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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
CASE TYPE: Civil Other

In re Syngenta Litigation

Court File No: 27-CV-15-3785
Judge: Thomas M. Sipkins

This Document Relates to ALL ACTIONS

PLAINTIFFS' OPPOSITION TO SYNGENTA'S MOTION FOR 50,000 PLAINTIFF FACT SHEETS

INTRODUCTION

Defendants' Motion for Plaintiff Fact Sheets ("PFS") provides no justifiable reason for this Court to reconsider its decision regarding the use of PFS in this litigation. Syngenta has repeatedly requested that the Court require PFS, and this Court has already rejected that request. This Court's decision was correct at the time it was initially made, and is even more justified now that bellwether cases have been selected.

This Court has already decided the PFS issue. It should not now reverse course and require PFS for each of the approximately 50,000 plaintiffs that have filed, or will soon file, lawsuits in this jurisdiction. This is especially so because the primary justification for use of PFS is not present here. A PFS is intended to provide the parties with preliminary information to aid in creating and implementing a non-randomized bellwether selection process. But given that the parties have already selected the 40 bellwether discovery cases, that purpose would not be served here. Rather, requiring a PFS from each plaintiff would result in an unnecessary diversion of party and judicial resources while providing limited to no utility at this stage of the litigation.

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In addition, requiring a PFS from each plaintiff does not further Syngenta's stated objectives. At bottom, Syngenta advocates for the use of PFS to gather reliable information, arguing that the information is necessary to properly analyze its exposure and the strengths and weaknesses of the parties' positions. Those objectives – and others – are better served by a court order appointing a mediator and requiring that the parties participate in a systematic monthly mediation process beginning in September 2016. By this time core discovery will be concluded, bellwether trial cases will have been selected, and experts will have been designated. This systematic mediation process will enable the parties to determine what plaintiff information is truly necessary to provide Syngenta with a full picture of its exposure and a means to negotiate the architectural framework of a potential settlement, all while promoting judicial economy for the parties involved.

I. THIS COURT HAS ALREADY RULED ON THE PLAINTIFF FACT SHEET ISSUE.

On September 28, 2015, in response to Syngenta's prior attempt to require PFS, this Court directed the parties that "[p]laintiff fact sheets will not be required of all 30,000 Plaintiffs." (Ltr., Sept. 28, 2015, Ex. A, p. 2.) The use of PFS was fully litigated by the parties and, after hearing argument on the issue, this Court provided a comprehensive case management plan, including a bellwether selection plan, a stay of discovery on all non-bellwether cases, and a final determination that PFS are not going to be required of each plaintiff in this litigation. Notwithstanding this Court's directive, Syngenta continues to seek a different result.

The first time Syngenta argued for the use of PFS was on July 31, 2015. This Court subsequently issued an Order on August 5, 2015, stating that while "it intends to coordinate and cooperate" with Judge Lungstrum, it also "recognizes the differences in size, types of parties, nature of the claims, and forum procedures between the two matters." (Memo. of Law, Aug. 5,

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2015, Ex. B, pp. 6-7.) Thus, this Court concluded that it "will exercise independent judgment on all matters arising in this litigation." (*Id.*)

The second time Syngenta advocated for the use of obligatory PFS was on September 24, 2015, when it argued that bellwether selection would be "highly premature" without such documents. (Ltr., Sept. 9, 2015, Ex. C, p. 2.) At the September 25, 2015, hearing, Syngenta vigorously reiterated its argument in favor of PFS. The Court ultimately rejected Syngenta's request, holding that: (1) all discovery will be stayed until bellwether cases are selected; (2) PFS will *not* be required; (3) 40 bellwether cases would be selected; and (4) case-specific discovery would then proceed solely on those bellwether cases. (Ltr., Sept. 28, 2015, Ex. A, p. 2.)

Finally, Syngenta raised the PFS issue for the *fourth* time during the October 30, 2015 hearing. This Court responded by issuing Scheduling Order No. 2, providing:

> Upon entry of this Order and the Coordination Order, the stay of discovery is hereby lifted as to discovery to Defendants and to the named Class Plaintiffs. Discovery as to all other Plaintiffs shall remain stayed; however, such stay shall be lifted as to bellwether discovery plaintiffs, once selected by the Court on December 21, 2015. (Order, Ex. D, ¶ IV, pp. 2-3 (emphasis added).)

Despite Syngenta's repeated arguments, this Court appropriately decided to stay discovery on all cases not selected as potential bellwether cases. The Manual for Complex Litigation, Fourth Edition ("MCL") provides that Courts should utilize "an array of litigation management techniques and procedures" in complex litigation and advocates for the type of approach adopted by this Court. One such example is the MCL's discussion of the Court's ability to designate "lead" cases in complex litigation. (MCL, Ex. E, p. 2.) Under this approach, all other cases are stayed pending the resolution of the designated lead cases. (*Id.*)

Similarly, Minnesota law recognizes that district courts have broad discretion "to issue discovery orders", orders that will be reversed on appeal only upon an abuse of discretion.

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Minnesota Twins Pshp. v. State by Hatch, 592 N.W.2d 847 (Minn. 1999) (*citing Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990).); *accord Deal v. Deal*, 740 N.W.2d 755, 762 (Minn. 2007) (noting that a district court's decision whether to stay discovery "will not be reversed unless the court abused its discretion, exercised its discretion in an arbitrary or capricious manner, or based its ruling on an erroneous view of the law") (internal quotations omitted).

With this latest motion, Syngenta distorts the Court's prior rulings by suggesting that "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." But there is no such condition in the Court's September 28, 2015 letter. In so arguing, Syngenta further ignores that this Court has already heard nearly identical arguments on the use of PFS and rejected them. Simply put, this Court's statement could not be clearer: "Plaintiff fact sheets will not be required of all 30,000 Plaintiffs." This Court should once again reject Syngenta's argument and deny its request for obligatory PFS from each plaintiff.

II. PLAINTIFF FACT SHEETS ARE NOT JUSTIFIED.

Syngenta's latest attempt to convince this Court to require all 50,000 plaintiffs to produce PFS contains an about-face in rationale. While Syngenta has previously argued that PFS are necessary to select bellwether cases, it now abandons that argument in light of the fact that the parties have successfully selected the 40 bellwether plaintiffs. Rather, Syngenta now argues that it requires PFS to gather accurate information that will help identify the strengths and weaknesses of the case. But this new argument ignores a critical fact, namely that PFS are primarily a bellwether selection tool. Syngenta cannot point to any decision or case law supporting the use of PFS *after* bellwether selection has been completed. Regardless, PFS are not

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an efficient or appropriate means to satisfy Syngenta's stated ends. A closer look at Syngenta's argument, and the sources it relies upon, reveals that the use PFS in this case would not serve Syngenta's proffered purposes and would do little more than delay this proceeding and result in a waste of party and judicial resources.

A. Plaintiff Fact Sheets are a Bellwether Selection Tool.

During the October 25, 2015 hearing, Syngenta argued that it needed PFS from all Plaintiffs in order to select bellwether cases. To be sure, PFS may be a useful bellwether selection tool where the court orders parties to pick bellwether nominees in a non-randomized fashion. *See In re Stryker Rejuventata and Abgil Hip*, MDL No. 13-2441, 2014 WL 2808919, at *2 (D. Minn. June 20, 2014). One such example is in personal injury cases where a PFS can be useful to ascertain which product was purchased, where that product was purchased, and where the allegedly harmful exposure occurred. *See, e.g.*, *In re Welding Fumes Litig.*, MDL Dkt. No. 1535, 2010 WL 2403355, at *4 (N.D. Ohio, June 11, 2010); *In re Diet Drugs*, MDL Dkt. No. 1203, 1999 WL 387322, at *1 (E.D. Pa., May 19, 1999); *In re Welding Fume Products Liab. Litig.*, 245 F.R.D. 279, 296 & n.95 (N.D. Ohio Sept. 14, 2007). These types of toxic exposure cases often utilize PFS to categorize the type of bodily injury sustained. *In re FEMA Formaldehyde*, MDL Dkt. No. 07-1873, 2008 WL 5217594, at *19 (E.D. La., Dec. 12, 2008). However, similar issues are not present here and the parties agreed on the limited additional information required to ensure that they were able to select a representative cross sample of the various types of claims. The parties have already been able to randomly select a group of plaintiffs representing non-producers and a mix of small, mid, and large size producers proportionally from all the relevant states. As a result, the use of PFS in this case provides no additional value because bellwether selection is already complete.

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B. Requiring Plaintiff Fact Sheets Would Waste Time and Resources.

Given that bellwether selection is complete, the only apparent purpose for Syngenta's repeated requests for PFS is to divert Plaintiffs' counsels' time and resources during the critical discovery portion of this litigation. Syngenta argues that its PFS request is reasonable because it allows a six-month time period to complete the process. (Def. Mot., pp. 8-9.) But this argument belies the reality that those six months are needed to focus on bellwether discovery and trial case selection, core discovery as to liability, and expert disclosures.

Syngenta relies heavily on a decision by the Federal MDL Magistrate to argue that PFS should be required in *this* case. The Federal MDL Magistrate, handling a small number of individual cases, reasoned that each PFS would require "only one or two days of time." If that same time estimate is used in this case, Plaintiffs' counsel must ensure that more than 275 PFS are completed *per day* to meet Syngenta's deadline. Magistrate Judge O'Hara's observation that PFS are appropriate as a portion of the bellwether selection process, in a case with a few hundred farmers, does not justify requiring a PFS from 50,000 farmers after bellwether selection is already complete.

In addition to diverting party resources, Syngenta's request would inevitably create additional judicial burdens as well. This fact is well demonstrated by a simple Westlaw search. A search for "Plaintiff Fact Sheet" among all federal cases on Westlaw results in 104 different published cases. Forty-five (45) of these cases involve a single mass tort, MDL 1873, *In re FEMA/Formaldehyde*. In that case, the Judge reflexively granted a motion for PFS and after tens of millions of dollars were spent by Plaintiffs' lawyers, the Court found itself immersed in

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overwhelming motion practice regarding individual PFS disputes.[1] This has also occurred in other MDL torts where the courts have been forced to divert judicial resources to dismiss a miniscule percentage of cases amongst thousands. *See In re Trasylol Prods. Liab. Litig.*, Case No. 08-MD-01928, 2012 WL 1662107 (S.D. Fla. May 9, 2012), aff'd, 503 Fed. App'x 850 (11th Cir. 2013). Requiring PFS in this case will provide little to no benefit to the litigation, but will result in this Court hearing hundreds of individual motions and disputes. Chief Justice Gildea's May 22, 2015 Order made clear that she wanted to "preserve the resources of the parties and the judiciary." (Order, May 22, 2015, Ex. F, p. 2.) Given that framework, Syngenta's motion should be denied.

C. Syngenta's Reliance on the Duke Manual is Misplaced.

Syngenta avoids the MCL, but quotes repeatedly from Duke's MDL Standards and Best Practices Manual. There are at least three problems with Syngenta's approach.

First, unlike the MCL 4th, which is drafted by the Federal Judiciary Center, the Duke Manual was drafted by six practitioners, some of whom were paid to espouse views on behalf of frequent litigants in complex cases. For example, Syngenta argues that denying its motion will "invite the filing of claims without adequate investigation." (Def. Mot., p. 17.) This quote is derived from a paper written by John H. Beisner[2], who is referring to plaintiffs who file suit repeatedly, a situation not relevant here.[3]

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[1] *See, e.g., In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873, 2012 WL 1664252 (ED. La. May 11, 2012).

[2] In addition to serving on the editorial board of the Duke Manual, Mr. Beisner has represented Syngenta in past litigation regarding genetically modified corn. *Randy Blades v. Syngenta Seeds, Inc.*, 2005 WL 6414740 (8th Cir Mar. 7, 2005) at Ex. 16 (listing Mr. Beisner as counsel of record for Syngenta).

[3] *Duke MDL Standards and Best Practices*, Ex. G, p. 11, n.48 (citing John H. Beisner & Jessica D. Miller, *Litigate the Tort, Not the Mass,* WLF (2009). ("Indeed, there is evidence that

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Second, Syngenta's repeated invocation of the Duke Manual ignores that document's own introduction, which states that "[t]he goal of this report then is not to create a one-size-fits-all solution that works across the array of MDLs." Duke, Ex. G, p. ii. The authors do not suggest that the practices discussed are the only practices and acknowledge that they are not best for every MDL. *Id*. at iii. The introduction also states that "the only clear rule in MDL may be that every MDL is different and requires individualized solutions to be effective." *Id*. at iv. This Court has already laid out a well-reasoned case management plan to deal with the unique issues presented by this complex litigation and requiring PFS from all plaintiffs would unnecessarily interrupt the progress of the case.

Third, Syngenta ignores that "a host of other differentiating factors makes the promulgation of any one-size-fits-all set of detailed rules impossible." *Id*. at iv. The cases cited by the Duke Manual for the proposition that plaintiffs must complete PFS promptly involved either a very small number of plaintiffs[4] or pharmaceutical and medical supply companies where PFS were agreed to[5] because medical record authorizations were needed to evaluate potential bellwethers in personal injury cases. None of these reasons to use PFS are present here.

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many claimants are 'rolodex' plaintiffs – persons whose counsel find a way to assert claims on their behalf in multiple successive mass torts.").

[4] Motion, p. 8, n.3, citing *Avaulta Pelvic Support Sys. Prods. Liab. Litig*., 746 F. Supp. 2d 1362 (JPML, Oct. 12, 2010), a case with only 39 actions when transferred into MDL 2187 and involving a PFS agreed to by the parties. Motion, p. 8, n.3, citing *In re Denture Cream Prods. Liab. Litig.*, 624 F. Supp. 2d 1379 (JPML, June 9, 2009), a case with only 19 actions when transferred into MDL 2051 and involving an agreed to PFS.

[5] *See In re Yasmin & Yaz*, MDL 2100, CMO 12 (S.D. Ill., Mar. 3, 2010), ¶ A(1), p. 1 ("The parties have agreed upon a Plaintiff Fact Sheet ("PFS").") (cited in Motion, p. 7); *In re Avaulta Pelvic Support Sys. Prods. Liab. Litig.*, MDL 2187, CMO 4 (S.D. W. Va., June 7, 2011) (cited in Motion, pp. 7 & 8, n.3); *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, MDL 1407, CMO 6 (PFS submitted by agreement) (cited in Motion, p. 7); *In re Genetically Modified Rice Litig.*, MDL 1811, CMO 3, p. 2 ("The parties have reached agreement on the form and content of the PFS.") (cited in Motion, p. 8); *In re Xarelto (Rivaroxaban) Prods. Liability Litig.*,

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D. Syngenta's Proffered Rationales for Requiring Plaintiff Fact Sheets are Misplaced.

Syngenta argues PFS should be required for three main reasons: (1) to prevent improper lawsuits, (2) for use in arguing class certification, and (3) to gather accurate information in order to enable assessment of the strengths and weaknesses of the case. Each of these arguments are addressed below.

1. PFSs are Not Necessary to Prevent Improper Lawsuits.

Syngenta argues that not requiring a PFS "raise[s] concerns that lawsuits will be filed without adequate investigation," and that the need for a PFS "is particularly acute in cases like this one, in which attorneys have aggressively solicited clients that they do not really know." (Def. Mot., 4-5.) This argument has no merit.

Syngenta argues that this case involves "aggressive solicitation of clients" and "inadequate investigation before filing claims" and that PFS are the only means to remedy this purported problem. To support its accusation of "aggressive solicitation," Syngenta cites to a website from Shields Law Group, a Kansas City firm unassociated with any lawyer on the Plaintiffs' Executive Committee appointed by this Court. Syngenta also quotes from a website (www.lostcornincome.com/faqs/), but ignores the section of that same website that advises potential claimants to collect: (1) crop insurance records, (2) FSA Form 578s, and (3) grain elevator receipts. These documents are similar to those utilized to settle the GMO Rice litigation and will provide Syngenta accurate information relating to each Plaintiff in the event of settlement negotiations in this case. Providing this type of information, including government documents, is the best method for ensuring that all parties have accurate data.

MDL 2592, PTO 13 (cited in Motion, p. 8); *In re Prempro Prods. Liab. Litig.*, MDL 1507, Order re Matters Considered at April 7, 2004 Hearing, (S.D. Ill., Mar. 3, 2010), p. 1.

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2. Plaintiff Fact Sheets Should Not be Required for Class Certification Purposes.

Syngenta suggests that "information called for by the PFS is also relevant to the question of class certification." (Def. Mot., p. 5.) But in contravention of the normal class action procedures, Syngenta seeks to require PFS from non-class representative plaintiffs. Most of the plaintiffs in this litigation intend to prosecute individual and not class claims. And as this Court is aware, counsel for the vast majority of Plaintiffs in this action (more than 45,000) have signed a Joint Prosecution Agreement, whereby those clients will not be included in any class action sought to be certified in the federal MDL. (Joint Prosecution Agree., Ex. H, p 14, ¶(2)(g)(1).) Similarly, Plaintiff Co-Lead Counsel, Lew Remele and Frank Guerra, and Minnesota Class Plaintiffs Co-Counsel, Bill Sieben and Dan Gustafson, are actively collaborating in prosecuting this litigation and do not intend to include individual plaintiffs in the class action.

Moreover, Syngenta will be able to obtain whatever information it deems necessary to contest class certification via discovery from the class representatives and 40 bellwether discovery plaintiffs. Appropriately, this Court has lifted its discovery stay with respect to these Plaintiffs and Syngenta has sent written discovery to, and is about to depose, named class representatives who are both Minnesota producers[6] and non-producers.[7] Additionally, through the bellwether discovery process, Syngenta will conduct both written and deposition discovery from nine additional Minnesota producers and two additional Minnesota non-producers. Given the robust discovery that is likely to take place in this case, there is no doubt that Syngenta will have ample information for its efforts to contest any motion for class certification.

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[6] On December 4, 2015, Syngenta submitted its "First Set of Requests for Production to Named Class Representatives-Producer Plaintiffs."

[7] On December 4, 2015, Syngenta submitted its "First Set of Requests for Production to Named Class Representatives-Non-Producer Plaintiffs."

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Courts have refused to consider PFS information as evidence supporting class certification, while others have limited PFS production to just class representatives or those stating class allegations. *In re Yasmin & Yaz*, MDL No. 2100, 2012 WL 865041, at *6 (S.D. Ill., Mar. 13, 2012) (refusing to consider PFS as evidence in resolving Plaintiffs' motion for class certification); *In re Aredia and Zometa*, No. 3-06-1760, 2011 WL 2182824, at *3 (M.D. Tenn., June 3, 2011) (beginning discovery with PFS required only from putative class plaintiffs). As Judge Susan Richard Nelson explained in the NHL Concussion Litigation:

> Courts typically limit discovery to named plaintiffs or class representatives. *See, e.g., In re Qwest Commc'ns Int'l, Inc. Secs. Litig.*, 283 F.R.D. 623, 625 (D. Colo. 2005) (noting, in a putative class action, that non-lead plaintiffs are not generally subject to discovery); *Mehl v. Canadian Pac. Ry.*, 216 F.R.D. 627, 631–32 (D. N.D. 2003) (finding no justification for compelling discovery from unnamed class members, and limiting discovery to the named plaintiffs in a putative class action); *In re Lucent Tech., Inc. Secs. Litig.*, No. 2:00–CV–621, 2002 WL 32815233, at *1 (D. N.J. July 16, 2002) (stating, in an MDL class action that non-lead plaintiffs were to be treated as passive class members and were not subject to discovery); *In re Folding Carton Antitrust Litig.*, 83 F.R.D. 260, 264 (D. Ill. 1979) (stating, "Named plaintiffs are always subject to discovery, while absent class members are not subject to discovery except under special circumstances."). . . . Consistent with other cases involving putative class actions, *see, e.g., Mehl*, 216 F.R.D. at 631–32, the Court limits initial discovery to the six Named Plaintiffs. If, however, Plaintiffs seek discovery of the NHL regarding a broader class of Plaintiffs who have filed suit, in the interests of parity, the Court will require the remaining 24 Plaintiffs who have brought suit but are "absent" putative class members to comply with Defendant's discovery requests.

In re Nat'l Hockey League Players' Concussion Injury Litig., MDL No. 2551, 2015 WL 1191272, at *4 (D. Minn., Mar. 16, 2015). Syngenta's suggestion that there may be information relevant to class certification is contrary to the general class action discovery practice and certainly does not justify requiring PFS from 50,000 plaintiffs in this case.

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3. Plaintiff Fact Sheets are Not Necessary to Gather Accurate Information in Order to Assess the Strengths and Weaknesses of the Case.

Syngenta's primary argument is that PFS are necessary to gather accurate information in order to assess of the strengths and weaknesses of the case.

First, Syngenta argues that PFS are necessary "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." (Def. Mot., p. 4.) Syngenta makes a series of arguments that PFS are necessary to ensure accurate information. However, there are public documents available that allow Syngenta to "know the overall size and scope of the litigation." (Def. Mot., p. 4, 6, 9, 10.) Syngenta has told Special Master Van de North that it is producing 26,000 Viptera and Duracade licensing agreements in the federal MDL. Thus, Syngenta already possesses the information necessary to determine which farmers grew its seed, and which did not. Further, the size of the corn crop has been documented in Farm Service Administration ("FSA") Form 578s. Similarly, United States Department of Agriculture ("USDA") statistics provide the parties accurate reports regarding the total number of acres and bushels of corn grown each crop year, and the number of corn acres harvested and corn bushels fed as silage. These government documents are more revealing to Syngenta in its purported effort to "know the overall size and scope of the litigation" than PFS from individual farmers. (Def. Mot., p. 4, 6, 9, 10.)[8]

Second, there are government documents available for the overwhelming majority of farms in the United States that can provide the parties reliable information regarding plaintiffs' crop production. In truth, Syngenta's argument demonstrates why the FSA Form 578 documents

[8] This issue becomes more acute when considering clients who have been inventoried, but not filed. Requiring Plaintiffs who have made their claim known to fill out a PFS, while other farmers wait while enjoying a tolling under *American Pipe*, does little to assist Syngenta in its professed goal of ascertaining the scope of the litigation.

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that are already being provided to Syngenta by Plaintiffs' counsel are far more valuable, and far more reliable, than an individual farmer's recollection of his or her production in crop years 2011 through 2015.

Third, Syngenta's three examples (out of more than 30,000 submitted on October 19, 2015) of purported inaccuracies further underscores why government documents should be used instead of PFS.

Syngenta's first example of an alleged error involves Plaintiff Jacqueline Montony. But Mrs. Montony does not present a compelling case for requiring 50,000 others to complete a PFS. Mrs. Montony is an elderly woman residing in Arizona, who owns 52 acres in Iowa that are farmed by others. Further, Syngenta selected Mrs. Montony as a bellwether discovery plaintiff, meaning that any questions regarding her crop production can and will be satisfied during bellwether discovery.

Syngenta next notes that there were differences in the acres disclosed by plaintiff Margery Houck in her October 19, 2015 estimate and the discovery information she provided on November 12, 2015. (Def. Mot., p. 6.) But that difference is the very reason not to rely on PFS, which rely on a farmer's individual recollection, and to instead rely on the FSA 578 forms already being provided by Plaintiffs. Syngenta further overlooks the fact that Plaintiffs' counsel had informed Syngenta and Judge Van de North that the initial corn acreage estimates should not be relied on because share percentages were not being asked for appropriately, many had not filled them in at all, and deciphering handwriting was causing errors. In fact, Plaintiffs explained that they were collecting FSA Form 578s and crop insurance application forms to alleviate these problems. Yet Syngenta alleges that it was somehow misled. As for Mrs. Houck, the mistake was

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a simple error resulting from an indecipherable decimal point on her Farm Information Sheet, which listed "76.8" acres but was transcribed as "768" acres by the data entry technician.

Farm Information Sheet

I. **PARTY'S BACKGROUND INFORMATION**

Entity Name (Corporation, Trust, LLC, etc): Margery Houck

FSN	Farm Name	Share %	'13 Corn Acres	'13 Soybean Acres	'13 Wheat Acres	'13 Milo Acres	'14 Corn Acres	'14 Soybean Acres	'14 Wheat Acres	'14 Milo Acres
		39.3%	80				167.5			
		33.3%	25				156.0			
		33.3%	768							

This same type of transcription error will inevitably occur if technicians transcribe data from handwriting. In contrast, data transcribed from FSA Form 578s or crop insurance forms dramatically decreases the chance for error.

As its third example, Syngenta cites differences in the acres disclosed by James F. Jessup. (*Id.*, p. 6.) Mr. Jessup's Farm Information Sheet appears to say 700 acres for 2013 and 100 acres for 2014. But the 700 should have been 100. Again, these types of inadvertent errors only support the argument that PFS are not the best source to obtain information.

Entity Name (Corporation, Trust, LLC, etc): James F. Jessup
State/County of Registration: State: INDIANA County: ELKHART
Farmer Name/Entity Representative: First: ~~ALBERT~~ Middle: W. Last: JESSUP Suffix:
Mailing Address: 6350 MINNEWASHTA WOODS
City: EXCELSIOR State: MN Zip Code: 55331
Primary Phone: 612-860-8193 Email: LOYALTYCO@YAHOO.COM
Type of Operation: (Farmer, Landlord, Purchaser, Elevator, Exporter, Insurer, Other): LANDLORD
2013: Total Corn Acres: 700 (your estimate is sufficient here)
2014: Total Corn Acres: 100 (your estimate is sufficient here)

Even assuming that more than three out of 50,000 plaintiffs have provided inaccurate information, it is doubtful that PFS are the best means to rectify such errors. Rather, government documents are a far more accurate source of information than the recollections of 50,000 farmers

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as to their crop yields from several years ago. When the GMO Rice Litigation was settled, payments were made based on data from FSA Form 578s, instead of from PFS. This Court should reject Syngenta's request for 50,000 handwritten PFS forms and instead permit the parties to rely on the more accurate FSA 578s.

The second prong of Syngenta's argument is that "PFSs are important" because they enable the parties and the Court "to assess the strengths and weaknesses of the global litigation" (Def. Mot., p. 4, 6.) Paradoxically, Syngenta then rejects the notion that data should be collected as part of a resolution process, because "there is no settlement." (*Id.*, at 9.)

It is perfectly normal for a corporate defendant to declare to the Court and other litigants that it will not settle. Nevertheless, the information gathering process should be tailored to providing the parties the information necessary to discuss a global resolution if possible. Perhaps the most useful method for gaining such information is bellwether trials. With bellwether discovery selection completed, the parties should focus their time and resources on preparing for trial, not PFS.

III. THIS COURT SHOULD ORDER A SYSTEMATIC-MONTHLY MEDIATION PROCESS.

Rather than requiring PFS, Plaintiffs propose an alternate plan to preserve party resources and maximize judicial efficiency while moving this litigation forward. Specifically, Plaintiffs suggest adopting an approach similar to the Unified Case Management Plan entered by Judge David R. Herndon for *In re Pradaxa* ("Pradaxa Order"). *In re Pradaxa*, MDL 2385, CMO 6 (S.D. Ill., Oct. 3, 2012) (Ex. I). Plaintiffs propose that this Court order the parties to participate in a systematic, monthly mediation process. Through this process, the parties will designate settlement counsel, select or propose to the Court a mediator, and meet monthly with the selected

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mediator beginning in September 2016. Through this process, the parties can also identify and begin collecting the information required to move this litigation towards a conclusion.

A. In re *Pradaxa*.

As background, the *Pradaxa* Order provided:

> a. . . . the parties (MDL plaintiffs, state court liaison from each state court jurisdiction and defendants) will each designate settlement counsel to be the primary contact for settlement discussions and agree on a Mediator to facilitate settlement negotiations. In the event the parties are not able to agree on a Mediator, they will notify the court jointly on or before July 2, 2013, through a single, joint letter requesting the designation of a Mediator by this Court. Such letter shall not exceed two pages in length, and may identify up to three proposed Mediators proposed by each side.
>
> . . .
>
> b. . . . the parties shall meet and confer at least one time per month to discuss settlement. Initial conferences may take place in person, via video conference, or by other means at the parties' discretion, provided the designated Mediator is a part of at least one such communication per month. No later than September, 2013, at least one in-person session shall have taken place at a site mutually agreed upon by the parties. Thereafter, negotiations may continue either in person or as agreed to by the parties and the Mediator.

Pradaxa stands out as a model of efficiency. *Pradaxa* involved thousands of plaintiffs but was resolved via settlement on May 28, 2014, just nineteen months after the issuance of the *Pradaxa* Order. The parties' monthly meetings with the mediator created a methodical process through which settlement could occur.

B. Adopting an Approach Derived From the *Pradaxa* Order Would Benefit The Parties and the Litigation.

Issuing an Order similar to the *Pradaxa* Order satisfies six concepts delineated in the MCL.

First, the MCL repeatedly stresses the need for an order regarding settlement negotiations in complex litigation. Indeed, the MCL advises that "[a]t each conference, the judge should

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explore the settlement posture of the parties and the techniques, methods, and mechanisms that may help resolve the litigation short of trial." MCL, Ex. E, p. 40, § 11.214. The MCL also stresses that Fed. R. Civ. P. 16(c) requires counsel to discuss a plan for possible settlement before the initial conference, that a case management plan be prepared that should evaluate "prospects for settlement . . . or possible referral to mediation," and that "[t]he judge can encourage the settlement process by asking at the first pretrial conference whether settlement discussions have occurred or might be scheduled." *Id*. at p. 40, § 11.214, p. 38, § 11.211, p. 167.

Second, the MCL endorses the use of designated settlement counsel:

> The litigating attorneys may not be suited to conduct settlement discussions and may be hampered by personal antagonisms developed in the course of the litigation. In such cases, consider suggesting that one or more of the parties engage or designate special settlement counsel separate from lead and liaison counsel. *Id*. at p. 27, § 11.224.

Allowing parties to designate counsel for their own settlement negotiation team also ensures that all constituents are fairly represented. Beginning settlement discussions with designated settlement counsel allows those directing the litigation to focus on the task at hand, permitting the litigation and settlement efforts to proceed on parallel tracks. *Id*. at p. 168. Thus, an order mandating such monthly settlement conferences and "requiring that the parties or representatives attend" is an effective technique that this Court should utilize.

Both the Minnesota and Federal Rules of Civil Procedure authorize judges to appoint a special master to aid in mediation of settlement negotiations. *See* Minn. R. Civ. P. 53; Fed. R. Civ. P. 53; *see also* MCL, Ex. E, p. 114, §§ 11.52, 13.13. The MCL notes that "special expertise" is especially "appropriate . . . when a complex program for settlement needs to be devised." *Id*. at p. 14, §§ 11.51-52. Plaintiffs' propose that the parties meet and confer to try to choose a recognized mass tort mediator.

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Under Scheduling Order No. 2 entered by Judge Lungstrum in the Federal MDL, and Scheduling Order No. 2 entered by this Court, all bellwether case discovery, bellwether trial plaintiff selection, and core discovery on Syngenta, will be completed in both the federal MDL and Minnesota coordinated proceedings by July 2016. (Ex. D; Ex. J) Plaintiffs propose that the court-ordered monthly settlement meetings with the settlement Special Master or mediator begin thereafter, in September 2016. As the MCL notes, "[a]lthough settlement should be explored early in the case, the parties may be unwilling or unable to settle until they have conducted some discovery. The benefits of settlement are diminished, however, if it is postponed until discovery is completed." MCL, p. 169.

Recognizing "the large sums involved, the high number of parties and counsel, and the complexity of the issues magnify the difficulty of achieving settlement," the MCL recommends that both "[s]tate and federal judges should consider conducting joint comprehensive settlement negotiations." *Id.* at 169, 167. Mass tort settlements are often consummated only after numerous negotiating sessions over many months. For these reasons, this Court should order that the parties begin the mediator-assisted settlement negotiation process in September 2016.

The undersigned Minnesota Plaintiff Co-Leads have conferred about the request for monthly mediation with the Federal MDL Co-Leads. The Federal Co-Leads generally agree with the settlement process outlined here and believe that process should be coordinated and begin in or around September 2016 after the Federal court determines whether one or more of the proposed classes should be certified. The Federal Co-Leads also agree that an important part of that process is appointing a Special Master for settlement who has substantial experience in complex multidistrict litigation and has the respect of all parties. After consultation with

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Syngenta and other interested parties in the federal MDL, the Federal Co-Leads intend to present a coordinated settlement process proposal to the Federal MDL court at an appropriate time.

Plaintiffs' proposal does not call for the selection of designated settlement counsel or proposed mediators for several months. During that time, the Minnesota Plaintiff Co-Leads commit to coordinate with their counterparts in the Federal MDL so that the Plaintiffs will speak with one voice when negotiations with Syngenta begin.

In the mass tort context, negotiations typically progress in two sequential steps. First, the parties ignore the issue of "how much," and instead negotiate only the framework of a potential master settlement agreement, and what proof plaintiff is required to provide to participate in the resolution program. This way, the parties can ascertain the size and scope of the plaintiff settlement census, and the potential total cost of a settlement given variations in compensation to individual plaintiffs or groups thereof. After the parties have forged consensus on the architecture of the deal, the parties, and the Defendants' insurers, come together to negotiate the financial aspects and total value of such a deal.

CONCLUSION

Plaintiffs' proposed mediation process will address all of Defendants' purported concerns regarding its need to ascertain the size and scope of the case in an efficient manner without diverting limited party and judicial resources during a critical phase of this litigation. Conversely, Syngenta's renewed attempt to require PFS from each of the 50,000 or more litigants in this case will delay the litigation and provide little or no benefit towards resolution. Accordingly, Plaintiffs respectfully request that this Court deny Syngenta's Motion for Production of PFS, and instead enter an Order requiring a systematic, monthly mediation process.

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Respectfully submitted.

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