ECF No. 3507-2). Watts tries to defend his position by arguing that the implication of the merger clause is that the Settlement Agreement must have also superseded the Fee-Sharing Agreement. ECF No. 3836 at 21. That is probably wrong as a matter of law because, unlike the JPA, the Fee-Sharing Agreement was executed together with the Settlement Agreement. *Crown Books Corp. v. Bookstop, Inc.*, No. CIV. A. 11255, 1990 WL 26166, at *8 (Del. Ch. Feb. 28, 1990) (citing 4 S. Willison, *A Treatise on the Law of Contracts* § 628 (3d ed. 1961)); *see also* 11 Williston on Contracts § 33:8 (4th ed.) ("the rule does not apply to contemporaneously executed writings when it appears that all were intended to be read together"). But, even if Watts is right as a matter of law, so what? The parties to the Fee-Sharing Agreement understood it was not actually binding on the courts. *See* Report, ECF No. 3816 at 60 ("This Fee-Sharing Agreement is not binding on any of the Courts….The decision regarding the total amount of fees to be awarded and how it should be allocated among the many plaintiffs' lawyers seeking fees is within the sole discretion of the Courts."). Its purpose was to provide a recommendation from lead counsel as to how to divide fees in a class action, and it served that function.

(ECF No. 3836 at 23-24), an argument that Watts previously buried in an expert report. *See* Ks. Fee Resp., ECF No. 3963 at 86. But the Special Master specifically found that the "premise of the JPA was an effort to secure a process that would automatically exclude [Watts'] clients form any class and correspondingly limit their common-benefit assessment on any individual recovery they secured. It is inconsistent with this premise that the same JPA was meant to address the opposite scenario, wherein their clients elect to participate in a federal settlement class and in which they seek fees out of the common fund." Report, ECF No. 3816 at 67. The very equitable rule Watts' experts rely upon does not require consideration of an unenforceable price term "if the grounds of unenforceability … draw into question the validity of the parties' agreement as to price." RESTATEMENT (THIRD) OF REST. AND UNJUST ENRICHMENT § 49 cmt g. Here, not only is the JPA is enforceable but simply inapplicable to a class recovery (and so the rule irrelevant), the "price term" at issue was never meant to address the circumstance now at bar.

Moreover, individual-case assessments are not a comparable "price term" because Kansas MDL leadership agreed to those assessments for reasons that do not apply in a nationwide class settlement, including because Watts' cases were outside the jurisdiction of the MDL Court to order a fair assessment. *See* Ks. Fee Resp., ECF No. 3693 at 87. Furthermore, the assessment levels reflect the additional work that it takes to actually prosecute a "mass tort" case to judgment (as opposed to merely conforming to a master complaint and preparing a short fact sheet), *id.* at 87-88; but, they do *not* compensate Kansas MDL leadership for the huge amount of work that Kansas MDL leadership brought by way of the successful federal class actions, including the Kansas judgment, or the concomitant settlement pressure that brought to bear on Syngenta, *id.* at 87.

Finally, Watts ignores the clear benefits that they are receiving by participating in the class settlement – savings that would have been part of any negotiation over Watts' participation therein and at what price – including:

- sharing in the total settlement fund paid by Syngenta for a nationwide release effectively capturing monies intended for absent class members that were not Watts' clients who did not file a claim, *id.* at 89-90;

- piggybacking on Kansas MDL leadership having secured the cooperation of the FSA for an electronic data exchange that saves Watts – by Mr. Watts' admission – $100 million, an amount that would have come out of their contract fees, *id.* at 88-91; *see* Watts Decl., ECF No. 3580-5 at 14 (¶ 35) (fee contracts "made expenses the responsibility of counsel (with repayment to be made from the contingent fee, if any");

- seeking more than $12 million in expenses from the common fund, even though both their contingency contracts and the JPA would have precluded such relief, *see id.*; Watts Fee Pet., ECF No. 3611 at 16 (correctly describing JPA term that "Watts Guerra 'will not seek any common benefit fee awards or expense reimbursements' from the *federal* common benefit fund"); and,

- participating in a settlement where class counsel is undertaking all of the time and labor to seek final approval and supervise administration of the claims – activities that Watts would otherwise have been required to undertake in their own settlement.

These are just some of reasons that the JPA assessments are not a "price term" that this Court can extrapolate to the division of class attorneys' fees.

B. The Lodestar and its Multipliers Do Not Justify Modification of the Allocations.

Watts also takes issue with the Special Master's recommendation based on the number of hours reported by Minnesota attorneys and the resulting lodestar multipliers of each jurisdiction. Watts Obj., ECF No. 3836 at 25-29. But Watts fails to cite any authority that the lodestar is dispositive under the *Johnson* factors. "[A] lodestar cross check is unnecessary in awarding a percentage-of-the-recovery." ECF No. 3587 at 53 (citing Professor Klonoff at ECF No. 3587-6 at ¶ 102.). It is merely supplemental to the *Johnson* factors, serving as a "back-of-the-envelope"

validation of the percentage-of-the-fund demanded by those factors. *Id.* at 91; *Gottlieb*, 43 F.3d at 483-84.[23] Watts did not oppose these arguments. *See* Watts Fee Resp., ECF No. 3692.[24] Indeed, here, the Court performed precisely that, a lodestar "cross-check" only to "confirm[]" the "reasonableness of a one-third award." Fee and Expense Award, ECF No. 3849 at 33.

The Special Master acknowledged that the results achieved between jurisdictions were different and justified different allocations, irrespective of hours spent. ECF No. 3816 at 78. Watts discusses only the fact that the Special Master remarked that 15% of all Minnesota attorney hours consisted of mere PFS work and argues that time should not have been excluded entirely. ECF No. 3836 at 27. But PFS work did not require the skill of an attorney (as Watts' acknowledged by using paralegals), and the Special Master's analysis that Watts cites was of *attorney* hours; thus, they are properly excluded in that analysis. Subtracting those PFS hours (which Kansas MDL leadership did *not* report in their fee submissions, *accord* CBO, ECF No. 936-1 at 7, from the Minnesota total, reduces Minnesota's common-benefit-attorney hours to 83,203.95. With 119,733.50 hours of MDL common-benefit-attorney work, the Kansas MDL

[23] *See Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999) (lodestar approach is "sometimes warranted to double-check the result of the 'percentage of the fund method"); *In re Rite Aid Corp. Secs. Litig.*, 396 F.3d 294, 306-07 & n.16 (3d Cir. 2005) (lodestar cross-check is "'not a full-blown lodestar inquiry,"' and "need entail neither mathematical precision nor bean-counting"); *In re Cendant Corp. Litig.*, 264 F.3d 201, 285 (3d Cir. 2001) (cross-check entails only "an abbreviated calculation of the lodestar amount"); *CompSource Okla. v. BNY Mellon, N.A.*, No. 08-469-KEW, 2012 WL 6864701, at *8 (E.D. Okl. Oct. 25, 2012) ("A majority of circuits recognize that trial courts have the discretion to award fees based solely on a percentage of the fund approach and are not required to conduct a lodestar analysis in common fund class actions.") (citing *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 644 (5th Cir. 2012)); *In re: Checking Account Overdraft Litig.*, No. 1:09-md-02836-JLK, 2014 WL 11370115, at *15 (S.D. Fal. Jan. 6, 2014 ("In view of the excellent results obtained here, the Court deems it unnecessary to scrutinize Class Counsel's lodestar.").

[24] In that brief, Watts indirectly concedes that the lodestars are *not* dispositive. *Id.* at 5 ("What is more, they are pressing the Courts to award hundreds of millions of dollars based on a subjective assessment of contributions and lodestar submissions (even though all agree that the percentage approach governs), without taking into account the actual recoveries by each attorney's clients or constituents under the Settlement.").

leadership performed 59% of all attorney common-benefit work. Moreover, viewed through the full lodestar lens, in an apples-to-apples comparision, the Kansas MDL leadership had $81 million in lodestar and Minnesota leadership had $41 million – which is nearly half of Kansas and was the metric that Kansas and Minnesota lead counsel used when they agreed to the 50 / 12.5 split in the Fee-Sharing Agreement. Thus, even lodestar and "time and labor" do not justify modifying the Special Master's recommendation, in light of her having already doubled the Minnesota group's allocation.[25]

But even if the numbers were as Watts claims, it would not justify modifying the Report. As pointed out, the Kansas lodestar hours were devoted to leading virtually every aspect of the litigation. Kansas attorneys took the lead on offensive discovery against Syngenta, third-party discovery, motion practice, experts (where shared, as many were), defense experts (where the same, as many were), class certification, and trial. Report, ECF No. 3816 at 79; ECF No. 3693 at 112-13; *supra* § I. They were the first to develop key legal arguments and obtain key rulings, including even the removal ruling that "cleared the path for [any] state court litigation" at all. Report, ECF No. 3816 at 79; ECF No. 3693 at 112-13. *See supra* § I; Supp. Stueve Decl., ECF No. 3693-1 at 48-58. Respectfully, hours spent blazing the trial are inherently more valuable (in terms of results achieved, risk undertaken, complexity of issues) to reaching the destination than hours spent following.

Watts argues that Minnesota attorneys "worked alongside attorneys in Kansas to complete discovery" (and that is certainly true) but it is unrefuted that Kansas attorneys both led

[25] As explained *supra* § I, the courts cannot legitimately compare CBO-compliant time, having undergone rigorous controls and contemporaneous recordings, with re-constructed and unverified estimates put together by Watts and other IRPAs. As previously discussed, there are significant differences between firms who recorded time contemporaneously (1.9 hours per PFS) versus those, like Watts, who did not (6.9 hours per PFS). *See* Ks. Fee Reps., ECF No. 3693 at 24-25.

and took a greater role in those critical efforts. *See* Ks. Fee Pet., ECF No. 3587 at 21-26; Ks. Fee Resp., ECF No. 3693 at 113-14. Such contributions are not reflected in raw hours because, although both groups attended all the depositions, Kansas MDL leadership took a greater role in eliciting the evidence. *See* ECF No. 3693-1 at ¶¶ 212-14 (summarizing that Kansas MDL leadership conducted 68% and 60% of all plaintiffs' examination of Syngenta employees of third parties, respectively).

It was certainly appropriate for the Special Master to give greater weight to the contribution from the Kansas MDL leadership in light of these facts. The *Johnson* factors require that weight be given to: "novelty and difficulty of the questions," "skill requisite to perform the legal service properly," and "undesirability of the case." *See* Fee and Expense Award, ECF No. 3849 at 25 (internal quotes omitted). In obtaining the precedent and developing the arguments that others could rely upon, Kansas MDL leadership's work justifies the recommendations. *See also* Ks. Mem. in Supp. Fee Pet., ECF No. 3587 at 104; *see also id.* at 43; Supp. Stueve Decl, ECF No. 3693-1 at 58 (¶¶ 217-18) (describing how work was shared with Minnesota). Of course, the work in Minnesota was also complex; novel in that jurisdiction; and, required skilled attorneys. But, unlike Minnesota leadership, Kansas MDL leadership did not have favorable precedent and pre-packaged arguments from which to start. It is not surprising that Watts ignores all these facts as they had little-or-no involvement in these key areas of the case (discovery or legal briefing). *See* Ks. Fee Resp., ECF No. 3693 at 99.

The "amount involved and results obtained" also justifies the recommended allocations. The Kansas judgment was a result unmatched in Minnesota, and one on which the Special Master appropriately relies. In addition, she notes that only Kansas obtained certification of eight producer classes, with actual (over $3 billion) and punitive damages at play in firm 2018

trial settings. Although the Minnesota class case was also important, when that trial was completed there would have been only Minnesota individual cases left to try, a daunting prospect that would have required years of sustained effort (many, many 2-3 week trials) and repeated successes (under very difficult facts) before they could replicate just the 7000-producer Kansas class judgment. In addition, prior to the settlement, Kansas MDL leadership had moved to certify an additional 12 producer classes, which would have ensured Syngenta faced even more class-wide liability in 2019. *Id.* at ¶ 8. Thus, in the Kansas MDL alone, Syngenta faced an actual $217.7 million judgment *and* a series of forthcoming trials presenting possible crippling liability.

Against this, Watts posits that "[w]ithout the substantial PFS effort, dismissal of tens of thousands of individual cases would have dramatically reduced the settlement pressure on Syngenta." Watts Obj., ECF No. 3836 at 27. To be sure, that many dismissals would not have been beneficial, but there is no evidence that they it would have had a "dramatic" impact on the plaintiffs' litigation position where the objective facts show that Syngenta was still facing more than $3 billion in liability in 2018 in the MDL alone.[26]

Watts also wants extra credit (ECF No. 3836 at 26) for preparing the *Mensik* case for trial, even though that case settled on individual terms that provided no benefit to the Class. Watts received his full contingency fee for that work (less the JPA-CBO assessment because it was an individual case); and the work performed in connection with that case was submitted as

[26] Watts claims Kansas MDL leadership negotiated the form of the PFS and therefore cannot disclaim it, but there was little doubt that the courts would have required them (they are typical in "mass torts"). *See* Order, ECF No. 1231 (denying motion by Kansas MDL leadership to stay PFSs for non-bellwether plaintiffs, noting that they require "very limited and basic information to complete.). And, in fact, Syngenta insisted on the PFSs, in part, because there were public allegations surfacing at the time that some plaintiffs' counsel (not Kansas MDL leadership) had filed thousands of false claims in the *Deepwater Horizon* MDL.

CBO-compliant common-benefit work in Minnesota for which Watts' contributions will be further compensated from the Minnesota allocation. *See* ECF No. 3693-1 at 36-37 (¶¶ 139-44).

Next, Watts criticizes the Special Master for not accepting their view that the claims rate, and their clients' ultimate share of the Settlement Fund, should control the allocation. Watts Obj., ECF No. 3836 at 29. But perfecting claims (half of which were filed without assistance from a lawyer) had *no* impact on creating the settlement or the size of the fund. Yet, without the settlement, there would be no recoveries, and Kansas MDL leadership's contributions easily equal (at least) 50% of the reasons for that achievement. *See supra* §§ I & II. Watts wants the courts to blindly rely on their clients recoveries *vis-à-vis* those of class members who did not hire Watts (or other IRPA), but nothing requires (or counsels) in favor of such an approach because the fee is awarded "for work that contributed to the class settlement." Fee & Expense Award, ECF No. 3849 at 25. It is not a competition for filing claims, as Watts would have it.[27]

Moreover, the simplicity of the Claim Form (accurately recognized by the Special Master) ensured that no one needed a lawyer to file a claim. Report, ECF No. 3816 at 71. Watts disregards that their success is due in large part to Kansas MDL leadership's insistence on this simplicity and on the use of government-provided data. *See* Stueve Decl., ECF No. 3587-1 at 121-22 (¶¶ 598-602). Watts also offers no evidence that their clients (already highly motivated as evidenced by hiring lawyer) would have filed substantially fewer claims without Watts' assistance, in light of the simple nature of the form and its requirements. To the extent that

[27] Indeed, while Watts has been expending its resources perfecting claims for the benefit of their fee petition, Settlement Class Counsel have expended substantial hours overseeing the settlement implementation, supervising the Claims Administrator, and obtaining approval of the settlement over the objection of several Class Members, including deposing several objectors represented by known professional objector counsel and drafting multiple briefs – all work that clearly *did* benefit the Class as a whole. Fortunately, for Watts, others continued to take the laboring ore on their behalf so they could invest their time supporting their fee petition, enable them to focus their time and energies supporting their fee petition.

Watts (and other IRPAs) drafted Claims Forms for and then mailed, called, texted, visited their clients to sign and submit those forms, that work benefits the client but not the class.

C. The Special Master Did Not Give Undue Weight to the Fee-Sharing Agreement.

Watts further contends that the Special Master gave undue weight to the Fee-Sharing Agreement (ECF No. 3836 at 29-32). That is utterly meritless. The Special Master recognized that the agreement was not binding. Report, ECF No. 3816 at 60. In fact, she disregarded it by creating the $50 million IRPA allocation (of which Watts will likely get 50%); nearly *doubling* the Minnesota allocation (also benefitting Watts); and, reducing the Illinois allocation (something else Watts urged, *see* Watts Fee Resp., ECF No. 3692 at 29). The only allocation she accepted (albeit by expanding those in the group) was the Kansas allocation, but that allocation is fully justified by the facts and the *Johnson* factors. *See supra* §§ I-II.

Importantly, Watts ignores that with the increase to the Minnesota allocation, the Special Master's recommendation has the full support of all Minnesota co-lead counsel (and the Kansas MDL leadership) other than Mr. Watts's partner Frank Guerra. *See* Bassford Remele Obj., ECF No. 3823 at 1 ("Bassford does not object to the Special master's proposed allocation of 50% to Kansas and 24% to Minnesota."). Fee-sharing recommendations among lead counsel are entitled to weight only because they reflect the considered judgment of the attorneys who led the litigation. *See* ECF No. 3693 at 39. Here, Watts is a dissenter (even among the Minnesota colleagues with whom they worked side-by-side) whose complaints no one else shares, and Watts seeks special treatment that no other individual leadership firm requests.

Watts maintains that the Special Master should have, instead, accorded weight to an unconsummated offer to include Watts in the Fee-Sharing Agreement, whereby Watts would have been allocated up to 20% of the total fees. ECF No. 3836 at 30-31. But there is no basis to

give any weight to an offer Mr. Watts rejected *before* he signed the Settlement Agreement in which he consented to the inclusion of his clients in a nationwide class, realizing that it would save his firm $100 million and was in the best interests of his clients. *See* Watts Decl., ECF No. 3580-5 at 82 (¶ 321).[28]

More importantly, Watts misstates the scope of the offer. The Kansas MDL leadership never offered 20% to Watts alone. Their last redline to Watts required that Watts agree to compensate all lawyers representing clients excluded from the federal litigation classes under the JPA. *See* ECF No. 3580-28 at 4 n.5; *see also* ECF No. 3712 at 26 n.19. Moreover, to the extent their were firms not covered by the Fee-Sharing Agreement, the parties made no agreement as to the allocation from whom they would be compensated. In fact, the redline offer to Watts specifically removed a provision saying each group would be share any such obligation *pro rata*. ECF No. 3580-28 at 4 n.5.

In any event, even crediting Watts' arguments that the court should cobble together an aggregate Minnesota allocation made up of the unaccepted 20% and the original 12.5%, Watts fails to show error in the Special Master's recommendation. Indeed, this 32.5% that Watts posits for the Minnesota group, is close to the share recommended by the Special Master when you consider what Watts and the other Minnesota IRPAs are likely to receive under her recommendations. Under the Special Master's framework: (i) Minnesota would receive 24% ($120.8 million); (ii) Watts would receive $25 million of the IRPA allocation; and, (iii) and (by Watts' own calculations) other Minnesota firms would receive 14% of the IRPA allocation ($7

[28] It really does not matter why Watts rejected the offer, but it is implausible that Watts lacked the authority from his affiliated counsel. As the courts are (no doubt painfully) aware, the parties had negotiated for months toward this deal, and if Watts had been negotiating without authority for that period, then that provides no excuse.

million). *See* Watts Obj., ECF No. 3836 at 46. This sum ($149 million) is almost 30.3% of the overall fee and is Minnesota-bound. That is close to the 32.5% Watts believes Minnesota would have been entitled to if Watts has signed the Fee-Sharing Agreement, despite the fact that the Fee-Sharing Agreement contemplated neither paying other IRPAs or the assignment of other firms to the Kansas group.

Finally, Watts attacks the Kansas MDL leadership, claiming that they "significantly underdelivered on their actual claims compared to their prospective assertions during fee negotiations." Watts Obj., ECF No. 3836 at 32. But as the Court and Special Masters are aware, the Kansas MDL leadership *never* accepted that percentages of claims filed would form the basis on which fees are allocated. They consistently and persistently argued that litigation contributions and results that drove the settlement were the key factors, of which Kansas delivered in spades, as the Special Master agreed. Moreover, the Kansas MDL leadership (and Mr. Gustafson as the other Settlement Class Counsel) never viewed themselves as in a competition with Watts (or anyone else) over who would file the most Claim Forms. That competition was invented by Watts to satisfy their own world-view of this process.

To the contrary, Kansas MDL leadership and Settlement Class Counsel directed their efforts towards increasing claims *from all class members* (whether they had an IRPA or not), by making the claims process simple, easy, and short. It is incredible that Watts seeks credit for the claims process (which was ordered by the court), when Watts was a significant impediment to that making that process fair and easy. It was Kansas MDL leadership and Settlement Class Counsel who insisted on a simple Claim Form that required no assistance to file, refusing to accept provisions in the term sheet negotiated by Watts that would have required a "wet ink"

signature and documentary evidence in support of each claim.[29] It was Kansas MDL leadership who (when Watts was insisting the parties paper the term sheet) negotiated and secured agreement of the FSA to provide electronic FSA 578 data. It was not Watts, but Kansas MDL leadership and Settlement Class Counsel who designed a robust notice campaign that included direct mail *and* print, electronic and radio advertising. It was Kansas MDL leadership who personally contacted farm bureaus to send notices of the claims deadline to their constituents. It was also Kansas MDL leadership whose efforts resulted in the courts requiring six months for class members to submit claims, which was *double* (or more) than the 60-90 day period Watts insisted upon in the term sheet. *See* Term Sheet, ECF No. 3514-1 at 4. It was not Watts, but Kansas MDL leadership and Settlement Class Counsel who insisted the Settlement Agreement provide for at least direct-mailed reminder notices and who then obtained Court-approval to send a third reminder notice (permitted but not required by the Settlement Agreement) that addressed frequently asked questions Class Members had raised regarding the process. *See* ECF No. 3699-1 at 4. These efforts, undertaken first by Kansas MDL leadership and then later by Settlement Class Counsel, benefited all class members, including Watts and all other IRPA clients. Those efforts are likely a substantial reason Watts and other IRPAs had such success in perfecting claims.

This is not to denigrate Watts' efforts on behalf of their clients. It is to demonstrate, however, that those efforts were focused on the interests of Watts and their clients, not on behalf of the class – a fact that stands in stark contrast to the actions of Kansas MDL leadership and Settlement Class Counsel. Watts' efforts were an extra service that Watts' (and other IRPAs')

[29] *See* Term Sheet, ECF No. 3514-1 at 3 (§ f) (requiring *inter alia* a "wet ink" signature, "documents sufficient to demonstrate ownership interests" and "years of the Plaintiff's FSA-578 forms").

clients received (that non-IRPA class members did not), and while Watts might have been justified in charging those clients extra for that service, they forfeited that right when they insisted that their clients pay the same fees as class members who did not receive the personal service of phone calls, e-mails, text messages, and visits to remind them of the need to submit their Claim Forms. Watts' success in this regard does not, however, justify modifying the Special Master's recommendations to penalize the Kansas MDL leadership, whose efforts have been on behalf of the entire class.

D. Watts Raises No New Arguments Regarding the Purported Quality and Quantity of Their Contributions and None of Their Objections Merit a Change to the Special Master's Proposed Allocations.

Watts stands alone in arguing that the Minnesota allocation somehow undervalues the work performed by Watts (none of his colleagues in Minnesota leadership support this argument). Not much more needs to be said in response to the continuing self-aggrandizing recitation of Watts' "devastating" and "withering" cross-examination, which is now remarkably characterized as the "testimony that broke Syngenta." Watts Obj., ECF No. 3836 at 34. Watts argues that their contributions are not only 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." *Id.* (emphasis in original). Such claims are irreconcilable with the facts known well to the Special Master and none of this rhetoric merits an increase in the allocation to Watts. *See* Ks. Fee Resp., ECF No. 3693 at 91-97.

Despite Watts' repeated touting of their own accomplishments and their contentions that the Special Master "undervalued, and often ignored, those victories," ECF No. 3836 at 32, the Special Master saw through this puffery. Contrary to Watts' insinuation that Syngenta "put another $1.3 *billion* on the table" as a result of the threat posed by the Minnesota trial, *id.* at 34, "prior to the state of the [Minnesota] trial, the parties were very close on a dollar amount for a

settlement." ECF No. 3816 at 28. Contrary to Mr. Watt's hyperbole that his cross-examination somehow broke Syngenta, after the start of the Minnesota class trial and following Watts' cross-examination, Plaintiffs lowered their settlement demand much more than Syngenta raised its offer. ECF No. 3693-1 at 8 (¶ 19).

As for Watts' continuing insistence that they deserve a higher allocation because punitive damages in the Minnesota class trial were "inevitable," ECF No. 3836 at 34, that is at odds with the Court's analysis that none of these cases were a "slam dunk." Nov. 12, 2018 Hr'g Tr. at 49. Because these trials "could've gone either way," *id.*, while the Special Master gave full credit to Minnesota for their trial-related work and the risk of additional individual trials, ECF No. 3816 at 19-20, 80, the Special Master reasonably accorded significant weight to an actual $217.7 million jury verdict, rather than the mere possibility of a favorable jury verdict.

Ultimately, all of these arguments simply rehash Watts' previous fee briefing, all of which the Special Master reviewed, ECF No. 3816 at 37, and all of which were previously addressed by Kansas MDL leadership. *See, e.g.*, ECF No. 3693 at 91-101. None of these arguments provide any meaningful criticism of the Special Master's Report or any reason for the Court to depart from the Special Master's recommended allocations.[30]

IV. THE ILLINOIS ALLOCATION SHOULD NOT BE INCREASED AT THE EXPENSE OF THE KANSAS ALLOCATION.

The Special Master recommended allocating 16⅔ percent of the aggregate attorneys' fee award to the Illinois group, which includes the Clark/Phipps group (ECF No. 3832) and

[30] Watts argues that "claims process proved to be the breakthrough that brought about this settlement in its present form," ECF No. 3836 at 37, but ignores that the Kansas MDL leadership agreed to support a claims process after receiving feedback from the courts and assurances that the onerous conditions of the term sheet designed to tilt the process in favor of Watts' clients would be removed.

Heninger. Both Clark/Phipps and Heninger filed objections. Both objections should be overruled, at least to the extent that they would reduce the Kansas allocation.[31]

A. Clark/Phipps' Objection that Heninger Should Be Compensated from the Kansas Allocation Must Be Rejected.

Clark/Phipps objects to the inclusion of Heninger in the Illinois group, arguing that Heninger should be compensated from the Kansas allocation. ECF No. 3832 at 6. That objection is without merit, and the recommended Illinois allocation, along with the substantial sums Clark/Phipps will receive from the IRPA allocation, is more than sufficient to reasonably compensate everyone in the Illinois group for the value they added to the litigation.

In seeking to place Heninger in the Kansas group, Clark/Phipps: disregard that Heninger's contribution to the litigation was predominantly based in Illinois, and that Clark/Phipps themselves avoided bearing responsibility for other firms that might reasonably have been placed in their group. Taken together or separately, these facts fully justify including Heninger in Illinois. First, Heninger was correctly assigned to Illinois under the Special Master's rational for justifying the Illinois allocation. Specifically, in the Special Master's view, the Illinois group's efforts created "an important third pressure point on Syngenta to resolve the growing litigation against it." Report, ECF No. 3816 at 81. But Clark/Phipps did not exert any such "pressure" alone. As others have pointed out – the "Illinois front" originated with Heninger. *See* ECF No. 3692 at 29; ECF No. 3835 at 11-12 (describing how *Tweet* case came about when Clark/Phipps acquired plaintiffs from *Poletti*). Including Heninger in the Illinois group was, thus, eminently just and sensible.

[31] Clark/Phipps also argues that the IRPA allocation should be increased, a position shared by several objectors. Kansas MDL leadership respond to that argument *supra* at § II.

Second, Clark/Phipps ignore that the recommended assignments were more than reasonable to them overall. The Kansas group bears responsibility for at least three other sets of lawyers who might reasonably belong in Illinois: Toups/Coffman and two of the three Subclass Counsel. Toups/Coffman were assigned to Kansas despite the fact that over 80% of their cases were filed in Williamson County as part of the "Illinois front."[32] Members of the Clark/Phipps group (Martin Phipps and Peter Flowers) were appointed "lead counsel" and were responsible for those cases. Order, ECF No. 3598-10 at 2 (appointing Martin Phipps, Peter J. Flowers, and Mark D. Prince as "lead counsel for this case and all other similar cases filed in this county"). Similarly, Subclass Counsel were assigned exclusively to Kansas, even though two of those three firms exclusively represented the interests of ethanol plants and grain-handling facilities – plaintiffs exclusively and partially claimed by Clark/Phipps. *See* ECF No. 3832 at 4 (claiming credit for "the grain handling facilities and ethanol production facilities" inclusion in the Settlement). In determining that these sets of firms belonged exclusively in Kansas, the Special Master significantly benefitted Clark/Phipps – a benefit their objection entirely ignores.

Most importantly, given Heninger's contributions to the Illinois front and the size of the Illinois allocation (relative to the work done there), the Special Master was undoubtedly correct. Clark/Phipps' arguments to the contrary lack merit. They contend that because Heninger signed the Coordination Order and therefore participated in discovery with the other Coordinated Actions (Kansas, Minnesota, and Louisiana), Heninger should be paid exclusively from the Kansas allocation. ECF No. 3832 at 3-5. Of course, coordination points in two directions –

[32] Indeed, Toups/Coffman had filed only claims for 864 plaintiffs in Kansas. In contrast, as of October 31, 2016, they had filed 5,342 individual plaintiffs cases in "Willimson, County Illinois" with the expectation that "additional clients … cases will be filed soon." ECF No. 2642 at 1. They have not filed any new cases in Kansas.

Kansas *and* Minnesota. But, more importantly, Clark/Phipps should not be rewarded for refusing to coordinate and Kansas should not be penalized for doing so.

For example, in *In re Genetically Modified Rice Litigation*, 764 F.3d 864, 873 (8th Cir. 2014), the Eighth Circuit affirmed the MDL court's refusal to award any common-benefit fees to counsel who filed state cases because they "worked 'separate and apart' from the leadership group," refusing to coordinate. *Id.* Courts must balance any fee award against reducing "incentives to collaborate with leadership counsel [that] could frustrate the purposes of the MDL statute to promote efficiency and coordination." *Id.* Here, the Report recommends a very substantial allocation from which Clark/Phipps will share, and made no reduction based on their failure to cooperate with everyone else. This is not a legitimate basis to uncouple Heninger from the "Illinois front" that Heninger originated and from which Clark/Phipps massively benefitted.

Next, Clark/Phipps cite Heninger's assertions that they were a member of the MDL leadership team. ECF No. 3832 at 6. They are both flatly incorrect. Heninger had no role on the MDL Plaintiff's Executive Committee (*see* ECF No. 67 at 7-8) and were merely coordinating counsel with access to MDL discovery. Their work was performed for the benefit of their clients in the *Poletti* case. At their request, Co-Lead Counsel assigned Heninger three, discrete common-benefit projects: a privilege review, a records subpoena, and a deposition. *See* ECF No. 3696-3 at 4 (¶ 10); ECF No. 3693-1 at 41 (¶ 168). The assignment of these minor tasks (which was work not included in the Kansas fee petition because Heninger refused to submit it) does not make Heninger part of Kansas MDL leadership. Nor does asking Heninger to perform a smidge of common-benefit work justify requiring Kansas to give weight to their $11.3 million in claimed lodestar, particularly since Kansas MDL leadership assigned that work under the auspices of the CBO and corresponding Participation Agreement, which did not permit such

credit. *See* Ks. Fee Resp., ECF No. 3693 at 123-28. None of this outweighs the fact that Heninger's fee petition is premised almost entirely on its work done setting up and prosecuting the "Illinois front."

Finally, Clark/Phipps assert that reasonableness and equity demand they receive (at least) the full ($80 million) Illinois allocation free of any obligation to Heninger. But that ignores that the allocation is already generous, given that they secured no verdicts; prepared no trials; conducted no depositions; and, disclosed no experts.[33] In their fee petition, they do not disclose the number of plaintiff fact sheets that they served, but it would not appear they even had to do that in Williamson County (where most of their cases were filed). After playing jurisdictional hopscotch from Kansas to Minnesota to Illinois, their achievements in the litigation included little more than defeating *almost* all of Syngenta's dismissal motions directed at their plaintiffs and opting their clients out of the certified classes. Moreover, although the Special Master charitably gave them credit for the latter, it is doubtful that opting clients out the certified litigation classes was a net benefit to the overall position of producer plaintiffs because that only diminished the aggregate damages that class counsel could and did seek at the trials and, consequently, the overall leverage against Syngenta.[34]

[33] They also tout they were the only attorneys to file claims on behalf of ethanol plants, but those claimants are only receiving $19.5 million of the Settlement Fund due in large part to the adverse ruling in *Fostoria Oil* finding no duty to this subclass and to the fact that while these plaintiffs suffered lower DDG prices for a portion of the time that producers were harmed, some of those losses were offset by lower input (corn) prices because of the *de facto* embargo. There were no objections to the size of this fund and only one ethanol plant opted out. Thus, even if Clark/Phipps were given full credit for the ethanol subclass portion of the settlement (despite the obvious contributions that bled over from the success in the producer claims), a one-third fee only equals $6.5 million, which is adequately subsumed in the Illinois allocation and their share of the IRPA allocation.

[34] Moreover, as the Special Master found, the state-court fronts owed their very existence to Kansas MDL leadership's defeat of Syngenta's arguments that there was federal-question jurisdiction. *See* Report, ECF No. 3816 at 79.

Clark/Phipps also ignore that (as the second-largest claims filer) they are also going to receive a significant share of the IRPA allocation. Their 16,321 claims represent 15.2% of the represented claimants. *See* ECF No. 3836-3 at 7, 9. Thus, they could receive $7.6 million (or more) from this pot, which are fees that will be distributed directly to Clark/Phipps and not subject to distribution to Heninger. This is more than the 1.5% amount by which the Special Master reduced the Illinois allocation from the percentages agreed to in the Fee-Sharing Agreement, proving no increase to the Illinois allocation (as requested by Clark/Phipps) is necessary.

Furthermore, in comparing which allocation should bear the weight of Heninger's fee request (and in evaluating Clark/Phipps' request for an increase to the Illinois allocation), the courts should not ignore that Clark/Phipps filed a 471-page, unsuccessful opposition to Kansas MDL leadership's motion for class certification (ECF No. 2348), and, they filed a similar unsuccessful opposition in Minnesota. Given the critical settlement leverage supplied by class trials, this early obstructionist move might have proven detrimental to the overall litigation position had they succeeded. Consequently, Clark/Phipps have no basis to complain about fairness, reasonableness, or equity. In contrast, it would be unfair and inequitable to ask Kansas to assume the obligation to pay Heninger for establishing an "Illinois front" where that work benefited Clark/Phipps and where the benefits between Kansas and Illinois were decidedly one-sided: Clark/Phipps and Heninger certainly benefited from the work undertaken in Kansas (*e.g.*, on all the key legal rulings obtained there), but there was no corresponding benefits flowing from Illinois which was procedurally behind Kansas (because it was filed much later).

The recommendation should, therefore, not be disturbed.

B. Heninger is Not Entitled to an Additional Allocation at the Expense of Kansas Attorneys.

Heninger's objection (ECF No. 3835) largely takes aim at their relative contribution to the Illinois front vis-à-vis Clark/Phipps. Such arguments should properly be presented to the Illinois court in the context of dividing the Illinois allocation. Heninger fails to show any reason to increase the Illinois allocation (or a provide a special allocation to Heninger – something no other lead counsel are reciving) at the expense of Kansas. None of the three litigation results touted by Heninger justifies such a request.[35]

1. Heninger touts their success in *Poletti* defeating Syngenta's economic-loss arguments under Illinois law. But the Kansas MDL leadership had obtained the same ruling – under Illinois law – seven months earlier. *See* Sept. 11, 2015, Mem. & Order, ECF No. 1016 at 41-42. Moreover, Heninger's arguments in *Poletti* were largely cut-and-pasted from Kansas MDL leadership's successful brief in the MDL.[36]

Heninger also puts great weight on a private e-mail from Co-Lead Counsel that expressed concern about the relative risk and benefits of an "Illinois front," including the risk of an adverse dismissal order based on the economic-loss doctrine to all class members. ECF No. 3835 at 18. But Heninger candidly admits that they pressed forward anyway because they "desperately wanted to actively participate in the litigation" and were not guaranteed work in Kansas. *See*

[35] Like Clark/Phipps, Heninger and their co-counsel tellingly ignore the amount they will be entitled to under the IRPA allocation. They filed claims for at least 1,104 claimants. *See* ECF No. 3836-3 at 4, 7 (Heninger: 161; Onder: 943). That represents 1.02 percent of the presently represented claimants, or about $600,000 of the IRPA allocation. Together, therefore, Heninger and Clark/Phipps share of the IRPA allocation is likely to be around $8.2 million, bringing the total fees paid to Illinois attorneys to $88.7 million, or 18% of all fees. That is 17.6% of the overall fee (higher than the Fee-Sharing Agreement, which did not address Heninger).

[36] To give one telling example, both arguments started a discussion with the following sentence: "The ELD began at the intersection between warranty and strict products liability." *Compare* MDL Mem. in Opp., ECF No. 927 at 98 *with Poletti*, Opp. Br., ECF No. 133 at 17. Most of the text, authorities, and arguments that follow are equally identical or similar.

Poletti Dkt., Case No. 3:15-cv-01221, ECF No. 349 at 9 (S.D. Ill.). In other words, they wanted to perform fee-earning work and created a new front for that purpose, despite the risk it created for everyone else. Importantly, it posed little risk to *them* because they admit, absent the "Illinois front," they had no guarantee of performing fee-earning work. It would be illogical to tax Kansas for a victory secured with their work that primarily benefitted Heninger and the other attorneys in Illinois

2. Heninger also points to their success in obtaining personal jurisdiction against Syngenta in Illinois, comparing it (inaptly) to a ruling in the MDL finding an absence of jurisdiction in Kansas for non-Kansas residents. *See* Heninger Obj., ECF No. 3835 at 12-14. They contend that "[t]he MDL ruling was a blow to the litigation efforts against Syngenta" that was undone by Heninger's efforts in making a "federal venue for all plaintiffs" available. *Id.* at 16. But they fundamentally misunderstand the Kansas ruling, which left a federal venue available for each plaintiff. The ruling only mandated that, in the MDL, farmers' claims would have to be transferred to their home state for trial. Mem. & Order, ECF No. 2047 at 2 ("The Court orders, upon agreement by the parties, that these particular plaintiffs' claims be transferred to the districts in which they reside."). (And, importantly, it did not apply to the class claims because Kansas MDL leadership successful argued that Syngenta had waived the defense). Trying a farmer's case in front of a jury of their neighbors was hardly a "blow" to the litigation.[37] Heninger's success created an Illinois venue for non-Illinois residents (likely necessary to meet their "mass action" threshold) but that was merely another building block in erecting the "Illinois front."

[37] Strategically, it was a close call to even challenge Syngenta's jurisdictional arguments, given the home state advantage for trial. To call the loss a "blow" is a vast overstatement.

3. Lastly, Heninger urges that their deposition participation is undervalued. Heninger Obj., ECF No. 3835 at 20-22. But the facts speak for themselves: Heninger conducted only 6% of all questioning by plaintiffs' counsel in the depositions of Syngenta's witnesses and just 3% of such questioning of the third-party witnesses. *See* Stueve Supp. Decl., ECF No. 3693-1 at 55. In comparison, Kansas MDL leadership conducted 68% and 60% of the respective questioning. *Id.*

Nor is there evidence that any of the exhibits used by Heninger at these depositions were particularly noteworthy to warrant special compensation. Heninger does not identify any exhibits that were used in dispositive briefing, trial, or otherwise. *See* Heninger Obj., ECF No. 3835 at 15-17. Also, while they boldly claim that their "examination played a valuable part in the MDL victory in the Kansas trial," *id.* at 22 (emphasis removed), neither their objection nor prior filings identify any of their examinations that were used at the Kansas trial. *See also Poletti*, ECF No. 349 at 22.[38]

V. Co-Lead Counsel Should Be Given an Opportunity to Divide the Kansas Allocation Pursuant to Relative Contributions to the Litigation, including the Two Objectors from the Kansas Group (Hossley-Embry and Toups/Coffman).

Only two groups of lawyers assigned to be compensated from the Kansas allocation objected to the Report: Hossley-Embry and Toups/Coffman. *See* ECF No. 3825, 3827. They both seek to now convert time spent on their individual cases into a request for payment from the

[38] Syngenta played the deposition of Tom Sleight at the Kansas trial. ECF No. 3294. Plaintiffs counter-designated less than 10 transcript pages of examination conducted by Mr. Garrison from the Heninger firm. *Id.* This was the one deposition that Co-Lead Counsel asked Heninger to take for MDL leadership. Downing Supp. Decl., ECF No. 3693-3 at 4 (¶ 10). Heninger was provided an opportunity to seek fees as part of the Kansas fee application for this work, but refused so they could include this work in their separate petition in violation of their signed Participation Agreement. ECF No. 3693 at 124-250. If this limited contribution justified increasing Heninger's allocation, it would be unfair and inequitable to all other Kansas attorneys who will share in the Kansas allocation – many of whom did much more than take a single deposition.

Kansas allocation. Consequently, the Court should reserve any consideration of their fee until after Co-Lead Counsel divide the Kansas allocation, at which point if they are dissatisfied with their fee, they can renew their objection directly with the MDL court.

A. Kansas MDL leadership renew their request that Co-Lead Counsel be assigned the task in the first instance of dividing the Kansas allocation "in a manner that, in Co-Lead Counsel's good judgment, reflects each plaintiff's counsel's contributions to the institution, prosecution and resolution of the litigation against Defendants." *See* Ks. Fee Mem., ECF No. 3587 at 106 (quoting *In re: Urethane Antitrust Litig.*, No. 04-1616-JWL, 2008 WL 696244, at *2 (D. Kan. Mar. 13, 2008) (Lungstrum, J.)). Courts frequently delegate this task outright to lead or class counsel.[39] That is a sensible decision because Co-Lead Counsel have the greatest familiarity with the prosecution of claims in the Kansas MDL and each firm's relative contribution. *Id.* No one has opposed this request.

Consequently, Co-Lead Counsel request that the Court establish a deadline 30 days from the date of the order adopting the Report (if it does), by which they will inform each firm of their

[39] *See also Victor v. Argent Classic Convertible Arbitrage Fund L.P.*, 623 F.3d 82 (2d Cir. 2010) ("Since lead counsel is typically well-positioned to weigh the relative merit of other counsel's contributions, it is neither unusual nor inappropriate for courts to consider lead counsel's proposed allocation"); *Milliron v. T-Mobile USA, Inc.*, 423 F. App'x 131, 134 (3d Cir. 2011) ("Generally, a district court may rely on lead counsel to distribute attorneys' fees among those involved."); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 646 (S.D. Cal. 2011) ("[F]ederal courts routinely affirm the appropriateness of a single fee award to be allocated among counsel and have recognized that lead counsel are better suited than a trial court to decide the relative contributions of each firm and attorney."), *aff'd*, 473 F. App'x 716 (9th Cir. 2012); *In re Korean Air Lines Co., Ltd. Antitrust Litig.*, No. 07-05107 SJO AGRX, 2013 WL 7985367, at *2 (C.D. Cal. Dec. 23, 2013) (allocation of fees would be made by class counsel given that "Settlement Class Counsel are the most familiar with the nature and amount of work done by other plaintiffs' counsel and the contributions they made to prosecution and settlement of this action"); *In re Initial Pub. Offering Sec. Litig.*, No. 21 MC 92 SAS, 2011 WL 2732563, at *7–8 (S.D.N.Y. July 8, 2011) ("Lead counsel is best positioned to gauge the relative contributions of each firm because, by assuming nearly every task litigation could require . . . the EC is intimately aware of the distribution of responsibility and work that ultimately led to final approval of the settlement."); *In re Am. Inv'rs Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 263 F.R.D. 226, 251 (E.D. Pa. 2009) (conferring "sole discretion" on Co-Lead Counsel to allocate award of fees and expenses); David F. Herr, *Annotated Manual for Complex Litigation, Fourth* § 14.221, at 210 (rev. ed. 2018) ("Lead counsel can be made responsible for overseeing [multiple fee submissions]").

share of the Kansas allocation. If any firm objects (and said objection cannot be resolved), the firm will have 14 days to seek relief from the MDL court. This should include Hossley-Embry and Toups/Coffman who were assigned to the Kansas group by the Special Master and who now seek fees from the Kansas allocation (despite couching their prior requests in terms of fees based on their contingency contracts). *See* Toups/Coffman Fee. Pet., ECF No. 3567; Hossley-Embry Fee Pet., ECF No. 3605.

The Report provides that some credit should be given to settlement and litigation work from firms who successfully filed and prosecuted a large numbers of individual cases. *See* Report, ECF No. 3816 at 64-65 ("The IRPA lawyers with large number of clients, who pursued their claims as mass actions in multiple venues, provided significant consolidated litigation and settlement pressure on Syngenta on top of that provided by the class actions. To that extent, they provided a benefit to the entire Class."). This finding justified paying IRPAs from the common fund and creation of the IRPA allocation.[40] Consistently, the MDL court made findings in its Fee and Expense Award, wherein it conducted (one of three) lodestar cross-checks that included *inter alia* all hours reported by individual lawyers.[41]

With the benefit of these rulings, Co-Lead Counsel should be given the opportunity to decide for both Hossley-Embry and Toups/Coffman, just as they will for the other Kansas MDL

[40] *Cf.* Kansas MDL leadership's Fee Resp., ECF No. 3693 at 38-39 (arguing that only "specific services [that] benefited the fund—whether they tended to create, increase, protect or preserve the fund" could be paid from the settlement fund under the common-fund doctrine, citing *Class Plaintiffs v. Jaffe & Schlesinger, P.A.*, 19 F.3d 1306, 1308 (9th Cir. 1994) (quoting *Lindy Bros. Builders, Inc., v. American Radiator, Etc*., 540 F.2d 102, 112 (3d Cir. 1976)).

[41] *See* Fee & Expense Award, ECF No. 3849 at 33. However, neither the Special Master nor the MDL court held that all individual work was compensable from the fund. *Id.* at 25 ("the Court awards a percentage of the fund sufficient to permit reasonable attorney fees for all work *that contributed to the class settlement* (emphasis added)), 34 n.12 ("for instance, [] the inclusion of time spent seeking clients or submitting claims" could be considered "padd[ing]"); Report, ECF No. 3816 at 71 ("IRPAs who also performed *litigation and settlement work that benefitted the class* would be compensated both as IRPAs and for their common benefit work." (emphasis added)).

leadership firms. It appears that both firms represent a large number of plaintiffs and both performed some litigation work, including preparing and serving plaintiff fact sheets and participating in bellwether discovery. *See* Hossley-Embry Obj., ECF No. 3825 at 2-3; Toups/Coffman Obj., ECF No. 2827 at 7-8. Their overall work in this regard, however, has not been evaluated under the same standards as others in the Kansas MDL leadership, who submitted only CBO-compliant work; whose work was approved by Co-Lead Counsel; and whose time was reviewed.[42] Furthermore, at least with respect to Toups/Coffman, the time purportedly expended was not kept contemporaneously, but entirely re-constructed. ECF No. 3646-1 at 3. And, although Toups/Coffman purport to represent over 9,400 plaintiffs, only around 1,000 plaintiffs were part of the federal MDL, where plaintiffs were required to answer and serve fact sheets. Since there is no evidence that plaintiff fact sheets were required to be served in Williamson County (where most of their cases were filed), it is difficult to determine whether the hours expended are reasonable because the number of underlying fact sheets is unknown. Despite having raised these issues throughout the fee briefing (ECF No. 3693 at 144-45), Toups/Coffman have persistently ignored these unanswered questions.[43] *See* ECF Nos. 3567,

[42] Toups/Coffman's CBO-compliant-common-benefit work (which was small) was submitted and reviewed by Co-Lead Counsel and is already included in the Kansas fee petition. Its work on plaintiff fact sheets, however, has not been reviewed or substantiated. Hossley-Embry concedes they failed to submit their work that might have been CBO-compliant-common-benefit work for their two bellwether plaintiffs, which justifies disregarding it under the CBO. *See* ECF No. 936 at 18. Nonetheless, since they allege this was by innocent mistake, Co-Lead Counsel will agree to accept the submission and to review the time records under the same protocols applied to all other Kansas firms.

[43] In increasing the allocation to Minnesota based on the amount of PFS work performed in that jurisdiction, the Special Master reasoned that "there is certainly an argument that completing PFSs … helped to push Syngenta toward settlement." ECF No. 3816 at 78. But, inherent in that statement, is that the lawyer and litigant actually completed and served a PFS on Syngenta to provide some proof that they were prepared to litigate that individual case. There is no evidence that the vast majority of Toups/Coffman's 9,400 plaintiffs, however, ever even served a PFS on Syngenta. Tellingly, several of the Toups/Coffman affiliated counsel admit in their declarations that they did not begin working on the case until after the Kansas trial. *See* ECF No. 3567-4 at 55 (¶ 19), 77 (¶ 4), 98 (¶ 4).

3690, 3720, 3827. Consequently, there is insufficient information, at present, to determine what total fees these firms should be awarded from the Kansas allocation.

Assigning the task of allocating fees to Co-Lead Counsel will allow the relevant parties to have a dialogue about these issues, and for Co-Lead Counsel to fashion an appropriate fee award that, in addition to each objector's share of the IRPA allocation, recognizes their contributions to the litigation, consistent with the Court's Fee and Expense Award and the Special Master's Report (assuming the courts adopt it).

B. To be clear, however, Kansas MDL leadership do *not* agree with the proposed division suggested by Toups/Coffman. ECF No. 3827-1. This proposal would result in a $25 million fee to Toups/Coffman – a figure they contend is 74% of their claimed lodestar. But that purported discount is illusory because Toups/Coffman originally reported a lodestar of $24,966,685.94 (ECF No. 3646) and now report lodestar of $25,168,934 (ECF No. 3827-1). Thus, in actuality, Toups/Coffman request a fee equivalent to their full lodestar. But even that is entirely ungrounded to their overall contributions to the case. It would result in one of the largest fee awards in the Kansas MDL for a firm that needed leadership's help to meets its PFS obligations[44] and who engaged in behavior (most charitably) that did not always advance the interests of the Class as a whole,[45] including behavior during the claims process that has (at best)

[44] *See* ECF No. 3693-5 at 4-5 (¶ 10) ("There were numerous days when [a Hare Wynn paralegal] spent a majority of her time reviewing fact sheets prepared by Coffman and Toups…. She frequently flagged for Coffman and Toups potential deficiencies … Altogether [she] exchanged 150-200 e-mails regarding fact sheets to paralegals at Coffman and Toups' office.").

[45] *See* ECF No. 3693 at 146 (Toups/Coffman unsuccessfully opposing contents of the litigation class notice intended to ensure class members understood the financial consequences of hiring their own lawyer); *id.* (opposing preliminary approval to insist on enforcement of a clearly superseded term sheet that would increase costs to class members); *id.* at 147 (erroneously telling clients paper FSA 578 forms would be required under the settlement, sowing confusion); ECF No. 3693 at 142-44 (soliciting clients by telling them class counsel was only pursuing claims of producers in few states, a false argument they persist in making (ECF No. 3827 at

diverted the resources of the claims administrator and (at worst) resulted in inaccurate claims. *See* Report, ECF No. 3816 at 31 n.83.[46]

Moreover, awarding a fee from the Kansas allocation equal to Toups/Coffman's entire purported lodestar gives credit to all of their individual client work, which will also be compensated from the IRPA allocation. *See* Report, ECF No. 3816 at 71 (additional common-benefit fees available to firms who engaged in "litigation and settlement work that benefitted the class"). In fact, most of Toups/Coffman work falls into categories that are not "litigation and settlement work" and did not benefit the class. *See* Toups/Coffman Fee Supp., ECF No. 3646-3 at 3 (claiming $2.3 million at $687.50 an hour for discovery file management; $7.9 million for client communications; $9.2 million for perfecting claim forms). Even its $4.8 million in lodestar purportedly spent on fact sheets seems out of line with similarly situated firms. Toups/Coffman claim to have spent 21,467 hours on that work, whereas Phipps Anderson Deacon who had twice as many clients reported 5,000 hours, which included time spent

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6 n.4), despite its complete falsity. *See* Producer Pls. Second-Phase Motion for Class Cert., ECF No. 3431 (seeking certification of 12 additional state classes).

[46] Toups/Coffman implausibly (and without explanation) argue that a link to the pre-populated Claim Form was "mistakenly" published on their website. ECF No. 3827 at 11. But the link was accompanied by explicit instructions telling claimants to "[c]omplete Page 1 (Name and SSN or Tax ID Number), and sign Pages 2 and 5" and to then return the form to Toups/Coffman for filing with the Claims Administrator. ECF No. 3747-1 at 6 ("That's it. We will take it from there…"). The website itself was directed at non-clients. *Id.* ("If you would like for us to represent you in the Syngenta settlement claim process, here's all you have to do[.]"). Toups/Coffman dismiss this as "no harm, no foul" because they say the pre-populated Claim Form was used by only a small number of claimants. ECF No. 3827 at 11. But the evidence shows the problem went beyond the version published on the website. Toups/Coffman also mailed paper Claim Forms to *all* of their clients (ECF No. 3827-3 at 4 ("mailed the claim form to their entire 9,400 plus member client base")), and never deny that this version also contained the same pre-populated answers, which is the only plausible explanation for why so many of Toups/Coffman clients gave identical answers (of 0%) on "fed on farm" and Viptera/Duracad purchaser status ('no") – answers that were substantially different from the average. *See* ECF No. 3747-1 at 6-7. Finally, Settlement Class Counsel's decision to withdraw their motion to enjoin was made only because Toups/Coffman agreed "to supplement, verify, and/or amend Claim Forms as necessary to ensure 100% accuracy" and that it would "not oppose any reasonable audit conducted by the Claims Administration." ECF No. 3764-1 at 4. It is woefully inaccurate to assign any credit to Toups/Coffman's plainly meritless defenses as the reason the motion was withdrawn; the motion was withdrawn solely because Settlement Class Counsel obtained all the necessary relief without requiring the Court's intervention.

negotiating the form of the fact sheet in *Tweet* (ECF No. 3659-1). Moreover, Toups/Coffman missed multiple, extended PFS deadlines in the MDL, necessitating their voluntary dismissal of 499 plaintiffs' cases. ECF No. 3693-1 at 26 (¶ 94); ECF No. 3693-5 at 3-5 (¶¶ 5-11). Thus, to the extent such cases exerted settlement pressure by demonstrating the ability of IRPAs to prosecute them, Toups/Coffman's performance was (at best) mixed. Additionally, Syngenta relied on marketing by Toups/Coffman in opposing Plaintiffs' request to abate the PFS requirement in the MDL; specifically, Toups/Coffman made public statements that suggested it "takes only minutes" and a "few documents" to file a case against Syngenta.[47] *See* ECF No. 1218 at 4. These factors (along with the Special Master's correct determination that they did not support the settlement) should inform any assessment of their overall contribution, and would not justify a $25 million fee.

In order to fashion a just allocation, Co-Lead Counsel will need to seek information from Toups/Coffman and Hossley-Embry (as relevant) about the number of fact sheets served, the assumptions used for their time reconstruction, and any responses they have to these other issues.

C. Toups/Coffman raise two primary arguments in defense of their $25 million fee request. First, they complain that the Court's two-step process for allocating fees among jurisdictions and then among firms is unfair.[48] But they did not seek timely reconsideration of the Court's scheduling order *before* the Special Master issued her Report, and they apparently believe they are entitled to evaluate their total fee before making any objections. ECF No. 3827

[47] Ironically, after inducing these farmers to hire them based on such a promise, Toups/Coffman now claim it took them 21,467 hours to complete some undisclosed number of fact sheets.

[48] Toups/Coffman state that this process violates their "due process," ECF No. 3827 at 3, but this argument is made with any development or citation to any legal authority. Consequently, the Courts should find it waived.

at 3. Indeed, they effectively argue that as long as they receive a $25 million fee, then they do not care what methodology the Courts employs. *See id.* at 2.

The Court, though, has broad discretion over scheduling and sequencing matters.[49] Toups/Coffman fail to justify that there was an abuse of discretion here, nor any prejudice. They complain that they need to know "how many bushels of corn are in play," ECF No. 3827 at 3, but the Claims Administrator has disclosed preliminary estimates as to the number of corn acres claimed (48.1 million per year) (ECF No. 3810-1 at 4) and Toups/Coffman purport to know the number acres claimed by their clients (2.9 million acres per year), ECF No. 3827-3 at 3. Thus (if their own acres are accurate) they have a reasonable means to estimate (subject to yield and subclass variation and further claims processing) what their clients' recoveries might be

In any event, they fail to show, even without the ability to make such an estimate, that the Court's scheduling order is unfair. Indeed, lawyers are often required to take a legal position without a guarantee as to how the argument will affect the ultimate outcome of an issue. For example, a lawyer often has to make a judgment about objecting to evidence without knowing the effect of the evidence on the court or the jury. To analogize, a lawyer cannot refuse to file a timely *Daubert* motion simply because he or she cannot predict the outcome at trial. Here, it was appropriate for the Court to ask the Special Master to recommend a division among the jurisdictions, given her unique position in being able to assess the relative weight each jurisdiction brought to the litigation.

[49] *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1310 (10th Cir. 2010) ("Discovery and scheduling are matters within the district court's broad discretion."); *King v. PA Consulting Grp., Inc.*, 485 F.3d 577, 591 (10th Cir. 2007) ("District courts are properly granted broad discretion over discovery and scheduling matters; otherwise, they would be unable to effectively manage their caseloads.").

Second, Toups/Coffman rely on general assertions by some law professors that organized opt-outs may increase the value of a class settlement. ECF No. 3827 at 4-7. Here, however, there is no evidence that class counsel (particularly Kansas Co-Lead Counsel) would have settled the case "cheap" but for "increased competitive pressure to improve the class settlement." ECF No. 3827 at 7 (quoting Coffee, *Accountability and Competition*, 30 CARDOZO L. REV. 408, 417 - 18 (2008)). In fact, it has been others (like Watts) who have been candid that they accepted the $1.51 billion with the intent to exploit the claims process as a means to increase their clients own recoveries.

Nor has Toups/Coffman offered anything to suggest that they specifically were the cause of any such "competitive pressure." Kansas MDL leadership were carrying their cases, and no one was concerned that they would organize a mass opt-out when they could not persuade many of their clients to complete plaintiff fact sheets. Moreover, 9,400 opt-outs farming approximately 2.9 million acres of corn a year (ECF No. 3827-3 at 3 (¶ 4)) is below *all* of the thresholds that would have triggered Syngenta's walk-a-way rights. *See* ECF No. 3509 at 2. The settlement would have gone forward even if *all* of Toups/Coffman's clients opted out. Consequently, their participation was neither critical nor necessary to the settlement. Even if, in some cases, coordinated opt-outs drive class settlements higher (generally), not only is there no evidence of that here, there is no evidence Toups/Coffman did or could have done so here.

Indeed, the most that Toups/Coffman can point to support their fee request is the work of its bellwether plaintiffs. ECF No. 3827 at 7. That is a factor worth consideration, but so is the fact that other Kansas MDL leadership attorneys performed most of the work prosecuting those

claims.[50] Indeed, when one compares Toups/Coffman (as the third-largest claims filer) with the Watts and Clark/Phipps (numbers 1 and 2), Toups/Coffman's 221 hours of bellwether work stands in stark contrast to the contributions of comparable IRPAs. Any suggestion that Toups/Coffman should receive parity is unsubstantiated.

VI. THE REMAINING OBJECTIONS EITHER DO NOT DISPUTE THE ALLOCATION TO THE KANSAS MDL LEADERSHIP OR PROVIDE NO SUBSTANTIVE REASONS FOR REDUCING THE ALLOCATION.[51]

A. Bassford Remele Only Seeks an Increase in the IRPA Allocation from Illinois.

Bassford Remele "does not object to the Special Master's proposed allocation of 50% to Kansas and 24% to Minnesota," but does argue that the IRPA fund nonetheless should be increased. ECF No. 3823 at 1, 8. Thus, it appears they argue this increase should come from the Illinois allocation. With that understanding, Kansas MDL leadership merely respond by reiterating their arguments as to why no reduction should be made from Kansas. *See supra* § II.

B. The Paul Byrd Law Firm's Objection Should be Overruled.

The Paul Byrd Law Firm makes no specific objection to the allocations proposed by the Special Master, other than vaguely arguing that the Special Master has "undervalued" the work of unspecified attorneys who filed individual lawsuits. ECF No. 3826 at 3. But if adopted and as explained above, the Special Master's Report does not limit an IRPA's recovery to the IRPA allocation. Instead, the Special Master fully anticipated that firms like Paul Byrd would be compensated out of both the IRPA allocation and for their other common-benefit work. For

[50] *See* ECF No. 3693-1 at 38 (¶ 155) (reciting that Toups/Coffman expended no more than 14 hours on each bellwether plaintiff's case (where said case produced a PFS, multiple rounds of written discovery, and a deposition) requiring the remainder of the work to be performed by other Kansas attorneys).

[51] Johnson Becker has requested that the Special Master's Report be modified to include Johnson Becker in both the Minnesota and Illinois pools, rather than in the Minnesota pool alone. ECF No. 3838. The Kansas MDL leadership did not work with Johnson Becker in either jurisdiction and therefore defers to the Special Master's recommendation as to the appropriate grouping for that firm.

example, Paul Byrd has submitted approximately $1.3 million in common-benefit lodestar in Minnesota, ECF No. 3662-1 at 529, and would be eligible for payment out of the IRPA allocation on behalf of the 2,500 cases they claim to have filed and supported. ECF No. 3662-1 at 279.

Paul Byrd raises the specter that "it will be much harder for farmer clients to find individual lawyers to prosecute their cases when there are future trade disruptions." ECF No. 3826 at 7. But the proposed allocation does no such thing for those attorneys who actually prosecuted their clients' cases. Rather than discouraging attorneys from participating in future MDLs, the recommended allocation ensures that attorneys who take on the risk of actively prosecuting the litigation on behalf of farmers are compensated for that risk and for that work. This incentivizes attorneys to spend their time on the merits of the litigation, knowing that such indispensable work will be compensated, rather than on the marketing and mere acquisition of clients. Furthermore, for those attorneys who flooded state and federal courts with individual lawsuits out of concern that a class may not be certified, the recommended allocation may have the salutary effect of deterring such attorneys from filing potentially needless lawsuits for individual class members and doing little while they await the outcome of a class certification motion. Such a result would benefit the courts though less congested dockets and also benefit absent class member who would be spared the burden of spending unnecessary time on the basic requirements for maintaining a lawsuit (such as PFS work in this case).

Finally, the Paul Byrd Law Firm argues that the JPA was intended to apply to a class settlement. ECF No. 3826 at 7. That argument is addressed above.

C. The Shields Law Group's Objections Should Be Overruled.

Shields primarily echoes the arguments raised by Bassford Remele and Watts, ECF No. 3840 at 3, both of which were addressed above. While Shields, too, contends that the IRPA

allocation should be increased, ECF No. 3840 at 3, it is yet another example of a law firm that could receive significant payments from two allocations. Shields has submitted more than $5.2 million in PFS time in Minnesota. ECF No. 3662-1 at 535. Also, for the "2,500+ Producers and 20+ Grain Elevators" that its represents, ECF No. 3840 at 1, it will be eligible for payment out of the IRPA allocation.

In criticizing the IRPA Pool, Shields posits: "Had one or more of our clients' cases required trial(s), was our prospective fee to be just 10% in that event?" ECF No. 3840 at 4. That hypothetical problem provides no basis for increasing the IRPA allocation. In making her recommendations, the Special Master was well aware that firms like Shields did *not* try their clients' cases or undertake any of the work necessary to try their clients' cases, such as obtaining and reviewing documents from Syngenta, deposing Syngenta, producing experts or surviving dispositive motion briefing. The Special Master's recommended IRPA Pool reflects the reality that the IRPAs relied on the work performed by leadership counsel to prosecute the litigation on behalf of their clients. To the extent that Shields assisted this work, it will be compensated out of the Minnesota allocation and its other work exclusively for the benefit of its individual clients—such as the "phone calls, emails, faxes, meetings, etc.," ECF No. 3840 at 4—will be fairly compensated out of the IRPA allocation. *See also* Ks. Fee Resp., ECF No. 3693 at 159-60 (summarizing Shields' work and correctly showing it is predominantly communicating with their clients and perfecting claims).

D. The Hecker Law Group's Objections Should be Overruled.

Similar to Paul Byrd and the Shields Law Firm, the Hecker Law Group objects to the Special Master's IRPA allocation. ECF No. 3833. But just like Shields and Paul Byrd, the Hecker Law Group may be compensated not only out of the IRPA allocation, but out of the Minnesota allocation for its submitted common-benefit work, which totals over $133,000, ECF

No. 3662-1 at 546, and as a referring firm for Watts Guerra. ECF No. 3833 at 4 (noting that Hecker's fee declaration was included in the Watts Guerra Fee Application); ECF No. 3580-5 at 106 (listing the Hecker Law Group, PLC as one of the Watts Guerra Referring firms).

The Hecker Law Group's objection, though, underscores why the Special Master drew distinctions between the relative contributions of different groups of counsel. For example, it admits that it "did not directly participate in the federal or state class actions, and it did not draft trial briefs or depose witnesses." ECF No. 3833 at 5. Hecker even acknowledges that a "large amount of time was spent by the firm in the Syngenta Litigation on identifying locations for town hall style meetings[.]" ECF No. 3833 at 4. Yet despite this, Hecker alleges that its work was "nearly as important" as the work undertaken by counsel who led all discovery, survived dispositive motion briefing, certified classes, and won at trial. *Id.* at 5. It is an astonishing claim to which the courts should give short shrift.

E. The Kirk Law Firm's Objections Should be Overruled.

Just like the Hecker Law Group, the Kirk Law Firm acknowledges it is another one of Watts' referring firms. ECF No. 3842 at 1; ECF No. 3580-5 at 104 (listing Kirk Law Firm as one of Watts Guerra's Referring firms). Kirk, too, may be entitled to compensation out of multiple allocations: out of the IRPA allocation for the "1705 producers and 7 corn elevator operator non-producers" it represents with Watts, ECF No. 3842 at 1; out of the Minnesota allocation for the more than $100,000 in lodestar submitted in Minnesota, ECF No. 3662-2 at 56; and out of its referral relationship with Watts Guerra.

The Kirk Law Firm's primary objection focuses on the purported "material discrepancies between the 'Reisman Report'" and the Common Benefit Order (ECF No. 936). ECF No. 3842 at 2. But Kirk did not (nor did anyone else) timely raise this argument in opposition to Kansas MDL leadership's (or Minnesota leadership's) fee petitions. In fact, Kirk did *not* even file a

timely fee petition or a response to any other fee petition, and therefore, has no standing to object to the Report.

In any event, while the Kirk Law Firm alleges that the CBO established assessments for individual cases, it never bothers to address the CBO's plain language stating that no such assessments are applicable in a class settlement.[52] This same language is quoted in the Special Master's Report as part of her overall analysis. ECF No. 3816 at 65. The Special Master concluded that "[t]his language makes clear that 'assessments' only applied to individual recoveries and not to any class recovery." *Id.* The Kirk Law Firm neither acknowledges this analysis nor draws any specific fault with the analysis, which merits the dismissal of this objection.

Kirk's additional objections fair no better. While stating that the Report is "based upon the Special Master's subjective assessment of each groups' contribution to the settlement," ECF No. 3842 at 3 (emphasis original), Kirk alleges no specific failure with her assessment. The *Johnson* factors are necessarily subjective. And, while purporting to "supplement the comprehensive objection filed by Watts Guerra LLP," Kirk then argues that attorneys' fees should be awarded "based upon contemporaneously kept time records." ECF No. 3842 at 3. Such an argument is irreconcilable with the submission from Watts Guerra, which makes liberal use of reconstructed time. *See, e.g.,* ECF No. 3686-2 at 28, 644, 681, 684, 686, 1093, 1138, 1143, 1144, 1146. Finally, Kirk states that contingency fee contracts "must be enforced," ECF

[52] The relevant language states in its entirety: "[i]n the event that there is a class settlement, recovery or judgment in favor of the class, no assessment pursuant to this Section will be made, either for attorneys' fees or for expenses, individually from any class member or his/her/its individual attorney as to the portion of any class recovery distributed to that individual class member if the class member remains in the class (i.e., does not opt-out of the class). Instead, all fees and expenses for that class member will come out of the overall class recovery funds provided by defendants, as approved by the Court, or as otherwise Ordered by the Court." ECF No. 936 at 20.

No. 3842 at 4, but did not timely object to fee applicants who argued for a "cap" (*see* Bassford Fee Pet., ECF No. 3568 at 25-26) and provides no authority for such a claim and never addresses the extensive analysis undertaken by the Special Master on this exact issue. ECF No. 3816 at 47-59. These cursory and unsupported objections should be dismissed.

VII. NO OBJECTIONS WERE MADE TO THE EXPENSES AND SERVICE AWARDS RECOMMENDED BY THE SPECIAL MASTER.

No one objected to the Special Master's recommendations with regard to expense and service awards. Kansas MDL leadership request that they be adopted, that the Kansas MDL leadership's fees be approved and awarded by the courts, and that all procedures for finalizing all expenses and IRPA fees be promptly adopted and implemented to create a final and appealable judgment on all issues related to attorneys' fees.

CONCLUSION

The Kansas MDL group (including Kansas Lead Counsel and Settlement Class Counsel Seeger) respectfully requests that the Courts issue a Fee & Expense Order adopting the Report, including:

- Awarding the 50% allocation recommended by the Special Master's Report to the Kansas group;
- Awarding Kansas MDL leadership their expenses;
- Holding that the JPAs do not govern how the Court awarded and allocated attorneys' fees and expenses; and
- Awarding the Service Awards listed in Exhibit 3 of the Report.

The Kansas MDL group additionally requests that the Court delegate to the Co-Lead Counsel allocation of fees to each firm that the Special Master assigned to the Kansas group, under the procedures requested above.

Dated: December 14, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on December 14, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Patrick J. Stueve
Plaintiffs' Co-Lead, Liaison, Class and Settlement Class Counsel for Plaintiffs