No. 16-_____

United States Court of Appeals for the Tenth Circuit

IN RE SYNGENTA AG MIR162 CORN LITIGATION

Syngenta AG; Syngenta Crop Protection AG; Syngenta Corporation; Syngenta Crop Protection, LLC; Syngenta Biotechnology, Inc.; and Syngenta Seeds, LLC,
Petitioners

On Petition for Leave to Appeal from the U.S. District Court for the District of Kansas (The Hon. John W. Lungstrum)
MDL No. 2591, Case No. 2:14-md-2591

RULE 23(f) PETITION FOR PERMISSION TO APPEAL CLASS CERTIFICATION ORDER

Paul D. Clement
Jeffrey M. Harris
Nicholas T. Matich
BANCROFT PLLC
500 New Jersey Ave., NW
Seventh Floor
Washington, DC 20001
(202) 234-0090

Michael D. Jones
Patrick F. Philbin
Edwin John U
Devin A. DeBacker
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000

Thomas P. Schult
BERKOWITZ OLIVER LLP
2600 Grand Boulevard, Ste. 1200
Kansas City, MO 64108
(816) 561-7007

Counsel for Syngenta Defendants-Petitioners

October 11, 2016

CORPORATE DISCLOSURE STATEMENT

Petitioner Syngenta AG is a Swiss corporation whose ordinary shares are publicly traded on the Swiss stock exchange and the New York Stock Exchange. Syngenta AG has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioners Syngenta Crop Protection AG, Syngenta Corporation, Syngenta Crop Protection, LLC, Syngenta Seeds, Inc. (now Syngenta Seeds, LLC), and Syngenta Biotechnology, Inc. (now merged into Syngenta Crop Protection, LLC) are wholly owned subsidiaries, either directly or indirectly, of Syngenta AG. No publicly held corporation other than Syngenta AG owns 10% or more of their stock.

/s/ Patrick F. Philbin

Patrick F. Philbin
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, D.C. 20005
(202) 879-5000
patrick.philbin@kirkland.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The decision below certified nine classes collectively seeking over $5 billion in damages on novel and dubious theories that Chinese rules on genetically modified (GM) traits for corn seeds should have dictated defendants' practices in the U.S. The certification decision rests on fundamental errors on issues of law that this Court has not resolved and that are vitally important for defining the nature of the "rigorous analysis" required by Rule 23. The district court's rulings bear upon every court's evaluation of a class certification motion and warrant review to clarify the unsettled law of this Circuit.

First, the district court deviated from the law in multiple Circuits by announcing that, in assessing whether Plaintiffs had met the requirements of Rule 23, the court "does not weigh" conflicting expert evidence. Mem. & Order ("Op."), Dkt. 2547 (Tab A) at 17. Instead, the court held that, merely by presenting an expert opinion that is admissible under *Daubert*, a plaintiff satisfies its burden "to offer evidence" and a court "*cannot deny* class certification" on the ground that the expert opinion is flawed and unconvincing. *Id.* (emphasis added). That holding turns the law on its head. The mere fact that an expert gets across the starting line on the threshold issue of admissibility does not mean that he automatically carries the day and that certification becomes inevitable. The district court's approach cannot be squared with the demand for a "rigorous analysis" requiring a plaintiff to "affirmatively demonstrate" compliance with Rule 23, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), and it has been rejected by many courts of appeals, which hold that "weighing conflicting expert testimony" is "integral to the rigorous analysis Rule 23 demands." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d

305, 323 (3rd Cir. 2008). The decision also created an *intra*-circuit conflict of authority.

The district court's assertion that its result was required by *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), misreads *Tyson* and simply raises another issue on which guidance from this Court is needed. *Tyson* did not silently jettison years of precedent requiring plaintiffs to *prove* compliance with Rule 23 and replace it with a rule that courts should treat a plaintiff as automatically carrying his burden simply because he can muster an expert who limps across the threshold of admissibility.

The error below was outcome-determinative and produced a result at odds with the only precedent directly on point. Plaintiffs' predominance arguments hinged on their experts' assertion that a change in the price of corn on the Chicago Board of Trade (CBOT) is uniformly reflected in all local prices thus providing common evidence of injury for all farmers. But when the *same* lawyers using the *same* experts asserting the *same* opinions argued that changes in CBOT prices uniformly affected local prices for another commodity grain (rice), a court that properly weighed expert opinions flatly rejected those theories and denied class certification. As that court explained, "a drop in the CBOT did not represent a class-wide injury," and "fluctuating deviation[s] from the CBOT" in local prices foreclosed "class-wide adjudication." *In re Genetically Modified Rice Litig.*, 251 F.R.D. 392, 398 (E.D. Mo. 2008).

Second, after noting a circuit conflict on the question whether there must be an "administratively feasible" means for determining membership in a class for the class to be "ascertainable," the court chose the *wrong* side of that conflict. It held that there is no need for an "administratively feasible" means of deciding who is in the class. Op. 6.

That ruling not only was error, but also created another *intra*-circuit conflict, because other courts in this circuit have adopted the opposite rule. This Court's guidance is sorely needed to clarify Tenth Circuit law concerning the threshold test of ascertainability.

Third, the court erred in holding that a class is a superior means for handling this case where it is *undisputed* that tens of thousands of plaintiffs have filed individual suits that either were designed to avoid inclusion in this MDL (and any class here) or were expressly carved out from the class definitions. This case is literally unprecedented given the guarantee that these tens of thousands of cases will remain separate from the class. Those suits not only show that individuals have an interest in handling their own actions, but also fatally undermine the efficiencies to be gained from the class action device. This Court's guidance on taking into account such an extraordinary mass of individual actions in considering the superiority requirement of Rule 23(b)(3) is also warranted.

BACKGROUND

This case involves an unprecedented effort to hold a seed company liable in tort for selling a U.S.-approved, GM corn seed in the U.S. simply because the GM trait in the seed had not yet been approved in China. In 2010, after the USDA, FDA, and EPA had found that the GM trait in Syngenta's seed known as Viptera did not pose risks to humans, animals, or the environment, the USDA "deregulated" the trait, allowing Viptera seed to be sold without restrictions on how corn grown from it should be sold or handled. Syngenta then sold Viptera in the U.S. for the 2011 crop cycle. Syngenta also secured import approval for the GM trait in countries including Japan, Mexico, Korea, and Canada, but had not yet secured import approval for China, which imported about 0.33%

of U.S. corn production at the time Viptera was launched.

More than two years later, in November 2013, the largest corn crop in 50 years was being harvested and U.S. corn prices had fallen by over 30% since July. China then began rejecting U.S. corn supposedly due to the alleged presence of Viptera and, according to the complaint, embargoed U.S. corn. Tens of thousands of plaintiffs sued Syngenta, alleging that China's actions hurt U.S. corn prices. The litigation now involves cases in this MDL as well as suits by tens of thousands of plaintiffs in Minnesota state court and more than three thousand plaintiffs in state and federal courts in Illinois.

There is no claim that Viptera is unsafe or defective, or that it caused any physical harm. Instead, Plaintiffs seek up to $7.02 billion in damages for an alleged price drop supposedly caused by reduced Chinese demand. Plaintiffs originally argued that Syngenta had a tort-law duty either (i) to refrain from selling Viptera *at all* in the U.S., or (ii) to ensure that Viptera corn was segregated from export channels. In denying a motion to dismiss, the district court announced a novel tort-law duty for a GM seed manufacturer to avoid purely economic harm to others by restricting its sale of U.S.-approved products in the U.S. *In re Syngenta AG MIR162 Corn Litig.*, 131 F. Supp. 3d 1177, 1193 (D. Kan. 2015). The court based that new duty on the view that Plaintiffs "were part of an inter-connected industry and market, with expectations on all sides that manufacturers" like Syngenta would run their businesses "at least in part for the mutual benefit of all in that inter-connected web." *Id.* at 1189. The court later recognized that an obligation to *segregate* Viptera corn would impose duties to inspect and test grain that are preempted by federal law. Mem. & Order, Dkt. 2426 at 19. Thus, the core surviving

theory is that tort law imposes a duty on Syngenta not to sell Viptera at all in the U.S. absent Chinese approval—thereby effectively giving China a veto over the sale of U.S.-approved biotechnology *in the U.S.*

Plaintiffs moved to certify a nationwide Lanham Act class (on the theory that alleged misrepresentations affected sales of Viptera) and eight state classes (alleging common law torts), each consisting of "producers" of corn who "priced their corn for sale after November 18, 2013." Op. 3. Their sole theory for showing injury through common proof was that the Chinese embargo affected the price of corn on CBOT and that changes in CBOT prices cause uniform and immediate changes in all local prices nationwide, regardless of where, when, how, and to whom each farmer sold his corn.

To show the connection between CBOT prices and local prices, Plaintiffs' experts relied on regression analysis. But by lumping together data at hundreds of delivery points over seven years, their analysis failed to address the key question—whether there was a uniform relationship between CBOT prices and local prices when data were disaggregated and tested against different locations and different time periods. Syngenta's experts performed that analysis and showed that the relationship between CBOT prices and local prices varies widely by time and location—with price changes in some locations showing *zero* association with changes in CBOT prices.

Holding that the "Court does not weigh the class-wide evidence concerning the relationship between CBOT and local prices," Op. 17, the court granted certification.

REASONS FOR GRANTING THE PETITION

This Court has "unfettered" discretion to grant review of a class certification order

based on "'any consideration [the Court] find[s] persuasive" and has rejected a "rigid test" restricting Rule 23(f) review. *Vallario v. Vandehey*, 554 F.3d 1259, 1262, 1264 (10th Cir. 2009) (quoting Fed. R. Civ. P. 23(f) advisory committee's note). Review is warranted here to provide guidance on unsettled questions that are both "significant to the case at hand, as well as to class action cases generally," and to avoid forcing Syngenta into at least nine class trials based on "manifestly erroneous" rulings. *Id.* at 1263-64.

I. The District Court Erred By Failing To Weigh Conflicting Expert Opinions.

The district court erred by refusing to weigh conflicting expert testimony in ruling on the predominance requirement of Rule 23(b)(3). That approach conflicts with decisions of multiple courts of appeals, creates an intra-circuit conflict, and presents a question of law on which clarity from this Court is sorely needed. *See id.*

The district court announced that, in ruling on class certification, the court "*does not weigh* the class-wide evidence concerning the relationship between CBOT and local prices." Op. 17 (emphasis added). The court thus expressly declined to weigh the persuasiveness of the expert opinions on which Plaintiffs had relied to argue that injury and damages could be shown through common evidence. Instead, the court held that, as long as Plaintiffs presented an opinion that was not ruled inadmissible under *Daubert* and that "a reasonable juror could believe," the court's inquiry was over. *Id.* Indeed, it went further to hold that the court "*cannot* deny class certification" based on critiques that fall short of rendering an opinion inadmissible. *Id.* (emphasis added).

That ruling squarely conflicts with the majority approach of other Circuits. Those courts hold that "weighing conflicting expert testimony at the certification stage is not

only permissible; it may be *integral* to the rigorous analysis Rule 23 demands." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 323 (3d Cir. 2008) (emphasis added); *see also Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005) ("in ruling on class certification, a court may be required to resolve disputes," including "expert disputes"); *West v. Prudential Secs., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002). That imperative follows from the repeated admonition that a court must satisfy itself through "rigorous analysis" that plaintiffs "affirmatively demonstrate" compliance with Rule 23, *Dukes*, 564 U.S. at 350-51, and from the fact that, "[l]ike any evidence, admissible expert opinion may persuade its audience, or it may not," *Hydrogen Peroxide*, 552 F.3d at 323.

Numerous courts of appeals have thus held that it is error for a court to "en[d] its analysis of the plaintiffs' [expert] evidence after determining such evidence was merely admissible" and to refrain from "judging the persuasiveness of the evidence presented." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982-83 (9th Cir. 2011); *see also Sher v. Raytheon Co.*, 419 F. App'x 887, 889 (11th Cir. 2011) (error to fail "to declare a proverbial winner in the parties' war of the battling experts").[1] Moreover, the decision below created an *intra*-circuit conflict with at least one other district court. *See Abraham*

[1] *See also Hydrogen Peroxide*, 552 F.3d at 323-24 ("Opinion testimony should not be uncritically accepted as establishing a Rule 23 requirement merely because the court holds the testimony should not be excluded, under *Daubert* or for any other reason."); *West*, 282 F.3d at 938; *In re IPO Secs. Litig.*, 471 F.3d 24, 42 (2d Cir. 2006); *Pedroza v. PetSmart, Inc.*, No. ED CV 11-298-GHK (DTBx), 2013 WL 1490667, at *3 (C.D. Cal. Jan. 28, 2013) ("*Ellis* instructs that to the extent the expert testimony concerns a Rule 23 requirement, we must go beyond mere admissibility and evaluate the testimony's persuasiveness under the relevant standard for evaluating that requirement—*i.e.* if the testimony concerns commonality, it must pass muster under the 'rigorous analysis' standard *Dukes* requires in assessing commonality.").

v. WPX Prod. Prods., LLC, No. CIV 12-0917 JB/CG, 2016 WL 4489936, at *81 (D.N.M. Aug. 16, 2016) (where an issue is "essential to determining whether the class claims are common, the Court must determine which expert's testimony is more persuasive").

Refusing to weigh expert evidence offered specifically in support of certification is fundamentally incompatible with a court's duty to reach "a determination that Rule 23 is satisfied." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). Under the ruling below, as long as a plaintiff can submit an admissible opinion on a Rule 23 requirement, he is deemed to meet that requirement, even if "rigorous analysis" would show the opinion is unpersuasive. That approach abdicates the court's role as a gatekeeper ensuring that Rule 23 has actually been "satisfied," and "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert." *West*, 282 F.3d at 938; *see also In re IPO Secs. Litig.*, 471 F.3d at 42 ("disavow[ing]" the view that "an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed"). The district court's further explanation that Plaintiffs are merely "required to *offer evidence* to show predominance," Op. 17 (emphasis added), echoes the universally discredited view that plaintiffs need only provide "some showing" to satisfy Rule 23. *See, e.g.*, *In re IPO*, 471 F.3d at 42.

The district court's approach also cannot be justified by the suggestion that the "persuasiveness of such [expert] evidence is for the jury at trial." Op. 17. That is just a variant on the emphatically rejected belief that a court must refrain from delving into the merits in resolving class certification. *See, e.g.*, *Comcast*, 133 S. Ct. at 1433; *Dukes*, 564 U.S. at 351; *Ellis*, 657 F.3d at 981 (court "*must* consider the merits if they overlap with"

Rule 23 requirements) (emphasis in original).

The court below thought its approach was dictated by *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016). *Tyson*, however, did not overturn years of precedent establishing that a plaintiff must "actually *prove*" that a "proposed class satisfies each requirement of Rule 23," *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014), and replace it with a rule that a plaintiff shows predominance merely by offering an expert opinion that crosses the threshold of admissibility. *Tyson* is a substantively and procedurally distinguishable case applying unique rules under the Fair Labor Standards Act (FLSA) in the context of review after a full trial.

Tyson was a suit for overtime wages under the FLSA for time spent donning and doffing protective gear. Significantly, the defendant breached its FLSA duty to record employees' time, which deprived plaintiffs of individual evidence and triggered certain evidentiary rules unique to the FLSA. 136 S. Ct. at 1043, 1047. At trial (not at class certification), the plaintiffs introduced an expert study to show *average* donning and doffing times. The central issue in *Tyson* was whether the average time study would be admissible in an individual case or whether the courts had improperly created a special rule for class actions. Critically, the Supreme Court held that the average time study could be used in an individual case solely due to FLSA precedents addressing situations in which "employers violate their statutory duty to keep proper records" and thereby create an "evidentiary gap" for the employee. *Id.* at 1047. It was in that unique context that the Supreme Court noted that, once expert evidence is found "to be admissible," weighing the evidence is up to a jury and that the class could have been decertified in

Tyson only if the district court had found that "no reasonable juror" could have credited the average time study. *Id.* at 1049. Nothing in that holding announced a general rule that, if a plaintiff offers an expert opinion addressing a requirement of Rule 23 at the certification stage (a scenario not even presented in *Tyson*), mere admissibility under *Daubert* means that the court must accept the opinion as satisfying the Rule 23 requirement and leave any other evaluation to the jury at trial.

The district court's approach deriving that mistaken rule from *Tyson* was doubly flawed. First, *Tyson* does not suggest that the mere absence of a *Daubert* challenge means that an expert opinion is admissible in an individual trial. The average time study in *Tyson* could be used in an individual case due to an "evidentiary gap" from poor records and due to particular FLSA rules. There is no similar basis here for the unexplained suggestion that an individual farmer could rely on Plaintiffs' expert reports to establish individual injury. Op. 16.[2] Second, the court ignored the point that, because the opinion in *Tyson* was introduced only on the merits, *Tyson* did not purport to address how a court should assess an expert opinion offered at the certification stage specifically to address a requirement of Rule 23. Not surprisingly, no other court has interpreted *Tyson* as a watershed decision changing the rules for weighing expert testimony (or the burden of proof) on class certification. To the contrary, other courts have continued to

[2] If a farmer who sold his corn in Dubuque on April 10, 2014 sought to establish injury by pointing to an expert report asserting that, on average, over a seven-year period the local cash prices in hundreds of *other* places reflected changes in CBOT prices *in the long run*, there is no reason to assume that evidence would be admissible to show individual injury and damages. Instead, evidence showing the influence (if any) of CBOT prices on prices in Dubuque in April 2014 would be required.

weigh expert testimony as they did before. *See, e.g.*, *IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, 818 F.3d 775, 783 (8th Cir. 2016).

The conflict between the experts here, moreover, was central to Plaintiffs' theory on predominance. Plaintiffs' experts failed to show that local prices at different places and different times uniformly reflected changes in CBOT prices, because their regression simply lumped together data from all places over seven years to show a long-run, *average* relationship. Courts rejecting similar analyses on class certification have recognized that an expert who runs the data together like that "evade[s] the very burden that he was supposed to shoulder." *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 493 (N.D. Cal. 2008). Without evidence that separately tested the relationship between CBOT prices and local prices at *different* times and *different* places to establish uniform impact, there was no basis for class certification.

The court's refusal to weigh expert evidence was also plainly outcome determinative. It produced a ruling flatly at odds with the only other court that has faced the same theory that drops in the CBOT price for a commodity grain (rice) uniformly affect local prices—indeed, a theory offered by the same lawyers and the same experts also seeking economic losses from the introduction of a GM seed. As that court explained in *denying* class certification, while "CBOT provided a national index . . . it was not a uniform 'price tag'" and thus "a drop in the CBOT did not represent a class-wide injury." *GM Rice*, 251 F.R.D. at 398. Instead, "[t]he very notion of a localized basis (or a fluctuating deviation from the CBOT) is itself at odds with class-wide

adjudication of damages,"[3] and any determination of "actual damage is an individual issue specific to each plaintiff in this case, involving a unique inquiry into the time, place, and manner in which each plaintiff both priced and sold his rice." *Id.* Had the district court weighed the expert evidence, it would have reached the same result here.[4]

There is no credible argument that, even if Plaintiffs' expert opinions had been rejected, common issues still would have been found to predominate. Citing *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184 (2013), the district court suggested that rejecting Plaintiffs' experts would yield a *uniform* ruling that "plaintiffs will be unable to prove the fact of injury" and the "case will effectively be lost" for all plaintiffs. Op. 17. That is not correct, and *Amgen* is inapposite. The key question in *Amgen* was whether certain information was "material" to the price of a stock, which was necessarily a binary determination that had the same answer for all plaintiffs. *See* 133 S. Ct. at 1196-97, 1199. The expert disputes in this case did not present a similar binary choice. While Plaintiffs' experts opined that changes in CBOT prices were uniformly reflected in all local prices, Syngenta's experts showed that whether (and to what extent) changes in CBOT prices were reflected in local prices *varied* by place and by time. Thus, if the court credited Syngenta's experts, the result would not be that "the case [would] effectively be lost." Op. 17. Instead, the result would be individualized inquiries to

---

[3] Local prices are often expressed by comparison to the CBOT price for purposes of hedging, and the difference between local price and the CBOT price is called the "basis."

[4] The existence of an alternative index (the world market price) for rice cannot distinguish *GM Rice*. *Cf.* Op. 20. The *GM Rice* court made clear that, even taking solely the growers whose local prices referenced the CBOT price as an index for comparison, CBOT prices still did not provide a common basis for establishing injury.

determine when and where each farmer sold his corn to determine whether the price in that place at that time had been affected by a change in the CBOT price or not.

Finally, the decision below cannot be salvaged by the court's fallback assertion that it was "persuaded that CBOT price changes are reflected in local prices." Op. 18. The court conducted no analysis of the expert opinions and instead relied on an analogy to *Urethane* that is especially misplaced. Op. 19, 20-21. *Urethane* was a price-fixing case in which there was evidence that all prices were *negotiated* from inflated list prices. *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014). Here, there is no comparable pricing mechanism. The CBOT price is not a starting point or "baseline" from which other prices are negotiated or set. The CBOT price is set by supply and demand, and so are local prices. While local prices are often expressed by noting the difference from the CBOT price (*i.e.*, basis), the conflicting expert evidence about the significance of that convention is exactly what the district court refused to consider.

As the court acknowledged, moreover, *Urethane* rested on a presumption of class-wide impact in price-fixing cases. Op. 21. But contrary to the court's assertion, there is no reason to *assume* that the tie between CBOT prices and local prices is somehow "even stronger" than the tie between list prices and individual prices in *Urethane*. *Id.* A presumption of class-wide impact can apply in a price-fixing case because there has been some showing to define a product and geographic market and collusion to raise prices can be assumed to affect that market. The very question the experts addressed below, however, was whether Chicago and all local markets were sufficiently integrated that all pricing signals from CBOT were uniformly and immediately reflected in local prices or

whether these geographically dispersed markets acted—in some cases—as distinct markets in which prices from CBOT would *not* always be uniformly and immediately reflected in local prices. That question could be resolved only by weighing expert *evidence*, not by borrowing assertions of theory from *Urethane*. *E.g.*, *In re Wholesale Grocery Prods. Antitrust Litig.*, 2012 WL 3031085, at *10 (D. Minn. July 25, 2012).

II. The District Court Erred By Holding That Ascertainability Does Not Require An Administratively Feasible Means For Determining Who Is In The Class.

The ruling below on ascertainability "involve[s] an unresolved issue of law" in this Court, *Vallario*, 554 F.3d at 1263, on which the district court not only chose sides in an avowed circuit conflict, but also created an *intra*-circuit conflict of authority among district courts, thus creating a pressing need for this Court to clarify the law.

After noting that this Court "has not discussed an ascertainability requirement," the district court acknowledged a conflict among the other circuits. Op. 4; *see also Sandusky Wellness Ctr., LLC v. Medtox Scientific, Inc.*, 821 F.3d 992, 996 (8th Cir. 2016) ("The circuits diverge on the meaning of ascertainability."). The Third Circuit, joined by the Second, Fourth, Ninth, and Eleventh Circuits, has required proof that "there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015).[5] That requirement ensures that a defendant will not be forced into a costly class trial only to find out later that determining who is in the class will degenerate into a

[5] *See also Brecher v. Republic of Arg.*, 806 F.3d 22, 25-26 (2d Cir. 2015); *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 948 (11th Cir. 2015); *Martin v. Pac. Parking Sys. Inc.*, 583 F. App'x 803, 804 (9th Cir. 2014); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014).

series of mini-trials in itself. It also protects the defendant's "due process right to raise individual challenges and defenses to claims" from being "eviscerate[d]" by certification of a class that "masks individual issues" that will arise in determining who meets the class definition. *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013). Three circuits have rejected the majority rule. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015); *see also Sandusky*, 821 F.3d at 996; *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015).

The district court embraced the minority approach. Op. 6. In doing so, it broke ranks with virtually every other district court in this Circuit to address the issue, as other courts have cited the majority rule and have agreed that "[a]scertainability requires that '[t]he method of determining whether someone is in the class must be administratively feasible' and must not depend on 'individualized fact-finding.'" *Donaca v. Dish Network, LLC*, 303 F.R.D. 390, 397 (D. Colo. 2014) (quoting *Carrera*).[6] Thus, the court sided with the minority in an acknowledged circuit split and created an (unacknowledged) intra-circuit conflict that cries out for guidance from this Court.

The ruling on ascertainability was also critical for the result, because it led the court to sidestep the problems Syngenta identified with determining who is in the class.

---

[6] *See also, e.g.*, *Abraham*, 2016 WL 4489936, at *77 (class must be capable of being "ascertained in an economical and 'administratively feasible' manner"); *McKnight v. Linn Operating, Inc.*, No. CIV-10-30-R, 2016 WL 756541, at *8 (W.D. Okla. Feb. 25, 2016) ("If class members are impossible to identify without extensive and individualized fact-finding or mini-trials, then a class action is inappropriate.") (citing Third Circuit); *Morris v. Davita Healthcare Partners, Inc.*, 308 F.R.D. 360, 370 (D. Colo. 2015) ("[T]here must be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.") (citing Third Circuit).

First, discovery showed that determining who "priced their corn for sale after November 18, 2013," Op. 3, would require extensive individualized fact-finding, given the myriad pricing mechanisms farmers used (including pricing long before delivery) and their typical lack of both records and any recollection concerning when they had priced their corn. Most producers did not retain contracts for the past three years, *see* Opp'n to Class Cert., Dkt. 2335 at 23, and the records they did retain failed to show when corn was priced, *id.* at 24.[7] The district court's solution for "producers' incomplete records" was to point out that "corn *purchasers* are generally required to keep records of contracts." Op. 6 (emphasis added). But the blithe suggestion that the way to determine the date of pricing for tens of thousands of producers would be to issue *third-party subpoenas* to every *purchaser* of corn could not have survived "rigorous analysis" to assess whether it was an "administratively feasible" means for finding class membership. It plainly is not.

The court's alternative suggestion that farmers could assert when they priced their corn by affidavit, Op. 6-7, only highlights the conflict in the law. The Third Circuit has rejected the use of such a self-serving affidavit, unsupported by other evidence, because the defendant's due process right to test the affidavit by questioning generates precisely the individual inquiries that defeat ascertainability. *See Carrera*, 727 F.3d at 309.

Second, the court failed to grapple with the problems posed by determining who qualifies as a "producer." Plaintiffs originally defined "producer" as one who shared risk

[7] Pinpointing 2013 pricing also could not be avoided on the view that any sale in 2014 or 2015 would suffice for class membership, both because corn could be priced two years in advance and because even a limited sample of 250 Plaintiff Fact Sheets indicated that as many as 3% of producers sold no corn in 2014 or 2015, thus making the date of 2013 pricing critical. Syngenta Class Cert. Hr'g Presentation, Dkt. 2524 at 4.

in a corn crop. Syngenta showed that definition would require individual inquiries into (among other things) oral share-cropping leases, which were common. Opp'n. to Class Cert., Dkt. 2335 at 34-35. Plaintiffs then changed the definition at argument to make a "producer" anyone listed as having a share in a corn crop on a USDA form—the FSA 578, on which farmers self-report shares in a crop. Op. 7. Undisputed evidence showed, however, that the 578s were riddled with inaccuracies, including listing persons who had no share in a crop whatsoever.[8] Even under the cases adopted by the district court, defining the class by use of such a list raised a fatal problem. It triggered the need for individual inquiries to weed out those who really had no share in a crop, because they could not participate in any judgment. And those inquiries would defeat predominance.

The district court ignored that problem. Asserting, without explanation, that the FSA 578 "provides a reasonably reliable and objective method of identifying corn producers," Op. 7-8, the court ruled there was no need to vet the forms. That approach is incompatible with Syngenta's "due process right to raise individual challenges and defenses to claims." *Carrera*, 727 F.3d at 307. Where undisputed evidence has shown that the forms include persons who *could not* have any claim, Syngenta has a due process right to challenge whether each person appearing on an FSA 578 actually has a share in a corn crop, and those inquiries would wholly defeat any efficiency of a class action.

III. The District Court's Ruling On Superiority Was Manifestly Erroneous.

The ruling below on superiority was manifestly erroneous for two reasons.

---

[8] The forms both listed individuals who have no interest in a crop, *see* Syngenta Class Cert. Hr'g Presentation, Dkt. 2524 at 8-9 (plaintiffs Bix and R&W Farms), and listed individuals as having a 100% share when, in fact, they did not, *see id.*

First, the court wrongly relied on "a presumption against dismissing a class action on manageability grounds" or a rule that "such dismissals are disfavored." Op. 29 n.11 (quoting 2 *Newberg on Class Actions* § 4:72 & n.7 (5th ed. 2012)).[9] That improperly reduced Plaintiffs' burden to prove that the requirements of Rule 23 had been met and was contrary to this Court's instruction that it is error to "relax[] and shift[]" Rule 23's "strict burden of proof," to resolve doubts "in favor of certification," or to "presume[]" that the requirements of Rule 23 are satisfied. *Wallace B. Roderick Revocable Living Tr. v. XTO Energy Inc.*, 725 F.3d 1213, 1218 (10th Cir. 2013).

Second, the district court's conclusion cannot be squared with the undisputed fact that, even with the classes certified, *tens of thousands* of suits remain to be resolved individually. More than 3,000 plaintiffs have filed individual actions in federal and state courts in Illinois precisely to avoid being part of this MDL and the classes certified here. In addition, because the class definitions exclude those who filed suit in Minnesota before June 15, 2016, *see* Op. 30-33, and because the proposed class in Minnesota includes only Minnesota residents, there are over 36,000 farmers from the eight States at issue here who have pending suits that *must* be resolved individually—they are not even part of any proposed class. That extraordinary number of suits remaining for individual resolution

[9] Plaintiffs' shortcomings on manageability are particularly apparent because they have no viable plan for trying the nationwide Lanham Act class given that the claims of some class representatives would have to be remanded to different courts of origin under *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). The court rejected Plaintiffs' bizarre proposal to try the nationwide class eight different times along with each state class. *See* Op. 30 n.13. As a result, *after* certifying the class, the court has now ordered briefing to figure out how to try the Lanham Act class, and has shifted the burden *to Syngenta* to explain why *Lexecon* rights preclude trying the class—as framed with the current class representatives—in Kansas. *See* Order, Dkt. 2563.

necessarily defeats a finding that a class action would be superior. *See, e.g.*, *GM Rice*, 251 F.R.D. at 400 (class action not superior where "hundreds of plaintiffs have shown significant interest in prosecuting their claims").

As an initial matter, "other pending litigation is evidence that individuals have an interest in controlling their own litigation." *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590, 624 (C.D. Cal. 2015). The district court wrongly discounted that consideration, speculating (without citation) that individual plaintiffs would not really want control over their own actions when it got closer to trial. Op. 28. But that rationale ignores the fact that 36,000 suits *must* proceed individually, because they are *carved out* from the class. It also ignores the fact that a large group of plaintiffs who filed suit in Illinois and who are represented by the Phipps Group of attorneys clearly *will* go to trial, in part because they have pursued a different strategy from the Plaintiffs' Leadership appointed in this MDL. While Plaintiffs' Leadership has colluded with large grain exporters such as Cargill and ADM, the Phipps Group has *sued* them for exporting Viptera corn and supposedly triggering the Chinese embargo. Given the "range of choice [in] the strategy and tactics of the litigation" here, the interest in individual control over actions is at its height. *Hobbs v. Ne. Airlines, Inc.*, 50 F.R.D. 76, 79 (E.D. Pa. 1970). Indeed, the Phipps Group, who also represent plaintiffs in this MDL, *opposed* class certification below.

The court below also wrongly suggested, without citing any evidence, that many claims are so small it would be impractical to pursue them separately. Op. 28. That is flatly contrary to the approach of other courts in this Circuit, which recognize that "the

extent to which proposed class members have already filed individual claims" is "probative evidence whether the claims are truly negative value." *Bustillos v. Bd. of Cty. Comm'rs of Hidalgo Cty.*, 310 F.R.D. 631, 655-56 (D.N.M. 2015). Here, tens of thousands of individual suits conclusively show that these are not negative value claims.

Finally, the fact that tens of thousands of suits will remain for resolution outside the classes certified below eliminates the efficiencies to be gained from a class. Those suits mean that there will be *both* a bellwether process for sorting through individual cases *and* at least *nine* class trials (eight state classes and the nationwide Lanham Act class). There is no basis for thinking such a dual-track approach is somehow superior, when a bellwether process alone can resolve complex litigation such as this after a minimal number of trials. As *GM Rice* noted, bellwethers before a few representative juries can provide valuable guidance for resolving cases, and thus rejecting a class does not result in "hundreds of identical cases separately tried." 251 F.R.D. at 400. That prediction proved correct, as *GM Rice* (like many other complex cases in which a class was denied) was resolved after fewer than ten bellwether trials. Syngenta Class Cert. Hr'g Presentation, Dkt. 2524 at 56. Especially given the novel and dubious nature of Plaintiffs' theory on the merits, it makes no sense to superimpose the hydraulic pressure of class actions onto the litigation where bellwethers will be better suited to inform the parties on how these unprecedented liability theories fare in front of representative juries.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

/s/ Patrick F. Philbin

Michael D. Jones
Patrick F. Philbin
Edwin John U
Devin A. DeBacker
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, D.C. 20005
Phone: (202) 879-5000
Fax: (202) 879-5200
mjones@kirkland.com
patrick.philbin@kirkland.com
edwin.u@kirkland.com
devin.debacker@kirkland.com

Paul D. Clement
Jeffrey M. Harris
Nicholas T. Matich
BANCROFT PLLC
500 New Jersey Ave., NW
Seventh Floor
Washington, DC 20001
(202) 234-0090
pclement@bancroftpllc.com

Thomas P. Schult
BERKOWITZ OLIVER LLP
2600 Grand Boulevard
Suite 1200
Kansas City, MO 64108
Phone: (816) 561-7007
Fax: (816) 561-1888
tschult@berkowitzoliver.com

Counsel for Syngenta Defendants-Petitioners

CERTIFICATE OF COMPLIANCE

I certify that this petition is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this petition complies with the page limitation established by Fed. R. App. P. 5(c).

/s/ Patrick F. Philbin

Patrick F. Philbin
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, D.C. 20005
(202) 879-5000
patrick.philbin@kirkland.com

CERTIFICATE OF DIGITAL-SUBMISSION COMPLIANCE

I certify that:

(1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk; and

(2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (Microsoft System Center Endpoint Protection, client version 4.9.218.0, updated as of October 11, 2016) and, according to the program, are free of viruses.

/s/ Patrick F. Philbin

Patrick F. Philbin
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, D.C. 20005
(202) 879-5000
patrick.philbin@kirkland.com

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2016, I caused true and correct copies of the foregoing Petition, with attachments, to be served by hand on the following counsel:

Patrick J. Stueve
STUEVE SIEGEL HANSON LLP
460 Nichols Road, Suite 200
Kansas City, MO 64112
Phone: (816) 714-7100
stueve@stuevesiegel.com

William B. Chaney
GRAY REED & MCGRAW, P.C.
1601 Elm Street, Suite 4600
Dallas, TX 75201
Phone: (469) 320-6031
wchaney@grayreed.com

Don M. Downing
GRAY, RITTER & GRAHAM, P.C.
701 Market Street, Suite 800
St. Louis, MO 63101
Phone (314) 241-5620
ddowning@grgpc.com

Scott Powell
HARE WYNN NEWELL & NEWTON
2025 3rd Ave. N., Suite 800
Birmingham, AL 35203
Phone: (205) 328-5330
scott@hwnn.com

Appointed Class Counsel for Producer Plaintiffs

Martin J. Phipps
Barry Deacon
PHIPPS ANDERSON DEACON LLP
102 9th St.
San Antonio, TX 78215
Phone: (210) 340-9877
Fax: (210) 340-9899
mphipps@phippsandersondeacon.com
bdeacon@phippsandersondeacon.com

Clayton A. Clark
Scott A. Love
CLARK LOVE HUSTON GP
440 Louisiana St., Suite 1600
Houston, TX 77002
Phone: (713) 757-1400
Fax: (713) 759-1217
cclark@triallawfirm.com
slove@triallawfirm.com

Counsel for Individual Plaintiffs Opposing Class Certification

/s/ Patrick F. Philbin
Patrick F. Philbin
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, D.C. 20005
(202) 879-5000
patrick.philbin@kirkland.com