Filed in Fourth Judicial District Court
12/1/2015 9:54:46 PM
Hennepin County, MN

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' MEMORANDUM IN SUPPORT OF MOTION FOR ROLLING PRODUCTION OF PLAINTIFF FACT SHEETS FROM REMAINING PRODUCER PLAINTIFFS WITHOUT DELAYING BELLWETHER DISCOVERY SCHEDULE**

INTRODUCTION

"Requiring plaintiffs to produce information verifying their basic factual allegations should allay concerns that MDL proceedings invite the filing of claims without adequate investigation." Duke MDL Best Practices Manual § 1C(iv) (Ex. A)[1]. It is for that reason and others that the Duke Manual and other authorities make clear that "[i]ndividual claimants should be required to produce information about their claims" at the beginning of a litigation, just like "in non-MDL cases, [where] plaintiffs are required to produce information about their claims from the outset." *Id.* This straightforward principle—that plaintiffs who file a lawsuit and become part of a consolidated proceeding should be provide basic information about their claims *now*, as opposed to months or years *later*—is why courts routinely require plaintiffs who take the affirmative step of bringing a lawsuit to provide Plaintiff Fact Sheets (PFSs) at the outset.

[1] Citations to exhibits refer to the exhibits attached to the December 1, 2015 Affidavit of D. Scott Aberson.

Filed in Fourth Judicial District Court
12/1/2015 9:54:46 PM
Hennepin County, MN

While this Court previously concluded that it would not require PFSs from all 30,000-plus plaintiffs if that would mean delaying bellwether discovery plaintiff selection and the ensuing events in the case, the parties have worked cooperatively to come up with a mechanism for bellwether plaintiff selection that will allow both sides and the Special Master to complete that selection process in December 2015. Now that any concerns about delaying bellwether plaintiff selection have thus been addressed and a schedule for bellwether discovery is already in place, Syngenta respectfully submits that the remaining producer plaintiffs should begin to provide PFSs so that crucial information on acreage, pricing, and the like can be obtained sooner rather than later-while memories are fresh and records are easier to obtain-rather than waiting until too late to learn even basic facts about each individual plaintiff.

Syngenta accordingly requests that the Court require PFSs, using a form modeled after the one in the federal MDL (Ex. B), on a rolling basis that gives the remaining producer plaintiffs a full ***six months*** to complete PFSs for those who already have lawsuits on file, and a full 45 days after initiating suit for those who file actions later—a timetable that is longer than what should be allowed, but moots any claimed objection that plaintiffs are "too busy" while also recognizing the reality that there are more plaintiffs here than in the federal MDL. The Minnesota MDL leadership itself acknowledged during the leadership selection process that all plaintiffs eventually should be required to provide PFSs, and there is no good reason to wait even longer.

BACKGROUND

As early as July 17, 2015, plaintiffs' counsel acknowledged in their leadership application that *all* plaintiffs should be required to complete a PFS promptly. *See* Remele/Sieben Joint Application to Lead Consolidated Action at 23, (July 17, 2015) (Ex. C) ("***Each plaintiff in an action filed in the state courts of Minnesota on or before December 1, 2015, shall complete***

Filed in Fourth Judicial District Court
12/1/2015 9:54:46 PM
Hennepin County, MN

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….") (emphases added). Only after being appointed did plaintiffs' leadership reverse course and claim that providing PFSs would unduly delay the selection of bellwether plaintiffs. *See* Pls. Proposed Agenda for Sept. 25, 2015 Status Conference at 9-10 (arguing that "Requiring That All 30,000 Plaintiffs Provide Fact Sheets Prior To Bellwether Discovery Selection Will Unnecessarily Delay Bellwether Trials," and that "plaintiffs—farmers—have limited availability during the fall due to harvest").

After the ensuing hearing that occurred on September 25, 2015, the Court advised the parties on a number of case management and bellwether selection decisions, including (1) that the Court believed January through March 2017 was a reasonable target for scheduling bellwether trials; (2) that the Court expected that the parties would each nominate 60 plaintiffs (120 in total) from which the Special Master would recommend 40 cases for bellwether discovery; and (3) agreeing with plaintiffs that PFSs would not be required for all 30,000 plaintiffs if that would mean delaying bellwether plaintiff selection and the overall case schedule.

Under the guidance of Special Master Van de North, the parties met and conferred on October 19, 2015 in Kansas City. In advance of that meeting, Special Master Van de North sent a letter asking that the parties be prepared to discuss, among other subjects:

> [h]aving 'classes' and 'criteria' in mind, what pre- ***and post-120*** case selection information is available now to plaintiffs and defendants; and, what can reasonably be obtained (fact sheets/profiles?) to assure a level playing field for the selection process?

Oct. 13, 2015 Letter from Special Master Van de North (emphasis added). During the meet-and-confer session, plaintiffs' leadership again acknowledged the need to eventually provide information from all plaintiffs in the case, but argued in an accompanying printed

Filed in Fourth Judicial District Court
12/1/2015 9:54:46 PM
Hennepin County, MN

presentation that "[f]or 37000+ Producers, 6-9 Months Would Be Required To Obtain Searchable Data." Pls.' Oct. 19, 2015 Bellwether Selection Presentation, at Slide 48 (Ex. D). With the assistance of the Special Master and the guidance provided by the Court, the parties accordingly reached agreement on a procedure and order that would allow for the selection of 40 bellwether discovery plaintiffs and a case scheduling order providing for an initial bellwether trial in March 2017.

ARGUMENT

Now that the agreed-upon bellwether selection process is well under way, any concerns about delaying bellwether discovery selection or bellwether trials because of PFSs have been addressed. Under these circumstances, the Court can and should require the remaining producer plaintiffs to complete PFSs now rather than later, in order to ensure that the information is provided while memories are fresh and documents are more easily obtained rather than waiting months or years down the road.

Separate and apart from bellwether selection, PFSs are important because they enable the parties and the Court "to assess the strengths and weaknesses of the global litigation" by providing an overall understanding of the scope of the litigation (including the actual acreage on each plaintiff's farm, the different ways in which producers sold their corn, and the different prices at which they sold it). Duke MDL Manual § 1C(iv) (Ex. A). As the Duke Manual also explains, *not* requiring plaintiffs to provide *any* information about their claims at an early stage can raise concerns that lawsuits will be filed without adequate investigation, knowing that there is effectively no check on a plaintiff unless he happens to be selected as a bellwether discovery plaintiff. *See id.* & n.48. That is a well-known problem in many MDLs, but it is particularly acute in cases like this one, in which attorneys have aggressively solicited clients that they do not really know and explicitly promised that prospective clients need only "estimate your acres if

Filed in Fourth Judicial District Court
12/1/2015 9:54:46 PM
Hennepin County, MN

needed," with no obligation to produce "your actual production records" until an unspecified "***later date*** in line with the orders of the court, after your Harvest is complete." Frequently Asked Questions We Most Often Receive From Farmers, No. 20, http://midwestcornfarmerlawyers.com/frequently-asked-questions/ (Shields Law Group) (emphasis added). In so doing, plaintiffs' counsel have downplayed how much information farmers will ever have to provide in support of their claims. *See, e.g.*, FAQ'S, http://www.lostcornincome.com/faqs/ (Watts Guerra LLP and Daniel M. Homolka, P.A.) ("Q: How much time and effort will I have to put into it? A. ***It takes 3 minutes to fill out the online form HERE***. Once you have signed up, we will send you a welcome pack that will ask you for 1) A copy of your crop insurance records (as a way to verify bushels and share) for 2013 & 2014 2) Your FSA form 578 that proves the acres you planted 3) Grain Receipts from 2013 & 14.") (emphasis added).

This creates the risk, for example, that some plaintiffs claiming to be non-Viptera farmers will turn out to have grown Viptera corn, that some plaintiffs will provide inaccurate estimates regarding the size of their corn crop, that some plaintiffs will turn out to have grown corn solely for use as feed on their farms (meaning they never intended to sell it), or that some plaintiffs will have sold their corn according to contractual pricing guarantees[2] (as opposed to spot market prices). How much and what type of corn a particular plaintiff actually grew, and how a particular plaintiff sold that corn—including at what price—are crucial issues that bear on each person's claim, along with a number of other categories of information that do not appear in the Notices to Conform (a submission whose purpose is simply to indicate that a plaintiff joins in the

[2] For example, even from the sample of plaintiffs from whom Syngenta has received very limited information, Syngenta has identified plaintiffs such as Iowa producer Jacqueline Montony (Watts Guerra Client No. 494497) who, as it turns out, "grew seed corn under contract for Monsanto."

Filed in Fourth Judicial District Court
12/1/2015 9:54:46 PM
Hennepin County, MN

Master Complaint) or in the Bellwether Selection Order with respect to these remaining non-bellwether plaintiffs. Obtaining this and other information called for by the PFS is also relevant to the question of class certification, which turns on understanding the differences across all of the plaintiffs, not just the handful of bellwethers whom the parties have selectively picked.

More broadly, all of this information could affect the parties'—and the Court's—assessment of the overall scope of the litigation. Indeed, even with the extremely limited information provided for the 595 Bellwether Discovery Candidates from which the parties selected their 60 nominees per side, Syngenta has already identified discrepancies in the estimated acreages that certain plaintiffs have provided. For example, the estimates provided to the defendants and the Special Master on October 19, 2015 claimed that South Dakota plaintiff Margery Houck (Watts Guerra Client No. 481222) had an average acreage of 598.3 acres for 2013 and 2014, whereas the bellwether discovery information later provided to the defendants and Special Master on November 12, 2015 claimed just 59 and 108 acres for 2013 and 2014 ***for that same plaintiff—in other words, ten times less acreage for 2013 and five times less acreage for 2014 than she originally claimed.*** Similarly, Minnesota plaintiff James F. Jessup (Watts Guerra Client No. 507751) claimed an average acreage of 400.0 for 2013 and 2014 in the estimates provided to the defendants and Special Master on October 19, but later claimed ***only 25% of that amount***—just 100 acres of corn in 2013 and 2014—based on updated bellwether discovery information given on November 12.

Regardless of the explanation for these and other discrepancies, they illustrate why the Duke Manual and other authorities emphasize that "individual claimants should be required to produce information about their claims" early, including because "[r]equiring plaintiffs to produce information verifying their basic factual allegations should allay concerns that MDL

Filed in Fourth Judicial District Court
12/1/2015 9:54:46 PM
Hennepin County, MN

proceedings invite the filing of claims without adequate investigation." Duke MDL Manual § 1C(iv) (Ex. A). Nor can plaintiffs contend that the PFS would be unduly burdensome: as the federal MDL court recently observed in denying a motion by plaintiffs to stay further PFSs, the form consists of only five pages, should take "no more than one or two days of time," and seeks "very limited and basic information." *See* Order at 2, *In re Syngenta AG MIR162 Corn Litig.*, No. 2:14-md-2591, (D. Kan. Nov. 20, 2015), ECF 1231 (Ex. E). If anything, the PFS used in the federal Viptera MDL is less burdensome than PFSs in other mass tort cases. *See, e.g.* Plaintiff Fact Sheet, *In re Yasmin and Yaz (Drosiperone) Marketing Sales Practices and Relevant Prods. Liability Litig.*, No. 3:09-md-2100 (S.D. Ill. Mar. 3, 2010), ECF 836-1 (33-page PFS with hundreds of questions that every plaintiff completed); *see also* Pretrial Order No. 27 (Amended Plaintiff Fact Sheet), *In re: C.R. Bard, Inc., Pelvic Repair System Prods. Liability Litig.*, No. 2:10-md-2187 (S.D. W. Va. Feb. 14, 2012) ECF 164 (24-page PFS with hundreds of questions); Plaintiff Fact Sheet, *In re: Denture Cream Prods. Liability Litig.*, No. 1:09-md-2051 (S.D. Fla. Sept. 23, 2009) ECF 107-1 (32-page PFS with hundreds of questions).

The time for plaintiffs to complete PFSs and provide this basic information about their claims is now, while memories are fresh and documents are readily available, just like "in non-MDL cases, [where] plaintiffs are required to produce information about their claims from the outset." Duke MDL Manual § 1C(iv) (Ex. A). "[U]nreasonable delay in completing Fact Sheets prejudice[s] the defendants' ability to proceed with the cases effectively." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1234 (9th Cir. 2006). The Duke Manual also explains that PFSs should be completed promptly: "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."

Filed in Fourth Judicial District Court
12/1/2015 9:54:46 PM
Hennepin County, MN

Duke MDL Manual § 1C(iv) (Ex. A). Tellingly, every order cited in the Duke Manual's discussion of PFSs required all plaintiffs to complete them promptly upon becoming part of an MDL.[3] Similarly, the Manual for Complex Litigation's exemplar case management order requires "each plaintiff" to file PFSs, including in later-transferred cases. *See* MCL § 40.52.2. The same approach was taken by Judge Perry in the *Bayer Rice* litigation, *see* Case Management Order No. 3, *In re Genetically Modified Rice Litig.*, No. 4:06-md-1811 (E.D. Mo. June 7, 2007), ECF 292, and by Judge Fallon in the *Xarelto* MDL, *see* Pretrial Order No. 13, *In re: Xarelto (Rivaroxaban) Prods Liability Litig.*, No. 2:14-md-2592 (E.D. La. May 4, 2015), ECF 895.

While plaintiffs in this case can and should be required to provide PFSs as promptly as in other MDLs, Syngenta's proposal would give the remaining producer plaintiffs a full ***six months*** to complete the five-page PFS for those with cases already on file, and a full 45 days after initiating suit for those who file cases later—in order to moot any claimed concerns that farmers are too busy, and to accommodate the reality that there are more plaintiffs in this case than in the federal Viptera MDL. Nor can plaintiffs' counsel claim that six months is too short a time period, especially when the executive committee consists of lawyers from at least nine different law firms, and lead counsel's own website touts its "joint venture relationships with fine law firms across the corn belt" and the fact that "we conducted hundreds of town hall meetings across the corn belt to inform farmers and to answer their questions concerning their possible rights against Syngenta." Latest News (July 17, 2015), http://cornsuits.com/how-did-so-many-farmers-hire-your-law-firm-to-file-their-lawsuits-against-syngenta/.

---

[3] *See* Duke Manual § 1C(iv) n.51 (citing *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.* (S.D. Ill. Mar. 3, 2010), n.52 (citing *In re Prempro Prods. Liab. Litig.*, (E.D. Ark. Dec. 6, 2010); *see also* Managing Multidistrict Litig. in Products Liability Cases, *A Pocket Guide for Transferee Judges* (J.P.M.L. 2011), at 31 n.40 (citing *In re: Avaulta Pelvic Support Sys. Prods. Liab. Litig*. (S.D. W. Va. June 7, 2011); *In re: Denture Cream Prods. Liability Litig.*, No. 1:09-md-2051 (S.D. Fla. Sept. 23, 2009).

Filed in Fourth Judicial District Court
12/1/2015 9:54:46 PM
Hennepin County, MN

It is no answer for plaintiffs to assert that equivalent information can be provided as part of an unspecified "claims resolution process" down the road. As a threshold matter, there is no settlement, and plaintiffs cannot cite any authority for indefinitely exempting all but a few bellwethers from providing information to support their claims just because of the possibility of some resolution years down the road, especially when the problems with collecting the information will only get worse as time goes by. Deferring the provision of information until a person-by-person claims process would also be far too late and actually frustrate any efforts to resolve the case as a whole, because each side would need to know the overall size and scope of the litigation for any such discussions even to begin, which in turn requires accurate information about the plaintiffs at the outset, not at the end. Moreover, neither the parties nor the Court would benefit from years of litigation only to learn at the end of plaintiffs who had signed up for the case based on mistaken information or, worse yet, plaintiffs who turned out not to exist.

Finally, it bears emphasis that the MDL court presiding over the federal Viptera litigation recently rejected efforts by plaintiffs to suspend the production of PFSs, emphasizing that "[b]ecause plaintiffs initiated this litigation[,] it is only reasonable to expect them to devote the no more than one or two days of time necessary" to complete PFSs. *See* Order at 2, *In re Syngenta AG MIR162 Corn Litig.*, No. 2:14-md-2591, (D. Kan. Nov. 20, 2015), ECF 1231 (Ex. E). In rejecting plaintiffs' arguments that the PFSs were unduly burdensome, that PFSs were no longer required once the bellwether selection process was complete, and that non-bellwether plaintiffs could provide the information later, the court held that PFSs should be provided by all of the plaintiffs promptly—precisely because the information will be harder to obtain months or years down the road:

> 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

Filed in Fourth Judicial District Court
12/1/2015 9:54:46 PM
Hennepin County, MN

> 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.

Id. All of those reasons apply with particular force here: it is precisely because of the larger number of plaintiffs that PFSs should be required sooner rather than later, so that the parties and the Court have the benefit of getting the information while it is fresh in each producer's mind—especially when Syngenta's proposal offers a timetable that accommodates the larger number of plaintiffs in this case compared to in the federal MDL.

CONCLUSION

For the foregoing reasons, Syngenta respectfully requests that the Court enter an Order requiring all remaining producer plaintiffs to submit a Plaintiff Fact Sheet within six months for those plaintiffs who already have lawsuits on file, with rolling deadlines of 45 days after the initiation of a lawsuit for plaintiffs who file suit thereafter.

Filed in Fourth Judicial District Court
12/1/2015 9:54:46 PM
Hennepin County, MN

Date: December 1, 2015

Respectfully Submitted by:

MASLON LLP

By: */s/ David T. Schultz*
David T. Schultz (#169730)
D. Scott Aberson (#0387143)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
Telephone: 612-672-8200
Facsimile: 612-672-8397
E-mail: david.schultz@maslon.com
scott.aberson@maslon.com

-and –

KIRKLAND & ELLIS LLP
Michael D. Jones (*admitted pro hac vice*)
Edwin John U (*admitted pro hac vice*)
Patrick F. Philbin (*admitted pro hac vice*)
Ragan Naresh (*admitted pro hac vice*)
Patrick Haney (*admitted pro hac vice*)
Suite 1200
655 15th Street Northwest
Washington, DC 20005
Telephone: 202-879-5000
Facsimile: 202-879-5200
E-mail: mjones@kirkland.com
edwin.u@kirkland.com
patrick.philbin@kirkland.com
ragan.naresh@kirkland.com
patrick.haney@kirkland.com

ATTORNEYS FOR SYNGENTA CORPORATION, SYNGENTA CROP PROTECTION LLC, SYNGENTA SEEDS, INC., AND SYNGENTA BIOTECHNOLOGY, INC.

4846-7400-7083