

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

In re: Syngenta Litigation

This Document Relates to: ALL ACTIONS

Case Type: Civil Other
Honorable Thomas M. Sipkins

File No.: 27-CV-15-3785

**AFFIDAVIT OF D. SCOTT ABERSON
IN SUPPORT OF SYNGENTA'S MOTION
FOR ROLLING PRODUCTION OF
PLAINTIFF FACT SHEETS FROM
REMAINING PRODUCER PLAINTIFFS
WITHOUT DELAYING BELLWETHER
DISCOVERY SCHEDULE**

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

I, D. Scott Aberson, state and declare under penalty of perjury the following:

1. I am an attorney in the State of Minnesota, a partner with the law firm of Maslon LLP, and am one of the attorneys representing the Syngenta Defendants in the above-captioned matter. I make this Affidavit based upon my personal knowledge of the matters stated herein and in support of Syngenta's Motion for Rolling Production of Plaintiff Fact Sheets from Remaining Producer Plaintiffs Without Delaying Bellwether Discovery Schedule.

2. Attached hereto as **Exhibit A** is a true and correct copy of select pages of the Duke Law Center for Judicial Studies' Manual for MDL Standards and Best Practices (Sept. 11, 2014).

3. Attached hereto as **Exhibit B** is a true and correct copy of the federal MDL Plaintiff Fact Sheet, Dkt. 1217-11, *In re Syngenta AG MIR 162 Corn Litig.*, No. 2:14-md-02591 (D. Kan. Nov. 18, 2015) .

4. Attached hereto as **Exhibit C** is a true and correct copy of the Proposed “Case Management Order No. 6 [Plaintiff Fact Sheets],” which was attached as an exhibit to the Remele/Sieben leadership group’s joint application to lead the consolidated Minnesota action dated July 17, 2015.

5. Attached hereto as **Exhibit D** is a true and correct copy of select pages of the printed presentation Plaintiffs’ counsel distributed during the October 19, 2015 conference with Special Master Van de North.

6. Attached hereto as **Exhibit E** is a true and correct copy of the federal MDL Order related to Plaintiffs’ motion to modify the requirement that all producer plaintiffs submit a plaintiff fact sheet, Dkt. 1231, *In re Syngenta AG MIR 162 Corn Litig.*, No. 2:14-md-02591 (D. Kan. Nov. 20, 2015).

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

Dated this 1st day of December, 2015

/s/ D. Scott Aberson

D. Scott Aberson

4825-9985-7963

MDL STANDARDS AND BEST PRACTICES
DUKE LAW CENTER FOR JUDICIAL STUDIES

Duke Law School
Center for Judicial Studies
September 11, 2014

Best Practice 1C(iv): Individual claimants should be required to produce information about their claims.

In non-MDL cases, plaintiffs are required to produce information about their claims from the outset, and that practice should not change simply because a claim has been transferred into an MDL proceeding. Such a balanced approach will ensure that both sides obtain information critical to claims or defenses. Moreover, development of plaintiffs' individual claims is vital to the establishment of a fair and informative bellwether trial process and is indispensable to any settlement discussions in which the parties may engage. In fact, settlement talks are often delayed precisely because the parties have not anticipated the need for assembling information necessary to assess the strengths and weaknesses of the global litigation and examine the potential value of individual claims. Finally, requiring plaintiffs to produce information verifying their basic factual allegations should allay concerns that MDL proceedings invite the filing of claims without adequate investigation.⁴⁸

Of course, until determinations are made about which (if any) cases might be selected for bellwether trials in the MDL proceeding (as discussed below) or early remand to transferor courts for trials, there is no need to delve into full case development (e.g., plaintiff depositions, case-specific expert discovery). Rather, each claimant should be required to engage in streamlined, cost-effective paper discovery to the maximum extent possible.

One of the most useful and efficient initial mechanisms for obtaining individual plaintiff discovery is the use of fact sheets. Fact sheets are court-approved standardized forms that seek basic information about plaintiffs' claims – for example, *when* and *why* the plaintiff used the

⁴⁸ See John H. Beisner & Jessica D. Miller, *Litigate the Tort, Not the Mass*, Washington Legal Foundation (2009) (expressing concern about the quality of mass tort claims filed in MDL proceedings, noting that “[t]his problem is compounded by the fact that many of the claims are not developed by the filing counsel – they effectively were purchased from other attorneys who advertised to attract claimants in their home markets with no intention of ever litigating the claims themselves”).

product at issue and *what* injury did the plaintiff sustain as a result of using the product.⁴⁹ Fact sheets spare defendants the expense of tailoring countless interrogatories to individual claimants, while allowing plaintiffs' attorneys to fulfill early discovery obligations with relative ease.⁵⁰ However, fact sheets will be meaningful only if plaintiffs and their counsel devote appropriate time and attention to this project. The fact sheets should be deemed a form of discovery governed by the relevant Federal Rules of Civil Procedure, requiring the same level of completeness and verification.⁵¹

Similarly, requiring the collection of plaintiffs' medical records (in personal injury cases) or employment histories (in employment cases) is another straightforward way that MDL courts can encourage a robust exchange of key information at a relatively early stage.⁵² This information can help defendants verify the answers provided in the fact sheets and shed light on the potential causes of the plaintiffs' injuries.

An alternative to fact sheets is standardized interrogatories or document requests, which are also less costly and onerous than individually tailored interrogatories and document requests. Especially as a proceeding matures, the transferee judge may consider the entry of *Lone Pine*

⁴⁹ MCL § 22.83; *see also* Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 Sedona Conf. J. 1, 8 n.40 (2011) ("The use of 'fact sheets' to streamline discovery by replacing formal interrogatories with supposedly less onerous, more fact-oriented formats is now a common practice in mass tort multidistrict litigation.").

⁵⁰ Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 Utah L. Rev. 863, 927-28 (2005); *see also* McGovern, *supra* note xxii, at 1888-89 (noting that in the Fen/Phen litigation, the parties "cooperated extensively with each other in the discovery process in order to reduce their transaction costs. Innovative processes, including the MDL-standardized fact sheets . . . provided models for discovery[.]").

⁵¹ *See, e.g., In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2100, No. 3:09-md-02100-DRH-PMF, Order # 12, Case Management (PFS), ¶ A.2 (S.D. Ill. Mar. 3, 2010) ("A completed PFS, which requires that each Plaintiff sign the Declaration in Section XIII, shall be considered to be interrogatory answers and responses to requests for production under the Federal Rules of Civil Procedure, and will be governed by the standards applicable to written discovery under the Federal Rules of Civil Procedure.").

⁵² "In the diet drugs MDL, for example, the court ordered 'first wave discovery' in which each plaintiff was required to submit a fact sheet and a list of medical providers and authorizations." 1-4 ACTL Mass Tort Litigation Manual § 4.05; *see also In re Prempro Prods. Liab. Litig.*, No. 4:03-CV-1507-WRW, 2010 U.S. Dist. LEXIS 135152, at *20 (E.D. Ark. Dec. 6, 2010) (the fact sheets require plaintiffs to provide "the identity of each of plaintiff's prescribing physician(s), medical history, employment history, educational history, and the identity of potential fact witnesses.").

orders requiring all plaintiffs to submit an affidavit from an independent physician to support their theories of injury or damages.⁵³ These orders are particularly important in MDL proceedings involving disparate theories of causation – or where multiple alternative potential causes of the alleged injuries exist.

In some MDL proceedings, courts have required defendants to prepare fact sheets for each plaintiff, providing basic information they may have about the claimant or their claim.⁵⁴ Typically, this step is required only after a plaintiff has completed a fact sheet.⁵⁵

The court should impose concrete time limitations for completing fact sheets. Unless such deadlines are rigorously enforced, counsel handling multiple claims may fall far behind in fulfilling that obligation. Missed deadlines may be excused if good cause is shown, but at some point, if fact sheets are not filed by a litigant, the claim should be dismissed for failure to prosecute.⁵⁶

Best Practice 1D: Class actions may require a different approach to discovery because of the need to resolve class certification issues as early as practicable.⁵⁷

In class actions, resolution of the class-certification question usually requires extensive discovery related to class certification, which may “include the depositions of the named plaintiffs

⁵³ See, e.g., *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, 2012 U.S. Dist. LEXIS 56309, at *5 (E.D. La. Apr. 23, 2012) (“*Lone Pine* orders [are] appropriate” because “it is not too much to ask a Plaintiff to provide some kind of evidence to support their claim that Vioxx caused them personal injury.”) (internal quotation marks and citation omitted).

⁵⁴ See, e.g., *Bextra and Celebrex Marketing Sales Practices and Prod. Liab. Litig.*, MDL No. 1699, Case No. M:05-CV-01699-CRB, Pretrial Order No. 6: Plaintiff Fact Sheets and Defendant Fact Sheets, ¶ 12 (N.D. Cal. Feb. 13, 2006).

⁵⁵ *Id.* ¶ 13 (“[Defendants] shall provide a complete and verified Defendant Fact Sheet within sixty (60) days after receipt of a substantially complete and verified PFS and substantially complete authorizations.”)

⁵⁶ See, e.g., *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2100, No. 3:09-md-02100-DRH-PMF, Order # 12, Case Management (PFS), ¶ E.1 (S.D. Ill. Mar. 3, 2010) (establishing progressive consequences for ongoing non-compliance with PFS requirements, including dismissal with prejudice).

⁵⁷ In the *Zurn Pex Plumbing* MDL proceeding arising out of the defendants’ design and choice of brass plumbing fittings, the MDL court bifurcated discovery and directed the parties to “focus first on the issue of class certification.” *In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-1958 ADM/RLE, 2009 U.S. Dist. LEXIS 47636, at *1 (D. Minn. June 5, 2009).

In Re Syngenta AG MIR 162 Corn Litigation
Confidential Plaintiff Fact Sheet

CASE NO. (pre-printed)

PLAINTIFF NAME: (pre-printed)

Please complete this form based on the instructions. If additional space is needed to supply the requested information, please attach additional pages to this form. Note that multiple names may be printed above in the "Plaintiff Name" line if claims are being brought by the partners of a partnership. If claims are being asserted by the partners of a partnership, only one form should be completed even if the partnership has several partners. Please provide the Plaintiff's mailing address.

PLAINTIFF'S ADDRESS: _____

Please provide below Plaintiff's Social Security or tax identification numbers. If claims are being asserted by the partners of a partnership, please provide the Social Security or tax identification number of each partner, listing the name of the partner beside each listed Social Security or tax identification number.

ENTITY/INDIVIDUAL NAME	SOCIAL SECURITY # OR TAX ID #

If Plaintiff is a corporation, limited liability company (LLC), limited liability partnership (LLP), or limited partnership (LP), please name the state under whose laws Plaintiff is organized. (Plaintiff would have filed organizational documents with the Secretary of State or Division of Corporations in this state.)

In Re Syngenta AG MIR 162 Corn Litigation
Confidential Plaintiff Fact Sheet

PART A – COMPLETE PART A IF PLAINTIFF PRODUCED AND SOLD CORN ANY TIME SINCE JANUARY 2011.

A1. Please list all farms on which Plaintiff produced corn from 2011 to 2015 in the first column, providing the FSA number, and the county and state in which the farm is located. Please then provide the number of acres of corn grown on each farm for the following growing seasons. Please list all farms where Plaintiff farmed corn whether or not Plaintiff owned the land:

FSA#	County/State	ACRES OF CORN				
		2011	2012	2013	2014	2015

A2. For each farm provided in response to question A1, please state the variety of corn grown (including the name of the genetically modified seed), acres grown, and whether you owned or leased the land.

FSA #	2011			2012		
	Corn Variety	Acres	Owned/leased	Corn Variety	Acres	Owned/leased

In Re Syngenta AG MIR 162 Corn Litigation
Confidential Plaintiff Fact Sheet

FSA #	2013			2014		
	Corn Variety	Acres	Owned/leased	Corn Variety	Acres	Owned/leased

FSA #	2015		
	Corn Variety	Acres	Owned/Leased

A3. For each contract for the sale of corn from 2011 to the present, please provide the contract date, number of bushels, how the bushels were priced (seasonal pool, pricing pool, booking contract, basis contract, hedged to arrive contract, cash sale, or other contract), date the corn was priced, the price per bushel, the name and location of the buyer, and the FSA # of the farm(s) the corn was grown on.

Date	No. of Bushels	How Priced	Date Priced	Price	Name & Location of Buyer	FSA #

In Re Syngenta AG MIR 162 Corn Litigation
Confidential Plaintiff Fact Sheet

Date	No. of Bushels	How Priced	Date Priced	Price	Name & Location of Buyer	FSA #

A4. From the 2011 crop year to the present, have you grown corn that you have not sold? (Yes or No) _____

If so, approximately what percentage of the corn have you not sold? _____

A5. Identify the name, company name and address of any crop or marketing consultant(s) who assisted you with the marketing of your corn from 2011 to the present. If you did not use a marketing consultant(s) please respond “Not Applicable.”:

A6. From the 2011 crop year to the present, have you raised livestock? (Yes or No)

If so, how much corn has been used in feeding the livestock each year?

A7. For each crop year from 2011 to the present, have you been or are you part of an ethanol cooperative? (Yes or No) _____

If so, please state for each year whether you are required to supply a certain amount of corn to the cooperative? _____

A8. From 2011 to the present, have you grown or sold any other crop that was genetically modified? (Yes or No) _____

A9. From 2011 to the present, have you taken any steps to test for the presence of Viptera or Duracade in corn grown or sold by you? (Yes or No) _____

In Re Syngenta AG MIR 162 Corn Litigation
Confidential Plaintiff Fact Sheet

A10. Do you use email to discuss any of the information described above (and/or do others use email in connection with the information above on behalf of any of your farms)? (Yes or No) _____ If so, please list all email addresses that are or were used?

A11. Do you keep electronic records reflecting any of the information described above? (Yes or No) _____

A12. Please provide the name of the individual completing this form:

Document Request:

- 1. Please provide documents sufficient to show the corn seed purchased from 2011 to the present.**
- 2. Documents sufficient to show all terms and conditions for all of your sales or contracts for sale of corn after and including 2011 to the present.**
- 3. Documents sufficient to show any cost you believe you have incurred or injury you believe you have suffered as a result of the presence of Viptera or Duracade in corn.**
- 4. Please produce all documents for crop insurance related to corn for the 2013 and 2014 crop years.**

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

In re: Syngenta Litigation

Court File No: 27-CV-153785

Court File Type: Civil

This Document Relates to: **ALL ACTIONS****CASE MANAGEMENT ORDER NO. 6****[Plaintiff Fact Sheets]**

1. On or before September 1, 2015, Plaintiffs' Co-Lead Counsel and counsel for the Syngenta Defendants are ordered to negotiate and submit for the Court's approval a brief Plaintiff Fact Sheet ("PFS"), allowing the Defendants to determine which entities have sued them, the number of acres of corn farmed by such entity, and to obtain such entities' Farm Services Administration ("FSA") Form 578. This data should be provided in an electronic format and submitted online, with PDFs to be utilized only to produce the underlying documentation required.

2. Each plaintiff in an action filed in the state courts of Minnesota on or before December 1, 2015, shall complete a complete "Plaintiff Fact Sheet" (PFS), the form of which is agreed to by the parties and/or ordered by the Court, along with responsive documents and completed authorizations, and shall serve the same on or before March 1, 2016 upon:

- (a) Syngenta Defendants' Liaison Counsel

David T. Schultz
MASLON, LLP
3300 Wells Fargo Center
90 South Seventh Street

Minneapolis, Minnesota 55402-4140
Phone: (612) 672-8399
Fax: (612) 642-8399

(b) Plaintiffs' Liaison Counsel

Robert K. Shelquist
LOCKRIDGE GRINDAL NAUEN, P.L.L.P.
100 Washington Avenue South
Minneapolis, Minnesota 55401-2159
Phone: (612) 339-6900
Fax: (612) 339-0981
Email: rkshelquist@locklaw.com

3. Plaintiffs and their counsel shall use their best efforts to serve the completed PFS on a rolling basis prior to the deadlines set forth in Paragraph 2.

4. For all cases that are filed after December 1, 2015, each Plaintiff shall have ninety (90) days from the date of the first answer filed by a Defendant to complete and serve the PFS, the completed authorizations, and the Farm Services Administration records. Defendants shall provide a copy of this CMO and accompanying PFS and authorizations with service of their Answer on Plaintiff's counsel of record.

5. In the event an individual or organization to which a signed authorization is presented refuses to provide responsive records, the individual Plaintiff's attorney and Defendant's counsel shall meet-and-confer to determine the most efficient way to resolve the issue such that the necessary records are promptly provided.

6. If a Plaintiff does not submit a PFS within the time specified in this Order, Defendants may send a Notice of Overdue Discovery letter to Plaintiff's

counsel of record ten (10) days after said deadline. Said Notice of Overdue Deficiency letter shall permit fourteen (14) days to cure the overdue PFS. In the event the completed PFS is not provided within such fourteen (14) day period, Defendants shall exercise all reasonable efforts to meet-and-confer with Plaintiff's counsel (for a period not to exceed five (5) days). If, after the meet-and-confer process, the discovery remains overdue, Defendants may move to dismiss that Plaintiff's case. Said motion to dismiss shall be without prejudice, and permit fourteen (14) days for an opposition, if any. Plaintiff's Liaison Counsel, Robert Shelquist, shall be served (via e-mail) with a copy of all Notice of Overdue Discovery letters and copies of any and all motion to dismiss under this paragraph.

7. If Defendants receive a PFS in the allotted time, but the PFS is not properly completed in Defendant's view, Defendants' counsel shall send to Plaintiff's counsel of record and Plaintiffs' Liaison Counsel a deficiency letter identifying the purported deficiencies. If Plaintiff believes the PFS was properly completed, the parties shall meet and confer on the issue within fourteen (14) days of Plaintiff's receipt of such notice. Subject to such meet and confer, Plaintiff shall then have twenty (20) days to serve an amended or supplemental response or advise that he/she is not amending/supplementing the response.

8. The admissibility of information in the PFS shall be governed by the Minnesota Rules and no objections or privileges are waived by virtue of any PFS response.

9. All information contained in the PFS is confidential and protected under the Confidentiality Order (CMO 7).

10. Within 30 days of the receipt of any records obtained pursuant to an authorization provided with the PFS, Defendants shall make such records available to the attorney for each individual Plaintiff. Lead and/or liaison counsel for the parties shall meet and confer regarding the process for making such records available, including any associated costs, if warranted and applicable. Plaintiffs' Liaison Counsel shall create and maintain a PFS repository database and store all such data and documents until the close of this litigation.

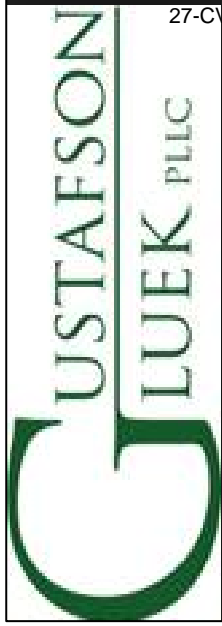
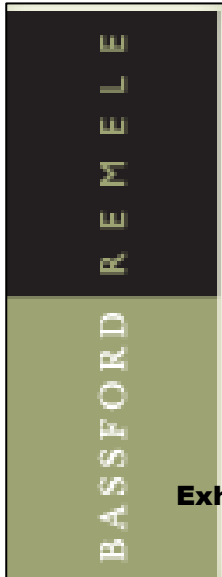
11. Other than the production of Plaintiff Fact Sheets, authorizations and/or records referenced herein, all discovery to individual plaintiffs is stayed, pending further order of the Court concerning potential bellwether case discovery.

IT IS SO ORDERED.

Dated this ___ day of August, 2015 at Minneapolis, Minnesota.

s/ Thomas M. Sipkins
JUDGE THOMAS M. SIPKINS

Bellwether Selection Meeting with Hon. John B. Van de North, Jr.



October 19, 2015

III. Topic #5 – Information Available Now, re: the Cases

5. Having “classes” and “criteria” in mind, what pre- and post-120 case selection information is available now to plaintiffs and defendants; and, what can be reasonably obtained (fact sheets/profiles?) to assure a level playing field for the selection process?

For 37,000+ Producers, 6-9 Months Would Be Required to Obtain Searchable Data

Timeline for Obtaining Searchable Data for All Clients

<u>Days Lapsed (Minimum)</u>	<u>Days Lapsed (Maximum)</u>	<u>Time Required (Minimum)</u>	<u>Time Required (Maximum)</u>	<u>Event Description</u>
0		0	0	Town Hall Meeting Conducted w/Corn Farmers
30	60	30	60	Contracts Received by Lawyers
45	90	15	30	Cases Filed by End of the Month of Contract Receipt
65	110	20	20	Welcome Packet Sent w/in 20 days (requesting FSA 578s, Crop.Ins.Apps., Gr.Elev. Summs)
125	230	60	120	<u>Some</u> Documents Sent in to Office
155	260	30	30	Documents Keyed into Law Firm Database
185	290	30	30	PDFs of 578s sent to India for Database Entry w/in 30 Days

Exhibit D

17 of 20

Total Time Required by Data Entry on Average is 6-9 months

For 25 non-producers, PSC will complete fact sheets ASAP

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE SYNGENTA AG MIR 162)	
CORN LITIGATION,)	MDL No: 2591
)	
(This Document Relates to All Cases))	Case No. 14-md-2591-JWL
_____)	

ORDER

Plaintiffs in this multi-district litigation have filed a motion to modify the requirement in Scheduling Order No. 2¹ that all producer plaintiffs submit a plaintiff fact sheet (“PFS”) by December 1, 2015, or within forty-five days of docketing (ECF doc. 1213). Specifically, plaintiffs ask the court to stay PFS discovery in cases docketed after October 22, 2015, which are not part of the bellwether pool of cases. Because plaintiffs have not demonstrated undue burden or good cause for the requested discovery stay, the motion is denied.

Plaintiffs move under Fed. R. Civ. P. 26(c), which permits the court, “for good cause,” to limit discovery to protect a party from “undue burden or expense.” Plaintiffs first argue that completing PFSs is burdensome because it requires them to obtain records from federal agencies and third parties. Plaintiffs further state that coordinating the production of PFSs from the hundreds of plaintiffs in this MDL consumes thousands of hours of attorney time. Finally, plaintiffs assert that the parties’ resources would be better directed at discovery related to the bellwether cases, and that “Syngenta has no need for this discovery at this

¹ECF doc. 1098 at 6–7.

time.”²

The court is unpersuaded by plaintiffs’ arguments. As the court noted in Scheduling Order No. 2, the PFSs—which are only five pages in length—require plaintiffs “to gather . . . very limited and basic information to complete.”³ Because “plaintiffs initiated this litigation[,] it is only reasonable to expect them to devote the no more than one or two days of time necessary” for the task.⁴ It bears mentioning that the form of the PFSs was negotiated and agreed to by plaintiffs’ counsel. Although completing the PFSs is undoubtedly a burden, plaintiffs have not demonstrated that it is an *undue* burden.

Rather than finding good cause to stay discovery of the PFSs in newly docketed cases, the court finds it prudent for this discovery to go forward now. Information can be gathered when fresh—before memories fade or documents have a chance to get lost. PFSs provide both sides a better understanding of the overall scope of the litigation, and allow the parties to assess their strengths and weaknesses in the global litigation. The court is certain that plaintiffs’ leadership team has the resources to continue with the coordination and production of PFSs, all the while continuing with bellwether discovery.

IT IS THEREFORE ORDERED that plaintiffs’ motion to stay PFSs discovery is denied. The previously set deadline for this discovery remains in effect. For cases docketed on or after October 23, 2015, plaintiffs have until the later of December 1, 2015, or forty-five

²ECF doc. 1213 at 5.

³ECF doc. 1098 at 7.

⁴*Id.*

days after the case is docketed in the MDL to submit their PFSs.

Dated November 20, 2015, at Kansas City, Kansas.

s/ James P. O'Hara
James P. O'Hara
U.S. Magistrate Judge