No. 16-607

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE SYNGENTA AG MIR162 LITIGATION

On Petition for Permission to Appeal (Grant of Class Certification)
from the United States District Court for the District of Kansas
Hon. John Lungstrum, District Judge
No. 2:14-md-2591

PLAINTIFFS-RESPONDENTS' ANSWER IN OPPOSITION TO DEFENDANTS-PETITIONERS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Respondents each have no parent and no publicly held corporation owns 10% or more of their stock.

INTRODUCTION

Rule 23(f) interlocutory appeals "are traditionally disfavored," appropriate in a "narrow" category of cases involving unsettled legal issues or manifest error "likely to evade end-of-case review." *Vallario v. Vandehey*, 554 F.3d 1259, 1262-63 (10th Cir. 2009). Syngenta does not attempt to show that the supposed unsettled issues of law here are likely to evade appellate review, given that those legal issues routinely arise in class actions. Its principal criticism is Judge Lungstrum's application of *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), but Syngenta cites neither a conflicting interpretation calling out for immediate review nor authority that has endorsed Syngenta's interpretation of *Tyson* as relevant only to FLSA claims or to post-trial appeals. Finally, even if the class-certification standard for considering conflicting expert testimony was unsettled and likely to evade review, Judge Lungstrum actually did what Syngenta claims it needs an appeal to make him do: He considered Syngenta's evidence, but was "persuaded" by Plaintiffs' weighty evidence to the contrary. Pet., Ex. A ("Op.") at 18.

This case is also a poor vehicle to consider the fact-intensive ascertainability standard. It is not a consumer class action relying on self-identification by affidavit. A farmer need only produce a government record and proof that he marketed *one* bushel of corn in the last three years priced after November 18, 2013. All, or very nearly all, farmers will do so with documentary proof, as shown by the undisputed record below.

Syngenta's final complaint is of "manifest error," the most disfavored justification for interlocutory appeal. The discretion that the Judicial Panel on Multidistrict Litigation vested

in Judge Lungstrum is at its apex in determining how to best organize and manage the MDL. Judge Lungstrum acted well within his discretion in finding that hundreds of thousands of farmers' claims would most efficiently be resolved through binding, classwide adjudication.

Syngenta also fails to even explain why *interlocutory* review is superior here. Except for the relationship between the commodity price of U.S. corn (CBOT) and local corn prices, Syngenta conceded that virtually *every* remaining element of Plaintiffs' claims present common questions. ECF 2436 at 42-45; Op. at 12-13. Discovery is all but complete and trial begins June 5, 2017. If Syngenta prevails at trial, its objections to class certification will be moot. Thus, this is not a case where class certification deprives Syngenta of a right to defend itself on the merits, as evidenced by the fact that even the defenses it highlights in its petition (Pet. 3-5) are decidedly common. *Cf.* ECF 2164 at 4, 6-7, 80. And although Syngenta challenges ascertainability, it does so only as to the feasibility of identifying prevailing plaintiffs (to which its factual arguments fail); it does not allege difficulty in determining preclusive impact of a class-wide judgment.

In contrast, if Plaintiffs prevail at trial, Syngenta retains its right to appeal class certification. Given the constellation of undisputed common issues (Op. at 12-13), the virtual completion of discovery below, and the fact that trial will likely be completed before an interlocutory appeal, the impulse for immediate review lacks a pragmatic justification. Interlocutory review would merely be "disruptive, time-consuming, and expensive," *Vallario*, 554 F.3d at 1262, particularly given the tenuous bases of Syngenta's arguments.

Respectfully, the Court should accordingly deny Syngenta's petition.

BACKGROUND

Each new genetically modified (GM) crop creates a risk to farmers, including those who do not use the new GM seed. Once released, GM traits are highly difficult to contain and without precautions will contaminate other farmers' crops who did not buy the trait. ECF 2531 at ¶323. Many countries regulate the presence of GM traits. For instance, U.S. agencies regulate whether the trait is a "plant pest;" once proven not a plant pest, it can be "deregulated." *Id*. at ¶122; 7 C.F.R. pt.340; ECF 1016 at 15. But deregulation does not dictate when, how or where a seed manufacturer commercializes, and federal agencies cannot consider the economic risks of contamination. ECF 2531 at ¶146; ECF 1016 at 15.

That harm, however, can be considerable because 14% of U.S. corn is sold to foreign markets, and even a small decrease in export demand can cause a "drop in price [that] is relatively large." Ex. GGG at ¶30. (Unless otherwise noted, all exhibits referenced are available in ECF 2164 & 2436.) Many importing countries, including China, will reject an entire cargo ship if they detect any amount of an unapproved trait. Biotech companies and industry organizations, including Syngenta, have publicly recognized this risk, broadly committing to commercialize only after receiving key-import-market approvals. Ex. V. Before commercializing Viptera, Syngenta itself made such a commitment, assuring farmers that there "should be no effects on the U.S. maize export market." ECF 2164 at 8. Yet, it repeatedly downplayed the risk of a trade disruption by misrepresenting the status of its confidential Chinese application for import approval and the scope of its sales; it even sued one grain buyer that balked at taking Viptera due to that risk. *Id*. at 23; ECF 2531 at 5.

Syngenta knew the importance of the Chinese market to U.S. corn farmers. Grain exporters warned Syngenta to wait, and its own employees acknowledged the risk; they even predicted and planned for the fallout from a trade disruption. ECF 2164 at 10-13. Although Syngenta erroneously characterizes Plaintiffs' claims as imposing a "duty not to sell," there are other precautions it could have taken to reduce the risks it created. ECF 1016 at 12. But despite its foreknowledge, Syngenta took none of them. ECF 2164 at 13, 23-26. In its CEO's words, the company's "commercial risk and commercial risk alone" would dictate when and how it commercialized. ECF 2164 at 16. By refusing to defer Viptera's commercialization or to take precautions, Syngenta caused U.S. farmers to lose access to the world's largest and fastest-growing agricultural market. Ex. GGG at ¶8. In October 2013, China detected the Viptera trait in a shipment of U.S. corn. *Id.* at ¶18. Shipments were refused, and China stopped buying.

Two respected agricultural economics professors measured the impact of the ongoing Chinese embargo on U.S. corn prices. They employed two largely independent and well-established, statistical and economic methodologies; both showed that the Chinese ban caused lower U.S. corn prices, which persist today. ECF 2164 at 26-40. While Syngenta blames lower prices on a large corn crop in 2013, Plaintiffs' methodologies isolate the price impact caused by lost Chinese demand. ECF 2539 ("Tr.") 104-05; Ex. GGG at ¶90.

After completing nearly all fact discovery, Plaintiffs moved to certify a nationwide class and eight statewide classes based on the same theory of harm – lower corn prices. Op. at 2. The order granting certification is based on a weighty record. The district court

considered approximately 380 pages of argument and over 4,500 pages of evidence, including expert testimony from both sides. It held an evidentiary hearing at Syngenta's request, where Syngenta and the district court questioned Plaintiffs' experts. ECF 2492.

ARGUMENT

A. The District Court Did Not Find Syngenta's Evidence Persuasive.

Syngenta's principal justification for an appeal now is the district court's statement that, under these facts, the court should "*not weigh* the class-wide evidence concerning the relationship between CBOT and local prices." Pet. 6 (original italics). That announcement was drawn directly from the order affirming class certification in *Tyson* that "[o]nce a district court finds evidence to be admissible, its persuasiveness is, in general, a matter for the jury." 136 S. Ct. at 1049. As *Tyson* explained, a "District Court could have denied class certification on this ground *only if* it concluded that no reasonable juror could have believed" the plaintiffs' common evidence. *Id.* (emphasis added). After reviewing Plaintiffs' experts' reports and personally observing their testimony, Judge Lungstrum found "that a reasonable juror *could* believe that local corn prices do reflect changes in the CBOT futures price." Op. at 17 (emphasis added). On this slender reed, Syngenta seeks to fasten an appeal, claiming the court employed the wrong legal standard in not weighing the evidence. That argument fails for two independent reasons. *First*, Syngenta fundamentally ignores that this was the beginning – not the end – of the court's analysis. Keenly aware that the "parties dispute the standard by which the Court should consider the opinions of plaintiffs' experts" (Op. at 14), the court went on: "[m]oreover, after considering the parties' submissions, the Court *is*

persuaded that CBOT price changes are reflected in local prices." *Id.* at 18 (emphasis added). In reaching that determination, Judge Lungstrum weighed-and-rejected Syngenta's conflicting evidence. *Id.* at 18-24.

He found Syngenta's experts' contention that CBOT changes do not always impact local prices "would defy logic" because "[i]t makes a great deal of sense [that] overall demand for corn, as reflected in the centralized exchange price for the commodity, [would] bear on local prices." *Id.* at 19. That conclusion followed from Syngenta's experts' concessions, including the "fundamental economic principle that decreased demand for a commodity results in lower prices" and that "local prices are generally expressed" by reference to CBOT. *Id.* at 18-19. These concessions are generalized evidence, and the district court was well within its discretion as fact finder to infer that all local prices are impacted by CBOT changes.[1]

"[S]tandard economic studies" (Op. at 18), including "the bible of commodity futures markets," supported this finding: "there's just one price and it's a central price. It's the Chicago [CBOT] price. And any variation from that is simply due to point of delivery." Tr. 39:12-25. Point-of-delivery deviations from CBOT reflect solely local factors, like local supply and demand and transportation costs (*see id.* at 40:1-2). Ex. VVV at 152. Syngenta did not adduce *any* evidence that lost Chinese demand would affect these local factors. Op. at

[1] *Cf. Tyson*, 136 S. Ct. at 1046-47 ("If the [common evidence] could have sustained a reasonable jury finding as to [the relevant fact in each class member's] individual action, that [evidence] is a permissible means of establishing the [disputed fact] in a class action.").

20.[2]

Judge Lungstrum also found persuasive that "both sides have cited" historical corn price data that "includes reference to the CBOT prices on the dates of those sales." Op. at 19. The data encompassed "every, if not practically every buying station . . . for corn in the United States," (Tr. 87:4-7; Ex. KKK at 61:22-62:3, 63:11-20, 226:19-231:13, 232:11-25; ECF 2335 Ex. 1 at ¶26 & n. 24), and shows that CBOT is "fully reflected" in local cash prices "for all days and all 5,000 locations," Tr. 96:11-21.[3]

Syngenta contends the district court did not adequately consider its experts' regression analysis showing that changes in local prices sometimes "varied by place and by time" in relation to CBOT. Pet. 12-13 (emphasis omitted). Judge Lungstrum, however, did consider this analysis but found that evidence unpersuasive: "[a]s plaintiffs' experts explained" this does "not mean that the CBOT change was not felt locally, as local factors [basis] may have

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[2] Judge Lungstrum acknowledged that the price of corn varies from CBOT by location due to the "effect of local factors" – known as the "basis." Op. at 18. Local price is the sum of CBOT plus basis. *Id.*; Tr. at 85:21-23. Syngenta's own experts concede that basis fluctuates based on *local* factors and is "independent of CBOT." Ex. LLL 172:3-10; *see also* Ex. KKK 122:25-123:5. No evidence was introduced that lost Chinese demand impacted these *local* factors, and thereby impacted the corn basis disparately anywhere. While Syngenta's expert hypothesized that this could occur, he admitted this was "speculation." ECF 2436 at 24 & 60 n.46. Still, Judge Lungstrum did *not* ignore Syngenta's argument, but was "persua[ded]" that "decreased exports generally do not affect local factors" (Op. at 20 n.8) based on testimony at the evidentiary hearing. *See* Tr. 82:12-83:17, 97-99.

[3] Syngenta's criticism (Pet. 11 & 10 n.2) focuses on a regression analysis done by Plaintiffs' expert. But Judge Lungstrum did not even cite that analysis as a determinative factor in granting class certification. And a regression analysis can be probative even when it is not determinative. *See In re TFT–LCD (Flat Panel)Antitrust Litig.*, 2012 WL 555090, at *5 (N.D. Cal. Feb. 21, 2012); *In re High-Tech Employee Antitrust Litig.*, 2014 WL 1351040, at *24 (N.D. Cal. Apr. 4, 2014).

added to or offset that CBOT decrease." Op. at 18; *accord* Ex. OOO at 113:18-23, 159:13-20. In fact, this is what occurred in September 2013, the period highlighted by Syngenta, as local prices adjusted based on an influx of local supply because corn was being harvested. Ex. OOO at 163:22-165:5. But the trade disruption did not impact those factors (*supra* note 2), so those deviations are irrelevant to the fact of uniform impact. *Id.*

Direct testimony from corn buyers, which Syngenta's own expert conceded "would be relevant," also proves the fallacy of Syngenta's expert evidence. Ex. KKK 66:21-67:10; Ex. LLL 192:5-8. Its expert highlighted two corn-buying ADM facilities that allegedly (under its interpretation of the regression) suffered no impact in September 2013 by the drop in CBOT. But ADM itself testified to the contrary: that CBOT is "fully reflected" in local prices on every day at every one of its facilities; corn-buyer Cargill gave the same testimony. Op. at 19; Ex. KKKK at ¶¶3, 7; Ex. JJJJ at ¶¶3, 5. These companies collectively represent 19% of all U.S. corn purchases. Ex. KKKK at ¶¶3; Ex. JJJJ at ¶¶3. Their testimony supports Plaintiffs' contention of classwide impact and directly rebuts Syngenta's contrary evidence.

Syngenta wants an appeal to establish that the court was required to consider and weigh the parties' submissions, but that is precisely what the court did. Op. at 18. Eager to tout an "unsettled" legal question, Syngenta barely mentions the foregoing analysis and ignores the evidence considered to falsely claim that Judge Lungstrum "conducted no analysis." Pet. 13. Thus, after *Tyson*, even if the obligation of a court to consider conflicting expert opinion at class certification were uncertain, this is simply not a case where it matters.

Second, interlocutory appeal is also unwarranted because *Tyson* settles the issue, at least as applied to these facts. Syngenta does not contend that Plaintiffs failed to put forward evidence "suffic[ient] for each member to make a prima facie showing" that local prices are tied to CBOT, which is all that *Tyson* requires. *Tyson*, 136 S. Ct. at 1045. And the ruling below is not inconsistent with *Comcast*. The Supreme Court did not weigh conflicting evidence there because it was plaintiffs' own evidence that was insufficient. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1434 (2013) (plaintiffs' expert "expressly admitted that [his] model" failed to limit damages to the certified theory of liability).

Syngenta also does not claim *Tyson* upends existing Circuit precedent.[4] And, in the pre-*Tyson* cases it cites, courts had erroneously granted class certification *without* conducting the type of analysis Judge Lungstrum performed here.[5] He carefully acknowledged the need for rigorous analysis; went beyond mere admissibility and found that a "reasonable juror

[4] Syngenta's claim of an intra-Circuit conflict (Pet. 7-8) is also contrived. *Abraham v. WPX Prod. Prods., LLC*, 2016 WL 4489936, at *80 (D.N.M. Aug. 16, 2016), did not even cite *Tyson* in finding that it would need to construe contract language before determining if the contract terms were common to all class members.

[5] *Ellis v. Costco Wholesale Corp.*, 657 F. 3d 970, 982 (9th Cir. 2011) ("[T]he district court seemed to end its analysis of the plaintiffs' evidence after determining such evidence was merely admissible."); *Sher v. Raytheon Co.*, 419 F. App'x 887, 890 (11th Cir. 2011) (district court refused to consider defendants' *Daubert* challenge); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (rejecting standard that anyone "can obtain class certification just by hiring a competent expert"). *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005), also provides no basis for inconsistency, holding that resolving expert disputes was limited to determining whether "common evidence could suffice, given the factual setting of the case, to show classwide injury." *Id.* at 575. That standard is consistent with the one employed here, as the district court plainly held that common evidence could "suffice."

could believe" Plaintiffs' evidence (Op. at 17); and then concluded that *he* was "persuaded" by all the evidence (*id.* at 18). That is sufficient under any standard.

Syngenta tries to manufacture uncertainty based on *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), a case where the district court had suggested that proof could be *limited* to "a prima facie showing" and had refused to "confront [the contrary expert's] analysis or his substantive rebuttal." *Id.* at 321-22. Judge Lungstrum did confront Syngenta's evidence, and after *Tyson* even the Third Circuit has tacitly acknowledged common evidence sufficient to make a *prima facie* case is enough for class certification.[6]

Syngenta makes a failed effort to distinguish *Tyson* as involving an "evidentiary gap" unique to the FLSA. Pet. 9-10. But, as the Chief Justice clarified in his concurring opinion, *Tyson* applied "the same standard of proof that would apply in any case," 136 S. Ct. at 1051. The majority did not disagree. Nor is there anything FLSA-specific about the majority's holding that predominance is absent "only if . . . no reasonable juror could have believed" plaintiffs' generalized evidence. *Id.* at 1049. For that proposition, *Tyson* cited not an FLSA case, but one from the 1986 summary-judgment trilogy, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), establishing that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . ." *Id.* at 255.

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[6] *See In re Modafinil Antitrust Litig.*, ___ F.3d ___, 2016 WL 4757793, at *16 (3d Cir. Sept. 13, 2016); *Harnish v. Widener Univ. Sch. of Law*, ___ F.3d ___, 2016 WL 4363133, at *3 (3d Cir. Aug. 16, 2016). In *Harnish*, the Third Circuit explained that evidence must be only "more than 'plausible in theory'" and "sufficient for the class to prevail," *id.* at *3-4 (emphasis added) – precisely what the district court here found. Op. 17-18.

Nor is *Tyson* limited by the fact that it was appealed from a final judgment: defendant asked the Supreme Court to "set aside" the verdict because the "classes should not have been certified." 136 S. Ct. at 1044. *Tyson* has been applied to interlocutory class-certification orders by both circuits to have considered it. *Supra* note 6; *Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 922 (7th Cir. 2016) (construing *Tyson* to hold that "where there is no *Daubert* challenge, district court may rely on expert evidence for class certification"). The only post-*Tyson* circuit case that Syngenta relies upon is *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775 (8th Cir. 2016), which did not cite *Tyson* and is distinguishable because unlike here, the plaintiffs' "theory" of common impact "provided no evidence that refuted defendants' overwhelming evidence of no price impact." *Id.* at 783.

Syngenta also challenges the district court's evidentiary finding that "plaintiffs could rely on [their experts'] opinions to show liability and damages in an individual class member's suit." Op. at 16 (citing *Tyson*, 136 S. Ct. at 1046-47). That raises a question of materiality and relevance, which are matters within the trial court's sound discretion. *United States v. Klein*, No. 73-1923, 1979 WL 5965, at *5 (10th Cir. Dec. 13, 1979). Beyond its regression analysis (which the district court found unpersuasive), Syngenta did not offer another method for showing (or disproving) injury in an individual setting. Plaintiffs' two experts testified that they would rely on the same generalized evidence in an individual case. Ex. GGG at 14; Ex. FFF at ¶1. And, in fact, in *In re Genetically Modified Rice Litigation*, these same experts *did* prove injury using similar methodologies here in three *individual*

trials (Tr. at 35-36, 55-56),[7] which is fully consistent with the district court's conclusion that "if the jury rejects plaintiffs' theory [they] will be unable to prove the fact of injury" for all class members, meaning individual issues cannot predominate. Op. at 17.[8]

Syngenta blithely insists this is not so because there must be "inquiries to 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" (Pet. 12-13), but it does not explain what those inquiries would be. All of the contracts its experts reviewed were based on CBOT. ECF 2436 at 22. Grain buyers representing 19% of the market confirmed this. And, despite completing fact discovery on 72 MDL plaintiffs, Syngenta did not seek discovery into "whether the price" in any given transaction was "affected by a change in the CBOT," such as by seeking to examine how a buyer prices the corn purchased from any one of these 72 MDL farmers. That Syngenta has not pursued such evidence in defending individual cases shows that CBOT price impact is an issue that will be proved *and defended* with generalized evidence, as reflected in the fact that Syngenta itself acknowledged many of its expert-based criticisms "do not, in themselves, give rise to *individualized* issues." ECF 2335 at 92 (emphasis original). Predominance is not defeated by a "defense [that] is itself

[7] Relying on the denial of class certification in *GM Rice*, Syngenta ignores that the case involved a *different* commodity and evidentiary record (Op. at 20). In *GM Rice* the evidence showed that while rice contracts were not as uniformly tied to CBOT, *corn* contracts were "connected directly to the CBOT." ECF 2419-1 at 39:1; *see id*. at 38:17-39:3; Tr. at 56-57.

[8] *Cf. Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013) (when the "failure of proof on the common question . . . ends the litigation [for all,] plaintiffs are not required to prove [it] at the class-certification stage").

common to the claims made by all class members." *Tyson*, 136 S. Ct. at 1047.

Finally, Syngenta disputes Judge Lungstrum's factual comparisons to *In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10th Cir. 2014), a class action he certified and tried. Here, "as a factual matter" (Op. at 21), reliance on a centralized commodity price is a "stronger" baseline than reliance on an informal price-fixing agreement, *id.*, because market forces dictate that changes in CBOT are fully reflected in local prices. Otherwise, traders would buy corn contracts in cheaper markets that fully reflect a drop in CBOT only to sell them in more expensive markets that do not, obtaining risk-free arbitrage profits. ECF 2436 at 60-62. It is no surprise then that Syngenta's agricultural economist conceded that CBOT was indeed the "benchmark" for local cash prices. *Id.* at 53 ("an important indicator of corn prices").

B. Ascertainability Is Not Unsettled as Applied to These Facts.

Also meritless is Syngenta's challenge (Pet. 14-17) to the district court's ascertainability findings. Even though Plaintiffs' class definitions employ plainly objective criteria, *e.g.*, ECF 2156 at 1-2 & n. 2, Syngenta maintained that membership cannot be ascertained. The fulcrum of its pitch below was *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013). But *Carrera* announced no rule of general application and has been narrowed as addressing the "evidentiary problems" where the plaintiff fails to adduce sufficient evidence showing that there are records that can "identify even a *single* purchaser." *In re Cmty. Bank of N. Va.*, 795 F.3d 380, 397 (3d Cir. 2015) (emphasis added). Thus, ascertainability presents an "intensely fact-specific" question for which a "precise definition" applicable to all cases is difficult. *Shelton v. Bledsoe*, 775 F.3d 554, 560 (3d Cir. 2015).

Undaunted by the fact-specific nature of the inquiry, Syngenta concocts a circuit and intra-circuit split to secure interlocutory review. Op. at 15. This ploy fails for several reasons. *First*, Syngenta distorts the jurisprudence to show a court split where there is no difference here that matters to the outcome in this specific case. Although a number of courts require that class definitions be "sufficiently definite so that it is administratively feasible . . . to determine whether a particular individual is a member," *Davoll v. Webb*, 160 F.R.D. 142, 144 (D. Colo. 1995), *aff'd*, 194 F.3d 1116, 1146 (10th Cir. 1999), *Plaintiffs never argued otherwise*. *See* ECF 2436 at 36-40. Likewise, Judge Lungstrum neither said nor implied it would be infeasible to determine class membership. To the contrary, considering the issue as part of the "superiority inquiry" (Op. at 6), he found that (i) it will *not* "require cumbersome individual inquires" to determine whether producers priced their corn after November 18, 2013; and (ii) the class definitions' reference to the USDA FSA-578 form "provides a reasonably reliable and objective method" of identifying class members. Op. at 6-8.[9]

Second, Syngenta's asserted "majority" view of ascertainability (Pet. 6, 15) is illusory. Even in the jurisdictions Syngenta cites, administrative feasibility does not mean that a class cannot be certified if some effort may be entailed in adducing and examining evidence of membership.[10] Post-*Carrera* cases in the Third Circuit explain that "ascertainability [has] no

[9] Syngenta falsely claims (Pet. 17) that "Plaintiffs changed their definition[s] at argument" to reference FSA-578 forms, but in fact it was Syngenta that ignored the FSA-578 reference in the class definitions in arguing that the term "producer" is vague. *See* ECF 2436 at 34-35.

[10] *E.g.*, *Byrd*, 784 F.3d at 161 ("[T]he size of a potential class and the need to review individual files to identify its members are not reasons to deny class certification.") (citation omitted); *Warnick v. Dish Network LLC*, 301 F.R.D. 551, 556 (D. Colo. 2014) (not fatal to

records requirement. *Carrera* stands for the proposition that a party cannot merely provide assurances to the district court that it will later meet Rule 23's requirements." *Byrd v. Aaron's Inc.*, 784 F.3d at 164 (quoting *Carrera*, 727 F.3d at 308 n. 2; emphasis in original).[11]

Syngenta's other Circuit-court cases (Pet. 14 n.5) explain that the "administratively feasible" requirement means only that membership determinations be made "in reference to objective criteria," *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014), or that they not entail "a mini-hearing on the merits of each case." *Brecher v. Republic of Argentina*, 806 F.3d 22, 25 (2d Cir. 2015) (citation and internal quotation marks omitted). The district court's findings, solidly grounded in the record, fully comport with those cases.[12]

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ascertainability if court must inquire into individual records, so long as inquiry is not so daunting as to render class definition insufficient); *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 116 (E.D.N.Y. 2012) (class not unascertainable "merely because an analysis of data is necessary"); *Dunnigan v. Metro. Life Ins. Co.*, 214 F.R.D. 125, 136 (S.D.N.Y. 2003) "slow and burdensome [manual process] cannot defeat the ascertainability requirement").

[11] In *Byrd*, the Third Circuit chastised the district court for doing what Syngenta has done here: conflating the inquiry as to the precision of class definitions with that of whether class members can be identified. 784 F.3d at 166. It also observed how class-action defendants "have seized upon" the judicially-created ascertainability element "with increasing frequency in order to defeat class certification." *Id*. at 162.

[12] Syngenta's assertion that Judge Lungstrum "broke ranks" with other district courts in this Circuit (Pet. 15) also fails. Syngenta's cases confirm the fact-specific nature of the ascertainability inquiry, where members were hard to identify given their peculiar facts. *See Morris v. DaVita Healthcare Partners, Inc.*, 308 F.R.D. 360, 370-71 (D. Colo. 2015) (defendant "did not record in [dialysis] patients' medical records which dialysate was administered to them"); *Donaca v. Dish Network, LLC*, 303 F.R.D. 390, 397 (D. Colo. 2014) (class of those receiving unsolicited telemarketing calls could not be ascertained given multiple dealers involved and different calling platforms used); *Abraham*, 2016 WL 4489936, at *78 (class of gas well lessors; "not feasible . . . to identify which wells' gas was processed in each year"); *McKnight v. Linn Operating, Inc.*, 2016 WL 756541, at *8 (W.D.

Third, Syngenta's supposed jurisprudential split is completely beside the point. Plaintiffs did not "merely provide assurances" that class membership can be ascertained. *Byrd*, 784 F.3d at 164. They adduced the very sort of documentary evidence that satisfies *any* formulation of the ascertainability test. While Syngenta characterizes its evidence below as "undisputed" and contends that Judge Lungstrum "failed to grapple with" or "ignored" its arguments (Pet. 16-17), Syngenta ignores that Judge Lungstrum fully considered feasibility under the rubric of superiority. Op. at 6. It also ignores the evidence that all, or virtually all, farmers can identify themselves based on documentary proof:

- One needs only an FSA-578 form to establish his status as a producer. Syngenta's *own expert* conceded that the necessary information for that purpose is reflected in that form. Ex. KKK (at 160:14-163:8); *see also* ECF 2436 at 34-35. Syngenta identified no one unable to demonstrate this through an FSA-578.

- A producer need only show that he priced *a single* bushel of corn after November 18, 2013. *Every* MDL plaintiff deposed demonstrated this. ECF 2436, Apps. C-D. And *every* plaintiff whose testimony Syngenta relied upon to argue administrative difficulty produced a contract or settlement sheet showing, on its face, a sale priced after November 18, 2013. *Id*., App. E; *see also* ECF 2436 at 36-40.

This record stands in stark contrast to *Carrera*, where there was inadequate evidence for "*even a single* purchaser." *Byrd*, 784 F.3d at 164 (emphasis added). Syngenta cannot identify a single producer without documentary proof here. To the extent it speculates there may be outliers, no Circuit has held that mere outliers defeats ascertainability.[13]

Okla. Feb. 25, 2016) (determining who was excluded from class required both gas well-by-gas well and month-by-month examination of lease language and payment methodology).

[13] *See In re Cmty. Bank of N. Va.*, 795 F. 3d at 396 (class ascertainable where some effort needed to determine real party in interest based on fact some claims in bankruptcy); *Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 687 (S.D. Fla. 2014) (process need not be

Syngenta's assertion that the district court "blithe[ly]" suggested resorting to third parties for pricing documentation, which would entail issuance of "tens of thousands" of subpoenas (Pet. 16), is rank speculation. The 72 MDL plaintiffs for whom Syngenta took discovery all produced a requisite record – no subpoenas were necessary. ECF 2436 at 39. Judge Lungstrum simply agreed that, like these plaintiffs, class members who may no longer have paperwork concerning their crop sales can get those records from their buyers based on state record-keeping laws. Op. at 6; *see* ECF 2436 at 37 & n. 26.[14]

After obtaining interrogatories and FSA-578 forms from 30,000 farmers and deposing over 110 of them, Syngenta further claims that government records are "riddled" with inaccuracies – a contention based on isolated testimony from just six plaintiffs. At most, these are outliers, and Syngenta's due-process contention (Pet. 17) is unavailing. That Syngenta has a due process right to challenge evidence does not mean it has a "right to a *cost-effective* procedure for challenging every individual claim to class membership."[15] The

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"next to flawless"); *Spencer v. Hartford Fin. Servs. Grp., Inc.*, 256 F.R.D. 284, 307 (D. Conn. 2009) (class ascertainable even if "handful of disputes that may arise").

[14] Syngenta maintains that *Carrera* rejected the possibility of proving membership through affidavits. Pet. 16; *see* Op. at 6-7. In reality, *Carrera* concerned a class that would be identified *entirely* by affidavit where the plaintiff's own testimony suggested unreliability, 727 F.3d at 309, and where there was no method to "weed out" such unreliable affidavits, *Byrd*, 784 F.3d at 170. It is decidedly more difficult to verify someone purchased a vitamin supplement, without documentary proof, than to verify a farmer marketed and priced a single bushel of corn, particularly where records will exist for virtually all farmers and *any* sale of corn in 2016, it is undisputed, will be sufficient for class membership. ECF 2436 at 38-39.

[15] *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 669 (7th Cir. 2015) (italics in original); *see Byrd*, 784 F.3d at 171 (due process not implicated merely because defendant has right to challenge evidence; concern arises only where proof of membership is unverifiable).

FSA-578s are submitted to obtain government subsidies, require certification that they are "true and correct," give the government authorization to enter and inspect land for compliance, and are potentially subject to criminal-and-civil-fraud statutes. Ex. PPP at 9. The district court was well within its discretion in finding the government records reasonably reliable. Op. at 7-8.

C. The District Court's Superiority Findings Are Also Correct.

Syngenta's attack on the district court's superiority findings (Pet. 17-20) has even less to commend it. It begins (Pet. 18) by claiming the district court "improperly reduced" Plaintiffs' burden because it stated that denial of certification on manageability grounds is disfavored (Op. at 29 n. 11). The court did no such thing. All it did is address Syngenta's argument that classwide adjudication would be *unmanageable*. *See* ECF 2335 at 113.[16]

Next, Syngenta argues the district court "wrongly discounted" the pendency of many individual actions in other courts (Pet. 19). A quibble over how much weight particular considerations deserved does not call an exercise of discretion into question, let alone show manifest error, because it merely invites this Court to reweigh matters and engage in second-guessing.[17] That aside, Judge Lungstrum found that those suits did not lessen the superiority

[16] Syngenta says that Plaintiffs "have no viable plan" for trying the nationwide class because *Lexecon* requires remand of non-Kansas plaintiffs' claims (Pet. at 18 n.9). That argument – which the district court has not yet addressed – is a red herring because the nationwide class asserts a *federal* law claim, so Kansas representatives can try it for everyone.

[17] *E.g.*, *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 646 (7th Cir. 2011) (that appellate court "might have weighed the evidence differently" does not mean that district court abused its discretion); *Negron-Almeda v. Santiago*, 528 F.3d 15, 21 (1st Cir. 2008) (same); *In re Centrix Fin. LLC*, 394 F. App'x 485, 486-87 (10th Cir. 2010) (citing cases).

of class treatment because: (i) these claims do not involve physical or emotional harm that might provide greater incentive for the plaintiffs "to control their own cases"; and (ii) while until now many have been able to be passive and benefit from pretrial MDL coordination, the value at stake would not incentivize them to see their cases through to trial. Op. at 28.

Besides, Syngenta ignores that: (i) the Illinois plaintiffs *are* class members; (ii) the number of corn farmers covered by the certification order *vastly* exceeds those who are not; (iii) certain Minnesota state court plaintiffs were excluded in order *to further* coordination, *see* ECF 2164-4 at ¶66; and (iv) even had the latter not been excluded, they could opt out anyway. *See* ECF 2436 at 90-98.[18] Notably, Syngenta cites district court cases from outside this Circuit but disregards *this* Court's instruction that "the 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[.]" *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1096 (10th Cir. 2014) (internal citation omitted). That is precisely what Judge Lungstrum found here, noting that tens of thousands of farmers did *not* file

[18] Syngenta asserts that Judge Lungstrum did not take into account that certain counsel are pursuing claims against non-producers such as Cargill and ADM, with whom Plaintiffs "ha[ve] colluded." Pet. 19. This innuendo masks salient facts: (i) those non-producers share no blame for Syngenta's misconduct and have sued it for their own losses, *see*, *e.g.*, *In re Syngenta AG MIR 162 Corn Litig.*, 2016 WL 1312519, at *2-3 (D. Kan. Apr. 4, 2016) (dismissing Syngenta's counterclaims); and (ii) Judge Lungstrum dismissed the dubious claims that those outlier counsel brought against ADM, Cargill, and others as preempted by federal law. *In re Syngenta AG MIR 162 Corn Litig.*, 2016 WL 4382772, at *4 (D. Kan. Aug. 17, 2016). Moreover, while those counsel opposed *this* class certification motion (Pet. 19), that was only to further their agenda, for they themselves filed no fewer than 8 *class action* complaints against Syngenta. *See* ECF Nos. 2027-2034; Op. at 28 n.10.

individual suits and that certification would achieve "great efficiencies." Op. at 29.[19]

Syngenta's unfounded assertion that class treatment is not superior because some other trials may occur in other jurisdictions (Pet. 20) is nonsensical. It cites no case in which post-certification remand defeated superiority of class treatment. To the extent that 7 of the 8 statewide classes may have to be tried in transferor districts on account of Syngenta's refusal to waive *Lexecon* rights, that does not mean that Judge Lungstrum will then *also* conduct individual bellwether trials. And to the extent Syngenta speaks of the Minnesota cases excluded from the class definition, there is equally no support that a federal judge must deny certification for hundreds of thousands based on the existence of some individual suits. The issue is not whether a bellwether process *might* result in global resolution, but whether it is *superior* to binding classwide adjudication that obviates the need for each class member to file suit. The district court acted well within its discretion in finding class treatment superior; certainly it committed no manifest error.

CONCLUSION

Syngenta's petition should be denied. Despite an attempt to ground its criticisms in legal error, the order below stands firm on the court's factual findings under either allegedly "unsettled" legal standard insisted upon by Syngenta, and there is no manifest error.

[19] Syngenta contends that the existence of individual suits "conclusively" demonstrates that the claims are not negative-value. Op. 19-20. There are reasons, however, to question whether the number of individual suits is the result of overly solicitous lawyers. *See* ECF 2599 at 14-25. Moreover, Plaintiffs explained how it would be cost-prohibitive for class members to litigate to trial against Syngenta, specifically illustrating the amounts at stake for typical farmers – facts that Syngenta did not contest. *See* ECF 2164 at 97-98.

October 21, 2016

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CERTIFICATE OF DIGITAL-SUBMISSION COMPLIANCE

I hereby certify that all privacy redactions have been made and this document has been scanned for viruses by Advanced Threat Protection, version 1.2.1391.52, lasted updated October 17, 2016, and, according to the program is free of viruses.

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