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STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

In re: Syngenta Litigation

Case Type: Civil Other
Hon. Thomas M. Sipkins

This Document Relates to: ALL ACTIONS

FILE NO. 27-CV-15-3785

ORDER

**** CONFIDENTIAL – FILED UNDER SEAL ****

The above-entitled matter came on for hearing before the Honorable Thomas M. Sipkins, Judge of District Court, on September 16, 2016, pursuant to Plaintiffs' motion for class certification of a Minnesota producer (farmer) class.

Attorneys Daniel E. Gustafson, William R. Sieben, Amanda M. Williams, and Karla M. Gluek appeared on behalf of Plaintiffs.

Attorneys Patrick F. Philbin, Patrick Haney, Edwin J. U, and Michael D. Jones appeared on behalf of Syngenta.

Attorney Michael K. Johnson appeared on behalf of four putative class members.

Based on all the files, records and proceedings herein, together with the arguments of counsel, the Court makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' motion for class certification is granted. The Court certifies the following class:

> All Minnesota producers that priced corn after September 2013. Excluded from the class are any corn producers that purchased or planted corn containing the MIR 162 trait (including Duracade); the Court, and its employees; Syngenta, and its parents, subsidiaries, affiliates, employees and directors during the relevant time period. A "producer" is a person or entity listed as a producer on an FSA-578 form filed with the United States Department of Agriculture.

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2. Leroy Edlund, Roger Ward, Grant Annexstad, and Nathan Thompson are designated as class representatives.

3. Daniel E. Gustafson and William R. Sieben were previously appointed as Co-Lead Class Counsel on an interim basis, and will continue in their leadership roles as Co-Lead Class Counsel.

4. On or before November 18, 2016, Co-Lead Class Counsel shall submit a proposed class notice to the Court for approval along with a proposed plan for providing notice to class members.

5. The accompanying Memorandum of Law is incorporated herein.

BY THE COURT:

Dated: 11-3-2016

Thomas M. Sipkins
Judge of District Court

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MEMORANDUM OF LAW

I. Factual and Procedural History[1]

Defendant Syngenta Seeds Inc. (n/k/a Syngenta Seeds LLC) ("Syngenta")[2] is a subsidiary of Syngenta Corporation with its principal place of business in Minnetonka, Minnesota. Syngenta develops, produces, and sells corn seed. In the years before 2007, Syngenta developed a new genetically modified ("GM") corn trait called MIR 162 designed to control above-ground corn pests. Syngenta commercialized corn seed with the MIR 162 trait under the brand name Agrisure Viptera ("Viptera") and later Agrisure Duracade ("Duracade") which added Event 5307.

On August 31, 2007, Syngenta applied to the United States Department of Agriculture ("USDA") to obtain approval for the sale of products containing MIR 162. The USDA deregulated MIR 162 in April 2010, which allowed Syngenta to sell Viptera to U.S. farmers. Syngenta applied for import approval of Viptera from China in March 2010. While Syngenta's application was pending, Viptera entered the U.S. corn supply and shipments were sent to China. Beginning in November 2013, China rejected shipments of corn that tested positive for the presence of MIR 162. China eventually approved the import of Viptera in December 2014. In 2014, Syngenta applied to China for import approval of Duracade. To date, China has not approved Duracade for import.

Farmers throughout the United States claim that Syngenta was negligent in its commercialization of Viptera and Duracade. They allege that in its USDA petition and other communications, Syngenta falsely represented: (1) that there should be no effects on the U.S.

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[1] The recitation of factual findings is record evidence material to the Court's rigorous analysis of the class certification requirements but not conclusive findings of fact at this pretrial stage.

[2] There are six Syngenta-related companies identified as Defendants in this Litigation. Syngenta Seeds Inc. is the only Defendant named in the Second Amended Class Action Complaint.

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maize export market; (2) regulatory filings were in process for China; and (3) it would enter into stewardship agreements with farmers that would require channeling MIR 162 away from markets where it was not yet approved for import. Plaintiffs allege Syngenta knew China was a key export country but misled Plaintiffs by misrepresenting and omitting facts about the importance of China and the timing of Viptera import approval in China.

According to the farmers, China's rejection of U.S. corn caused corn prices to drop in the United States. Producers use several different types of pricing contracts when selling corn, including: spot sales, hedge-to-arrive, basis contracts, forward contracts, average price contracts, participation in a cooperative, options to hedge risk, and consignment sale. Some farmers use more than one pricing mechanism to sell different portions of the same crop. Regardless of the type of pricing, producers assert they were harmed by lower prices for corn caused by the Chinese rejection of corn contaminated with MIR 162.

Thousands of producers, as well as grain handlers and exporters, filed lawsuits based on these allegations surrounding Syngenta's commercialization of Viptera and Duracade in various federal and state courts. The majority of individual producer claims are filed in this action and number approximately 50,000. Approximately 800 federal cases are pending in a multidistrict litigation proceeding in the United States District Court for the District of Kansas, captioned *In re Syngenta AG MIR162 Corn Litigation*, MDL Docket No. 2591, before U.S. District Judge John W. Lungstrum ("Federal MDL"). Three additional federal actions, involving more than 2,800 plaintiffs, are filed in the United States District Court for the Southern District of Illinois before U.S. District Judge David R. Herndon and about 200 cases are pending in the Illinois First Judicial Circuit Court before Judge Brad K. Bleyer. In addition, Cargill and Archer Daniels Midland have initiated related lawsuits against Syngenta in state courts in Louisiana.

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Lead Counsel in the Federal MDL and Lead Counsel in this litigation entered into an Amended and Restated Joint Prosecution Agreement dated June 18, 2015 ("JPA"). The JPA states, *inter alia*, that individual producers whose counsel executed the JPA will be excluded from any class proposed by plaintiffs in the Federal MDL and the individual producers agreed not to oppose class certification. Lead Counsel in this action executed and circulated a Minnesota Participation Agreement ("MPA"). The MPA provides that individual producers represented by counsel that execute the MPA will be excluded from any class proposed by Plaintiffs and such producers agree not to contest class certification. Counsel that sign the MPA must provide Lead Counsel a list of the applicable cases and a declaration stating, "We possess records identifying the names of such producers so that they can be excluded from any class in the above-captioned multidistrict litigation based on objective criteria."

Currently before the Court is a motion for class certification. In the Second Amended Minnesota Class Action Master Complaint for Producers ("SAC"), putative class action Plaintiffs ("Plaintiffs") assert claims for negligence, violation of the Minnesota Unfair Trade Practices Act ("MUPTA"), and strict liability duty to warn. Plaintiffs seek certification of a class of all Minnesota producers that priced corn after September 2013, excluding corn producers that purchased or planted Viptera or Duracade. The current motion is brought by four named class representatives, Leroy Edlund, Roger Ward, Grant Annexstad, and Nathan Thompson, on behalf of a class of all Minnesota producers. The USDA's 2012 Census of Agriculture indicates there are over 30,000 corn farms in Minnesota. From 2011 through 2013, Syngenta corn comprised between 2-3% of the total corn acreage in Minnesota. Of this amount, there were very few Minnesota farmers that purchased Syngenta products containing MIR 162. Class counsel have

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submitted a list indicating approximately 9,081 Minnesota producers that will be excluded from the class pursuant to the MPA procedure for submitting a list and declaration.

In support of their motion, Plaintiffs retained two agricultural economists to study, measure, and explain the common impact of Syngenta's conduct on U.S. corn prices and determine a method to calculate class-wide damages. Dr. Bruce A. Babcock ("Babcock") is a Professor of Economics at Iowa State University's Biobased Industry Center who has studied commodity markets, particularly the corn market, for more than 25 years. Dr. Colin A. Carter ("Carter") is a Distinguished Professor of Agricultural and Resource Economics at the University of California, Davis who has studied commodity markets for 36 years.

Syngenta opposes certification of a class. In support of its opposition, Syngenta submitted the expert reports of Walter Thurman ("Thurman"), Charles Finch ("Finch"), and Daniel Fischel ("Fischel"). Syngenta did not challenge Drs. Carter and Babcock under Rule 702 of the Minnesota Rules of Evidence or the two-prong *Frye-Mack* test used in Minnesota state courts. Syngenta did not contest the experts' qualifications or methodology.

According to Dr. Carter, corn is an integrated market where demand and supply curves are relatively inelastic, meaning a relatively small shift in the demand or supply will result in a comparatively large change in price. Dr. Carter notes that when a foreign market closes, "The drop in price is relatively large even if the shrinkage in exports is a small share of production, because the price must fall to clear a market in which both supply and demand are inelastic." With respect to supply and demand, Dr. Babcock states, "[b]ut for the presence of MIR 162 in the U.S. corn supply, China would have imported far more U.S. corn than they did. Hence demand for U.S corn would have been higher and … a higher demand from China would have resulted in a higher price of corn to U.S. growers." Syngenta's expert, Thurman, however,

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claims that China's actions did not change the overall export demand for U.S. corn and that other outlets absorbed the reduction in China exports. Fischel opines that despite the issues with MIR 162, U.S. exports to China would have declined due to other market factors.

According to Dr. Babcock, "Fundamental economic forces determine U.S. corn prices." The price for corn is equal to the Chicago Board of Trade ("CBOT") futures price plus a "basis," which is controlled by local supply and demand and shipping costs. Dr. Carter states that the CBOT futures market "is spatially integrated and informationally efficient, which means that prices tend to react quickly and rationally to changes in supply and demand information." Therefore, Dr. Carter opines that "Events like trade disruptions affect Chicago and export prices, and in turn the price that U.S. corn farmers receive for their corn."

Finch agrees that the price of corn is the CBOT futures price plus a "basis." Syngenta's experts, however, dispute aspects of the two components. Thurman states that, "local circumstances are important in determining local corn prices," and "local markets reflect distinct supply and demand signals resulting in prices that, in some locations, are only minimally affected, if at all, by events in specific sectors, such as export." Thurman admits that local corn prices and futures prices are correlated over long periods but says the relationship can vary over time and geography. Thurman concludes that because localized market forces can drive price changes, a change in the CBOT price can be reflected in widely varying degrees in local prices.

Dr. Babcock uses a competitive-storage model to calculate the per-bushel decline in corn prices as a result of the loss of Chinese demand. Applying the model, Dr. Babcock creates a demand curve for each use of corn and then determines the magnitude of the shift in corn demand that the ban represents. Dr. Babcock determined the difference between the corn China imported in the 2013-14 marketing year and the amount China expected to import and of the

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private tariff-rate quota ("TRQ") set forth in China's agreement with the World Trade Organization. The aggregate amount of damage in each of the marketing years between 2013 and 2023 equals the number of bushels in the class in each year multiplied by the per-bushel price impacts.

To determine the number of bushels in the class, Dr. Babcock used data from the Census of Agriculture to determine the average farm size in acres for Minnesota and the yield per harvested acre in each county. He excluded bushels which were planted by farmers that purchased Viptera or Duracade, corn that was not marketed but was put into storage or fed on the farm, and bushels that were marketed before the price impacts of China's ban on U.S. corn imports showed up in the market. Using these figures, he determined the total Minnesota bushels in the class per year. The "total amount of damage to Minnesota corn producers caused by China's ban on U.S. corn imports is simply the number of bushels in the class multiplied by the per-bushel damages."

Using a regression analysis, Dr. Babcock found that 88% of daily variability in local prices "is explained by changes in futures prices." He concludes that, "a change in the demand for U.S. corn caused by China's ban on corn imports would be felt equally in all corn growing areas, because such a change in demand for U.S. corn would be reflected in futures prices and local corn prices are primarily determined by futures prices." Although the basis may vary based on local factors, a change in the futures price will result in a relatively uniform change in all markets.

Thurman asserts Babcock's analysis is flawed because it is based on a dataset that was constructed haphazardly. He also claims Babcock fails to test the sensitivity of liability results to different time periods and the inclusion of more delivery locations. Thurman performed a series of modifications to Babcock's regression analyses to test the relationship between changes in the

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CBOT price and changes in the local cash price at delivery points in Minnesota and the MDL states. Thurman's analysis showed varying R-squared values. Based on these results, Thurman concludes that, "alleged changes in the CBOT price result in difference changes (and sometimes no change at all) at different locations at different times for different producers." In addition, he states there is a wide variability in the relationship between changes in the CBOT price and changes in local cash prices within a single state.

Dr. Carter used an event study, which measures the impact of a specific event on the value of a commodity or asset. First, he identified a structural break in September 2013 in the relationship of corn and sorghum, which is a close feed substitute for corn but has a lower yield and no GM varieties. At this point, corn went from commanding a 10% premium over sorghum to an 8% price discount. He opines that the abrupt change in relative prices was a signal that changes were taking place in the global feed grain market and that it is not unusual for a well-functioning informationally efficient market (such as the U.S corn market) to anticipate a forthcoming shock to the market.

Dr. Carter then performed a correlation analysis on ten separate locations to quantify the relationship between corn prices at different locations, relative to an index of futures prices for other commodities. He found that all of the markets have highly correlated prices, meaning that "the demand shock caused by the Chinese *de facto* embargo would have a common impact" on all local prices. Dr. Carter opines that "U.S. corn farmers who priced their corn after August 2013 have received a lower price for their corn than they would have received if China's imports of U.S. corn had not effectively stopped." He calculated the drop in price due to the contamination and determined that damages will continue for five years before dissipating. Dr. Carter calculates aggregate damages for the class using the total bushels marketed in the class.

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Thurman makes the following criticisms of Carter's analysis: (1) correlation does not imply causation; and (2) the calculation should be between changes in corn prices rather than the prices themselves. Using the same methodology, Thurman re-calculated Carter's correlation analysis to show correlations in the changes in corn prices and found that damages in the CBOT price do not show uniformly high correlation to price changes in other markets.

The Court reviewed the voluminous submissions of the parties, including the expert reports. The Court attended a joint evidentiary hearing in U.S. District Court before Judge Lungstrum in Kansas City. At the hearing, the Court heard testimony from Plaintiffs' experts on cross-examination by Syngenta and re-direct examination by Plaintiffs. Plaintiffs chose not to cross-examine Syngenta's experts at the hearing. The parties also made separate oral arguments before this Court. The Court has reviewed and considered all of this material in its decision on the motion for class certification.

After consideration of substantially the same evidence and argument that is before this Court, the Federal MDL court granted class certification. *In re: Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL, 2016 WL 5371856 (D. Kan. Sept. 26, 2016). In an Order dated September 26, 2016, Judge Lungstrum granted certification to a nationwide class to pursue Lanham Act claims and certification of eight statewide classes (consisting of producers in Arkansas, Illinois, Iowa, Kansas, Missouri, Nebraska, Ohio, and South Dakota) to pursue negligence claims, as well as tortious interference claims in the case of the Arkansas and Missouri classes, and statutory consumer protection claims in the case of the Illinois and Nebraska classes. Producers who filed suit in this action on or before June 15, 2016 and who are represented by attorneys who executed the JPA with the MDL Plaintiff's co-lead counsel are excluded from the class.

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II. Legal Analysis

Plaintiffs move the Court for class certification under Rule 23 of the Minnesota Rules of Civil Procedure. Minnesota's Rule 23 is nearly identical to Rule 23 of the Federal Rules of Civil Procedure.[3] The Advisory Committee Notes to the Minnesota Rules explain that Federal Rule 23 was adopted in Minnesota "so that consistency between federal decisions and the Minnesota decisions are more likely." Minn. R. Civ. P. Ann. 23 *Advisory Committee Note* (West 1979). Therefore, cases applying Federal Rule 23 provide guidance in applying the parallel Minnesota rules. *See Whitaker v. 3M Co.*, 764 N.W.2d 631, 635 (Minn. Ct. App. 2009).

To certify a class, a class representative must establish the four prerequisites of Minn. R. Civ. P. 23.01 and at least one provision of Rule 23.02 by a preponderance of the evidence. *Id.* at 638; *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). The Court must undertake a rigorous analysis to ensure that the requirements of Rule 23 are satisfied. *Bennett v. Nucor Corp.*, 656 F.3d 802, 814 (8th Cir. 2011). "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 350, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011). "The preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case." *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005). However, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013). The Court must

[3] While the text of the two Rules is nearly identical, they are numbered differently. Minn. R. Civ. P. 23.01 corresponds to Fed. R. Civ. P. 23(a) and Minn. R Civ. P. 23.02 corresponds to Fed. R. Civ. P. 23(b). With respect to section II.C *infra*, Minn. R. Civ. P. 23.02(c) correlates with Fed. R. Civ. P. 23(b)(3).

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address and resolve factual disputes relevant to class-certification requirements, including disputes among expert witnesses. *Whitaker*, 764 N.W.2d at 640. However, any factual findings at the class certification stage are not binding on the ultimate trier of fact. *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004).

A. Class Definition

Syngenta argues that membership in the class is not sufficiently ascertainable. Most federal circuit courts of appeals have recognized that Rule 23 contains an implicit threshold requirement that that classes be defined clearly and based on objective criteria. *See Mullins v. Direct Digital, LLC*, 795 F. 3d 654, 658 (7th Cir. 2015), cert. denied, 136 S. Ct. 1161 (2016); *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 998 (8th Cir. 2016). Some federal circuit courts use a two-prong ascertainability inquiry, requiring a plaintiff to show: (1) that the class is defined by reference to objective criteria; and (2) that class members may be determined in an economical and administratively feasible manner, such that "class members can be identified without extensive and individualized fact-finding or mini-trials." *See Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); *see also Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015); *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 947 (11th Cir. 2015). However, the Eighth Circuit, along with the Sixth and Seventh Circuits, have declined to adopt this heightened standard. *Sandusky*, 821 F.3d at 996-98; *Mullins*, 795 F.3d at 658; *Rikos v. Procter & Gamble Co.*, 799 F.3d 97 (6th Cir. 2015). The *Sandusky* court held that ascertainability is not a separate and preliminary requirement. *Sandusky*, 821 F.3d at 998. "Rather, this court adheres to a rigorous analysis of the Rule 23 requirements, which includes that a class 'must be adequately defined and clearly ascertainable.'" *Id.* Pursuant to the governing and persuasive opinions in *Sandusky* and *Mullins*, the Court will not apply a heightened test for ascertainability.

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Therefore, Plaintiffs must show the class is adequately defined using objective criteria. *See Sandusky*, 821 F.3d at 996-998; *Mullins*, 795 F.3d 654; *Rikos*, 799 F.3d at 660. Where a class definition identifies a particular group, harmed during a particular time frame, in a particular location, in a particular way, it is not overly vague. *Mullins*, 795 F.3d at 660. A class definition is objective when it is defined in terms of conduct rather than a state of mind. *Id.* Finally, a class definition is impermissible where it is a "fail-safe" class, that is, a class that cannot be defined until the case is resolved on its merits. *Id.*

Plaintiffs propose the following class:

> All Minnesota producers that priced corn (or who shared revenue from such corn sales under a crop-share agreement) after September 2013. Excluded from the class are any corn producers that purchased or planted corn containing the MIR 162 trait (including Duracade); the Court, and its employees; and Syngenta, and its parents, subsidiaries, affiliates, employees and directors during the relevant time period.

Plaintiffs' class definition is clearly defined and based on objective criteria. The definition is not impermissibly vague because it identifies a group (producers), harmed during a particular time frame (after September 2013), in a particular location (Minnesota), and in a particular way (priced corn).

Syngenta's argument that Plaintiffs waived any argument on ascertainability by addressing the issue in a footnote in their moving brief is unpersuasive. Where a party bears the burden of establishing a point as part of its affirmative case on a motion, failure to address and develop the issue in a moving brief may amount to waiver. *Freeman v. Gerber Prods. Co.*, 450 F. Supp. 2d 1248, 1259 (D. Kan. 2006). As noted above, the Eighth Circuit has held that ascertainability is not a separate and preliminary requirement for class certification but rather part and parcel of the rigorous analysis of Rule 23. *Sandusky*, 821 F.3d at 998. Plaintiffs thus addressed and developed the issue of ascertainability throughout their moving brief by defining and establishing the criteria for the

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class as well as its compliance with the requirements of Rule 23. Plaintiffs addressed the issue, Syngenta fully briefed the issue, and Plaintiffs had an opportunity to respond. Plaintiffs did not waive any argument on the issue of ascertainability.

Syngenta argues that the term "priced" is ambiguous due to the various ways producers sell corn. It is reasonable and common to understand the term to refer to the date that the parties to a transaction agreed upon the price of the sale. "Priced" is the term that best captures the relevant date of the alleged harm to Plaintiffs. The date the producers planted, harvested, entered into contracts for the sale, sold, or stored their corn would not uniformly capture the date that the price for the corn was established and agreed upon. Pricing of the corn is the occurrence that Plaintiffs allege caused their injury. The term is an objective criteria to determine whether a Plaintiff was harmed during a particular time frame in a particular way.

The term "priced" also does not necessarily entail cumbersome individual inquiries in light of the various types of contracts and ways to sell corn. While an individual inquiry is necessary to determine if a producer is a member of the class, it is not burdensome. It is a matter of determining whether the potential class member satisfies the objective criteria. Dr. Babcock testified that it is a matter of discovering what type of contract was used and the date on which the contract priced the corn for sale. Syngenta's claim that individual inquiries will be difficult due to poor and incomplete documentation is unavailing. To show membership in the class, a producer will need to establish only one instance where corn was priced after September 2013. The Court is not persuaded that Syngenta has shown that all records of all sales and contracts are difficult to produce. The Court is also not persuaded that the objective criteria of showing the date corn was priced is particularly onerous.

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Syngenta also argues that the term "producer" is vague and will require individual inquiries. Plaintiffs did not include a separate sentence defining "producer" but included "those who shared revenue from such corn sales under a crop-share agreement." The statutory definition used by the USDA provides:

> *Producer* means an owner, operator, landlord, tenant, or sharecropper, who shares in the risk of producing a crop and who is entitled to share in the crop available for marketing from the farm, or would have shared had the crop been produced. A producer includes a grower of hybrid seed.

7 C.F.R. § 718.2 (emphasis original). Plaintiffs in the Federal MDL tracked the USDA definition in defining the term for the proposed classes. At the Federal MDL motion hearing, the plaintiffs agreed that their proposed definition turned on the identification of producers on the USDA's Farm Service Agency 578 form ("FSA-578"). Judge Lungstrum modified the definition to reflect use of FSA-578 to identify producers and found the term sufficiently objective and definite. At this Court's hearing on this motion, Plaintiffs indicated they were amenable to a similar modification in the class definition.

Syngenta complains that FSA-578s reflect only what is self-reported to the USDA, contain inaccuracies, and are not required for all producers. Use of a government form, however, provides an objective criteria to identify a particular group – producers. Although the form reflects self-reported information, it is submitted to a government agency which should deter and limit fraudulent reporting and increase reliability. Any inaccuracies or misuse of the form found during discovery in these litigations does not prove that such issues are widespread or invalidate the form entirely. Syngenta's one example where not all farmed acreage was reported on a FSA-578 because the landowner was not participating in USDA programs does not evidence that non-participation is common. Throughout this litigation the FSA-578 has been cited as common proof of farming activity. Furthermore, the form is being used in this instance

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to show qualification as a producer and not evidence of acreage. Form FSA-578 uses a standard definition of the term "producer" and provides a reasonably reliable and objective method of determining if a class member is a qualifying producer. The Court finds modification of the class to include the definition of a "producer" as a person or entity listed on a FSA-578 will clearly identify a particular group and will change the definition of the class accordingly.

The exclusion of producers that purchased or planted Viptera or Duracade is not an onerous undertaking. Plaintiffs indicate Syngenta produced records to show which farmers purchased Viptera and Duracade, and Plaintiffs' experts used those records in their analyses. Producers will also have evidence to determine if they purchased or planted Viptera or Duracade. Furthermore, the parties indicate this exclusion will apply to a maximum of approximately 2-3% of producers. This is an objective criteria based on conduct used to determine exclusion from the class.

Syngenta argues the definition is defective because it includes producers who suffered no injury. Proof that every class member will be able to recover is not required at the class certification stage. *Kleen Products LLC v. International Paper Co.*, 831 F.3d 919, 927 (7th Cir. 2016). A class is defined too broadly to permit certification if it is "defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct." *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824 (7th Cir. 2012). A critical distinction in considering if the definition is overly broad is whether it includes class members who *were not* harmed or those that *could not* have been harmed. *Id.* Because "if a proposed class consists largely (or entirely, for that matter) of members who are ultimately shown to have suffered no harm, that may not mean that the class was improperly certified but only that the class failed to meet its burden of proof on the merits." *Id.*

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Syngenta argues that some producers may not have been injured by a drop in the central market prices because of individualized pricing strategies, variations in local pricing, planting and sale of specialty corn, increased prices for other crops, or the use of corn to feed livestock. These are examples of merits-based defenses, which if proven, would show a class member *was not* harmed. All of these potential class members *could have* been harmed even if these circumstances occurred. There is no basis to conclude that a "great number" of members could not have been harmed as alleged by Plaintiffs. *See, e.g., Oshana v. Coca-Cola Co.*, 472 F.3d 506-514-15 (7th Cir. 2006). The Court is not persuaded that Plaintiffs' proposed class is so overly broad as to require denial of certification.

Accordingly, the class definition, as modified, is adequately defined using objective criteria and clearly ascertainable

B. Rule 23.01 Prerequisites

In order to justify a departure from the rule that litigation is conducted by the individual named parties only, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Wal-Mart*, 131 S. Ct. at 2550 (citations and internal quotations omitted). Pursuant to Minn. R. Civ. P. 23.01, a member of a class may sue on behalf of a class only if:

> (a) the class is so numerous that joinder of all members is impracticable;
> (b) there are questions of law or fact common to the class;
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (d) the representative parties will fairly and adequately protect the interests of the class.

Minn. R. Civ. P. 23.01. These prerequisites are referred to as numerosity, commonality, typicality, and representivity. *Streich v. Am. Family Mut. Ins. Co.*, 399 N.W.2d 210, 213 (Minn. Ct. App. 1987). These four requirements ensure that the named plaintiffs are appropriate

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representatives of the class whose claims they wish to litigate and limits the class claims to those fairly encompassed by the named plaintiffs' claims. *Wal-Mart*, 131 S. Ct. at 2550 (citations and internal quotations omitted). "Sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. Frequently, that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim." *Id.* at 2541.

1. Numerosity

Rule 23.01(a) does not include a specific numeric value for the size of a class. The impracticability of joining all members is a fact-specific determination. *Lewy 1990 Trust ex rel. Lewy v. Investment Advisors, Inc.*, 650 N.W.2d 445, 452 (Minn. Ct. App. 2002). The factors the Court considers in determining impracticability include the size of the proposed class, the size of the class member's individual claim, the inconvenience of trying individual suits, the nature of the action itself, and other factors relevant to the practicability of joining all putative class members. *See Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559, 569 (D. Minn. 2014); *Lewy*, 650 N.W.2d at 452. While mere speculation as to the size of the class is insufficient to satisfy the numerosity requirement, it is also not necessary to prove a number of the class members with specificity. *Id.* Here, the proposed class consists of approximately 30,000 Minnesota farmers. It is estimated that the number of those producers that purchased or grew Syngenta products is 2-3% of the class. And 9,081 Minnesota farmers that have filed individual claims have indicated they will choose to opt-out pursuant to the declaration procedure in the MPA. Even excluding those farmers that grew Viptera or Duracade or have filed an individual case, the proposed class will still include approximately 20,000 Minnesota farmers. The proposed class satisfies the numerosity requirement.

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2. Commonality

A class must have common questions of law or fact. Minn. R. Civ. P. 23.01(b). The threshold to demonstrate commonality is not high and only requires that "the resolution of the common questions affect all or a substantial number of class members." *Streich v. American Family Mut. Ins. Co.*, 399 N.W.2d 210, 214 (Minn. Ct. App. 1987) (citing *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986)). The existence of just one common issue is enough to satisfy this requirement. *Wal-Mart*, 564 U.S. at 359; *Lockwood Motors, Inc. v. Gen. Motors Corp.*, 162 F.R.D. 569, 575 (D. Minn. 1995). The "common contention" in Rule 23(a)(2) "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal–Mart,* 564 U.S. at 338. A key consideration in assessing commonality is whether class treatment can "generate common *answers* apt to drive the resolution of the litigation." *Id.* at 338 (citation and internal quotation marks omitted; emphasis original); *see also Ario v. Metropolitan Airports Comm'n*, 367 N.W.2d 509, 515 (Minn. 1985) (noting a class action judgment finding an invasion of privacy would do little to advance an end to the litigation because class members would still have to establish a right to inverse condemnation). Individual class members need not be identically situated so long as the questions linking the class members are substantially related to the resolution of the litigation. *In re Workers' Comp.*, 130 F.R.D. 99, 104 (D. Minn. 1990).

Questions of fact common to all class members include: (1) Syngenta's acts and knowledge in the commercialization of MIR 162; (2) representations made by Syngenta regarding Chinese import approval of MIR 162; (3) Syngenta's warnings regarding use of MIR 162; and (3) the impact of China's ban on the CBOT futures price for corn. Common issues of law include: (1) Syngenta's

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duty to exercise reasonable care in the commercialization of MIR 162; (2) the scope of Syngenta's duty to Minnesota farmers; (3) whether Syngenta breached its duty of care; (4) whether Syngenta knowingly misrepresented the quality, ingredients, or origin of MIR 162; (5) whether Syngenta's warnings regarding use of MIR 162 were insufficient; (6) causation; and (7) whether Plaintiffs are entitled to damages. These are questions common to all members of the proposed class that can be addressed by common proof. The answers to these common questions will resolve issues central to Plaintiffs' claims. The Rule 23.01(b) prerequisite of commonality is satisfied.

3. Typicality

The typicality requirement of Rule 23.01(c) is met when the claims of the named Plaintiffs arise from the same event or are based on the same legal theory as the claims of the class members. *See Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996). A "strong similarity of legal theories" satisfies the typicality requirement even if substantial factual differences exist. *Lewy*, 650 N.W.2d at 453. Typicality requires that the class representatives "have an interest compatible with that of the class sought to be represented." *Id.* Here, the claims of all members of the proposed class arise from the same conduct by Syngenta and all Plaintiffs assert the same legal claims on behalf of the class that they seek to represent. Like members of the proposed class, the named Plaintiffs farm corn in Minnesota, did not purchase or grow Viptera or Duracade, priced corn after September 2013, and claim they were harmed by Syngenta's alleged breach of its duty to responsibly commercialize MIR 162 and by the alleged misrepresentations made by Syngenta during the commercialization. The claims of the representative parties are typical of the claims of the class.

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4. Adequacy of Representation

Rule 23.01(d) requires Plaintiffs to show that "the representative parties will fairly and adequately protect the interests of the class." Minn. R. Civ. P. 23.01(d). "A class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Texas Motor Freight Sys. Inc. v. Rodriguez,* 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (quoting *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 216, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)). To satisfy the adequate representation requirement, the interests of the class must coincide with the interests of the representative parties, and the parties and their counsel must competently and vigorously prosecute the lawsuit. *Lewy*, 650 N.W.2d at 454.

> Factors used to determine if representivity is satisfied include: 1) whether the representatives' interests are sufficiently identical to those of absent class members so that the representatives will vigorously prosecute the suit on their behalf; 2) whether the attorneys are qualified, experienced, and capable of conducting the litigation; and 3) whether the representatives have any interests that conflict with the objection of the class they represent.

Id. The named Plaintiffs, Leroy Edlund, Roger Ward, Grant Annexstad, and Nathan Thompson, are all adequate individuals to represent the interests of the class. Plaintiffs and class members allege to have been injured by the same conduct by Syngenta, and they assert the same legal claims. Plaintiffs have shown that they will vigorously pursue the claims on behalf of the class by answering written discovery, participating in motion practice, and submitting to depositions. The Plaintiffs' interests are sufficiently identical to those of the class and have shown they will vigorously prosecute the claims.

Rule 23.01(d) requires that counsel be "qualified, experienced, and capable of conducting the litigation." *Lewy*, 650 N.W.2d at 454-55. The biographies of Co-Lead Interim Class Counsel indicate they are qualified to prosecute a class action. As the Court previously found when appointing them on an interim basis in its August 5, 2015 Order, Class Counsel are excellent trial

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lawyers and possess extensive class action experience. Counsel have shown they are capable by drafting pleadings and actively participating in discovery and motion practice in the fourteen months since they were appointed in this matter. Attorneys for Plaintiffs are qualified, experienced, and capable of conducting the litigation.

The four putative Plaintiffs, represented separately by Michael Johnson, contend there is a conflict of interest and due process violation as a result of the JPA and MPA and so oppose class certification. A conflict of interest must be fundamental to defeat the adequacy requirement. *Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) (citing *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003)). A conflict is not fundamental when all class members share common objectives, the same factual and legal positions, and have the same interest in establishing the liability of defendants. *Id.* The Court is not convinced that Minnesota producers whose counsel do not sign the MPA do not share the same factual and legal positions as those producers whose counsel executed the MPA. All putative class members will have the ability to opt-out of the class action and proceed with individual claims. There is no due process violation for absent class members when they are provided an opportunity to opt-out, which occurs after the class is certified. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). The only difference is the form used to opt-out. The difference between submitting the declaration or an opt-out notice does not affect the producers' ultimate factual or legal position regarding their claims against Syngenta.

The four putative members' reliance on *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F. 3d 331 (4th Cir. 1998) is misplaced. In *Broussard*, the class members were franchisees that had three different types of agreements with the defendant. *Id.* at 335. The different types of agreements gave rise to a conflict among the class because the plaintiffs were entitled to different

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relief as a remedy for their claim against the defendant. *Id.* The court found that the difference in types of remedies available to the subgroups of plaintiffs created a conflict of interest among the class. *Id.* Here, there is no difference among the Plaintiffs in their relation to Syngenta or the type of remedy available. All proposed class members have a shared common objective and interest in establishing Syngenta's liability and damages.

C. Rule 23.02 Maintenance Requirements

Plaintiffs move for certification under Rule 23.02(c), which requires a showing that questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and because a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *See* Minn. R. Civ. P. 23.02(c); *Lewy*, 650 N.W.2d at 455-58.

1. Predominance and Commonality

The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 l.Ed.2d 689 (1997). The "fundamental question is whether the group aspiring to class status is seeking to remedy a common legal grievance." *Lockwood*, 162 F.R.D. at 580 (quoting Moore's Federal Practice ¶ 23.45[2] at 23-306 to 23-307 (2nd ed. 1995)).

> An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof. The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.

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Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (citations and internal quotations omitted).

"At the core of Rule 23(b)(3)'s predominance requirement is the issue of whether the defendant's liability to all plaintiffs may be established with common evidence." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1029 (8th Cir. 2010) (citing *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)). If the same evidence will suffice for each member to make a prima facie showing, it is a common question. *Id.* Predominance is established where "generalized evidence may prove or disprove" the claims, even if individual facts exist that are unique to particular class members. *Lewy,* 650 N.W.2d at 455. Where common evidence can make out a prima facie case for the class, common issues predominate. *See In re Zurn Pex Plumbing Prods.*, 267 F.R.D. 549, 560 (D. Minn. 2010), *aff'd*, 644 F.3d 604 (8th Cir. 2011).

Plaintiffs' common law and statutory claims are appropriate for class adjudication because the elements can be shown with common proof. Evaluating predominance begins with the elements of the underlying causes of action. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 131 S. Ct. 2179, 2184 (2011). All of the class action claims involve common factual and legal issues. Common evidence can make out a prima facie case for the class on the elements of the claims. Syngenta's defenses relating to its own conduct or to causation also will be the subject of class-wide proof and thus present common issues. The common issues in the case are more prevalent and important than any remaining potential individual issues. Therefore, the Court finds that common questions predominate over individual questions for purposes of certification under Minn. R. Civ. P. 23.02(c).

The elements of a negligence claim are: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) the breach of that duty was the proximate cause of the injury.

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Engler v. Illinois Farmers Ins. Co., 706 N.W.2d 764, 767 (Minn. 2005). Plaintiffs allege that Syngenta had a duty to all Minnesota farmers to use reasonable care in the commercialization of MIR 162 and breached that duty by commercializing MIR 162 before Chinese import approval and without channeling measures. The central factual issues for this claim are Syngenta's knowledge and actions surrounding its commercialization of MIR 162. The claim presents common legal issues regarding Syngenta's duty to all Minnesota producers, the scope of that duty, whether Syngenta breached that duty, injury, and causation. The evidence on liability will focus on Syngenta's conduct such as the timing and content of Syngenta's submissions for import approval to China, Syngenta's knowledge of the status of China's approval, Syngenta's actions and efforts regarding stewardship and channeling, and Syngenta's representations. The negligence claim will involve common proof of Syngenta's actions and its effect on the market.

Plaintiffs assert violations of Minnesota's Unfair Trade Practices Act (MUTPA), Minn. Stat. § 325D.13. The statute provides that, "No person shall, in connection with the sale of merchandise, knowingly misrepresent, directly or indirectly, the true quality, ingredients or origin of such merchandise." Minn. Stat. § 325D.13. Plaintiffs must show that "the defendant engaged in conduct prohibited by the statutes and that the plaintiff was damaged thereby." *See Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2, 12 (Minn. 2001). Plaintiffs have made allegations and submitted evidence regarding Syngenta's representations to Plaintiffs regarding China's approval of MIR 162. Plaintiffs and the class members allege they were harmed by Syngenta's public misrepresentations and omissions regarding China's import approval of MIR 162 as well as its ability to channel MIR 162 corn away from China. Proof of this claim will involve common evidence of Syngenta's representations and knowledge.

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Plaintiffs assert a strict liability duty to warn claim. The elements of such a claim are: (1) defendant's knowledge of the dangers of using the product; (2) defendant's warnings were insufficient and thus breached the duty of care; and (3) the lack of adequate warning caused plaintiff's injury. *McRunnel v. Batco Mfg.*, 917 F. Supp. 2d 946, 957 (D. Minn. 2013) (citing *In re Levaquin Prods. Liab. Litig.*, 700 F.3d 1161, 1166 (8th Cir. 2012)). This claim will involve common proof of Syngenta's knowledge, duty of care, sufficiency of warnings, and the effect on the market.

All three of Plaintiffs' claims require a showing of injury and causation. Plaintiffs claim each class member was injured by a lower price for corn priced after September 2013. Plaintiffs intend to prove the fact and amount of damage through expert testimony in a class-wide manner. The reports and testimony of Drs. Carter and Babcock demonstrate on a prima facie basis that Syngenta's actions caused a drop in the CBOT futures price of corn beginning in September 2013. Their analyses show that a change in the CBOT futures price resulted in a uniform change on all local Minnesota corn prices. They then calculate damages based on a cents per bushel mathematical or formulaic calculation that is applicable to each member of the class. While each class member will have a different amount of damages based on how much corn they priced, it is a matter of taking a member-specific factor and inserting it into the class-wide formula.

The parties dispute the extent of the Court's review of the expert evidence. The Eighth Circuit has held that "[e]xpert disputes concerning the factual setting of the case should be resolved at the class certification stage only to the extent necessary to determine the nature of the evidence that would be sufficient, if the plaintiff's general allegations were true to make out a prima facie case for the class." *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 611 (8th Cir. 2011) (quoting *Blades v. Monsanto Co.*, 562, 567 (8th Cir. 2005) (internal quotation marks omitted). "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification

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stage," and that "[m]erits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1195-96 (2013).

The U.S. Supreme Court recently discussed the review for expert evidence at the class certification stage in an FLSA case where plaintiff employees alleged they were improperly denied pay for time spent donning and doffing their equipment at work. *See Tyson Foods*, 136 S. Ct. at 1042-43. The plaintiffs relied on an expert who averaged and estimated donning and doffing times on a class-wide basis. *See id.* at 1043. The Supreme Court refused to adopt a rule prohibiting the use of such representative evidence in class action cases. *See id.* at 1046. The Court noted that if each class member could have relied on the representative evidence to establish liability in an individual action, then use of that evidence is permissible to establish the number of hours to show class-wide liability in a class action. *See id.* at 1046-47. The Court then addressed a district court's proper consideration of such evidence:

> This is not to say that all inferences drawn from representative evidence in an FLSA case are just and reasonable. Representative evidence that is statistically inadequate or based on implausible assumptions could not lead to a fair or accurate estimate of the uncompensated hours an employee has worked. Petitioner, however, did not raise a challenge to respondents' experts' methodology under *Daubert*; and, as a result, there is no basis in the record to conclude it was legal error to admit that evidence.
>
> Once a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury. Reasonable minds may differ as to whether the average time [the expert] calculated is probative as to the time actually worked by each employee. Resolving that question, however, is the near-exclusive province of the jury. The District Court could have denied class certification on this ground only if it concluded that no reasonable juror could have believed that the employees spent roughly equally time donning and doffing.

See id. at 1048-49 (citations omitted). As noted above, Syngenta did not challenge Plaintiffs'

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expert's qualifications or their methodologies under *Frye-Mack*.[4] After reviewing all of Plaintiffs' and Syngenta's expert opinions, the Court finds Plaintiffs presented representative evidence that is statistically adequate and based on plausible assumptions. Such evidence could lead the trier of fact to a fair and accurate calculation of the per-bushel drop in corn price. In this action, Plaintiffs could rely on those expert opinions to show liability and damages in an individual class member's suit; thus under *Tyson Foods*, the class may rely on those opinions to show class-wide injury.

Syngenta argues that the representative evidence is deficient because the CBOT price is not sufficiently tied to local corn prices. Plaintiffs' experts relied on standard economic studies to show CBOT price changes are reflected in local prices. Syngenta's experts conceded that local contract prices are customarily expressed in terms of the CBOT price. The data concerning the prices at which corn sales have historically taken place in the United States, the GeoGrains data which both sides have cited, includes reference to the CBOT prices on the data of those sales. As Plaintiffs' experts explained, the fact that local prices may not decrease as much as the CBOT prices, or may even increase despite a CBOT decrease, does not mean that the CBOT change was not locally felt, as the local factors may have added to or offset that CBOT decrease. Syngenta failed to show that the expert evidence is based on inadequate data or statistical analyses. Ultimately, this may be an issue for a jury.

Syngenta's experts made extensive criticisms of Plaintiffs' experts' analyses and opinions. For instance, Syngenta's experts criticize the composition of data sets, the comparable products chosen, the rate of decay of the price effects, and the failure to confirm results against particular

[4] Minnesota uses a two-prong *Frye-Mack* test. *Goeb v. Tharaldson*, 615 N.W.2d 800, 809-10 (Minn. 2000). Under this standard, scientific evidence is admissible when (1) the scientific theory, technique or methodology is generally accepted in the relevant scientific community and (2) the evidence has a scientifically reliable foundation. *Id.* at 810. The Minnesota Supreme Court explicitly rejected *Daubert*, criticizing it for requiring judges to be "amateur scientists," whereas *Frye-Mack* ensures that those most qualified to assess the scientific validity of a technique – i.e., the scientists – have the "determinative voice." *Id.* at 812-13. The court also voiced concern that *Daubert* could lead to non-uniformity, since cases with similar expert testimony could lead to varying decisions on admissibility. *Id.*

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time periods and locations. "As other courts have recognized, the issue at class certification is not which expert is the most credible, or the most accurate modeler, but rather have the plaintiffs demonstrated that there is a way to prove a class-wide measure of [impact] through generalized proof." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 604 (N.D. Cal. 2010), *amended in part*, No. M 07-1827 SI, 2011 WL 3268649 (N.D. Cal. July 28, 2011) (citations and internal quotation marks omitted). Syngenta's criticisms go to the manipulation of the data but do not challenge the foundation of the type of analyses performed. The majority of Syngenta's arguments and competing expert opinions go to the persuasiveness of the evidence and not the admissibility. The Court cannot conclude that the experts' methodologies are so statistically inadequate or unreliable as to preclude certification. Plaintiffs' experts sufficiently demonstrated that there is a way to prove a class-wide measure of damages using generalized proof.

Syngenta attacks the experts' use of September 2013 to show anticipation of Chinese rejection as implausible. Syngenta argues that the use of September 2013 means that market participants anticipated the November 2013 rejections by China, even though according to Syngenta Plaintiffs' experts were not able to identify a public prediction of the rejection. Dr. Carter, however, based the use of that date on the structural break in export and prices between corn and sorghum that signaled a change in the market. The use of September 2013 is thus a plausible and supported assumption, and the expert opinions are not lacking in foundation.

Syngenta argues that individual inquiries are needed to: 1) determine whether each producer suffered any injury; (2) determine a methodology for determining damages; and (3) evaluate Syngenta's affirmative defenses. The presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3). *Tyson Foods*, 136 S. Ct. at 1045; *Wal-Mart*, 564 U.S. at 362. "Courts frequently grant class certification despite individual differences in class members'

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damages." *Lewy,* 650 N.W.2d. at 456-57. "When injury and damage is capable of mathematical or formulaic calculation, individualized claims are not a barrier to managing the case as a class action." *Id.* at 456.

Syngenta argues that individual inquiries of all class members are required because some producers may have benefitted from the Chinese import ban on U.S. corn. The Court disagrees. "A class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification." *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009). The Court incorporates the discussion in section II.A, *supra*, finding the class definition not overly broad even if it includes producers who suffered no harm.

Syngenta opines that benefits could occur arising from local market factors, a corresponding increase in other crop prices, or lower price for feed for livestock. Plaintiffs respond that any such gains would not fall within the offsetting benefits rules, and that it would violate the collateral source doctrine to reduce damages for such gains. Even if offsets for higher prices of other grain were permitted, Plaintiffs' expert testified that he could conduct a similar analysis involving other grains to determine an aggregate offset on a class-wide basis. In addition, Syngenta has not identified any class member whose benefits from sales of other grains and livestock purchases would completely offset the damages from lower corn prices under Plaintiffs' damage models, and thus it is speculative whether any class members had no injury for these reasons. This Court finds that even if individual inquiries are needed in some instances, they would not be so overwhelming as to defeat predominance. Syngenta also argues that lower overall demand could impact local

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factors, which impact would skew any direct correlation between CBOT and local price changes. Plaintiffs' expert testified persuasively, however, that decreased exports generally do not affect local factors. Furthermore, the determination of the fact and amount of damage does not pose a risk that individual inquiries will predominate because if the jury rejects Plaintiffs' theory that CBOT price changes are reflected in local prices, the case will effectively be lost, as Plaintiffs will be unable to prove the fact of injury.

Syngenta next argues that individual inquiries are necessary to determine a methodology for calculating damages. Plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). Plaintiffs have identified the existence of an integrated market in which events, such as China's rejection of U.S. corn, are felt uniformly throughout the market. Such common impact supports use of a common damages model and formula on a class-wide basis. Dr. Babcock opines that the aggregate amount of damages for all class members "equals the number of bushels in the class multiplied by the … per-bushel price impact." This formula is common to each and every class member and relies on total corn production in Minnesota. The expert testimony establishes a methodology that would permit the jury to determine class-wide aggregate damages as well as per-bushel losses for each class member.

Syngenta challenges Plaintiffs' "aggregate damages model" as inappropriate because it would inflate Syngenta's liability and limit their rights to challenge individual issues. Syngenta's reliance on *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d. Cir. 2008) for the proposition that an aggregated damages model is impermissible where it relies on unsupported assumptions and would mask the prevalence of individual issues is misplaced. The *McLaughlin* court discussed fluid recovery, which is different from aggregate damages. *See In re Scrap Metal Antitrust Litig.*, 527

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F.3d 517, 534 (6th Cir. 2008). The case is further distinguishable because plaintiffs in *McLaughlin* provided only a rough estimate of gross damages for the class. *McLaughlin*, 522 F.3d at 231. Here, Plaintiffs have presented expert testimony creating models to determine the per-unit effect on class members' sales of corn.

Syngenta urges the Court to follow *In re Genetically Modified Rice Litig.*, 251 F.R.D. 392 (E.D. Mo. 2008), pet. for permission to appeal denied, No. 08-8010 (8th Cir. Oct. 6, 2008), in which the court denied class certification in an action alleging the defendants contaminated the U.S. rice supply with non-approved GM strains of rice and seeking market-loss damages. The court found some producers used various types of contracts based on the CBOT price, some sold rice at a price based on the World Market Price, and others sold at a flat price set by the buyer. *Id.* at 394-95. The plaintiffs proposed to show the total amount of economic harm and quantity of rice affected to calculate each producer's individual damages based on the amount of rice sold. *Id.* While the court found a number of common issues, it decided the calculation of damages was an individual issue, involving a unique inquiry into the time, place, and manner in which each plaintiff priced and sold his rice. *Id.* at 398. The court noted that variation in individual damage amounts does not bar certification. *Id.* But concluded that the claims of the rice producers did not lend themselves to an easy "mathematical or formulaic calculation." *Id.* at 399. In *Rice*, Plaintiffs failed to demonstrate the predominance of common questions respecting the plaintiffs' claims for market-loss damages. In this case, there is no separate price index for corn; and all experts agree that the CBOT price is a component used in the sale of corn. Furthermore, here Plaintiffs have presented persuasive evidence that damages can be determined by an adequate mathematical calculation.

The Court finds that the *Urethane* and *Kleen* cases from the Tenth and Seventh Circuits are more instructive than *Rice*. *See In re Urethane Antitrust Litigation*, 768 F.3d 1245 (10th Cir. 2014);

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Kleen Products LLC v. International Paper Co., 831 F.3d 919 (7th Cir. 2016). *Urethane* involved allegations of a price-fixing conspiracy in violation of antitrust law. The Tenth Circuit affirmed class certification based on evidence that the alleged price-fixing would have affected the entire market and thus raised baseline prices for all buyers, even if prices were individually negotiated. *See id.* at 1254-55. The court noted that antitrust law permits an inference of class-wide impact from price-fixing. *See id.* at 1254. The court concluded that impact could be treated as a common question capable of class-wide proof for purposes of class certification. *See id.* at 1255. The Tenth Circuit further noted that, "[t]he presence of individualized damages issues would not change this result," as "[c]lass-wide proof is not required for all issues" for predominance under Rule 23(b)(3). *See id.* (citing *Amgen*, 133 S. Ct. at 1196). Finally, the court upheld the use of class-wide aggregate damages as proper and not in violation of *Comcast*. *See id.* at 1268-69. While this is not an antitrust case with an inference of class-wide impact, Plaintiffs here use CBOT, a more centralized commodities exchange, as a benchmark to show the entire market was affected. Class certification is similarly appropriate in this case because there are common factual and legal issues that allow market impact and damages to be treated as a common question capable of class-wide proof.

In *Kleen*, the Seventh Circuit affirmed class certification in a case involving evidence of coordinated price fixing. *Kleen*, 831 F.3d at 931. The court found that containerboard was a commodity whose price is tied to a benchmark price published in an industry periodical. *Id.* at 923. Using this benchmark, plaintiffs presented expert testimony performing regression analyses to calculate aggregate damages for the class. *Id.* at 928-29. When addressing the defendants' claims that the plaintiffs' experts used incorrect models, the Seventh Circuit noted that the plaintiffs "have shown actual price increases, a mechanism for those increases, the communication channels the conspirators used, and factors suggesting that cartel discipline can be maintained. We are not

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saying that any of these points have been proven, of course, but we are saying that this evidence is enough to support class treatment of the merits." *Id.* at 928. Similarly, Plaintiffs use the CBOT as a benchmark. Plaintiffs' experts show that all putative class members' claims can be determined using a common methodology. All that Plaintiffs must demonstrate is that injury can be shown on a class-wide basis using common proof. Common proof of injury is shown through Plaintiffs' expert testimony that Syngenta's conduct depressed CBOT futures price for corn, which caused a decrease in all local Minnesota corn prices. Both Plaintiffs' experts, Drs. Babcock and Carter, presented methodologies for showing class-wide impact of Syngenta's conduct and concluded that corn prices for all Minnesota class members were affected by Syngenta's actions. Dr. Babcock asserts that he would use the same methodology for each individual class member and the only thing that would differ would be the amount of corn production that is damaged. Plaintiffs have presented an acceptable model for the determination of injury and damages. Whether that model is persuasive is an issue for trial rather than class certification. *See Gordon v. Microsoft Corp.*, No. 00-5994, 2001 WL 366432, at *8 (Minn. Dist. Ct. Mar. 30, 2001).

In addition, the plaintiffs in *Kleen*, used different pricing mechanisms. The *Kleen* court found that "[e]ven for transactions where prices were negotiated individually or a longer term contract existed … the starting point for those negotiations would be higher if the market price for the product was artificially inflated." *Id.* at 928-29. Similarly, whether any class members sold other crops whose sale price increased, raised livestock that consumed the corn when prices were adversely affected, local differences in transportation costs, and the identity of the corn buyer would have no effect on the futures price decrease caused by the China rejection and identified by Plaintiffs' experts. This is analogous to what Plaintiffs allege here; regardless of individual contracts or local factors affecting basis, the price for corn was uniformly affected by Syngenta's

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conduct. Plaintiffs have sufficiently presented evidence of a methodology to determine damages on a class-wide basis.

Syngenta also argues that individual inquiries are needed to evaluate its affirmative defenses of failure to mitigate damages and comparative negligence as well as issues such as hedging and crop insurance. Syngenta argues that these defenses are "highly producer-specific" and thus do not present common issues. Plaintiffs argue that the collateral source offset rules prevent such evidence from diminishing a plaintiff's recovery. Mitigation of damages, like other damage-related affirmative defenses, is not a barrier to class certification. *In re Checking Account Overdraft Litig.*, 307 F.R.D. 630, 651 (S.D. Fla. 2015). "Rule 23 does not demand that *every* issue be common; classes are routinely certified under Rule 23(b)(3) where common questions exist and predominate, even though other individual issues will remain after the class phase." *Kleen*, 831 F.3d at 922. These affirmative defenses go to the issue of damages and not liability. Whether the class members had a duty to undertake any such efforts and whether the collateral source offset rules prevent such evidence from diminishing a plaintiff's recovery present a common threshold issue that does not need to be decided at the class certification stage. Even if some of these defenses are available with respect to some class members, such individual issues are not so overwhelming as to defeat predominance. Common questions predominate here despite any possible individual questions relating to Syngenta's defenses.

Accordingly, the Court finds, pursuant to Rule 23.02(c), that common questions predominate with respect to the proposed class.

2. Superiority

Plaintiffs must also show under Rule 23.02(c) that a class action is superior to other available methods of adjudication.

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> The matters pertinent to the findings include: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.

Minn. R. Civ. P. 23.02(c). Factors to consider in superiority analysis include "manageability, fairness, efficiency, and available alternatives." *Streich v. American Fam. Mut. Ins. Co.*, 399 N.W.2d 210, 218 (Minn. Ct. App. 1987) *review denied* (Minn. Mar. 25, 1987). When collective adjudication promotes efficiency benefits and makes it possible for class members with small claims to bring suit and enforce substantive law, a class action is superior to other available methods for the fair adjudication of the controversy. *Lewy*, 650 N.W.2d at 457.

Syngenta and the four putative plaintiffs note that over 50,000 plaintiffs have filed individual suits against Syngenta. They argue the substantial number of cases demonstrates a desire by class members to control the individual litigation of their claims. Syngenta also highlights the facts that some Plaintiffs have named additional Defendants and that some Individual Plaintiffs have opposed certification.

> [T]he mere existence of individual actions brought by putative class members does not necessarily defeat a claim for superiority. It is enough that class treatment is superior because it will achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

CGC Holding Co. v. Broad and Cassel, 773 F.3d 1076, 1096 (10th Cir. 2014) (citations and internal quotation omitted). Although there is a large number of Minnesota farmers who have brought individual cases in this Court, there are still twenty thousand Minnesota corn farmers who have not filed individual cases. Given the length this matter has been pending and the publicity received, it is unlikely that individuals that have not yet filed a case will, in the future, file an individual case or opt out of the proposed class because, if there was an interest in pursuing individual claims, they

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would have likely already done so. Without a class action vehicle, many individual farmers may never pursue their claims. In addition, Plaintiffs request purely economic damages, and thus there is no emotional factor or physical injury that might otherwise provide a reason for class members to wish to control their own cases.

Moreover, the amounts at stake per farm are small enough that separate suits may be impracticable for many class members. The vehicle of a class action is meant to permit plaintiffs with small claims and little money to pursue a claim otherwise unavailable. *In re Workers' Comp.*, 130 F.R.D. 99, 110 (D. Minn. 1990). For class members with a relatively small pecuniary interest, the potentially significant cost of individual litigation is prohibitive of an individual claim. The Federal MDL and this action and the coordinated proceedings have allowed Plaintiffs to pursue individual suits with little investment of time or money. "This prong of the superiority requirement directs courts to determine whether individuals really would want to control their own litigation in the given situation or whether the ideal is more fiction than reality." 2 William B. Rubenstein, *Newberg on Class Actions* § 4:69 (5th ed. 2012). The court notes that several Plaintiffs opted not to pursue their claims when chosen as bellwether cases and faced with discovery. This may indicate that other Plaintiffs would do the same once more involvement was required and trial arrives. In addition, any class member who does desire to control the litigation of its own claims may opt out of the class action and pursue its own claim.

Syngenta's argument that concentrating the litigation in a particular forum would have no benefit beyond pretrial coordination is ineffective. This matter has been pending in this forum for approximately 18 months, and this Court is very familiar with the factual and legal issues. The proposed claims on behalf of the class do not present any difficulties such as state law variations or choice of law determinations. This weighs in favor of class treatment.

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Finally, Syngenta argues that a class action would be unmanageable in light of the individual issues that must be litigated. "[C]ourts generally hold that if the predominance inquiry is met, then the manageability requirement is met as well." 2 William B. Rubenstein, *Newberg on Class Actions* § 4:72 (5th ed. 2012). As noted above, common questions surrounding liability will predominate the trial. In light of those common issues, the litigation of individual suits "would be grossly inefficient, costly, and time consuming because the parties, witnesses, and courts would be forced to endure unnecessarily duplicative litigation." *Urethane*, 237 F.R.D. at 453. It would be a huge burden on the Court to engage in twenty thousand individual trials presenting the same evidence and claims. Conducting one trial on behalf of twenty thousand farmers that would resolve the common questions is superior to thousands of individual trials. Due to the complexity of the issues involved and class-wide issues that can be resolved with common proof, class certification is the superior method for litigating the claims of those Minnesota farmers who have not filed an individual action. Any remaining individual issues do not make class actions any more unmanageable than individual actions would be. The Court does not foresee any particular difficulties in the management of a class action and ascertaining the class members does not require difficult individual inquiries. Accordingly, a class action would be superior to other methods of adjudication of these claims.

For all of these reasons, the Court finds that the requirements of Rule 23.01 and Rule 23.02(c) are satisfied in this case.

T.M.S.