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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **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 **DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION FOR ROLLING PRODUCTION OF PLAINTIFF FACT SHEETS FROM REMAINING PRODUCER PLAINTIFFS WITHOUT DELAYING BELLWETHER DISCOVERY SCHEDULE**

Plaintiffs' arguments against the production of Plaintiff Fact Sheets—including by pointing to errors in what little information they have provided for just a fraction of the plaintiffs to date and arguing that 'mistakes always happen'—confirm exactly why plaintiffs should be required to provide basic information about their claims now rather than later, when the problem will only get worse with the passage of time.

First, plaintiffs' argument that this issue has already been litigated ignores the entirely different procedural posture of what the parties addressed leading up to the Court's September 28, 2015 letter. All of plaintiffs' arguments at the September 25 hearing—which in turn prompted the September 28 letter—concerned the claimed difficulty of gathering 30,000 PFSs in time for bellwether selection without unduly delaying bellwether selection and the ensuing next steps in the case. Now that bellwether selection is over, the basis for plaintiffs' claimed objection is moot because requiring PFSs will not delay the bellwether discovery process or any other aspect of the case. Nor can plaintiffs claim an undue burden in collecting basic information about each plaintiff's case, when Syngenta's motion would give plaintiffs a

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full six months to collect the information (far longer than they ought to receive, but a proposal designed to moot any claimed objection that the task is too great).

Second, plaintiffs' brief wholly ignores the fact that ***they themselves*** proposed that each producer provide a Plaintiff Fact Sheet **"*on or before December 1, 2015*"** when emphasizing the diligence with which they planned to handle the case in seeking leadership positions before this Court. Remele/Sieben Joint Application to Lead Consolidated Action at 23 (July 17, 2015) ("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…."). Plaintiffs cannot deny the appropriateness of requiring PFSs at the start of the litigation, when they already proposed to the Court that each producer provide a PFS at the outset of the case. Nor can plaintiffs point to the number of claimants as a reason to excuse PFSs, when the Remele-Sieben group already claimed to represent "***more than 17,772 producers and-non producers*** with claims against Syngenta" at the time. *Id*. at 3 n. 2 (emphasis added).[1] If anything, the fact that this litigation is bigger than the average lawsuit and seeks

[1] Plaintiffs' counsel aggressively solicited these claimants for months via a wide-ranging advertising campaign that included interactive websites with "live chat" features, *see* http://cornsuits.com, town hall meetings across the Corn Belt, and even a professional infomercial featuring Mr. Watts himself. *See* https://vimeo.com/129181865. Plaintiffs' counsel went so far as to retain former Iowa Lieutenant Governor Patty Judge to serve as "the front person for the firm" and to make "'robo-calls' in which she identified herself as the former lieutenant governor rather than a paid spokesperson," a practice that other plaintiffs' lawyers have objected to. *See* Dana Larsen, *Texas Firm Urges SL Farmers To Sue Syngenta*, Pilot-Tribune, Feb. 2, 2015, available at http://www.stormlakepilottribune.com/story/2162300.html. That article and others make abundantly clear plaintiffs' strategy—"If 50,000 farmers sue Syngenta, there will not be enough black robes to try cases. It is likely that a few test cases will be selected to try, and if successful, the rest would be decided in mass. '***Most of you will never have to go to trial***.'" *Id*. (emphasis added; quoting Mr. Watts). If plaintiffs' counsel was able to undertake these efforts to persuade farmers to sue Syngenta, then requiring PFSs so that

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billions of dollars in damages, *see* Watts Guerra Corn Suits Website, http://cornsuits.com, increases the well-known risk in all MDLs that claims will be filed without adequate investigation or based on mistaken facts—and should entitle Syngenta to *more* information about the litigants, not *less* than in a garden-variety case. As Syngenta explained in its opening motion, "in non-MDL cases, plaintiffs are required to produce information about their claims at the outset, and that practice should not change simply because a claim has been transferred into an MDL proceeding." Duke MDL Best Practices Manual § 1C(iv).

Third, plaintiffs' suggestion that PFSs are no longer necessary because bellwether plaintiffs have been selected ignores the fact that the purpose of PFSs is not only to aid the bellwether selection process, but also for the independent reason that requiring each plaintiff to submit basic information about his or her claims at the outset is a bedrock requirement in any litigation (as with Initial Disclosures), and PFSs specifically are "one of the most useful and efficient mechanisms" for starting to collect information about each plaintiff's case. *Id.* Any suggestion that PFSs are only useful in bellwether selection is belied by plaintiffs' own citation to the federal Syngenta MDL case.[2] The federal court presiding over the federal MDL has expressly required that *all* plaintiffs must submit PFSs, even after the bellwether selection process is complete, and specifically rejected the plaintiffs' request "to stay PFS discovery in cases docketed after October 22, 2015, *which are not part of the bellwether pool of cases*."[3] In

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Syngenta can better understand who has sued it (and the facts behind their claims) should not be too great a burden as well.

[2] Plaintiffs' suggestion that the federal MDL consists of a "small number of individual cases" is inaccurate on its face. Opp'n at 6. Over 1,500 plaintiffs have filed suit in the federal MDL.

[3] *See* Order, *In re Syngenta AG MIR162 Corn Litig.*, No. 2:14-md-02591 (D. Kan. Nov. 20, 2015), ECF doc. 1231 ("Federal MDL PFS Order") at 1 (requiring all plaintiffs to submit PFSs by December 1, 2015 or within forty-five days of docketing) (emphasis added). The parties completed bellwether selections on November 20, 2015.

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so doing, the court also rejected the arguments advanced by plaintiffs here—including 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 time.'" Federal MDL PFS Order at 2. Nor is that decision alone: plaintiffs' assertion that no court has ever required "the use of PFS *after* bellwether selection has been completed," Opp'n at 4, is flatly incorrect. *See, e.g.*, Case Management Order, *In re: Aredia and Zometa Prods. Liab. Litig.*, No. 3:06-md-01760 (M.D. Tenn. July 28, 2006), ECF doc. 89 (providing that "all discovery in cases outside of the original three and additional seven test cases is STAYED" but requiring that "[e]ach plaintiff in each case filed in or transferred to this Court ***shall complete a separate PFS***") (emphasis added); *see also* Pretrial Order No. 4, *In re: Levaquin Prods. Liab. Litig.*, No. 08-md-01943 (D. Minn. Feb. 20, 2009), ECF doc. 132 (naming bellwether pool of 15 plaintiffs for "case-specific fact discovery" but also ordering that "for other Levaquin tendon injury cases currently assigned to MDL No. 1943…[***p***]***laintiffs shall complete and serve Plaintiffs' Fact Sheets no later than March 16, 2009***" and that "for future Levaquin tendon injury cases…[***p***]***laintiffs shall complete and serve Plaintiffs' Fact Sheets no later than 90 days after*** Defendants have filed responsive pleadings….") (emphases added).

Fourth, plaintiffs' suggestion that information Syngenta seeks via the PFS is publicly available or has already been provided to Syngenta is false. As Special Master Van de North will recall from the October 19, 2015 meet-and-confer in Kansas City, plaintiffs' counsel expressly opposed providing PFSs in advance of the bellwether selection process precisely on the ground that the information was *not* publicly available and would require collecting information from each of their clients—underscoring that the information is in each plaintiff's possession. Plaintiffs' assertion that "the FSA Form 578 documents that are already being

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provided to Syngenta by Plaintiffs' counsel are far more valuable" is also misleading in several respects. Opp'n at 12-13. Syngenta has not *received one single* FSA Form 578 from any of the "approximately 50,000 plaintiffs," *id.* at 1, in this litigation.[4] Moreover, plaintiffs' suggestion that Syngenta can identify only "three examples (out of more than 30,000 submitted on October 19, 2015) of purported inaccuracies," *id.* at 13, is also mistaken.[5] Although Mr. Watts provided Syngenta's counsel and the Special Master with a spreadsheet containing exceptionally limited information about Watts Guerra's clients on October 19, it turns out that ***11,601 of the 31,656*** entries—over thirty-six percent—provided no estimated corn acreage for 2013 and 2014. Notwithstanding plaintiffs' caveat that "the initial corn estimates should not be relied on," the fact that over one-third of the plaintiffs for which Syngenta has *any* information report *zero* corn acreage in 2013 and 2014 (the very years in which China purported to reject U.S. corn before approving Viptera in December 2014) raises serious concerns about these plaintiffs—underscoring the point that PFSs are necessary now to determine whether or not plaintiffs have signed up for the case based on mistaken information, or worse. Indeed, concerns like these are exactly why the Duke Manual emphasizes that "[r]equiring plaintiffs to produce information

[4] Plaintiffs' counsel provided Syngenta with a spreadsheet purporting to summarize certain limited fields of data of plaintiffs' own choosing from the FSA Form 578s of only about 1,075 producers on October 19.

[5] For example, Illinois plaintiff the Kittle Agency, Watts Guerra Client No. 513075, reported average corn acreage of 166,053,694 for 2013 and 2014—which would mean that its farm is roughly four-and-a-half times the size of the entire state of Illinois. Nebraska plaintiffs Mark S. and Elizabeth M. Andrews, Watts Guerra Client No. 507083, reported average corn acreage of 15,002,000 for 2013 and 2014—which would mean that its farm is roughly the size of West Virginia.

Plaintiffs will no doubt try to explain these and any other errors as "mistakes" that occur on handwritten forms. If anything, however, these discrepancies underscore precisely why PFSs should be required. Requiring formal representation of information on a plaintiff-by-plaintiff basis via PFSs with supporting documentation, rather than leaving it to plaintiffs' counsel's informal say-so, will increase accuracy, reduce mistakes, and ferret out plaintiffs who may not have a claim at all.

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verifying their basic factual allegations should allay concerns that MDL proceedings invite the filing of claims without adequate investigation." Duke MDL Manual § 1C(iv) (Ex. A).[6]

Fifth, if anything, plaintiffs' response appears to reveal that they have no principled objection to providing more detailed information such as that required by the PFS—as plaintiffs themselves imply that they would provide such information as part of a mediation or claims resolution process down the road—and simply do not want to stand by the accuracy of the information for use in litigation. As an initial matter, plaintiffs' attempt to turn an opposition brief into a request for mandatory mediation does nothing to rebut the relevance of the information in PFSs. And even if this case eventually results in a settlement, plaintiffs cannot point to any authority for exempting themselves from providing information about their claims (through a PFS that does not even rise to the level of Initial Disclosures) just because of the possibility of settlement or mediation discussions far down the road. Parties are required to live up to their obligations as litigants, regardless of their hopes for how a case ultimately may end.

Plaintiffs are also incorrect in asserting that "plaintiff fact sheets are not necessary to gather accurate information in order to assess the strengths and weaknesses of the case." Opp'n

[6] Contrary to what plaintiffs contend, numerous authorities have recognized that PFSs also serve to discourage the filing of claims without adequate investigation. The Duke Manual itself notes that the "*MDL Standards and Best Practices*…were drafted by 22 prominent defense and plaintiff practitioners well experienced in MDL litigation – with significant input and comment from 17 federal and state court judges…." Duke MDL Manual Introduction at i. Plaintiffs' characterizations of the motivations of certain drafters are a misleading attempt to distract the Court from these well-accepted principles—and are inaccurate even on their terms. *See* Docket Sheet, *Blades v. Monsanto et al.*, No. 03-3993 (8th Cir. 2005) (listing John Beisner as counsel of record for Monsanto, not Syngenta). In any event, other authorities provide ample support for the same point. *See, e.g.*, *In re Digitek Prods. Liab. Litig.*, 264 F.R.D. 249, 258-59 (S.D. W. Va. 2010) (noting that PFSs can call "into question the prefiling investigation performed by plaintiffs' counsel"); *see also In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, No. 07-md-01873, 2011 WL 4368719, at *4 (E.D. La. Sept. 16, 2011) (noting that "[t]he purpose of the PFS is to provide the defendants with the basic information necessary to move this MDL proceeding toward a resolution. The Court finds that the defendants have been prejudiced by [plaintiff's] failure to provide these fundamental facts").

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at 12. The limited bellwether discovery information provided to Syngenta for 595 plaintiffs contained brief one-line comments for approximately 59 plaintiffs—a sample size that is approximately 0.1 percent of the plaintiffs. But even that sample revealed multiple plaintiffs who appear to have fed all of their corn on their farms (meaning they never intended to sell it, and thus cannot claim any "market loss" in their ability to sell corn) and others who look to have sold their corn under contractual guarantees (as opposed to spot market prices). These issues further demonstrate why the PFS—which is tailored to this litigation and requires plaintiffs to provide contracts and pricing data for sales of corn and answer other questions including the amount of corn that was fed to livestock (information that is not found in an FSA Form 578)—is the appropriate vehicle for plaintiffs to provide this information.

Plaintiffs' argument that PFSs are not relevant to understanding the differences from one plaintiff to the next (and thus also not relevant to the question of class certification) rests on a mischaracterization of their own cited authorities. Plaintiffs point to the *In re Yasmin & Yaz* MDL as "refusing to consider PFS as evidence in resolving Plaintiffs' motion for class certification." Opp'n at 11. But that decision did not reach the question of whether PFSs were relevant to class certification—instead, the district court *denied* plaintiffs' motion for class certification on other grounds without needing to consider differences in the Plaintiff Fact Sheets, and thus "denied as moot" plaintiffs' objection "to defendant's reliance on Plaintiff Fact Sheets." *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Products Liab. Litig.*, No. 3:09-CV-20001-DRH, 2012 WL 865041, at *6 (S.D. Ill. Mar. 13, 2012). Plaintiffs also cite the *In re Aredia and Zometa* MDL as "beginning discovery with PFS required only from putative class plaintiffs." Opp'n at 11. In reality, however, the court expressly concluded that the "[d]efendant was entitled to discovery in each separate MDL case via service of a PFS and

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medical records authorization forms"—not just from the putative class representatives. *In re Aredia & Zometa Prods. Liab. Litig.*, No. 3:06-md-01760, 2011 WL 2182824, at *4 (M.D. Tenn. June 3, 2011); *see also id*. at ECF doc. 89 (stating that "***each plaintiff*** in each case filed in or transferred to this Court ***shall complete a separate PFS***") (emphases added). Moreover, while plaintiffs suggest that Judge Susan Richard Nelson's order in the NHL Concussion Litigation supports denying PFSs here, the decision actually shows just the opposite. Just two paragraphs after plaintiffs' misleading excerpt, Judge Nelson's decision made clear that:

> in order to address Defendant's concerns about the need for more fulsome discovery of medical information which may be relevant to Plaintiffs' alleged injuries, and in anticipation of the need to acquire such medical information from other numerous Plaintiffs in the future, the Court directs the parties to meet and confer to develop an appropriate fact sheet for this litigation that addresses the Plaintiffs' medical histories, going back to age 15, consistent with this ruling. The Court orders ***the parties to meet and confer about a schedule to begin to collect information, via a fact sheet, from Plaintiffs who have sued or expect to be a part of this litigation in advance of this Court's ruling on class certification***.

In re Nat'l Hockey League Players' Concussion Injury Litig., MDL No. 14-2551, 2015 WL 1191272, at *5 (D. Minn. Mar. 16, 2015) (emphasis added).

At bottom, plaintiffs' position should be exposed for what it is: an effort to exempt all but 40 bellwether plaintiffs from providing *any* information about themselves or their alleged claims in any meaningful way (even a PFS that is less burdensome than an Initial Disclosure)—until literally years down the road. And there is no question that when the time comes years down the road, plaintiffs will simply repeat the same argument that the task is too great or that farmers are too busy—at a point when the information is even harder to come by because memories will not be as fresh and documents will be harder to obtain. There is every reason to start the process sooner rather than later, especially on the extended six-month timetable that Syngenta has proposed.

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