APPENDIX

APPENDIX – Continued

APPENDIX – Continued

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KENNETH P. KELLOGG; RACHEL KELLOGG; KELLOGG FARMS, INC.; ROLAND B. BROMLEY; BROMLEY RANCH, LLC; JOHN F. HEITKAMP; DEAN HOLTORF; GARTH KRUGER; CHARLES BLAKE STRINGER; STRINGER FARMS, INC.,

Plaintiffs - Appellants,

v.

WATTS GUERRA LLP; DANIEL M. HOMOLKA, P.A.; YIRA LAW OFFICE, LTD; HOVLAND AND RASMUS, PLLC; DEWALD DEAVER, P.C., LLO; GIVENS LAW, LLC; MAURO, ARCHER & ASSOCIATES, LLC; JOHNSON LAW GROUP; WAGNER REESE, LLP; VANDERGINST LAW, P.C.; PATTON HOVERSTEN & BERG, PA; CROSS LAW FIRM, LLC; LAW OFFICE OF MICHAEL MILLER; PAGEL WEIKUM, PLLP; WOJTALEWICZ LAW FIRM, LTD.; MIKAL C.

No. 20-3172

(Filed Jul. 26, 2022)

WATTS; FRANCISCO GUERRA; LOWE EKLUND WAKEFIELD CO., LPA; JOHN DOES, 1-250,

Defendants - Appellees.

Appeal from the United States District Court for the District of Kansas (D.C. No. 2:18-CV-02408-JWL-JPO)

Douglas J. Nill, Douglas J. Nill, PLLC, Minneapolis, Minnesota, for Plaintiffs-Appellants.

Christopher L. Goodman, Thompson, Coe, Cousins & Irons, Saint Paul, Minnesota (John M. Degnan, Kathryn M. Short, and Adam Chandler, Taft Stettinius & Hollister, LLP, Minneapolis, Minnesota; Arthur G. Boylan and Philip J. Kaplan, Anthony Ostlund Baer & Louwagie P.A., Minneapolis, Minnesota; and William L. Davidson and Joao C.J.G. de Medeiros, Lind Jensen Sullivan & Peterson PA, Minneapolis, Minnesota, with him on the briefs), for Defendants-Appellees.

Before **HARTZ**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

BACHARACH, Circuit Judge.

This appeal stems from mass litigation between thousands of corn producers and an agricultural company (Syngenta). The litigation took two tracks. On one track, corn producers filed individual suits against Syngenta. On the second track, other corn producers sued through class actions.[1]

The appellants are some of the corn producers who took the first track, filing individual actions. (We call these corn producers the "Kellogg farmers.") The Kellogg farmers alleged that their former attorneys had failed to disclose the benefits of participating as class members, resulting in excessive legal fees and exclusion from class proceedings. These allegations led the Kellogg farmers to sue the attorneys who had provided representation or otherwise assisted in these cases. The suit against the attorneys included claims of common-law fraud, violation of the Racketeer Influenced and Corrupt Practices Act (RICO) and Minnesota's consumer-protection statutes, and breach of fiduciary duty.

While this suit was pending in district court, Syngenta settled the class actions and thousands of individual suits, including those brought by the Kellogg farmers. The settlement led to the creation of two pools of payment by Syngenta: one pool for a newly created class consisting of all claimants, the other pool for those claimants' attorneys. For this settlement, the district court allowed the Kellogg farmers to participate

---

[1] The court certified eight statewide classes and one national class.

in the new class and to recover on an equal basis with all other claimants.

The settlement eliminated any economic injury to the Kellogg farmers, so the district court dismissed the RICO and common-law fraud claims. The court also dismissed the Kellogg farmers' other claims, reasoning that

- the Kellogg farmers had failed to allege a public benefit from the claims under Minnesota's consumer-protection laws,
- the Kellogg farmers' disobedience of court orders merited dismissal of the claim for breach of fiduciary duty, and
- seven other law firms, which had provided assistance, could not have breached a fiduciary duty because they had no attorney-client agreements with the Kellogg farmers.

The court not only dismissed these claims but also assessed monetary sanctions against the Kellogg farmers. We uphold these rulings.

Background

I. The Kellogg farmers sue Syngenta and then sue their former attorneys.

Like most of the other corn producers, the Kellogg farmers sued Syngenta for genetically modifying corn-seed products and commingling these products in the U.S. corn supply. The Kellogg farmers had intended to export much of that corn to China, but the Chinese

government refused to import genetically modified corn. That refusal sparked tumbling corn prices and financial disaster for thousands of corn producers like the Kellogg farmers. Corn producers reacted by filing thousands of suits against Syngenta, and the Judicial Panel on Multi-District Litigation transferred the suits to the District of Kansas for pretrial proceedings.

As the suits progressed, the Kellogg farmers began to reconsider the benefits of suing individually rather than participating in the class actions. As the Kellogg farmers reconsidered their litigation strategy, they suspected their former attorneys of inflating the legal fees by touting individual actions and concealing the benefits of class litigation. So the Kellogg farmers retained new counsel and sued in Minnesota federal district court, asserting claims against their former attorneys and seven other law firms that had provided legal assistance. That suit was then transferred to the District of Kansas as part of the multi-district litigation.

II. The Syngenta litigation settles, creating separate pools to compensate the corn producers and their former attorneys.

After the Kellogg farmers sued their former attorneys, the district court approved a global settlement of the cases involving Syngenta's genetically modified corn. The Kellogg farmers acknowledge that the settlement allowed them to participate equally as members of a newly created class consisting of all settling

claimants. Corn producers in this class split a settlement pool of roughly $1 billion that Syngenta had paid.

The district court also created a separate pool of about $500 million for all of the claimants' attorneys. Given the availability of this pool, the court prohibited enforcement of any contingency-fee agreements.

Analysis of the Claims Against the Kellogg Farmers' Former Attorneys

Most of the appellate issues involve the Kellogg farmers' claims against their former attorneys. These issues fall into two categories:

1. Arguments that the district judge should have refrained from ruling on certain issues
2. Arguments that the district judge erred in the rulings that he did make

I. The district judge didn't err in ruling on particular issues.

The Kellogg farmers argue that the district judge erred by deciding particular issues rather than leaving them for another court or judge. According to the Kellogg farmers, the district judge

- should not have ruled on the merits because the case had been improperly transferred to the District of Kansas,
- should have recused, and

- lost jurisdiction after the Kellogg farmers had appealed the denial of their motion to recuse.

We reject these arguments.

A. We lack jurisdiction to review the Multi-District Litigation Panel's transfer of the case to the District of Kansas.

In the Panel's proceedings, the Kellogg farmers moved to vacate the transfer to the District of Kansas. The Panel denied the motion and a later request to reconsider this ruling. The Kellogg farmers ask us to

- direct the Multi-District Litigation Panel to retransfer the case to the District of Minnesota and
- vacate all orders in the District of Kansas.

We lack jurisdiction to consider these requests.[2]

---

[2] In their opening brief, the Kellogg farmers devote only one sentence to this argument:

> To comply with the § 1407(a) mandate and [the Kellogg farmers'] due process rights to proceed with their federal and Minnesota claims before an impartial judge to protect and preserve their property interest in the Syngenta [multi-district litigation] common fund, [the Kellogg farmers] respectfully request that the Court vacate all orders and decisions in the *Kellogg* lawsuit in the District of Kansas under § 2106 and the Court's inherent supervisory authority, and direct the [Multi-District Litigation] Panel under §§ 1407 and 2106 and in the interests of justice to return *Kellogg* to the District of Minnesota.

Federal law expressly prohibits appellate review of the Panel's denial of a motion to transfer the case to the originating court. *See* 28 U.S.C. § 1407(e) ("No proceedings for review of any order of the panel may be permitted except by extraordinary writ. . . ."). Given the statutory prohibition of appellate review, transfer decisions are reviewable only through an extraordinary writ. *Id.*; *see In re Morg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 780 (9th Cir. 2014) (concluding that "[m]andamus is the exclusive mechanism for reviewing [the Multi-District Litigation Panel's] orders" and dismissing an appeal for lack of jurisdiction because the appellants had not sought mandamus); *In re Wilson*, 451 F.3d 161, 168 (3d Cir. 2006) ("Mandamus is the sole means though which petitioners can seek review of the [Multi-District Litigation Panel's] order."); *Grispino v. New England Mut. Life Ins. Co.*, 358 F.3d 16, 19 n.3 (1st Cir. 2004) ("The language of 28 U.S.C. § 1407(e) only permits the courts of appeals for the transferee court to review the [Multi-District Litigation Panel's] transfer decision via the issuance of an extraordinary writ. . . ."); *see also In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309 (5th Cir. 2008) ("There can be no doubt therefore that mandamus is an appropriate means of testing a district court's § 1404(a)

Appellants' Opening Br. at 27. For the sake of argument, we assume that this sentence adequately develops an argument that the Panel should not have transferred this case as part of the multi-district litigation. *Cf. Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148 n.3 (10th Cir. 2008) (stating that an argument was waived when it consisted of a single sentence in an appeal brief).

ruling."). Indeed, the Kellogg farmers themselves argued in district court: "In 28 U.S.C. § 1407(e), Congress stated that the *only* process for 'review' of transfer orders is via 'extraordinary writ' under 28 U.S.C. § 1651 'in the court of appeals having jurisdiction over the transferee district.'" Class Pls.' Omnibus Surreply to Mots. to Dismiss at 14, No. 18-cv-2408-JWL-JPO (D. Kan. Mar. 6, 2019) (emphasis in original). We have previously denied the Kellogg farmers' requests for a writ, and we lack jurisdiction to review the transfer through this appeal.[3]

The Kellogg farmers argue that the Supreme Court has allowed appellate review of a Panel order, citing *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). We disagree with this interpretation of *Lexecon*.

Lexecon did not involve a challenge to the Panel's transfer of a case. There the Panel had transferred a case for pretrial proceedings. *Id.* at 31–32,. After these proceedings ended, the transferee court refused to return the case to the initial court, conducted the trial, and entered judgment for the defendants. *Id.* at 32. The plaintiff appealed, challenging the transferee court's refusal to remand the case to the initial court for trial. *Id.* The Supreme Court concluded that the transferee

[3] The Kellogg farmers asked us three times for a writ. When we declined for the third time, the Kellogg farmers asked the Supreme Court for a writ. The Supreme Court also declined to issue a writ.

court had to remand the case to the initial court before the case could go to trial. *Id.* at 40–42.

Lexecon addressed a federal district court's refusal to remand a case after the pretrial proceedings had ended. There the problem arose because the transferee court had conducted a trial. Our case instead addresses the validity of the Panel's transfer order for pretrial proceedings—an issue that didn't arise in *Lexecon*. Given these differences, *Lexecon* does not apply and federal law prohibits jurisdiction to consider

- the Panel's refusal to return the case to the District of Minnesota and
- the Kellogg farmers' request to vacate all of the District of Kansas's orders.

B. The district judge acted within his discretion in denying the Kellogg farmers' motion to recuse.

The Kellogg farmers also argue that the district judge should have recused. This argument stems from suspicion that the district judge met privately with the former attorneys to discuss exclusion of the Kellogg farmers from any proposed class. This suspicion led the Kellogg farmers to request recusal, and the district judge declined this request. We conclude that the district judge did not abuse his discretion in declining to recuse.

1. The abuse-of-discretion standard applies to the district judge's decision not to recuse.

In considering whether a district judge erred in declining to recuse, we ordinarily apply the abuse-of-discretion standard. *Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1508 (10th Cir. 1995). But the Kellogg farmers urge de novo review, invoking exceptions when

- the district judge "does not acknowledge the factual evidence" supporting disqualification or
- the claimant alleges a denial of due process.

Appellants' Opening Br. at 26. In urging these grounds for de novo review, the Kellogg farmers have misinterpreted our case law.

For the first exception, the Kellogg farmers rely on *Sac & Fox Nation of Oklahoma v. Cuomo*, 193 F.3d 1162 (10th Cir. 1999). But they err in applying the exception recognized in *Sac & Fox Nation*. There we conducted de novo review because the district judge had failed to create a record on the decision not to recuse. *Id.* at 1168.

That exception lacks any bearing here because the district judge explained his refusal to recuse. In this explanation, the district judge

- cited caselaw stating that recusal isn't necessary when a judge acquires knowledge from a related proceeding and

- observed that a party's disagreement with rulings doesn't show bias.

Mem. & Order at 12, No. 18-cv-2408-JWL-JPO (D. Kan. Dec. 18, 2019) (citing *United States v. Page*, 828 F.2d 1476, 1481 (10th Cir. 1987)). The judge added that he had not met privately with anyone to discuss exclusion of the Kellogg farmers. Mem. Op. & Order at 10, No. 18-cv-2408-JWL-JPO, No. 14-MD-2591-JWL (D. Kan. Apr. 3, 2020). The Kellogg farmers disagree with this explanation, but disagreement alone doesn't trigger the exception: The trigger is the absence of an explanation.

For the second exception, the Kellogg farmers rely on *Williams v. Pennsylvania*, 579 U.S. 1 (2016). But there the Supreme Court didn't discuss the standard of review for the denial of a motion to recuse. In the cited discussion, the Court addressed only whether a refusal to recuse could prevent consideration of harmlessness. *Id.* at 14. Our issue involves the standard of review, not harmlessness in the event of an error.[4]

Because neither exception governs, we apply the abuse-of-discretion standard. *See* p. 1255, above.

---

[4] The former attorneys argue that a failure to recuse would have constituted harmless error. But we need not address this argument because the district court did not err. *See* pp. 1256-58, below.

2. The district judge had discretion to deny the motion for recusal.

The Kellogg farmers challenge their automatic exclusion from the class actions, arguing that the district judge

- breached a fiduciary duty to them and
- needed to recuse as a result of that breach.

We reject this challenge.

According to the Kellogg farmers, they lost the ability to participate in the class actions because the district judge breached a fiduciary duty to protect potential class members. It was the district judge, the Kellogg farmers say, who agreed to their automatic exclusion from the proposed classes.

Though the Kellogg farmers fault the district judge, he didn't breach a fiduciary duty; he simply allowed automatic exclusion based on the parties' agreement in the class action proceedings. In those proceedings, attorneys for some of the corn producers submitted a joint prosecution agreement. This agreement stated that the proposed class would exclude the Kellogg farmers and certain other corn producers. Am. and Restated Joint Prosecution Agreement at 16, *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL (D. Kan. July 26, 2016).

At a hearing, the district judge stated that he had reviewed the joint prosecution agreement but did not need to approve it:

> It's a private agreement among private parties. . . .
>
> But I'm not going to approve it and I'm not going to disclose it. I've read it. I'm not troubled by it, but I'm not approving it.

Tr. of Hr'g on Sealed Mot. by Pls. for Approval of Joint Prosecution Agreements at 30, *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL (D. Kan. Apr. 27, 2015).

Based on the joint prosecution agreement, attorneys for the corn producers sought certification of classes that excluded the Kellogg farmers and the other corn producers identified in the joint prosecution agreement. Sealed Mem. in Support of Producer Pls.' Mot. to Certify Class, *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL (D. Kan. June 17, 2016). After conducting a hearing and considering objections, the district judge found that the exclusions would not create a conflict of interest or deny due process. Mem. Op. & Order at 29-30, *In re Syngenta AG MIR 162 Corn Litig*., No. 14-MD-2591-JWL (D. Kan. Sept. 26, 2016). Based on these findings, the judge certified classes that excluded the Kellogg farmers and the other corn producers specified in the joint prosecution agreement. *Id.* at 30.

The Kellogg farmers argue that the district judge should have recused because he had "played a critical role" in the decisions to "[allow] the automatic opt-outs of Farmers from the Syngenta MDL proceedings intended by [the Kellogg farmers' former attorneys] to

exploit [the Kellogg farmers]." Appellants' Opening Br. at 47. This argument erroneously assumes that the district judge would need to recuse based on his earlier decision to allow automatic exclusion from the class action.

This assumption is wrong, for "judges need not ordinarily recuse after ruling on similar issues in other cases involving the same parties." *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 968 F.3d 1156, 1168 (10th Cir. 2020). To the contrary, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute the basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *see also Frey v. EPA*, 751 F.3d 461, 472 (7th Cir. 2014) ("[I]nformation a judge has gleaned from prior judicial proceedings is not considered extrajudicial and simply does not require recusal."). The Kellogg farmers haven't pointed to "deep-seated favoritism or antagonism" arising from the district judge's certification of classes excluding the corn producers identified in the joint prosecution agreement.

To show partiality, the Kellogg farmers point to a declaration by an expert witness, who urged recusal for three reasons:

1. The district judge might have breached a fiduciary duty by allowing the automatic

exclusion without considering the Kellogg farmers' best interests.

2. The former attorneys might have lied to the district judge about the effect of the automatic exclusion.

3. The district judge might have engaged in ex parte communications with class counsel or the Kellogg farmers' former attorneys.

In the expert witness's view, these possibilities required the district judge to testify why he had allowed the automatic exclusion. But the expert witness's speculation does not require the district judge to testify.

We can see for ourselves why the district judge allowed the automatic exclusion. The proceedings in the class actions included extensive discussion of the joint prosecution agreement, the scope of the classes to be certified, and the issues bearing on exclusion of the Kellogg farmers from these classes. *See* Tr. of Hr'g on Sealed Mot. by Pls. for Approval of Joint Prosecution Agreements at 28-30, *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL (D. Kan. Apr. 27, 2015) (the district judge's statements that he had reviewed the joint prosecution agreement containing provisions for exclusion from the classes); Sealed Phipps/Clark Pls.' Mem. in Opp'n to Producer Pls.' Mot. for Class Certification, at 18–21, 25–28, *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL (D. Kan. July 26, 2016) (attorneys for one group of corn producers arguing that the joint prosecution agreement had created conflicting interests among the corn producers).

Because the record shows what the district judge considered and why he ruled as he did, there's no need for the judge to testify about his reasoning.[5] *See* Mem. Op. & Order at 29–30, *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-MD-2591-JWL (D. Kan. Sept. 26, 2016) (the district judge's rejection of the challenge to the automatic exclusion of producers designated in the joint prosecution agreement).

Nor is testimony needed based on the expert witness's suspicion of ex parte communications. In considering the expert witness's suspicion, we apply "a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). So "[m]ere speculation that an ex parte contact has occurred or that a judge was affected by it . . . does not warrant relief or further investigation." *Kaufman*

---

[5] The Kellogg farmers contend that opting out is an individual decision, which their attorneys weren't authorized to make. Some courts have held that class counsel can't decide whether to allow automatic opt-outs. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024 (9th Cir. 1998) ("The right to participate, or to opt-out, is an individual one and should not be made by the representative or the class counsel."), *overr'd on other grounds*, *Castillo v. Bank of Am., NA*, 980 F.3d 723, 729 (9th Cir. 2020); *Sharp Farms v. Speaks*, 917 F.3d 276, 299 (4th Cir. 2019) ("[A]llowing representatives to opt out a group of class members would deprive those members of their due-process right to make that choice for themselves. . . ."). Here class counsel didn't unilaterally decide on the exclusions; the Kellogg farmers' own attorneys consented. The Kellogg farmers present no reason for a judge to question the attorneys' authority to consent to their clients' exclusion from a proposed class.

v. Am. Family Mut. Ins. Co., 601 F.3d 1088, 1095 (10th Cir. 2010).

The district judge says that he didn't engage in any ex parte conversations, and the Kellogg farmers present no reason to question the district judge's word. *See Livsey v. Salt Lake Cnty.*, 275 F.3d 952, 957 (10th Cir. 2001) (noting that we usually "[t]ak[e] the district court at its word"). The district judge thus did not abuse his discretion by declining to recuse.

C. The district court had jurisdiction to proceed while the interlocutory appeal was pending.

Before filing this appeal, the Kellogg farmers had sought interlocutory review of the district judge's refusal to recuse. The Kellogg farmers contend that the district court lost jurisdiction during that appeal. This contention leads the Kellogg farmers to seek vacatur of thirteen orders:

1. the district judge's acceleration of briefing deadlines for a request to schedule a planning conference, Order, No. 18-cv-02408-JWL-JPO (D. Kan. Jan. 21, 2020)

2. the magistrate judge's order for supplemental briefing on the district court's jurisdiction to proceed during the pendency of a petition for rehearing, Order, No. 18-cv-02408-JWL-JPO (D. Kan. Jan. 30, 2020)

3. the district judge's statement that he would later decide whether to suspend a briefing

schedule, Order, No. 18-cv-02408-JWL-JPO (D. Kan. Jan. 30, 2020)

4. the magistrate judge's requirement for the Kellogg farmers to participate in a scheduling conference, Order, No. 18-cv-02408-JWL-JPO (D. Kan. Feb. 4, 2020)

5. the district judge's denial of a motion to suspend a briefing schedule, Order, No. 18-cv-02408-JWL-JPO (D. Kan. Feb. 4, 2020)

6. the magistrate judge's order to expedite briefing on a motion for sanctions, Order, No. 18-cv-02408-JWL-JPO (D. Kan. Feb. 12, 2020)

7. the magistrate judge's cancellation of a scheduling conference, Order, No. 18-cv-02408-JWL-JPO (D. Kan. Feb. 18, 2020)

8. the magistrate judge's grant of leave to answer the amended complaint out of time, Order, No. 18-cv-02408-JWL-JPO (D. Kan. Feb. 19, 2020)

9. the magistrate judge's denial of leave to file a surreply on a motion for sanctions, Order, No. 18-cv-02408-JWL-JPO (D. Kan. Feb. 24, 2020)

10. the magistrate judge's assessment of monetary sanctions and resetting of deadlines, Order, No. 18-cv-02408-JWL-JPO (D. Kan. Mar. 3, 2020)

11. the district judge's denial of the Kellogg farmers' motion to vacate orders, recuse, and stay the proceedings, Mem. & Order, No. 18-cv-02408-JWL-JPO (D. Kan. Apr. 15, 2020)

12. the district judge's assessment of monetary sanctions for filing vexatious motions, Mem. Op. & Order, No. 18-cv-02408-JWL-JPO (D. Kan. Apr. 27, 2020)

13. the district judge's assessment of monetary sanctions for failing to attend a planning conference, Order, No. 18-cv-02408-JWL-JPO (D. Kan. Apr. 28, 2020)

We decline to vacate these orders, concluding that the district court did not lose jurisdiction when the Kellogg farmers appealed the denial of their motion to recuse.

Some orders are appealable before the issuance of a final judgment. *See*, *e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (stating that denials of qualified immunity are immediately appealable). When a matter is appealable, the district court loses jurisdiction absent a certification of frivolousness. *Stewart v. Donges*, 915 F.2d 572, 577–78 (10th Cir. 1990). But a party can't strip the district court of jurisdiction by prematurely appealing. *See Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227, 1229 (10th Cir. 1998) ("[N]o transfer [of jurisdiction to the appellate court] occurs if the appeal is taken from a non-appealable order.").

We've disallowed immediate appeals from the denial of a motion to recuse or disqualify a judge. *Lopez v. Behles* (*In re Am. Ready Mix, Inc.*), 14 F.3d 1497, 1499 (10th Cir. 1994). Given the unavailability of an immediate appeal, we dismissed two of the Kellogg farmers' previous appeals. Order at 2, *In re Syngenta AG MIR 162 Corn Litig. (Kellogg Group)*, No. 19-3066 (10th Cir.

Dec. 31, 2019) (dismissing the Kellogg farmers' appeal of the district court's denial of a recusal motion based on the failure to "establish[ ] that the district court's decisions [were] final or immediately appealable"); Order at 2, *In re Syngenta AG MIR 162 Corn Litig. (Kellogg Group II)*, No. 20-3006, 2020 WL 4192067 (10th Cir. May 12, 2020) ("[T]his court's case law is clear that '[a]n order denying a motion to recuse or disqualify a judge is interlocutory, not final, and is not immediately appealable.'" (second alteration in original) (quoting *In re Am. Ready Mix, Inc*., 14 F.3d 1497, 1499 (10th Cir. 1994))).

Though disgruntled litigants can't appeal the denial of a motion for recusal, they can seek mandamus. *Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir. 1995). And the Kellogg farmers did seek mandamus. *See* Order, *In re Kenneth P. Kellogg, et al.*, Nos. 20-3051, 20-3070 & 20-3084 (10th Cir. June 1, 2020) (denying the Kellogg farmers' petition for a writ of mandamus). But the filing of a mandamus petition didn't divest the district court of jurisdiction. *See Nascimento v. Dummer*, 508 F.3d 905, 910 (9th Cir. 2007) ("[P]etitions for extraordinary writs do not destroy the district court's jurisdiction in the underlying case."); *Clark v. Taylor*, 627 F.2d 284, 288 (D.C. Cir. 1980) ("[T]he trial court had not lost its jurisdiction because the appellate court was entertaining an application for writ of mandamus.").

The Kellogg farmers cite *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338 (10th Cir. 1976), for the proposition that once the appeal was filed, the Tenth Circuit obtained jurisdiction. But in *Arthur Andersen*, we

pointed out that a district court can proceed when the appeal involved a non-appealable order. *Id.* at 340–41. So under *Arthur Andersen*, the district court did not err by proceeding.

The Kellogg farmers also assert that by proceeding with the case, the district court committed a due process violation under *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1990). But *Stewart* addressed only the loss of jurisdiction when a party appeals an order deciding qualified immunity, which is immediately appealable, not when a party appeals a non-appealable order like the denial of a request for recusal. *See id.* at 573. So *Stewart* does not apply, and the district court did not violate due process by proceeding with the case.[6]

II. The Kellogg farmers' substantive challenges are either moot or invalid.

The Kellogg farmers also challenge the rulings that the district court did make.

---

[6] In a letter submitted under Fed. R. App. P. 28(j), the Kellogg farmers state that the district court's order was immediately appealable as a denial of an injunction. But this was the first time that the Kellogg farmers suggested that the district court's refusal to recuse would have constituted a denial of an injunction, and we don't consider new arguments raised in a 28(j) letter. *See Niemi v. Lasshofer*, 728 F.3d 1252, 1262 (10th Cir. 2013). Even if we were to consider the new argument, the Kellogg farmers haven't explained or supported their characterization of the ruling as a denial of an injunction.

A. The RICO and common-law fraud claims are moot.

The district court dismissed the claims under RICO and common-law fraud, reasoning that the Kellogg farmers had not suffered an injury-in-fact. The Kellogg farmers disagree with the dismissals, relying on their contingency-fee agreements and inability to participate in any of the class actions.

Under the mootness doctrine, an actual controversy must exist throughout the case. An actual controversy requires

- an injury-in-fact,
- "a sufficient causal connection between the injury and the conduct complained of," and
- a "likelihood that the injury will be redressed by a favorable decision."

Brown v. Buhman, 822 F.3d 1151, 1164 (10th Cir. 2016) (internal quotation marks omitted). The kind of injury-in-fact required for an actual controversy depends on the elements of the claim. *See Transunion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

"If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (internal quotation marks omitted). Intervening circumstances arose here, implicating the

requirements of a claim involving RICO and common-law fraud.

These claims required the Kellogg farmers to prove an economic injury. *See Tal v. Hogan*, 453 F.3d 1244, 1253 (10th Cir. 2006) (stating that a RICO action requires proof of an injury to business or property); *Hoyt Props. Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007) (stating that a common-law fraud claim requires proof of pecuniary damage). But the Kellogg farmers' alleged economic injury vanished when the district court

- prohibited the Kellogg farmers' former attorneys from enforcing the contingency-fee agreements and
- allowed the Kellogg farmers to participate in the class settlement on an equal basis with all other corn producers.

With the disappearance of an economic injury, the RICO and common-law fraud claims became moot.

Despite the disappearance of an economic injury, the Kellogg farmers contend that the district court

- considered the wrong time-period,
- disregarded the fees that their former attorneys had collected based on the contingency-fee agreements,
- failed to consider the case against their attorneys as a separate lawsuit, and
- ignored statutes that establish standing.

We conduct de novo review and reject these arguments. *See Niemi v. Lasshofer*, 770 F.3d 1331, 1344 (10th Cir. 2014) (de novo review).

1. The district court properly considered events after the suit had been filed.

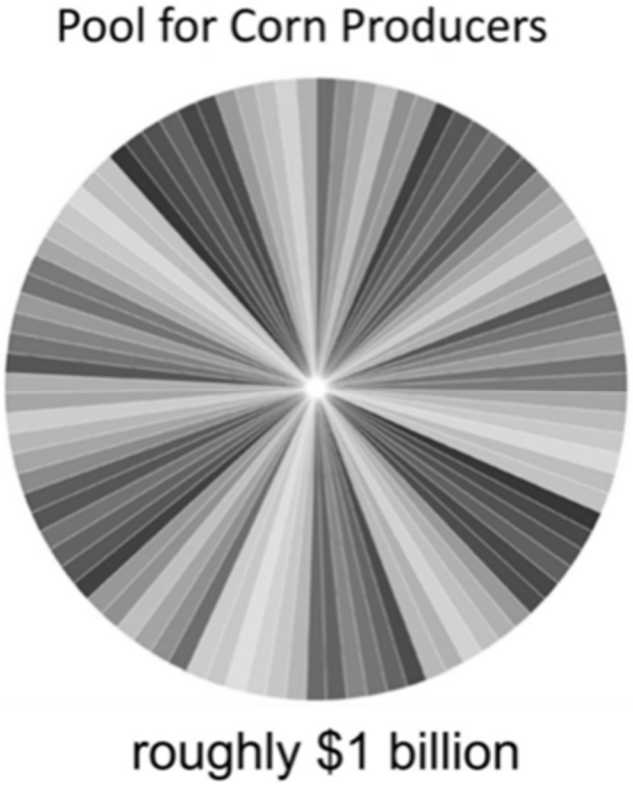
The Kellogg farmers view an injury-in-fact as something that we consider only when the suit begins. And when the Kellogg farmers sued, they allegedly had an economic injury from their obligations under the contingency-fee agreements. But a case or controversy must remain throughout the litigation. *See Phelps v. Hamilton*, 122 F.3d 1309, 1315 (10th Cir. 1997) ("[A] plaintiff must maintain standing at all times throughout the litigation for a court to retain jurisdiction." (quoting *Powder River Basin Res. Council v. Babbitt*, 54 F.3d 1477, 1485 (10th Cir. 1995))).

The case or controversy on the RICO and common-law fraud claims ended when the Kellogg farmers settled with Syngenta. So the district court did not err by considering the settlement even though it took place after the Kellogg farmers had sued their former attorneys.

2. The attorney fees from the settlement do not constitute an injury-in-fact for the claims under RICO and for common-law fraud.

The Kellogg farmers urge an ongoing injury because their former attorneys ultimately profited from

their contingency-fee agreements. But the former attorneys profited from the attorney-client relationships, not the contingency-fee agreements. Those relationships allowed the attorneys to recover settlement fees from Syngenta; but those fees came at the expense of Syngenta, not the Kellogg farmers, because the settlement had created two pools. In one pool, the district court had awarded roughly $1 billion to the Kellogg farmers and thousands of other corn producers. The court had also created a separate pool, containing roughly $500 million, to compensate the attorneys. *See* p. 5, above.



The tradeoff was that the attorneys couldn't collect anything outside their awards from the second pool. Mem. Op. & Order at 21–22, No. 14-MD-2591-JWL, 2018 WL 6839380 (D. Kan. Dec. 31, 2018) (MDL Dkt.

No. 3882); *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1115 (D. Kan. 2018).[7]

The attorneys could seek payment from the second pool based on the amount of their clients' losses. So the Kellogg farmers' former attorneys used those losses when calculating the payouts from the second pool. But that pool was divided only between attorneys; the attorneys' payouts from the second pool couldn't affect the amount paid to the Kellogg farmers or any other corn producers. So the payouts could not cause an economic injury to the Kellogg farmers on their claims involving common-law fraud or RICO.[8]

The Kellogg farmers argue that the entire settlement (including the pool of funds allotted to the attorneys) belonged to the class members. But the Kellogg farmers waived this argument by

- failing to sufficiently brief it and
- presenting it too late.

---

[7] In the amended complaint, the Kellogg farmers asked the court to cap their former attorneys' contingency fees "at zero" to equalize the assessment of attorney fees and expenses. Am. Class Action Compl. for Declaratory and Injunctive Relief and Damages at 10, ¶ 20, No. 18-cv-02408-JWL-JPO (D. Kan. Nov. 13, 2018). The district court effectively granted this cap by prohibiting attorneys from collecting anything under their contingency-fee agreements.

[8] The Kellogg farmers appear to recognize that their common-law fraud and RICO claims wouldn't affect their own recovery under the settlement, as they argue that "[i]t is the process that matters, not the outcome." Appellants' Opening Br. at 44.

The Kellogg farmers waived this appellate argument by failing to develop a reason to disturb approval of the settlement, which had created the separate pools for corn producers and attorneys. The Kellogg farmers' opening brief states only that their "share of the Syngenta [multi-district litigation] common fund is [their] property." Appellants' Opening Br. at 38 (emphasis omitted). This one-sentence contention doesn't adequately present an argument that the $500 million attorney-fee pool belonged to the corn producers. *See Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff P.*, 540 F.3d 1143, 1148 n.3 (10th Cir. 2008) (stating that an argument is waived when it consists of a single sentence in an appeal brief).

Even if the Kellogg farmers had developed an argument to upend the settlement, this argument would have come too late. The Kellogg farmers didn't appeal the order approving the global settlement. *See Hawkins v. Evans*, 64 F.3d 543, 546 n.2 (10th Cir. 1995) (rejecting an attempt to collaterally attack an order in a previous case that had not been appealed). Nor did they raise the argument in district court when responding to their former attorneys' motion to dismiss.

The Kellogg farmers instead raised this argument for the first time when seeking vacatur of the district court's judgment. But a motion to vacate the judgment doesn't allow parties to present new arguments that could have been raised earlier. *See Lebahn v. Owens*, 813 F.3d 1300, 1306 (10th Cir. 2016) ("[A] Rule 60(b) motion is not an appropriate vehicle to advance new arguments or supporting facts that were available but

not raised at the time of the original argument." (citing *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir. 1996))). The district court thus acted properly by declining to consider the Kellogg farmers' new argument involving the class members' ownership of the settlement funds.

3. The Kellogg farmers didn't show an injury-in-fact from the existence of a separate suit involving property interests.

The Kellogg farmers also point to the Multi-District Litigation Panel's distinction between the Kellogg farmers' suit against their former attorneys and the suits against Syngenta. According to the Kellogg farmers, the Panel's distinction served as recognition of an injury-in-fact.

We disagree. The Panel was just saying that the dispute between the Kellogg farmers and their former attorneys would need to be resolved through separate litigation rather than an objection to the global settlement. The Panel didn't comment on the existence of an injury-in-fact.

The Kellogg farmers also characterize their claims as "choses in action," triggering property interests under the Fifth Amendment. Regardless of this characterization, however, the Kellogg farmers lost a stake in the outcome when the district court nullified the contingency-fee agreements and allowed equal participation in the settlement.

4. Federal statutes did not create an injury-in-fact.

The Kellogg farmers also argue that RICO and the declaratory-judgment statute confer standing. It's true that "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Warth v. Seldin*, 422 U.S. 490, 514 (1975). But Congress's authority to create an entitlement doesn't scuttle the need for an injury-in-fact. *See TransUnion v. Ramirez*, 141 S. Ct. 2190, 2200 (2021).

The two federal statutes being invoked (RICO and the declaratory-judgment statute) don't automatically confer an injury-in-fact. RICO expressly requires an injury to "business or property." 18 U.S.C. § 1964(c); *see Tal v. Hogan*, 453 F.3d 1244, 1254 (10th Cir. 2006). And the declaratory-judgment statute requires the claimant to separately show an injury-in-fact. *See* 28 U.S.C. § 2201(a) (stating that a court can issue a declaratory judgment "[i]n a case of actual controversy"); *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 95 (1993) ("[A] party seeking a declaratory judgment has the burden of establishing the existence of an actual case or controversy." (citation omitted)).

Despite the lack of statutory support for an ongoing case or controversy, the Kellogg farmers argue that the district court disregarded the separation of powers by dismissing the claims under RICO and the Declaratory Judgment Act. This argument is waived and

invalid. It's waived because the Kellogg farmers didn't present this argument in district court or ask us to apply the plain-error standard. *See United States v. Leffler*, 942 F.3d 1192, 1197 (10th Cir. 2019). And the argument is invalid because statutory claims—like other claims—can become moot. *See*, *e.g.*, *Powder River Basin Res. Council v. Babbitt*, 54 F.3d 1477, 1480, 1484–85 (10th Cir. 1995) (concluding that claims brought under the Declaratory Judgment Act and another federal statute had become moot).

* * *

We thus conclude that the district court properly dismissed the claims involving common-law fraud and RICO. These claims became moot because the Kellogg farmers had no economic injury.

B. The district court acted within its discretion by sanctioning the Kellogg farmers through dismissal of their claim for breach of fiduciary duty.

The district court also sanctioned the Kellogg farmers by dismissing their claim involving breach of fiduciary duty, and the Kellogg farmers challenge that dismissal. We conclude that jurisdiction existed and the district court did not abuse its discretion.

1. Jurisdiction existed in district court despite the absence of an economic injury.

We again must address jurisdiction, considering whether the Kellogg farmers alleged an injury-in-fact. Though the Kellogg farmers suffered no economic injury, none was required for a claim involving breach of a fiduciary duty. *See Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 212 (Minn. 1984) ("[Minnesota] law treats a client's right to an attorney's loyalty as a kind of 'absolute' right in the sense that if the attorney breaches his or her fiduciary duty to the client, the client is deemed injured even if no actual loss results."); *see also Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982) (allowing a client to recover the compensation paid to an attorney who breached a duty of loyalty).

Because economic injury wasn't required, a legally protected interest existed based on Minnesota's recognition of a right to an attorney's loyalty. *See St. Paul Fire & Marine Ins. Co.*, 345 N.W. 2d at 212 (concluding that clients have a right to an attorney's loyalty under Minnesota law). The alleged invasion of that interest constituted an injury-in-fact. *See In re Facebook, Inc., Internet Tracking Litig.*, 956 F.3d 589, 600–01 (9th Cir. 2020) (concluding that the availability of a disgorgement action under state law would establish a legally protected interest that suffices for Article III standing).

Given the allegation of an injury-in-fact, we consider the former attorneys' other jurisdictional

challenges. The former attorneys argue that recovery couldn't benefit the Kellogg farmers because forfeiture of the attorney fees would result only in the distribution of additional fees to other attorneys rather than to other producers. We disagree. The district court explained that even though it "may have necessarily found that attorneys for farmers in the underlying litigation deserved fees (for work benefitting the settlement class)," "the [c]ourt did not find . . . that attorneys [had] never breached any duty of loyalty while representing farmers throughout the entire course of the underlying litigation." Mem. & Order at 14, No. 18-cv-2408-JWL-JPO D. Kan. Dec. 18, 2019). So breach of a duty of loyalty could trigger an award to the Kellogg farmers. *See Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 212 (Minn. 1984).

2. The district court didn't abuse its discretion in sanctioning the Kellogg farmers by dismissing the claim for breach of fiduciary duty.

The court sanctioned the Kellogg farmers by dismissing their claim for breach of fiduciary duty, reasoning that the Kellogg farmers and their new counsel had "repeatedly, obstinately refused to accept the Court's rulings or to comply with its orders, even after warnings that continued noncompliance could result in dismissal." Mem. Op. & Order at 1, No. 18-cv-02408-JWL-JPO (D. Kan. July 28, 2020).

The Kellogg farmers challenge the dismissal, and we review

- the dismissal for an abuse of discretion and
- the underlying factual findings for clear error.

See Ehrenhaus v. Reynolds, 965 F.2d 916, 920 (10th Cir. 1992) (abuse-of-discretion standard); *Olcott v. Dela. Flood Co.*, 76 F.3d 1538, 1551 (10th Cir. 1996) (clear-error standard).

The Kellogg farmers previously filed two premature appeals. After we dismissed the first one, the district court tried to move the case along. The court started by ordering a discovery planning conference.

The Kellogg farmers' new attorney refused to participate, stating that the district court lacked jurisdiction. The Kellogg farmers then filed a second notice of appeal and applied for a writ of mandamus, again challenging the district court's refusal to recuse.

The magistrate judge set a date for the planning conference, but the Kellogg farmers' new attorney failed to attend and again moved for recusal and vacatur of every ruling made during the pendency of the prior appeal. When the new attorney failed to appear at the discovery planning conference, the former attorneys moved for sanctions, including dismissal. The magistrate judge declined to recommend dismissal, but ordered the Kellogg farmers to pay the fees and expenses incurred by the former attorneys to attend the earlier discovery planning conference.

The magistrate judge scheduled a second discovery planning conference, warning the Kellogg farmers' new attorney that failure to attend or participate would result in a recommendation of dismissal. The new attorney attended the second conference by telephone. But he refused to budge, announcing that he would not participate in discovery or pretrial preparation until our court decided the new appeal and request for mandamus.

The Kellogg farmers also filed a second motion for recusal without addressing the district court's reasons for denying the first motion. The district court required the Kellogg farmers to pay the attorney fees and expenses that the former attorneys had spent to respond to the second recusal motion. The Kellogg farmers failed to pay these sanctions.

Given the Kellogg farmers' disregard of these orders, the former attorneys obtained sanctions consisting of dismissal with prejudice on the sole remaining claim (breach of fiduciary duty). In imposing this sanction, the court considered five pertinent factors: "(1) the degree of actual prejudice to the other party; (2) the amount of interference with the judicial process; (3) the litigant's culpability; (4) whether the court warned the [offending] party in advance that dismissal would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions." Mem. Op. & Order at 8, No. 18-cv-02408-JWL-JPO (D. Kan. July 28, 2020) (quoting *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1140–41 (10th Cir. 2007)). In the district court's view, each factor supported dismissal.

In responding to the district court's assessment, the Kellogg farmers contend that the district judge had a conflict of interest and lacked jurisdiction to proceed during the pendency of the appeal. We've elsewhere rejected these contentions. *See* pp. 10-20, above.

The Kellogg farmers also argue that

- the failure to pay the monetary sanctions could have been addressed by other means, like the posting of a bond or execution of the judgment, and
- bad faith is necessary for a dismissal with prejudice.

We reject both arguments.

The district court could have enforced the monetary sanctions through a bond or execution of a judgment. But the court reasonably viewed lesser sanctions as futile given the Kellogg farmers' refusal to pay the monetary sanctions. So the court did not abuse its discretion in dismissing the claim with prejudice.

The Kellogg farmers also argue that dismissal is appropriate only when a party acts in bad faith. We disagree.

Although dismissal is a harsh sanction, it may be appropriate in cases of "willfulness, bad faith, *or* some fault." *Chavez v. City of Albuquerque*, 402 F.3d 1039, 1044 (10th Cir. 2005) (emphasis added) (cleaned up); *see also Archibeque v. Atchison, Topeka & Santa Fe Ry. Co.*, 70 F.3d 1172, 1174 (10th Cir. 1995) ("[D]ue process requires that the discovery violation be predicated

upon willfulness, bad faith, or some fault of [the] petitioner rather than inability to comply." (cleaned up)). So the district court can impose dismissal when a defendant willfully disobeys orders. *See Willner v. Univ. of Kan.*, 848 F.2d 1023, 1030 (10th Cir. 1988).

The magistrate judge found that the Kellogg farmers had "willfully refus[ed] to participate in the litigation before th[e] court." Order at 8, No. 18-cv-02408-JWL-JPO (D. Kan. Mar. 3, 2020). The district judge upheld this ruling. Mem. & Order at 2-3, No. 18-cv-02408-JWL-JPO (D. Kan. Apr. 15, 2020). The magistrate judge and the district judge had discretion to find willful disregard of their orders. *See Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992). We review their factual findings for clear error, *see id.*, and see none here.

The Kellogg farmers insist that bad faith is required for dismissal, relying on *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). We disagree. In *Societe Internationale*, the Supreme Court invalidated a dismissal because compliance with the underlying order might have violated Swiss law. *Id.* at 204, 208–12.

No similar impediment prevented the Kellogg farmers from complying with the district court's order. And in *Societe Internationale*, the Supreme Court reiterated that noncompliance with a court order could justify dismissal when there is "willfulness, bad faith, *or* . . . fault" on the petitioner's part. *Id.* at 212 (emphasis added).

The district court reasonably based the sanction of dismissal on prejudice to the former attorneys, interference with the judicial process, culpability, warnings to the Kellogg farmers, and ineffectiveness of lesser sanctions. In applying these considerations, the court acted within its discretion.

C. The district court did not err in dismissing the Minnesota statutory claims based on the failure to allege a public benefit.

The district court also dismissed claims under three Minnesota statutes:

1. Minnesota Consumer Fraud Act, Minn. Stat. § 325F.69, subd. 1
2. Minnesota False Statement in Advertising Act, Minn. Stat. § 325F.67
3. Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43–48

The Kellogg farmers challenge these dismissals, and we reject the challenges.

1. The district court had jurisdiction over these claims.

The threshold issue involves jurisdiction, which requires an injury-in-fact. *See* Part II(B)(1), above.

An injury-in-fact requires

- "an invasion of a legally protected interest" and
- a harm that is "concrete and particularized" and "actual or imminent. . . ."

Spokeo, Inc. v. Robins, 578 U.S. 330, 339 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

The Kellogg farmers adequately alleged an injury-in-fact. The attorneys' alleged conduct included deceptive statements that deprived the Kellogg farmers of an opportunity to make informed decisions about the Syngenta litigation. *See* Appellants' App'x vol. II, at 153–59. Based on these allegations, the Kellogg farmers have adequately alleged the invasion of a legally protected interest because Minnesota law recognizes a protected interest in the loyalty of one's attorneys. *See Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 212 (Minn. 1984) (allowing a client to recover the compensation paid to an attorney who breached a duty of loyalty); *see also State v. Minn. v. Sch. of Bus., Inc.*, 935 N.W. 2d 124, 138–39 (Minn. 2019) (allowing recovery for equitable restitution to divest a wrongdoer of improper profits). The Kellogg farmers' interest is legally protected even if they can't recover under the Minnesota statutes. *See Duke Power v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 78–79 (1978); *see also WildEarth Guardians v. United States Bureau of Land Management*, 870 F.3d 1222, 1232 (10th Cir. 2017) ("Our own precedents indicate that the legal theory and the standing injury need not be linked as long as [the

injury-in-fact is likely to be redressed by a favorable decision].").

Given the allegations of statutory violations involving disloyalty, the Kellogg farmers have adequately alleged a legally protected interest and a harm that is "concrete and particularized" and "actual and imminent." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). So we have jurisdiction over the statutory claims.

2. The Kellogg farmers fail to adequately develop an appellate argument on public benefit.

Given jurisdiction, we consider the Kellogg farmers' challenge to the dismissals. The Kellogg farmers had brought these claims under Minnesota's private-attorney-general statute, Minn. Stat. § 8.31 subd. 3a. Under this statute, a private right-of-action exists only if successful prosecution of the claim would benefit the public. *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000).

Recovery might benefit the public when a merchant broadcasts a fraudulent advertisement and makes "numerous sales and information presentations" to the public. *Collins v. Minn. Sch. of Bus.*, 655 N.W.2d 320, 330 (Minn. 2003). In contrast, recovery doesn't benefit the public when the claimant is defrauded in a "single one-on-one transaction." *Nystrom*, 615 N.W.2d at 314.

In the amended complaint, the Kellogg farmers allege that

- their former attorneys chose a harmful litigation strategy in order to maximize their own attorney fees and
- recovery from the former attorneys would benefit the 60,000 farmers and consumers in Minnesota who rely on an honest, ethical market for legal services.

The district court considered these allegations and concluded that they hadn't created a public benefit. Mem. & Order at 6–9, No. 18-cv-2408-JWL-JPO (D. Kan. Aug. 13, 2019), *adhered to in part on reconsideration*, Mem. & Order at 9–11, No. 18-cv-2408-JWL-JPO (D. Kan. Dec. 18, 2019). For this conclusion, the court reasoned that

- the Kellogg farmers had mainly sought forfeiture of attorney fees to compensate for past wrongs rather than to stop ongoing misconduct,
- the pursuit of class-wide claims hadn't necessarily provided a public benefit, and
- the alleged misrepresentations had targeted a specific group within a specific industry.

Id.

The Kellogg farmers sought reconsideration, arguing that for a public benefit, "the Minnesota Supreme Court only requires a determination of whether Defendants are engaged in misrepresentations to the

public through advertisement." Class Pls.' Mem. in Support of Mots. to (1) Correct a Clerical Error in the August 13, 2019 Mem. and Order, (2) Vacate the Substantive Rulings, (3) Certify a Question to the Minnesota Supreme Court, and (4) Vacate All Orders at 14–15, No. 18-cv-02408-JWL-JPO (D. Kan. Sept. 10, 2019). The district court rejected this argument, reasoning that the Kellogg farmers hadn't alleged a misrepresentation to the public at large. Mem. & Order at 10–11, No. 18-cv-2408-JWL-JPO (D. Kan. Dec. 18, 2019).

In their opening appeal brief, the Kellogg farmers present an argument consisting of only a single sentence, asserting that the district court "disregard[ed] binding Minnesota Supreme Court precedent that the *only* requirement for application of the Minnesota business and consumer protection claims is a determination of whether the [attorneys] engaged in misrepresentations to the 'public at large' through advertisements, etc." Appellants' Opening Br. at 41 (emphasis in original) (quoting *Collins*, 655 N.W.2d 320). Nowhere do the Kellogg farmers address the district court's reasoning, which treated the alleged misrepresentations as made to a specific group rather than the public at large. By failing to develop an argument that the district court erred, the Kellogg farmers waived a challenge to dismissal of the statutory claims. *See Murrell v. Shalala*, 43 F.3d 1388, 1389 n.2 (10th Cir. 1994) ("[P]erfunctory [allegations of error] fail to frame and develop an issue sufficient to invoke

appellate review."). Given this waiver, we affirm the dismissal of the three statutory claims.[9]

D. The district court did not abuse its discretion in assessing monetary sanctions against the Kellogg farmers.

The Kellogg farmers also challenge monetary sanctions imposed by the magistrate judge and the district judge.

---

[9] The district court noted that one of the statutes (the Minnesota Uniform Deceptive Trade Practices Act) contains its own provision for a private right-of-action. So the requirement of a public benefit might not apply to that claim. Nevertheless, the Kellogg farmers relied only on the private-attorney-general statute to bring their claims under the Minnesota Uniform Deceptive Trade Practices Act. So the district court concluded that

- "the claim as pleaded [wa]s subject to dismissal,"
- even if the Kellogg farmers had asserted a claim through the Minnesota Uniform Deceptive Trade Practices Act rather than the private-attorney-general statute, the claim would have been futile because the Act provides only injunctive relief, and
- the Kellogg farmers had not alleged ongoing deception of other consumers.

Mem. & Order at 6–10, No. 18-cv-2408-JWL-JPO (D. Kan. Aug. 13, 2019), *adhered to in part on recons.*, Mem. & Order at 9-11, No. 18-cv-2408-JWL-JPO (D. Kan. Dec. 18, 2019). The Kellogg farmers have not challenged the district court's reasoning on the alleged violation of the Minnesota Uniform Deceptive Trade Practices Act. The failure to present a separate challenge constitutes a waiver. *See Navajo Nation v. San Juan Cnty.*, 929 F.3d 1270, 1281 (10th Cir. 2019) (finding a waiver when an appellant failed to explain how the district court's reasoning was wrong).

The magistrate judge assessed sanctions against the Kellogg farmers for failing to obey a scheduling order and permit discovery.[10] The district judge assessed sanctions under 28 U.S.C. § 1927 for unreasonably and vexatiously multiplying the proceedings. Mem. & Order at 5–6, No. 18-cv-02408-JWL-JPO (D. Kan. Apr. 15, 2020). The § 1927 sanctions were based on costs that the former attorneys had incurred in responding to the Kellogg farmers' motion to vacate and recuse. We review these sanctions for an abuse of discretion. *See Farmer v. Banco Popular of N. Am.*, 791 F.3d 1246, 1256 (10th Cir. 2015).

In challenging the monetary sanctions, the Kellogg farmers argue that they had legitimate grounds to object to the district court proceedings and to refuse to participate until we decided their interlocutory appeal. The district court had the discretion to regard these objections as illegitimate.

If the Kellogg farmers had questioned the validity of the district court's order for a discovery conference, "they could have sought reconsideration or a writ; but they could not violate the order." *Auto-Owners Ins. Co. v. Summit Park Townhome Ass'n*, 886 F.3d 863, 867 (10th Cir. 2018); *see also Maness v. Meyers*, 419 U.S. 449, 458–59 (1975) (stating that a party must comply with an order (in the absence of a stay) even when the party questions the validity of an order). And the

[10] The Kellogg farmers objected to the magistrate judge's monetary sanctions, but the district judge overruled the objections. Mem. Op. & Order, No. 18-cv-02408-JWL-JPO (D. Kan. Apr. 3, 2020).

Kellogg farmers lacked a reasonable basis to question the validity of the district court's initiation of discovery because we'd already dismissed a virtually identical appeal as premature. Order at 2, *In re Syngenta AG MIR 162 Corn Litigation (Kellogg Group)*, No. 19-3066 (10th Cir. Dec. 31, 2019); *see also Lopez v. Behles* (*In re Am. Ready Mix, Inc.*), 14 F.3d 1497, 1499 (10th Cir. 1994) (stating that orders denying recusal are not immediately appealable).[11]

We've held that jurisdiction continues in district court when a party prematurely appeals. *See Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227, 1229 (10th Cir. 1998) (stating that a non-appealable order does not transfer jurisdiction from the district court to the appellate court). The Kellogg farmers' new attorney flouted these holdings and obstructed the proceedings by refusing to comply with the district court's orders.

That attorney did attend the second planning conference and announce his position. But he still refused to proceed with a discovery plan, which stymied the district court's ability to advance the case. *See Dietz v. Bouldin*, 579 U.S. 40, 41 (2016) (noting a district court's "inherent power to . . . manage its docket and courtroom with a view toward the efficient and expedient resolution of cases"). The magistrate judge and the

[11] The Kellogg farmers assert that the district court imposed the sanctions as "an adversarial response . . . to [their] efforts to disqualify the district court through the interlocutory appeal and mandamus petition[]." Appellants' Opening Br. at 5. For this assertion, the Kellogg farmers provide no support.

district judge thus had a reasonable basis to find obstructive conduct.[12]

The Kellogg farmers also argue that sanctions may be imposed only after the case had ended. For this argument, the Kellogg farmers rely on *Steinert v. Winn Group, Inc.*, 440 F.3d 1214 (10th Cir. 2006). But *Steinert* holds only that § 1927 sanctions *may* be imposed after final judgment. *Id.* at 1223. The case does not prevent sanctions while the case is proceeding, and the district court acted properly in imposing sanctions before entering the final judgment.

We thus conclude that the district court did not abuse its discretion in imposing monetary sanctions.

Analysis of the Claims Against the Seven Other Law Firms

The Kellogg farmers sued not only their own former attorneys but also seven law firms that had assisted.[13] For the dismissal of these claims, we engage in de novo review, using the standard that applied in district court. *BV Jordanelle, LLC v. Old Republic Nat'l*

---

[12] The Kellogg farmers say that they couldn't "be charged with a failure to prosecute" during their interlocutory appeal and application for mandamus relief. Appellants' Reply Br. at 5. But the district court didn't suggest a failure to prosecute the action; the court instead imposed sanctions based on a failure to comply with orders.

[13] The seven other law firms are Hovland and Rasmus, PLLC; Dewald Deaver, P.C., LLO; Patton Hoverson & Berg, P.A.; Wojtalewicz Law Firm, Ltd.; Johnson Law Group; VanDerGinst Law, P.C.; and Wagner Reese, LLP.

Title Ins. Co., 830 F.3d 1195, 1200 (10th Cir. 2016). In district court, the applicable standard was the one governing motions to dismiss under Fed. R. Civ. P. 12(b)(6): whether the amended complaint contained factual allegations creating a reasonable inference of liability. *See Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009); *BV Jordanelle*, 830 F.3d at 1200–01.

The Kellogg farmers argue that they could bring claims against the seven law firms because they had been listed in the contingency-fee agreements.[14] For this argument, the Kellogg farmers invoke

- Minnesota Rule of Professional Conduct 1.5(e), which requires attorneys to accept joint responsibility under fee-sharing agreements, and
- the opinion of an expert witness, who concluded that all of the attorneys listed on the contingency-fee contracts had violated their fiduciary obligations to the Kellogg farmers.

We reject this argument. The district court granted judgment on the pleadings to the seven law firms after terminating all but the Minnesota claim for breach of fiduciary duty. Under Minnesota law, however, an attorney bears no fiduciary duty to a non-client. *See McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008). And the

[14] The Kellogg farmers also argue that they could bring these claims in a representative capacity. But the district court did not dismiss these claims based on an inability to sue in a representative capacity.

Kellogg farmers were not clients of these seven law firms. So these law firms had owed no fiduciary duty to the Kellogg farmers, and the district court properly granted judgment on the pleadings to the seven law firms.

The Kellogg Farmers' Additional Motions

The Kellogg farmers have filed a motion entitled "Motion for Judicial Notice or, in the Alternative to Supplement the Record on Appeal." They have also filed a second motion for judicial notice of other documents.

These motions concern the fee awards received by the former attorneys as part of the global settlement in the suits against Syngenta. The Kellogg farmers ask us to (1) take judicial notice of demands that the former attorneys deposit the attorney fees into an escrow account until this case is resolved or (2) supplement the record with these demands. The Kellogg farmers also seek vacatur of the district court's rulings and return of the case to the District of Minnesota. These motions lack merit.

Even though the Kellogg farmers demand an escrow account for the collection of forfeited attorney fees, this demand does not affect our analysis of mootness, recusal, public benefit, or sanctions. So our analysis moots the demand for an escrow account.

Our analysis also moots the Kellogg farmers' repetition of their arguments for vacatur and transfer of

the case to the District of Minnesota. We've elsewhere rejected these arguments. *See* pp. 6–9, 17–20, above.

We thus deny the Kellogg farmers' motions.

Conclusion

We lack appellate jurisdiction to review the Multi-District Litigation Panel's transfer of the case to the District of Kansas and reject the Kellogg farmers' procedural challenges involving recusal and jurisdiction in district court. And we affirm

- the dismissal of the claims involving common-law fraud and RICO based on mootness,
- the sanctions requiring monetary payment and dismissing the claim for breach of fiduciary duty,
- the dismissal of the claims under Minnesota's private-attorney general statute, and
- the award of judgment on the pleadings to the seven law firms lacking contractual ties to the Kellogg farmers.

Finally, we deny the Kellogg farmers' motion for judicial notice or supplementation of the record.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KENNETH P. KELLOGG, et al., Plaintiffs - Appellants, v. WATTS GUERRA LLP, et al., Defendants - Appellees.	No. 20-3172 (D.C. No. 2:18-CV-02408-JWL-JPO) (D. Kan.)

ORDER

(Filed Oct. 17, 2022)

Before **HARTZ**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

This matter is before the court on *Appellants' Petition for Rehearing and Rehearing en Banc*. Having carefully considered the petition and the filings in this appeal, we direct as follows.

Appellants' motion for leave to file a reply in support of their petition for rehearing and rehearing en banc is denied.

To the extent Appellants seek rehearing by the panel, the petition is denied pursuant to Fed. R. App. P. 40.

The petition for rehearing *en banc* was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition seeking rehearing *en banc* is denied pursuant to Fed. R. App. P. 35(f).

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: SYNGENTA AG MIR 162 CORN LITIGATION (KELLOGG FARMERS).	No. 20-3257 (D.C. No. 2:14-MD-02591-JWL-JPO) (D. Kan.)

ORDER AND JUDGMENT*

(Filed Oct. 17, 2022)

Before **HARTZ**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

This case involves a group of corn producers (the Kellogg farmers) who filed individual suits against an agricultural business (Syngenta AG) and then sought to intervene in a separate class action filed against Syngenta. Through intervention in the class action, the Kellogg farmers wanted to oppose the disbursement of a fee award to their former attorneys. The Kellogg farmers claimed that their former attorneys had forfeited their attorney fees by violating federal and state statutes, engaging in fraud, and breaching fiduciary duties.

* This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

The district court denied the Kellogg farmers' motion to intervene. In denying the motion, the court noted that it had already dismissed the Kellogg farmers' claims against their former attorneys. Because the dismissal had not been stayed, the Kellogg farmers no longer had an interest in the fees disbursed to their former attorneys. So the court didn't allow the Kellogg farmers to intervene in the class action. The court also denied the Kellogg farmers' motion for recusal. The Kellogg farmers appeal the district court's decisions (1) declining to recuse and (2) disallowing intervention.

In a related appeal, we affirmed the dismissal of the Kellogg farmers' claims and the decision not to recuse. In light of our opinion in the related appeal, we affirm the denial of the Kellogg farmers' motions for recusal and intervention.[1]

Entered for the Court

Per Curiam

---

[1] In appealing the denial of intervention, the Kellogg farmers also assert that the fees to their attorneys are disputed and must be held in escrow until appeals have been exhausted here and in the Supreme Court. But the Kellogg farmers do not cite any authority for this argument, and an unstayed judgment normally takes effect despite a pending appeal. *See Coleman v. Tollefson*, 575 U.S. 532, 539 (2015) ("Unless a court issues a stay, a trial court's judgment (say, dismissing a case) normally takes effect despite a pending appeal."). We thus reject the Kellogg farmers' argument for intervention based on a continued dispute over the attorney fees.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: SYNGENTA AG MIR 162 CORN LITIGATION (KELLOGG FARMERS).	No. 20-3257 (D.C. No. 2:14-MD-02591-JWL-JPO) (D. Kan.)

ORDER

(Filed Oct. 17, 2022)

Before **HARTZ**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

All pending motions are denied as moot.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT,
Clerk

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: SYNGENTA AG MIR162 CORN LITIGATION MDL No. 2591

TRANSFER ORDER

(Filed Aug. 1, 2018)

Before the Panel:* Plaintiff farmers in a District of Minnesota action (*Kellogg*) move under Panel Rule 7.1 to vacate the Panel's order conditionally transferring this action, which is listed on the attached Schedule A, to MDL No. 2591. Defendant attorneys[1] oppose the motion.

After considering the argument of counsel, we find this action involves common questions of fact with the actions previously transferred to MDL No. 2591, and that transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. Transfer is warranted for reasons set out in our order directing centralization. In that order, we held that the District

---

* Judge Lewis A. Kaplan took no part in the decision of this matter.

[1] Cross Law Firm, LLC; Dewald Deaver, P.C., LLO; Givens Law, LLC; Francisco Guerra; Daniel M. Homolka; Hovland and Rasmus, PLLC; Johnson Law Group; Law Office of Michael Miller; Mauro, Archer & Assocs., LLC; Patton Hoversten & Berg, P.A.; VanDerGinst Law, P.C.; Wagner Reese, LLP; *Mikal C. Watts; Watts Guerra, LLP; Wojtalewicz Law Firm, Ltd.; Pagel Weikum, PLLP and Yira Law Office LTD.

of Kansas was the appropriate transferee forum for actions sharing allegations regarding Syngenta's decision to commercialize the MIR162 genetically modified corn trait in the absence of Chinese approval to import corn with that trait. *See In re: Syngenta AG MIR162 Corn Litig.*, 65 F. Supp. 3d. 1401 (J.P.M.L. 2014).

Plaintiffs in *Kellogg* sue their attorneys over alleged misrepresentations and omissions they made in their initial solicitations via multiple websites, television commercials and town hall-style meetings – and other communications with the putative class of corn farmer clients. Defendants filed approximately 60,000 individual suits in Minnesota state court ostensibly on behalf of the putative class in *Kellogg*, in what plaintiffs characterize as a scheme to increase their attorneys' fees. Plaintiffs are members of the current MDL settlement class that has a final approval hearing set for November 15, 2018.

Plaintiffs oppose transfer, arguing that their action presents distinct issues as to the validity and enforceability of agreements between defendants and their clients, and *Kellogg* should be allowed to proceed in Minnesota, where the 60,000 state court cases were filed. While no similar action appears to have been brought in this MDL by state court plaintiffs against their own attorneys, *Kellogg* is replete with factual allegations of conduct that occurred in the Syngenta MDL proceedings. For instance, plaintiffs criticize the role of defendant Mikal Watts of Watts Guerra LLP, a member of the court-appointed Plaintiffs' Settlement Negotiating Committee, in negotiating the MDL settlement

and alleged related side-deals concerning fees. Plaintiffs also assail defendants' entry into Joint Prosecution Agreements with MDL counsel and Minnesota state court-appointed lead counsel and the allegedly inappropriate exclusion of plaintiffs, without appropriate consultation, from classes certified before the current settlement class was reached.

Further underscoring the factual connection of *Kellogg* to the MDL, plaintiffs' allegations are similar to objections made by approximately 9,000 individual plaintiffs to the preliminary approval of the MDL settlement concerning the settlement's allegedly unfair treatment of individuals who were represented by counsel and already had filed suit. Though the transferee judge rejected the argument that these concerns should delay preliminary approval, he noted:

> Many class members who did not file individual suits may have retained counsel, and the amount of work performed by attorneys for individual plaintiffs will have varied greatly. Therefore, it could certainly be reasonable (within the range of reasonable settlements) to treat all class members the same for purposes of recovery, whether or not they filed their own suits. In addition, any such argument may be made as an objection to final approval or in connection with attorney fee applications.

See In re: Syngenta, D. Kansas, Case No. 14-2591, doc. 3531 at 14-15 (April 10, 2018) (emphasis added). Transfer places *Kellogg* before the transferee judge,

and it may inform his overall assessment of the fairness of the settlement and any subsequent requests for attorneys' fees.

Plaintiffs also argue that neither the settlement, nor Rule 23, authorizes the transferee judge to resolve this dispute over the validity of client contracts. That argument misses the point. We need not speculate about the precise contours of the transferee judge's authority. If the settlement or Rule 23 does not provide a basis to limit or declare the attorney fee contracts at issue void *ab initio*, as plaintiffs request, then transfer of *Kellogg* provides a ground for doing so, if such relief is indeed warranted. Should the transferee judge agree with plaintiffs that this dispute can be resolved more appropriately in the District of Minnesota, he can suggest Section 1407 remand to that district after he has had the opportunity to examine plaintiffs' serious allegations of misconduct occurring, in part, in the MDL.[1]

Plaintiffs alternatively sought to stay the issuance of our transfer order so they may pursue a writ of

[1] For example, Judge Lungstrum may wish to examine plaintiffs allegations of improper exclusion of the plaintiffs from a prior certified class. *See Kellogg* Complaint at ¶ 182 ("when the courts approved class notice that automatically excluded Defendants' 60,000 clients from the class definition and the obligatory Rule 23 notice and opt-out requirements, the courts erred in accepting Defendants' sleight-of-hand claim that Farmers were never part of the class because they were excluded from the class by the JPA and MPA. The courts accepted Defendants' claim because they presumed, in orders approving class notice, that Defendants had satisfied their fiduciary and ethical obligations to procure informed consent from individual Farmers to be automatically excluded from the class proceedings.").

mandamus challenging our transfer decision. *See* 28 U.S.C. § 1407(e). We decline this request. If plaintiffs choose to pursue appellate relief, they can do so in the normal course.

IT IS THEREFORE ORDERED that this action is transferred to the District of Kansas and, with the consent of that court, assigned to the Honorable John W. Lungstrum for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTI-
DISTRICT LITIGATION

/s/ Sarah Vance
Sarah S. Vance
Chair

Marjorie O. Rendell
Ellen Segal Huvelle
Catherine D. Perry
Charles R. Breyer
R. David Proctor

IN RE: SYNGENTA AG MIR162 CORN LITIGATION MDL No. 2591

SCHEDULE A

District of Minnesota

KELLOGG, ET AL. v. WATTS GUERRA, LLP, ET AL., C.A. No. 0:18-1082

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

IN RE: SYNGENTA AG MIR162 CORN LITIGATION MDL No. 2591

ORDER DENYING RECONSIDERATION

(Filed Oct. 3, 2018)

Before the Panel:* Plaintiff farmers in a District of Minnesota action (*Kellogg*) seek reconsideration of our August 1, 2018, order denying their motion under Panel Rule 7.1 to vacate the Panel's order conditionally transferring this action, which is listed on the attached Schedule A, to MDL No. 2591. Defendant attorneys[1] oppose the motion.

After considering all argument of counsel, we conclude that we need not reconsider our denial of plaintiffs' motion to vacate. As we previously found, this action involves common questions of fact with the MDL No. 2591 actions, and transfer under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of

---

* Judge Charles R. Breyer took no part in the decision of this matter.

[1] Cross Law Firm, LLC; Dewald Deaver, P.C., LLO; Givens Law, LLC; Francisco Guerra; Daniel M. Homolka; Hovland and Rasmus, PLLC; Johnson Law Group; Law Office of Michael Miller; Mauro, Archer & Assocs., LLC; Patton Hoversten & Berg, P.A.; VanDerGinst Law, P.C.; Wagner Reese, LLP; Mikal C. Watts; Watts Guerra, LLP; Wojtalewicz Law Firm, Ltd.; Pagel Weikum, PLLP and Yira Law Office LTD.

the litigation. Transfer is warranted for reasons set out in our order directing centralization. In that order, we held that the District of Kansas was the appropriate transferee forum for actions sharing allegations regarding Syngenta's decision to commercialize the MIR162 genetically modified corn trait in the absence of Chinese approval to import corn with that trait. *See In re: Syngenta AG MIR162 Corn Litig.*, 65 F. Supp. 3d. 1401 (J.P.M.L. 2014).

We rarely reconsider our transfer orders, and we do so only upon a showing of a significant change in circumstances.[2] Plaintiffs, on behalf of a putative class of roughly 60,000 farmers who sue their attorneys for wrongfully pursuing individual state court cases, point to no change in facts or other developments that would merit reconsideration. Instead, their motion mostly parrots arguments made in their initial motion to vacate, largely ignoring our significant observation that "*Kellogg* is replete with factual allegations of conduct that occurred in the Syngenta MDL proceedings." *See* Transfer Order at 2.[3]

---

[2] *See*, *e.g.*, *In re: Richardson-Merrell, Inc. "Bendectin" Prods. Liab. Litig. (No. II)*, 588 F. Supp. 1448, 1449 (J.P.M.L. 1984) (granting reconsideration due to intervening events in the litigation).

[3] "For instance, plaintiffs criticize the role of defendant Mikal Watts of Watts Guerra LLP, a member of the court-appointed Plaintiffs' Settlement Negotiating Committee, in negotiating the MDL settlement and alleged related side-deals concerning fees. Plaintiffs also assail defendants' entry into Joint Prosecution Agreements with MDL counsel and Minnesota state court-appointed lead counsel and the allegedly inappropriate exclusion of plaintiffs,

Plaintiffs argue that our transfer order improperly equates the *Kellogg* plaintiffs with objectors to the settlement. It does not. While the transfer order noted that a group of approximately 9,000 individual plaintiffs had objected to preliminary approval because of the settlement's allegedly unfair treatment of individuals who were represented by counsel and already had filed suit, we were aware that the *Kellogg* plaintiffs were not objecting to the MDL settlement or any fees awarded thereunder. Our reference to the objections to the preliminary settlement merely served to underscore that other individual plaintiffs were objecting to the potential imposition of additional, non-class attorney fees. Were those arguments successful and the terms of the settlement affected, the *Kellogg* plaintiffs' recovery potentially could be impacted.

Plaintiffs offer a somewhat confusing argument that transfer *of Kellogg* denies them their due process rights under the Fifth and Fourteenth Amendments to proceed in D. Minnesota. As an initial matter, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal citations and quotations omitted). Plaintiffs' argument that transfer denies them such an opportunity is speculative, largely devoid of specifics and, ultimately, without merit. Defendants offer a persuasive response: so long as their claims are adjudicated in accordance with governing statutes and rules

---

without appropriate consultation, from classes certified before the current settlement class was reached." Transfer Order at 2.

(*i.e.*, relevant federal and state statutes and federal procedural rules), the requirements of due process are fulfilled. Plaintiffs failed to meaningfully respond to this assertion in their reply.

Intertwined with their due process argument, plaintiffs argue that if the global settlement is approved, then transfer would be futile because there will be no work remaining in the MDL, which in turn will force the transferee judge to remand *Kellogg* to D. Minnesota. This argument is unpersuasive for several reasons. Even if the global settlement resolves most cases, much work remains to be completed in the MDL – in addition to any opt-out litigation, four exporter cases remain in this MDL (one such case is set for a bellwether trial in September 2019). The conclusion of the substantial bulk of the farmer cases via settlement does not trigger the requirement that *Kellogg* – which is in its infancy – be remanded to the District of Minnesota. Section 1407 remand usually occurs upon the conclusion of pretrial proceedings, which in *Kellogg are* just beginning. *See* 28 U.S.C. § 1407(a) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated"). Plaintiffs appear to argue that they should be afforded discovery and class certification before the settlement is finalized, but that is unlikely as a practical matter whether this

recently-filed action proceeds in the transferor or transferee court.[4]

Plaintiffs also suggest that transfer forecloses the possibility of discovery or class certification proceedings in *Kellogg*,[5] but nothing in our transfer order (or, more generally, Section 1407 transfer itself) prohibits class certification or discovery regarding plaintiffs' claims. All appropriate pretrial proceedings can take place in the transferee court, where much of the conduct about which plaintiffs complain is alleged to have occurred. The precise contours of such pretrial

---

[4] Plaintiffs argue that the transferor judge is capable of issuing an escrow order holding the disputed funds until the claims in *Kellogg* have been resolved. We do not doubt that. But, in light of *Kellogg*'s undisputed factual overlap with the MDL proceedings, we view the more efficient approach to secure this relief would be transfer to the MDL. The transferee judge can resolve the first question of whether defendants are entitled to a fee (and, if so, how much) in connection with the class settlement proceedings. He can then decide whether any funds awarded should be placed in escrow in light of the pendency of *Kellogg*.

[5] *See* Motion to Reconsider at 6 ("There is no circumstance under which Farmers can fairly address Defendants' racketeering, attorney deceit and breach of fiduciary obligations without class certification and discovery and a jury trial. Any determination of Defendants' entitlement to a fee award by the Syngenta MDL or any court, without class certification, without discovery for Farmers, and without a trial on the jury issues, unambiguously violates the Fifth Amendment Due Process Clause."); Reply at 2 ("The Syngenta MDL cannot address whether Defendants' individual contingent fee contracts with Farmers were procured through deceptive marketing and are void without class certification and discovery for Farmers.").

proceedings are, as always, dedicated to the discretion of the transferee judge.

IT IS THEREFORE ORDERED that the motion for reconsideration of the Panel's August 1, 2018, order transferring the action listed on Schedule A is denied.

PANEL ON MULTI-
DISTRICT LITIGATION

/s/ Sarah Vance
Sarah S. Vance
Chair

Marjorie O. Rendell
Ellen Segal Huvelle
Catherine D. Perry
Lewis A. Kaplan
R. David Proctor

IN RE: SYNGENTA AG MIR162 CORN LITIGATION MDL No. 2591

SCHEDULE A

District of Minnesota

KELLOGG, ET AL. v. WATTS GUERRA, LLP, ET AL., C.A. No. 0:18-1082

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: SYNGENTA AG MIR 162 CORN LITIGATION This Document Relates To: *Kellogg, et al. v. Watts Guerra, LLP, et al.*, No. 18-2408-JWL	MDL No. 2591 Case No. 14-md-2591-JWL

MEMORANDUM AND ORDER

(Filed Mar. 1, 2019)

This matter comes before the Court on the motion to dismiss filed by defendants Watts Guerra, LLP ("Watts Guerra"), Mikal Watts, and Francisco Guerra (Doc. # 140), in which most of the other defendants have joined (Doc. ## 142, 143, 144, 146).[1] Defendant Lowe Eklund Wakefield Co., LPA has also filed a motion to dismiss (Doc. # 149), in which it joins the other defendants' motion and asserts additional bases for dismissal. For the reasons set forth below, the Court concludes that plaintiffs have failed to satisfy the constitutional requirement of standing. Accordingly, the

[1] Defendants Givens Law, LLC and Cross Law Firm, LLC have not appeared in this action, and no proof of service has been filed for either defendant. Thus, all defendants that have been served have moved to dismiss the action.

Court grants the motions and dismisses this action in its entirety.[2]

I. Background

This action has been transferred into multi-district litigation (MDL), over which this Court presides, involving claims by farmers and others in the corn industry against various related entities known collectively as Syngenta. On December 7, 2018, the Court certified a settlement class and approved a global settlement[3] of claims against Syngenta, including claims that had been pending in the MDL, in a similar consolidated proceeding in Minnesota state court, and in federal court in Illinois. *See In re Syngenta AG MIR 162 Corn Litig.*, 2018 WL 6436074 (D. Kan. Dec. 7, 2018), *appeals filed.* The Court also awarded one third of the

[2] The Court also grants plaintiffs' motion for leave to file a surreply brief (Doc. # 165). Defendants did not raise any new arguments relating to standing in their reply briefs, and thus a surreply brief would not ordinarily be warranted with respect to that issue. Nevertheless, in order to afford plaintiffs every opportunity to articulate a basis for standing, the Court has considered plaintiffs' proffered surreply brief in making this ruling. The Court does deny as moot plaintiffs' motion for leave to file a supplemental exhibit (Doc. # 166), as plaintiffs have not argued that the exhibit relates to the issue of standing. Finally, in light of this ruling, the Court denies as moot the motion (Doc. # 167) by Joanna and John Burke for reconsideration or review of the Magistrate Judge's order denying their motion to intervene in the action.

[3] The settlement did not include claims against Syngenta by a few grain handlers and exporters, but did include all claims by corn producers (except for claims asserted by those who opted out of the settlement class).

settlement fund as attorney fees. *See id.* On December 31, 2018, the Court allocated the attorney fee award among various pools of attorneys (with further allocation within the pools to be completed in the future by the three courts). *See In re Syngenta AG MIR 162 Corn Litig.*, 2018 WL 6839380 (D. Kan. Dec. 31, 2018), *appeals filed.* In so doing, the Court allocated a portion of the fee award to a pool to compensate individually-retained private attorneys (IRPAs), and it held that any attorney representing a client on a contingent fee basis relating to the settled claims could recover attorney fees only from the Court's fee award and the allocation pools. *See id.*

Watts Guerra and various associated counsel filed individual lawsuits against Syngenta in Minnesota state court on behalf of a large number of clients. Those clients were generally excluded from the litigation classes certified in the MDL and in Minnesota state court. Watts Guerra agreed to the settlement, however, and its clients were included in the settlement class. Watts Guerra and associated counsel presently seek awards of attorney fees from the Minnesota pool allocation and the IRPA pool allocation.

In the present suit (*Kellogg*), plaintiffs are six sets of corn growers who were formerly represented by Watts Guerra and associated counsel in the Syngenta litigation. Plaintiffs assert claims against those attorneys, including claims under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act, Minnesota statutes, and common law. Plaintiffs also seek to assert those claims on behalf of a class of

approximately 60,000 farmers who signed retainer agreements with defendants relating to the Syngenta litigation. In general, plaintiffs allege that defendants engaged in a fraudulent scheme to maximize their attorney fees, in which defendants pursued individual lawsuits while misrepresenting or failing to disclose the possibility and benefits of participating in class actions. Defendants now seek dismissal of those claims.

II. Analysis

Defendants argue that plaintiffs cannot satisfy the constitutional requirement of standing. The Court agrees that plaintiffs have failed to meet that burden, and it therefore dismisses this suit.[4]

The requirement of standing is rooted in Article III of the Constitution, which limits the scope of federal courts' power to actual cases and controversies. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). A federal court plaintiff bears the burden of establishing standing, and at the pleading stage the plaintiff must clearly allege facts demonstrating each required element of standing. *See id.* Specifically, the plaintiff must show that he or she "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *See id.* (citations omitted). To establish the "first and foremost" element of injury in fact, "a plaintiff must show that he or she suffered

[4] In light of this conclusion, the Court need not address the other bases for dismissal argued by defendants.

an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *See id.* at 1547-48 (internal quotations and citations omitted). "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *See id.* at 1548 (internal quotations and citations omitted). To be concrete, the injury must actually exist and not be merely abstract. *See id.*

As defendants note and plaintiffs do not dispute, plaintiffs' amended complaint alleges only two general ways in which plaintiffs were harmed by defendants' conduct: first, defendants effected the exclusion of their clients from the class actions, and plaintiffs were thus deprived of the opportunity to litigate their claims against Syngenta within a class action; and second, that exclusion meant that plaintiffs faced the likelihood of effectively paying attorney fees twice, once through the percentage of the common fund that would be awarded to class counsel and a second time through the fees that defendants would recover under the 40-percent contingent fee agreements plaintiffs signed.

Defendants argue that plaintiffs have not suffered and will not suffer either type of harm. They argue that plaintiffs were not harmed by the exclusion from the initially certified litigation classes because no judgment was ever entered in favor of those classes. In approving the global settlement with Syngenta, the Court certified a new settlement class, which did include plaintiffs and other clients for whom Watts Guerra had filed individual suits. Plaintiffs had the

opportunity but chose not to opt out of that settlement class. Thus, plaintiffs and all other settlement class members will recover from the settlement proceeds on the same basis, pursuant to the same formulas, whether or not they retained their own counsel or filed individual lawsuits. Therefore, because plaintiffs will not recover less than others, defendants argue that plaintiffs were not injured by any inability to proceed as part of a class action.[5]

Defendants also argue that plaintiffs will not be injured by any "double dip" with respect to attorney fees. Plaintiffs allege that they entered into contingent fee contracts with defendants, and they have not alleged that they have yet paid any attorney fees to defendants. Pursuant to this Court's orders, Watts Guerra and the other defendants will receive attorney fees only from the courts' attorney fee awards from the settlement funds, and defendants are in fact prohibited from collecting any other fees from their clients' settlement proceeds. Thus, plaintiffs will effectively pay no more in attorney fees than any other settlement class member who has filed a claim for proceeds, and therefore any wrongful conduct by defendants did not result in any greater fee deduction for plaintiffs. Defendants further argue that they could not collect on their contingent fee contracts with plaintiffs at any

[5] Defendants also note that because plaintiffs had terminated defendants' representation of them, plaintiffs were no longer excluded from the definitions of the certified litigation classes at the time of the settlement with Syngenta, and thus plaintiffs were indeed included in the class actions immediately prior to the settlement.

rate because plaintiffs have terminated those contracts; and they have now disavowed any possible claim for an attorney lien on their clients' settlement proceeds or for fees under a quantum meruit theory.

The Court agrees with defendants that, for the reasons just stated, plaintiffs have not suffered and will not suffer any injury of the types alleged in the complaint. In response to defendants' motion to dismiss for lack of standing, plaintiffs have not identified a particular injury in fact resulting from the alleged misconduct. Instead, plaintiffs have made seven arguments in opposing dismissal, none of which has merit.

First, plaintiffs insist that they are not making an objection to the settlement or to the requests for attorney fees; rather, they seek disgorgement of any fees that defendants eventually receive from the attorney fee award allocation. Plaintiffs therefore argue that they have not waived their claims by failing to file a timely objection to the settlement or to defendants' fee petitions. That position addresses only defendants' waiver argument, however; it does not provide a basis for standing based on an injury in fact.

Second, plaintiffs argue that the JPML sanctioned discovery and class certification proceedings and ruled that the case should proceed on its merits, and that such ruling constitutes the law of the case. In denying plaintiffs' motion for reconsideration of the original transfer order, however, the JPML merely noted that nothing in its transfer order prohibited class certification or discovery. The JPML certainly did not state that

plaintiffs' claims could not be dismissed at the pleading stage, nor did it make a pronouncement about standing, nor did it preclude this Court's consideration of the issue. Moreover, the JPML statement that the case would go to this Court for "pretrial proceedings" did not mean that plaintiffs are guaranteed a trial on their claims, as pretrial proceedings in this MDL have included the Court's consideration of motions to dismiss at the pleading stage.[6] The actions of the JPML have not somehow relieved plaintiffs of their obligation to satisfy the constitutional requirement of standing.

Third, plaintiffs cite a series of cases from the Minnesota Supreme Court in support of their claims. In *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982), the court held that a client could obtain forfeiture of attorney fees because of the defendant attorneys' breach of their fiduciary duty even if the client could not prove that she was actually injured. *See id.* at 411. In that case and in two cited companion cases, however, the court did *not* address the constitutional requirement of standing. *See id.*; *Perl v. St. Paul Fire and Marine Ins. Co.*, 345 N.W.2d 209 (Minn. 1984); *Gilchrist v. Perl*, 387 N.W.2d 412 (Minn. 1986). Thus, the *Perl* cases do not support any argument that the mere breach of a fiduciary duty necessarily creates an injury that satisfies the requirement of standing. Plaintiffs have not cited

[6] Contrary to plaintiffs' argument, although they may have an ownership interest in their causes of action (to whatever extent the causes of action may have value), due process does not guarantee plaintiffs the right to have their claims considered on the merits without satisfaction of constitutional jurisdictional requirements.

any authority that does support that argument; nor have plaintiffs successfully distinguished the case cited by defendants in which a Minnesota court rejected a similar argument. *See Fountain v. Oasis Legal Fin., LLC*, 86 F. Supp. 3d 1037, 1043 (D. Minn. 2015) (plaintiff failed to show how a violation of Minnesota's rules of professional conduct could confer Article III standing).[7]

Fourth, plaintiffs rely on their attorney's affidavit, required by Minnesota statute in any case alleging professional negligence, in which the attorney states that the facts of the case have been reviewed by the attorney with an expert and that, in the opinion of the expert, defendants deviated from the standard of case and by that action caused injury to plaintiffs. *See* Minn. Stat. § 544.42. Plaintiffs have not cited any authority, however, that such an affidavit necessarily establishes standing, and the Court concludes that the affidavit, by itself, is not sufficient in this case. In the affidavit, the attorney has merely parroted the statute's required language, without providing any detail concerning the expert's opinion. Thus, plaintiffs have merely alleged injury without identifying how they actually suffered or will suffer harm from defendants' alleged misconduct. In light of the Court's orders certifying the settlement class and restricting the

[7] In their surreply brief, plaintiffs state that defendants have "misuse[d]" *Fountain* (which defendants cited in their original brief and which plaintiffs failed to address in their response brief), but plaintiffs do not explain why that court's holding is not relevant here.

recovery of attorney fees, plaintiffs must explain how an injury nonetheless exists.

Fifth, plaintiffs point to a 2016 letter to one plaintiff in which Watts Guerra asserted that the plaintiff's termination of its representation was without cause and that it retained its contractual interest and a lien against future proceeds. Plaintiffs cite that letter and a similar letter from Watts Guerra to a non-plaintiff client in November 2018 in attempting to refute defendants' contention that they have abandoned any interest under terminated client contracts. The letter to the plaintiff does not establish standing, however. Circumstances have changed greatly since the 2016 letter to one plaintiff – since that time, plaintiffs have become members of the settlement class (and declined to opt out), and the Court has prohibited defendants from seeking fees other than those awarded by the courts from the attorney fee award from the settlement fund. In addition, defendants have now disavowed any right to collect any additional fees. Thus, the 2016 letter does not provide evidence of a concrete and imminent risk that defendants could successfully extract additional fees from plaintiffs in the future, such that plaintiffs would suffer an injury in fact.

Sixth, plaintiffs complain that defendants are essentially arguing "no harm, no foul," which may be equated with an argument that the ends may justify the means, and plaintiffs insist that such concepts may not be countenanced in our system of American jurisprudence. As defendants point out, however, the constitutional requirement of standing does mean that if a

plaintiff suffers no harm from a foul, he cannot be the one to seek relief for that foul in a suit in federal court. The United States Constitution, as interpreted by the Supreme Court, requires a showing of injury in fact, and plaintiffs may not bypass that requirement simply by quoting lofty platitudes.

Seventh and finally, plaintiffs flatly state that of course they were injured by the egregious conduct by defendants that they have alleged. Again, however, plaintiffs have failed to explain – even when given a second chance in their surreply brief – exactly how they suffered an injury in fact in light of the Court's orders in the Syngenta litigation. The Court will not simply take plaintiffs' word for it in the face of those orders, which protect plaintiffs from the very types of harm that they have alleged in their complaint.

Accordingly, the Court concludes that plaintiffs have failed to satisfy their constitutional burden to establish standing. The Court therefore grants the pending motions and dismisses this action in its entirety.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiffs' motion for leave to file a surreply brief (Doc. # 165) is hereby **granted**.

IT IS FURTHER ORDERED BY THE COURT THAT the motions to dismiss filed by defendants Watts Guerra, LLP, Mikal Watts, and Francisco Guerra (Doc. # 140), in which other defendants have joined (Doc. ## 142, 143, 144, 146), and by defendant Lowe Eklund Wakefield Co. (Doc. # 149) are hereby **granted**, and this action is dismissed in its entirety.

IT IS FURTHER ORDERED THAT plaintiffs' motion for leave to file a supplemental exhibit (Doc. # 166) is hereby **denied as moot**.

IT IS FURTHER ORDERED THAT the motion (Doc. # 167) by Joanna and John Burke for reconsideration or review of the Magistrate Judge's order denying their motion to intervene in the action is hereby **denied as moot**.

IT IS SO ORDERED.

Dated this 1st day of March, 2018, in Kansas City, Kansas.

s/ John W. Lungtrum
John W. Lugstrum
United States District Judge

United States District Court
----------DISTRICT OF KANSAS----------

Kenneth P. Kellogg, Rachel Kellogg and Kellogg Farms, Inc., Roland B. Bromley and Bromley Ranch, LLC, individually, and on behalf of all others similarly situated,

Plaintiff,

v. Case No: 18-2408-JWL

Watts Guerra, LLP, Daniel M. Homolka, P.A., Yira Law Office LTD, Hovland and Rasmus, PLLC, Dewald Deaver, P.C., LLO, Givens Law, LLC, Mauro, Archer & A ssociates, LLC, Johnson Law Group, Wagner Reese, LLP, VanDerGinst Law, P.C., Patton, Hoversten & B erg, P.A., Cross Law Firm, LLC, Law Office of Michael Miller, Pagel Weikum, PLLP, Wojtalewicz Law Firm, Ltd., Mikal C. Watts, Francisco Guerra, and John Does 1-50,,

Defendant,

JUDGMENT IN A CIVIL CASE

(Filed Mar. 1, 2019)

☐ Jury Verdict. This action came before the Court for a jury trial. The issues have been tried and the jury has rendered its verdict.

☒ Decision by the Court. This action came before the Court. The issues have been considered and a decision has been rendered.

Pursuant to the Memorandum and Order filed on March 1, 2018, plaintiffs Kenneth P. Kellogg, Rachel Kellogg, and Kellogg Farms, Inc., Roland B. Bromley and Bromley Ranch, LLC, shall take nothing and this action is dismissed.

March 1, 2019
Date

TIMOTHY M. O'BRIEN
CLERK OF THE
DISTRICT COURT

by: s/Sharon Scheurer
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: SYNGENTA AG MIR 162 CORN LITIGATION This Document Relates To: *Kellogg, et al. v. Watts Guerra, LLP, et al.*, No. 18-2408-JWL	MDL No. 2591 Case No. 14-md-2591-JWL

MEMORANDUM AND ORDER

(Filed May 21, 2019)

This matter comes before the Court on plaintiffs' motion to vacate the Court's dismissal order and judgment in favor of defendants (Doc. # 172). In this case, plaintiffs asserted claims against defendants, their counsel in this MDL's underlying litigation against Syngenta. In general, plaintiffs alleged that defendants engaged in a fraudulent scheme to maximize attorney fees, in which they pursued individual lawsuits on behalf of their clients while misrepresenting or failing to disclose the possibility and benefits of participating in class actions. By Memorandum and Order of March 1, 2019, the Court dismissed the action, ruling that plaintiffs had failed to satisfy the constitutional requirement of standing. *See In re Syngenta AG MIR 162 Corn Litig.*, 2019 WL 1002352 (D. Kan. Mar. 1, 2019) (Lungstrum, J.). Plaintiffs now move essentially for reconsideration of that ruling. As more fully set forth below, upon further consideration, the Court concludes that plaintiffs have alleged an injury

recognized under Minnesota law, and therefore that defendants are not entitled to dismissal of plaintiffs' Minnesota state-law claims for lack of standing. Accordingly, plaintiffs' motion is **granted in part and denied in part**. The Court vacates the judgment as it pertains to plaintiffs' claims under Minnesota law, and plaintiffs' motion is granted to that extent. The motion is denied with respect to plaintiffs' federal claims, which remain dismissed.

I. Governing Standards

Plaintiffs argue by the present motion that the Court erred in dismissing this suit for lack of standing; thus, plaintiffs seek reconsideration of that ruling by the Court. The Court's rules provide that a party seeking reconsideration of a dispositive order or judgment must pursue such relief through a motion filed pursuant to Fed. R. Civ. P. 59(e) or Fed. R. Civ. P. 60. *See* D. Kan. Rule 7.3(a). In the present motion, plaintiffs state that they seek relief under Rule 60(b)(1) and (6). Those provisions impose a high hurdle, allowing for relief only for an obvious error of law that is apparent on the record or in the case of truly extraordinary circumstances. *See Van Skiver v. United States*, 952 F.2d 1241, 1244-45 (10th Cir. 1991).

Defendants argue that plaintiffs have invoked the wrong rule. Defendants rely on *Van Skiver*, in which the Tenth Circuit stated that a challenge to the correctness of the district court's adverse judgment, based on the argument that the court misapplied the law or

misunderstood the plaintiff's position, is properly brought under Rule 59(e) or on direct appeal, and does not justify relief under Rule 60(b). *See id.* at 1244. Defendants note that plaintiffs make just such an argument here, and they further note that the 28-day deadline has now passed for. a motion under Rule 59. *See* Fed. R. Civ. P. 59(e). Thus, defendants argue that the Court should not address the merits of plaintiffs' motion.

Plaintiffs respond to this argument with their own citation to *Van Skiver*. In that case, the Tenth Circuit construed the plaintiffs' motion as one under Rule 60 because plaintiffs had missed the deadline for a motion under Rule 59. *See Van Skiver*, 952 F.2d at 1243. The Tenth Circuit distinguished between the two rules as follows:

> The Federal Rules of Civil Procedure do not recognize a "motion to reconsider." Instead, the rules allow a litigant subject to an adverse judgment to file either a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) or a motion seeking relief from the judgment pursuant to Fed. R. Civ. P. 60(b). These two rules are distinct; they serve different purposes and produce different consequences. Which rule applies to a motion depends essentially on the time a motion is served. If a motion is served within ten days of the rendition of judgment, the motion ordinarily will fall under Rule 59(e). If the motion is served after that time it falls under Rule 60(b).

See id. (citations omitted). Plaintiffs argue, based on this statement, that because they filed their motion more than ten days after the Court's March 1 judgment, the motion properly falls under Rule 60(b). At the time *Van Skiver* was decided, however, Rule 59(e) required that motions be filed within ten days. The rule has since been amended, and parties now have 28 days from the date of judgment in which to file a motion to alter or amend under Rule 59(e). *See* Fed. R. Civ. P. 59(e). Plaintiffs filed their motion on March 27, 2019, within 28 days of the judgment. Thus, plaintiffs were free to seek relief under Rule 59(e).

Plaintiffs insist in their reply brief that their motion is properly considered under Rule 60(b), but because plaintiffs essentially argue that the Court misapplied the law or misunderstood plaintiffs' position, the motion is properly considered under Rule 59(e), as argued by defendants and as explained by the Tenth Circuit in *Van Skiver*. Defendants argue that the deadline has now passed for a Rule 59(e) motion, but plaintiffs did file the instant motion within the 28-day deadline. Accordingly, the Court will construe the motion as a motion to alter or amend the judgment under Rule 59(e), and it will apply the standards governing review under that rule. *See*, *e.g.*, *Jones v. Colvin*, 2015 WL 5883910, at *1 (D. Kan. Oct. 8, 2015) (Lungstrum, J.) (construing motion filed within 28 days of the judgment as a motion to alter or amend under Rule 59(e)), *aff'd*, 647 F. App'x 878 (10th Cir. 2016).

The Tenth Circuit has set forth the following standards to govern a motion to reconsider under Rule 59(e):

> Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.

See Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000) (citations omitted). Plaintiffs have not cited an intervening change in the law or presented new evidence previously unavailable; rather, plaintiffs argue that the Court erred by misapprehending their arguments and the controlling law concerning standing.

II. Analysis

In its previous order, by which it granted defendants' motions to dismiss for lack of standing, the Court noted that (as plaintiffs had not disputed) plaintiffs' amended complaint alleged only two ways in which plaintiffs were harmed by defendants' conduct: plaintiffs were excluded from class actions in the Syngenta litigation; and plaintiffs would effectively pay attorney fees twice, through a common fund award and under

their contingent fee contracts with defendants. *See Syngenta*, 2019 WL 1002352, at *2. The Court ruled that plaintiffs could not suffer either harm under the Syngenta settlement agreement (from which plaintiffs did not opt out) and the Court's orders because all claimants will recover on an equal basis, whether they filed individual suits or participated merely as class members in class actions; and because attorneys will not be permitted to recover anything under contingent fee contracts with claimants. *See id.* at *3. The Court proceeded to address and reject seven specific arguments made by plaintiffs concerning standing. *See id.* at *3-5.

Upon further reflection, however, the Court agrees with plaintiffs' argument that the Minnesota Supreme Court, in the *Perl* cases, held that an attorney's breach of a duty of loyalty to his client constitutes an injury that allows for a remedy of forfeiture of attorney fees, whether or not the client has sustained an actual loss, and that such injury is sufficient to confer standing. *See Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982) (*Perl I*); *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209 (Minn. 1984) (*Perl II*); *Gilchrist v. Perl*, 387 N.W.2d 412 (Minn. 1986) (*Perl III*). For that reason, the Court is persuaded that it erred in dismissing plaintiffs' claims under Minnesota law for lack of standing.

In *Perl I*, the plaintiff alleged that her attorney breached his fiduciary duty by failing to disclose certain information, and the Minnesota Supreme Court affirmed the rulings that the attorney had breached a duty and that he was therefore subject to forfeiture of

his fees. *See Perl I*, 320 N.W.2d at 411. The court noted that those consequences follow such a breach even if the client "cannot prove actual injury to [herself]." *See id* (quoting *Anderson v. Anderson*, 197 N.W.2d 720, 724 (Minn. 1972)).[1] In *Perl II*, the supreme court held that the forfeiture ordered in *Perl I* constituted "money damages" for purposes of an insurance policy. *See Perl II*, 345 N.W.2d at 212-13. In so doing, the court stated as follows:

> The law treats a client's right to an attorney's loyalty as a kind of "absolute" right in the sense that if the attorney breaches his or her fiduciary duty to the client, the client is deemed injured even if no actual loss results. . . . The fee forfeiture in this situation is not restitution. A sum usually equivalent to the fee is awarded to the client, not to restore the client to any status quo because of any unjust enrichment, but because the client has been injured. The injury lies in the client's justifiable perception that he or she has or may have received less than the honest advice and zealous performance to which a client is entitled.

See id. (footnote omitted). In *Perl III*, the supreme court held that in the absence of bad faith or actual fraud,

---

[1] This use of the word "injury" causes some confusion in analyzing Constitutional standing. It may best be understood, the Court believes, as meaning that even if no tangible or financial loss has been suffered, an identifiable harm has occurred. In the later *Perl* cases, the supreme court made clear that an "injury" has indeed been sustained if the attorney breaches a duty of loyalty to the client.

the attorney's fee forfeiture for a breach of duty is not necessarily total. *See Perl III*, 387 N.W.2d at 416-17. The court repeated its holdings from *Perl II* that "a fee forfeiture is not restitution, but rather damages similar to nominal damages for breach of an 'absolute' right," and that the client "is deemed injured even if no actual loss results." *See id.* at 416 (quoting *Perl II*, 345 N.W.2d at 212). The court continued:

> As *Perl II* makes clear, forfeiture damages are both reparational and admonitory. Because clients have an "absolute right" to their attorney's undivided loyalty, any breach is deemed to result in some harm entitling the client to reparation consisting of at least nominal damages; still, undeniably, the predominant functions of any fee forfeiture are punishment and deterrence.

See id.

In its previous order, the Court rejected plaintiffs' citation to the three *Perl* cases on the basis that the cases did not address the issue of standing, and it noted that plaintiffs had not cited any cases in which standing was held to exist solely because a breach of duty that did not result in any actual loss. *See Syngenta*, 2019 WL 1002352, at *4. Defendants did not address these cases in their reply brief in support of their motions to dismiss, and in responding to plaintiffs' motion to vacate, defendants only repeat the Court's rationale that the *Perl* cases did not specifically address standing. The Court now concludes that the proper analysis is not so simple. In the *Perl* cases, the

Minnesota Supreme Court stated unequivocally – and then confirmed – that if an attorney violates the client's "absolute right" to the attorney's loyalty, thereby breaching the attorney's fiduciary duty to the client, the client is deemed injured and suffered harm, even if no pecuniary loss resulted, because the client did not receive the representation to which he was entitled. Thus, Minnesota law recognizes this particular type of actual injury, and the Court must apply Minnesota law in considering plaintiffs' Minnesota state-law claims. Plaintiffs have alleged facts to support a claim that defendants breached their duty of loyalty to them by placing their own interests ahead of plaintiffs' interests. Therefore, the Court concludes that plaintiffs have demonstrated standing at this stage with respect to their claims arising under state law.

In arguing that a mere breach cannot create standing, defendants cited *Fountain v. Oasis Legal Finance, LLC*, 86 F. Supp. 3d 1037 (D. Minn. 2015), and the Court also cited that case in its previous ruling, *see Syngenta*, 2019 WL 1002352, at *4. A closer look at the *Perl* cases, however, reveals *Fountain*'s lack of relevance. In *Fountain*, the court noted that the plaintiff had failed to explain how Minnesota's ethical rules can convey constitutional standing in federal court. *See Fountain*, 86 F. Supp. 3d at 1043. In that case, however, the attorney was essentially seeking advice concerning his ethical obligations in a hypothetical circumstance. *See id.* The case did not involve the present situation, in which clients seek a fee forfeiture because of attorneys' actual breach of their duties to the clients. Thus,

the court in *Fountain* had no occasion to discuss the *Perl* cases, in which the Minnesota Supreme Court held that such a breach constitutes an actual injury.[2]

The Court does reject plaintiffs' argument that the same injury provides standing for their federal RICO claims. The Minnesota Supreme Court has recognized this type of injury under Minnesota law, so plaintiffs have standing for purposes of claims arising under that law,[3] but plaintiffs have not shown that federal law recognizes the same injury. In addition, the RICO statute's particular standing provision requires an injury in the plaintiff's business or property, *see* 18 U.S.C. § 1964(c), and as discussed below and in the Court's previous opinion, plaintiffs have not identified any such injury that they have suffered or will suffer. Thus, the Court does not vacate its judgment in favor of defendants with respect to plaintiffs' federal RICO claims on this basis.

Nor do plaintiffs' other arguments for reconsideration, most of which the Court previously rejected, support vacating the judgment with respect to plaintiffs' federal claims. For instance, plaintiffs again argue that the JPML, in overruling plaintiffs' objection to inclusion of this case in the MDL, effectively indicated that plaintiffs had standing and the case should be addressed on its merits; as previously explained,

---

[2] Because it does not relate to the issue of standing, the Court does not here address defendants' argument that ethical violations cannot be remedied by private right of action.

[3] Such claims would include plaintiffs' declaratory judgment claims to the extent based on rights created by Minnesota law.

however, the JPML did not address the issue of standing, which must always be present before the merits may be reached. *See Syngenta*, 2019 WL 1002352, at *3. Plaintiffs' ownership interest in their claims does not create a due process right to have the merits considered in the absence of standing. *See id.* at *3 n.6.

In addition, plaintiffs again point to their attorney's affidavit, required by Minnesota statute, stating that an expert has concluded that plaintiffs suffered injury by the defendants' deviation from the standard of care. Again, however, plaintiffs cannot establish standing without at least identifying that possible harm, particularly in light of the ultimate settlement and the Court's orders. *See Syngenta*, 2019 WL 1002352, at *4. Plaintiffs also rely on a 2015 opinion letter by a (now-deceased) attorney expert. Although plaintiffs submitted this letter in response to defendants' motion to dismiss, plaintiffs did not specifically cite to that letter in addressing the issue of standing in that response. Moreover, it is not clear that the attorney affidavit was referring to this expert's opinion, as the particular expert was not named in the affidavit. At any rate, the opinion letter addresses only whether particular attorneys should be appointed as lead counsel in the Minnesota Syngenta litigation; it does not include any opinion that these defendants did breach duties to these plaintiffs, and it does not state that these plaintiffs suffered or will suffer any particular concrete injury. The letter also precedes the events (the settlement and the Court's subsequent orders) that foreclose the possibility of the alleged injuries.

Accordingly, this opinion letter does not provide a basis for standing.

Plaintiffs again insist, as a general matter, that the alleged misconduct *is* the injury, but their many arguments on the merits of their claims are not helpful to the standing analysis, which requires them to identify an injury in fact resulting from the alleged misconduct. Plaintiffs' cite the Supreme Court's recognition that "the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure." *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). This is not case of a mere failure of proof, however, as plaintiffs have not succeeded in even *identifying* an injury to their business or property that they did or will suffer from defendants' conduct. Plaintiffs also repeat some of their old aphorisms (the ends cannot justify the means) while also finding a new one that they sprinkle throughout their latest briefs (*dolus circuitu non purgatur*, or fraud is not purged by circuity). Again, such "lofty platitudes" do not satisfy the constitutional burden to show injury-in-fact. *See Syngenta*, 2019 WL 1002352, at *4.[4]

In the present motion, plaintiffs also return to a defendant's 2016 lien letter to one plaintiff, which they

[4] The rhetoric and accusations and unnecessary references to the underlying merits that dominate plaintiffs' briefs are not helpful to the analysis of the legal issues before the Court. The parties are strongly encouraged to confine future briefs to a dispassionate discussion of the relevant issues.

argue shows an intent to enforce fee contracts.[5] As the Court explained previously, however, the Court's orders, issued subsequent to that letter, do not allow for any recovery under the fee contracts. *See id. at* *4.[6] Plaintiffs note that defendants have appealed those rulings, but the Court must assume that its orders represent good law at this stage.[7]

In their latest briefs, the parties address the timing of the standing inquiry. In a general sense, plaintiffs argue that harm that existed at the time of their complaint cannot be remedied after the fact, and they repeatedly insist that "[i]t is the *process* that matters, not the outcome." (Emphasis in original.) Subsequent events – the outcome – may determine whether or not plaintiffs in fact will suffer any injury, however, and in

---

[5] Plaintiffs cite to the amended complaint in arguing that defendants were enforcing their fee contracts with the other plaintiffs at the time that pleading was filed. The amended complaint, however, contains no such allegation concerning defendants' enforcement of their fee contracts.

[6] In their latest brief, plaintiffs refute defendants' alternative argument that plaintiffs have terminated any representation by defendants. It is not clear why plaintiffs would not have terminated any such representation at this point. Nevertheless, the Court need not resolve this dispute because the Court's orders foreclose any possible attempt by defendants to recover fees under contracts with plaintiffs.

[7] Of course, if defendants prevail on appeal and they are permitted to enforce contingent fee contracts with *Syngenta* clients, plaintiffs may at that point be said to have sustained an injury-in-fact, thereby creating standing and providing grounds for plaintiffs to refile the dismissed RICO claims.

this case, events have foreclosed the possibility of the injury alleged by plaintiffs in their complaint.

Plaintiffs insist that standing is measured at the time the suit is filed. *See Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008). Plaintiffs argue therefore that events occurring after they filed their complaint and amended complaint – for instance, the Court's orders and defendants' renunciation of any interest in plaintiffs' fee contracts – do not affect whether they originally had standing. The Supreme Court has also stated, however, that the need to satisfy the requirements of standing "persists throughout the life of the lawsuit." *See Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016). The Tenth Circuit recently confirmed that a plaintiff's burden to demonstrate standing exists throughout the litigation, although the terminology changes depending on the stage of litigation – mootness is "the doctrine of standing set in a time frame," and a case becomes moot if standing is lost after commencement of the litigation. *See Collins v. Daniels*, 916 F.3d 1302, 1314 (10th Cir. 2019) (internal quotations and citations omitted). In this case, even if plaintiffs had standing at the time they filed their original complaint, the Court's subsequent orders foreclosed the possibility that the alleged injury would occur. Thus, whether it is termed a lack of standing or mootness, this issue of timing does not provide a basis to relieve plaintiffs from the judgment of dismissal.

Plaintiffs note that mootness is subject to a possible exception if the "allegedly unlawful activity is

capable of repetition, yet evading review." *See Wild-Earth Guardians v. Public Serv. Co. of Colo.*, 690 F.3d 1174, 1182-83 (10th Cir. 2012). Plaintiffs have not explained how that exception would apply here, however. Plaintiffs also note that the burden would shift to defendants to establish mootness, *see id.* at 1183, but defendants have met any such burden here by citing the relevant Court orders. Finally, plaintiffs argue that the Court dismissed their claims based on a lack of standing and that defendants should not be permitted now to rely on the discrete theory of mootness. As the Tenth Circuit noted in *Collins*, however, mootness is merely a lack of standing arising during the litigation. Defendants originally sought dismissal based on the argument that the Court's orders foreclosed the possibility of the alleged injury, and that argument remains the basis for the Court's ruling.

In their motion to vacate, plaintiffs argue that the Court misunderstood the harm that plaintiffs are claiming. They do not and cannot dispute, however, that the complaint alleges only the two types of harm identified above (loss of the opportunity to participate in a class action, potential for "double-dip" attorney fees). Now plaintiffs argue that their injury consists of the attorney fees that defendants seek to recover from the Court's attorney fee award pools.[8]

---

[8] Plaintiffs insist that the pools represent their property, and that defendants are enforcing the fee contracts by seeking such awards. The Court has made clear, however, that attorneys may recover fees only from the Court's fee award, which has been removed from the settlement fund that claimants will receive, and

First, this argument is improper at this stage, as plaintiffs could have made the argument in response to defendants' motions to dismiss. Second, plaintiffs did not allege any such harm in their amended complaint, and therefore the Court did not err in failing to address the argument. Plaintiffs did not seek to amend to assert such a harm in responding to defendants' motions to dismiss (or any time thereafter). Third, this argument fails on its merits, as any award to defendants from the attorney fee pools would not affect the amounts received by these plaintiffs. On this issue, the Court does not agree with plaintiffs' interpretation of the Court's rulings. Even if defendants were prohibited from receiving any awards from the Minnesota pool or the IRPA pool, plaintiffs' recovery would not be affected, as the Court set aside one third of the settlement amount for attorney fees, without regard to which attorneys would recover those fees. Plaintiffs argue that the Court's fee award was based in part on submissions and applications by these defendants, but the Court assures plaintiffs that it would have awarded one third as attorney fees even without those submissions. Thus, plaintiffs' recovery is not affected – and they are not injured in fact – by any fee awards received by defendants from the Court's pools.

Plaintiffs also make reference to defendants' applications for awards of expenses, although they have

---

that such awards are *in lieu of* any recovery under contingent fee contracts, which may not be enforced. Thus, plaintiffs are mistaken in referring to a 12-percent cap on recovery of fees under the fee contracts.

not made any specific argument based on an injury from expense awards as opposed to fee awards. It is true that if defendants were denied awards of expenses, more would remain for claimants to recover. Again, however, plaintiffs have not alleged any such harm. Nor have plaintiffs plausibly explained how they will receive less for their claims, traceable to expense awards to these defendants, specifically because of the alleged misconduct by these defendants. Therefore, plaintiffs' new theory of injury does not provide a basis for the Court to reverse its prior dismissal.

Accordingly, because plaintiffs have demonstrated standing for their claims based on Minnesota law, those claims remain in the case. In its prior order, in which it dismissed the entire case for lack of standing, the Court did not address defendants' other arguments in support of dismissal. *See Syngenta*, 2019 WL 1002352, at *2 n.4. Thus, the Court will rule on the remainder of defendants' motions to dismiss, which remain pending to the extent they address plaintiffs' state-law claims, based on the briefing already submitted. In addition, in the prior order the Court granted plaintiffs' motion for leave to file a sur-reply brief in opposition to the motions to dismiss, *see id.* at *1 n.2, and in ruling on the remainder of defendants' motions, the Court will consider the arguments in that sur-reply (including the exhibit that the Court originally declined to consider because it did not relate to standing). So that defendants may have the last word, however, in accordance with this Court's customary practice, defendants are granted leave to file a sur-sur-reply brief,

limited to 15 total pages, addressing only arguments (not related to standing) contained in plaintiffs' surreply brief. Any such brief shall be filed on or before **May 31, 2019**.

Finally, plaintiffs also request that the Court suggest to the JPML that this case be remanded to the District of Minnesota, from whence it came to this MDL. The Court denies that request. Plaintiffs appear to base this request on their argument that the case never should have been transferred into the MDL in the first place. That issue has been fully litigated before the JPML, however, and it is not appropriate for this Court to question the JPML's decision. Plaintiffs also note that pretrial proceedings are complete with respect to the cases subject to the settlement with Syngenta. Four other cases that were excepted from the settlement remain in the MDL, however, and pretrial proceedings have not been completed in three of those cases. The MDL has not been dissolved, and this case has not completed pretrial proceedings. Accordingly, there is no basis for a suggestion of remand at this time.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiffs' motion to vacate the Court's dismissal order and judgment (Doc. # 172) is hereby **granted in part and denied in part**. The motion is granted with respect to plaintiffs' claims arising under Minnesota law, and the judgment in favor of defendants on those claims is hereby vacated. The motion is denied with respect to plaintiffs' claims arising under federal law.

IT IS FURTHER ORDERED THAT defendants shall file any sur-sur-reply brief in support of their motions to dismiss, limited as set forth herein, on or before **May 31, 2019**.

IT IS SO ORDERED.

Dated this 21st day of May, 2019, in Kansas City, Kansas.

s/ John W. Lungtrum
John W. Lugstrum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: SYNGENTA AG MIR 162 CORN LITIGATION	)	MDL No. 2591
This Document Relates To:	)	Case No. 14-md-2591-JWL
Kellogg, et al. v. Watts Guerra, LLP, et al., No. 18-2408-JWL	)	

MEMORANDUM AND ORDER

(Filed Aug. 13, 2019)

This matter again comes before the Court on the motion to dismiss filed by defendants Watts Guerra, LLP ("Watts Guerra"), Mikal Watts, and Francisco Guerra (Doc. # 140), in which most of the other defendants have joined (Doc. ## 142, 143, 144, 146).[1] Defendant Lowe Eklund Wakefield Co., LPA ("Lowe") has also filed a motion to dismiss (Doc. # 149), in which it joins the other defendants' motion and asserts additional bases for dismissal. For the reasons set forth below, the Court grants the motions in part and denies them in part. The motions are granted with respect to Counts I, IV, V, VI, IX, X, XI, XII, and XIV of the amended complaint, and with respect to Count XIII to the extent based on an underlying fraud claim, and those claims

[1] Defendants Givens Law, LLC and Cross Law Firm, LLC have not appeared in this action, and no proof of service has been filed for either defendant. Thus, all defendants that have been served have moved to dismiss the action.

are hereby dismissed. The motion is denied with respect to the other remaining counts.

This matter also comes before the Court on plaintiffs' motions for certification of a question to the Minnesota Supreme Court (Doc. # 197) and for certification for interlocutory appeal or remand (Doc. # 203). For the reasons set forth below, the Court denies those motions.

Finally, because claims remain in this case, the motion by Joanna and John Burke for reconsideration or review of the Magistrate Judge's order denying their motion to intervene in the action (Doc. # 167) is no longer moot. Any response to that motion shall be filed on or before August 26, 2019, and any reply brief shall be filed on or before September 9, 2019.

I. Background

This action has been transferred into multi-district litigation (MDL), over which this Court presides, involving claims by farmers and others in the corn industry against various related entities known collectively as Syngenta. On December 7, 2018, the Court certified a settlement class and approved a global settlement[2] of claims against Syngenta, including claims that had been pending in the MDL, in a similar consolidated proceeding in Minnesota state court, and in

[2] The settlement did not include claims against Syngenta by a few grain handlers and exporters, but did include all claims by corn producers (except for claims asserted by those who opted out of the settlement class).

federal court in Illinois. *See In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094 (D. Kan. 2018), *appeals filed.* The Court also awarded one third of the settlement fund as attorney fees. *See id.* On December 31, 2018, the Court allocated the attorney fee award among various pools of attorneys (with further allocation within the pools to be completed by the three courts). *See In re Syngenta AG MIR 162 Corn Litig.*, 2018 WL 6839380 (D. Kan. Dec. 31, 2018), *appeals filed.* In so doing, the Court allocated a portion of the fee award to a pool to compensate individually-retained private attorneys (IRPAs), and it held that any attorney representing a client on a contingent fee basis relating to the settled claims could recover attorney fees only from the Court's fee award and the allocation pools. *See id.*

Watts Guerra and various associated counsel filed individual lawsuits against Syngenta in Minnesota state court on behalf of a large number of clients. Those clients were generally excluded from the litigation classes certified in the MDL and in Minnesota state court. Watts Guerra agreed to the settlement, however, and its clients were included in the settlement class. Watts Guerra and associated counsel have been awarded attorney fees from the Minnesota pool allocation, *see In re Syngenta AG MIR 162 Corn Litig.*, 2019 WL 3203356 (D. Kan. July 16, 2019), and they seek further awards of fees from the IRPA pool allocation.

In the present suit (*Kellogg*), plaintiffs are six sets of corn growers who were formerly represented by Watts Guerra and associated counsel in the Syngenta

litigation. Plaintiffs assert claims against those attorneys, including claims under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act, Minnesota statutes, and Minnesota common law. Plaintiffs also seek to assert those claims on behalf of a class of approximately 60,000 farmers who signed retainer agreements with defendants relating to the Syngenta litigation. In general, plaintiffs allege that defendants engaged in a fraudulent scheme to maximize their attorney fees, in which defendants pursued individual lawsuits while misrepresenting or failing to disclose the possibility and benefits of participating in class actions.

On March 1, 2019, the Court dismissed this action in its entirety for lack of standing. *See In re Syngenta AG MIR 162 Corn Litig.* (*Kellogg*), 2019 WL 1002352 (D. Kan. Mar. 1, 2019). On May 21, 2019, however, the Court reconsidered that decision, and it vacated the dismissal with respect to plaintiffs' state-law claims, while reaffirming its dismissal of plaintiffs' claims under federal law for lack of standing. *See In re Syngenta AG MIR 162 Corn Litig.* (*Kellogg*), 2019 WL 2184863 (D. Kan. May 21, 2019). Accordingly, the Court must now consider the alternative arguments for dismissal raised by defendants in their motions to dismiss, which arguments the Court did not consider in its prior orders.[3]

[3] Because plaintiffs had been permitted to file a sur-reply brief in opposition to defendants' motions to dismiss, the Court granted leave to defendants to file a sur-sur-reply brief.

II. Motions to Dismiss

A. Governing Standards

The Court will dismiss a cause of action for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) when the factual allegations fail to "state a claim to relief that is plausible on its face." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not contain detailed factual allegations, but a plaintiff's obligation to provide the grounds of entitlement to relief requires more than labels and conclusions; a formulaic recitation of the elements of a cause of action will not do. *See id.* at 555. The "[f]actual allegations must be enough to raise a right to relief above the speculative level." *See id.*

B. Common-Law Fraud Claims – Lack of Pecuniary Loss

Defendants argue that plaintiffs have not plausibly alleged that they suffered any pecuniary loss, and that therefore they cannot maintain the following "fraud-based claims": fraudulent misrepresentation (Count IX), negligent misrepresentation (Count X), fraudulent inducement (Count XI), aiding and abetting (to the extent based on fraud) (Count XIII), and civil conspiracy to commit fraud (Count XIV).[4] As defendants point out, and plaintiffs do not dispute, each

[4] Defendants concede that plaintiffs' claim for fraudulent execution (Count XII) does not require a showing of pecuniary loss.

of those claims under Minnesota law[5] requires a showing of pecuniary loss. *See Hoyt Props., Inc. v. Production Resource Group, L.L.C.*, 736 N.W.2d 313, 318 (Minn. 2007) (fraudulent misrepresentation); *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 368, 369 (Minn. 2009) (fraudulent inducement, negligent misrepresentation); *Rilley v. MoneyMutual, LLC*, 2017 WL 3822727, at *10 (D. Minn. Aug. 30, 2017) (aiding and abetting and civil conspiracy claims require underlying tort) (citing cases).

The Court agrees that these claims are subject to dismissal on this basis. As the Court explained in its prior opinions concerning standing, because defendants are prohibited by Court order from recovering fees under any retainer contracts with plaintiffs, and because plaintiffs (and all Syngenta settlement claimants) will recover on the same basis, whether or not they were represented by counsel, plaintiffs have not plausibly alleged that they have suffered or will suffer any pecuniary loss as a result of the alleged misconduct by defendants. *See Kellogg*, 2019 WL 1002352, at *2-5; *Kellogg*, 2019 WL 2184863, at *4-6. Nor have plaintiffs identified any such injury in their briefs. Indeed, in opposing defendants' motions to dismiss, plaintiffs have not directly addressed this issue of a lack of pecuniary loss, instead arguing injury only in the context of standing. As the Court recently concluded, the only injury plausibly alleged by plaintiffs is

[5] Plaintiffs have asserted their state-law clams under Minnesota law, and both parties have applied that state's law to these claims in their briefs.

the mere fact that defendants breached their fiduciary duties to them, as recognized in the *Perl* cases. *See Kellogg*, 2019 WL 2184863, at *3. Thus, *Perl* is the blueprint for the present case, and in that case, all claims requiring proof of damages were summarily dismissed. *See Rice v. Perl*, 320 N.W.2d 407, 410 (Minn. 1982). Similarly here, plaintiffs cannot maintain any claim that requires proof of a pecuniary loss, as they have been unable to identify any such loss here.

Accordingly, the Court dismisses plaintiffs' claims for fraudulent misrepresentation (Count IX), negligent misrepresentation (Count X), and fraudulent inducement (Count XI). In addition, plaintiffs have based their civil conspiracy claim (Count XIV) on underlying claims of fraud, and thus the Court dismisses that claim as well. Finally, plaintiffs have based their aiding and abetting claim (Count XIII) on both fraud and breach of fiduciary duty; thus, the Court dismisses that claim only to the extent based on an underlying claim of fraud.

C. Minnesota Statutory Claims – No Public Benefit

Plaintiffs have asserted claims for violations of three Minnesota consumer-protection statutes: the Minnesota Consumer Fraud Act (MCFA), Minn. Stat. § 325F.69 (Count IV); the Minnesota False Statement in Advertisement Act (MFSAA), Minn. Stat. § 325F.67 (Count V); and the Minnesota Uniform Deceptive Trade Practices Act (MUDTPA), Minn. Stat. § 325D.44

(Count VI). In each case, plaintiffs assert a claim for a violation of the statute pursuant to Minnesota's private attorney general statute, Minn. Stat. § 8.31, which provides a private right of action for persons injured by business practices in violation of certain statutes. The Minnesota Supreme Court has held that a plaintiff may maintain an action under Section 8.31 only if it demonstrates that its cause of action benefits the public. *See Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000). Defendants argue that plaintiffs' claims under these statutes lack the necessary public benefit.

The Court addressed this issue in ruling on Syngenta's motion to dismiss in the main litigation in this MDL. *See In re Syngenta AG MIR 162 Corn Litig.*, 131 F. Supp. 3d 1177, 1229-31 (D. Kan. 2015). In dismissing claims by the corn producer plaintiffs for violations of two Minnesota consumer-protection statutes, the Court discussed and applied the applicable considerations as follows:

> Minnesota courts have not set forth a clear test for determining when a claim benefits the public for this purpose. *See Buetow v. A.L.S. Enters., Inc.*, 888 F. Supp. 2d 956, 960 (D. Minn. 2012). In making that determination, however, Minnesota courts have considered "the form of the deceptive practice and the type of relief sought." *See Summit Recovery, LLC v. Credit Card Reseller, LLC*, 2010 WL 1427322, at *5 (D. Minn. Apr. 9, 2010); *see also Buetow*, 888 F. Supp. 2d at 960-62.

The court in *Buetow* summarized this consideration by Minnesota courts of the relief sought as follows:

> Although there exists no hard-and-fast rule, a public benefit typically will be found when the plaintiff seeks relief primarily aimed at altering the defendant's conduct (usually, but not always, through an injunction) rather than seeking remedies for past wrongs (typically through damages). This is because individual damages, generally speaking, merely enrich (or reimburse) the plaintiff to the defendant's detriment; they do not advance a public interest.

See Buetow, 888 F. Supp. 2d at 961 (citation and footnote omitted). In these counts, plaintiffs seek only damages to compensate them for past wrongs (and attorney fees). They have not sought injunctive or other forward-looking relief, and although that failure is not necessarily dispositive, *see id.* at 961 n.6, it does weigh strongly against a finding of a public benefit here.

See Syngenta, 131 F. Supp. 3d at 1230.

The same result is appropriate here. Plaintiffs primarily seek the forfeiture of attorney fees awarded to defendants, and thus they seek to remedy past wrongs. Plaintiffs do purport to seek injunctive relief, in the form of the forfeiture of fees and the voiding of retainer contracts, but that relief is also intended to remedy past wrongs. Plaintiffs do not seek to enjoin continuing

misrepresentations or deceptions by defendants – indeed, at this stage of the MDL, defendants are no longer soliciting corn producers for the assertion of claims against Syngenta – and thus, plaintiffs do not seek forward-looking relief aimed at altering defendants' ongoing misconduct. Therefore, plaintiffs' statutory claims do not serve the public benefit.

Plaintiffs argue that they assert claims on behalf of an entire class, but the Court rejected that argument made by the corn producers in the underlying MDL. *See id* at 1230. Under Minnesota law, the pursuit of class claims does not necessarily provide a public benefit, *see id.*, and plaintiffs' class claims also seek to remedy past wrongs only. Plaintiffs also argue that this case has garnered national attention and that this suit will educate the public concerning attorneys' conduct with respect to mass torts and class actions. The Court rejected just such a public-education argument by the corn producers, however. *See id.* (citing *Buetow*); *see also Buetow*, 888 F. Supp. 2d at 962 (although any successful lawsuit recovering damages could have the potential to cause some deterrent public benefit, such a broad application of the private attorney general statute would allow any "dog bite case" to fall within the statute; thus "this type of ostensible benefit is too remote or theoretical to pass muster"). Finally, some courts have considered the fact that the alleged misrepresentations were made to the public at large. *See id.* at 1230-31 (citing cases). As in the underlying MDL, however, the misrepresentations alleged here were directed to a specific group within a specific industry, and

thus this factor does not weigh in favor of finding a public benefit here. *See id.* at 1231. For these reasons, the Court concludes that plaintiffs cannot satisfy the public-benefit requirement, and it therefore dismisses plaintiffs' statutory claims asserted through Section 8.31, the private attorney general statute.

The Court notes that only two of the three statutes cited by plaintiffs – MCFA and MFSAA – fall within the explicit scope of Section 8.31, subd. 3, which refers back to the statutory violations listed in subdivision 1 of the statute. *See* Minn. Stat. 8.31, subd. 1, 3. MUDTPA is not included in that list, perhaps because that statute contains its own provision for an individual claim. *See State ex rel. Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 496 (Minn. 1996) (citing Minn. Stat. § 325D.45, subd. 1). Nevertheless, plaintiffs have asserted their MUDTPA claim only through Section 8.31, and because they cannot satisfy a requirement for a claim asserted under Section 8.31, the claim as pleaded is subject to dismissal. *See Syngenta*, 131 F. Supp. 3d at 1231 (dismissing claim under statute with its own private right of action that was nevertheless pleaded as asserted through Section 8.31). Moreover, any amendment to assert the MUDTPA claim under Section 325D.45 would be futile because such a claim is limited to one for an injunction against a continuing deceptive trade practice, *see* Minn. Stat. § 325D.45, subd. 1, and as noted above, there is no longer any danger that other consumers could be harmed by deceptive solicitation with respect to claims against Syngenta.

Accordingly, the Court dismisses all three statutory claims on this basis.[6]

D. Additional Arguments Concerning Remaining Claims

In Count I, plaintiffs seek a declaratory judgment to the effect that defendants' retainer contracts with them are void, that defendants' have forfeited any claim to compensation from plaintiffs, and that defendants have waived any quantum meruit claim against plaintiffs. Thus plaintiffs essentially seek to prohibit defendants from recovering fees from plaintiffs for work done pursuant to the retainer contracts. As previously discussed many times by the Court, its orders in this MDL preclude the possibility of defendants' recovery of any fees directly from plaintiffs. Accordingly, the Court would not exercise its discretion to issue the requested declaration, and it therefore dismisses Count I. Plaintiffs seek the same relief in its claim for fraudulent execution (Count XII), and for the same reason, the Court would not grant such equitable relief; the Court therefore dismisses Count XII as well.

The Court's rulings leave only plaintiffs' claim for breach of fiduciary duty (Count VIII) and their claim for aiding and abetting such a breach (Count XIII). Plaintiffs also seek treble damages under a Minnesota

---

[6] In light of this ruling, the Court need not address defendants' argument that these statutes do not apply to professional services or any other alternative basis for dismissal of these claims.

statute in Count VII, but plaintiffs have voluntarily dismissed that count to the extent that it asserts an independent cause of action, and they have agreed that by Count VII they only seek a remedy for their other claims.

The Court rejects defendants' argument that plaintiffs have not stated a claim for aiding and abetting in Count XIII. Defendants rely on the particularity requirement of Fed. R. Civ. P. 9(b), but that requirement would apply to this claim only to the extent based on an underlying claim of fraud, and thus it would not apply to the remaining claim that is based solely on a breach of fiduciary duty. The Court also concludes that plaintiffs have sufficiently alleged defendants' knowledge.

The Court also rejects defendants' argument that plaintiffs have waived these claims by failing to object in the MDL with respect to awards of attorney fees. The Court agrees with the MDL Panel that plaintiffs' claims are separate from that fee process. Plaintiffs are seeking a forfeiture of fees awarded to defendants, and there was no mechanism for plaintiffs to assert such a claim in that process. Moreover, because plaintiffs have already been injured by any breach of fiduciary duty (as ruled by the Minnesota Supreme Court in the *Perl* cases), plaintiffs' claims are ripe.

Finally, the Court rejects any additional arguments for dismissal raised by Lowe in their separate motion. While only one plaintiff has alleged a direct connection to Lowe, Lowe could be liable to other plaintiffs

through the aiding-and-abetting claim. The Court concludes that plaintiffs have alleged sufficient facts to support their remaining claims based on breach of fiduciary duty as recognized in the *Perl* cases.

III. Motion for Certification of a Question

Plaintiffs have filed a motion seeking certification of a question to the Minnesota Supreme Court pursuant to Minn. Stat. § 480.065, subd. 3. The request arises from defendants' argument that the consumer-protection statutes of which plaintiffs have alleged violations (Counts IV, V, VI) do not apply to professionals such as attorneys. Plaintiffs seek to certify a question asking whether those statutes apply to the entrepreneurial aspects of legal practice.

As discussed above, the Court has dismissed the claims based on those statutes on an alternative basis (the lack of a public benefit), and the Court need not reach the issue raised by the proposed question. Thus, any answer from the Minnesota Supreme Court to the proposed question would not be determinative of an issue pending in this Court, as required under the certification statute. *See* Minn. Stat. § 480.065, subd. 3. Accordingly, the Court denies the motion.

IV. Motion for Certification for Interlocutory Appeal or Remand

In another motion, plaintiffs request various forms of relief: entry of final judgment on the dismissed

federal claims pursuant to Fed. R. Civ. P. 54(b); certification for interlocutory appeal from the dismissal of those claims pursuant to 28 U.S.C. § 1292(b); an order vacating the dismissal of the federal claims; and a suggestion of remand of this action to the transferor court. The Court notes that plaintiffs have devoted very little of their briefs in support of this motion to the standards that govern those requests. Instead, plaintiffs have used most of their briefs to reargue the merits of the standing issue or even the merits of their underlying claims.[7] The Court has already twice considered the issue of standing with respect to the federal claims, and it will not reconsider its ruling in the context of deciding the present motion.

A. Entry of Final Judgment – Rule 54(b)

Plaintiffs seek an order directing entry of final judgment with respect to the dismissed federal claims. Rule 54(b) provides that a court may direct entry of a final judgment as to some claims in an action "only if the court expressly determines that there is no just reason for delay." *See* Fed. R. Civ. P. 54(b). The Tenth Circuit has discussed the purpose of the rule and the standard for its application as follows:

> The purpose of Rule 54(b) is to avoid the possible injustice of a delay in entering judgment on a distinctly separate claim or as to

[7] Plaintiffs continue to make the same arguments that they have made multiple times before, but without disputing or even acknowledging the Court's particular reasoning in previously rejecting those arguments.

fewer than all of the parties until the final adjudication of the entire case by making an immediate appeal available. However, Rule 54(b) preserves the historic federal policy against piecemeal appeals – a policy that promotes judicial efficiency, expedites the ultimate termination of an action and relieves appellate courts of the need to repeatedly familiarize themselves with the facts of a case. Thus, the rule attempts to strike a balance between the undesirability of more than one appeal in a single action and the need for making review available in multiple-party or multiple-claim situations at a time that best serves the needs of the litigants.

Rule 54(b) entries are not to be made routinely. Indeed, trial courts should be reluctant to enter Rule 54(b) orders since the purpose of this rule is a limited one: to provide a recourse for litigants when dismissal of less than all their claims will create undue hardships. Thus, a certification under Rule 54(b) is only appropriate when a district court adheres to the rule's requirement that a court make two express determinations. First, the district court must determine that the order it is certifying is a final order. Second, the district court must determine that there is no just reason to delay review of the final order until it has conclusively ruled on all claims presented by the parties to the case.

. . .

> . . . To be considered "final", an order must be "final" in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action. While the exact definition of "claim" for purposes of Rule 54(b) is unsettled, a "claim" is generally understood to include all factually or legally connected elements of a case. This notion of connectedness also appears in *Moore's Federal Practice 3d* § 202.06[2], which states:
>
> > [A] judgment is not final unless the claims disposed of are separable from the remaining claims against the same parties. *Separability is* an elusive term, and no reliable litmus test exists for determining when a claim is a distinct claim of relief. Courts, however, have concentrated on two factors: (1) the factual overlap (or lack thereof) between the claims disposed of and the remaining claims, and (2) whether the claims disposed of and the remaining claims seek separate relief.
>
> Thus, a judgment is not final for the purposes of Rule 54(b) unless the claims resolved are distinct and separable from the claims left unresolved.

See Oklahoma Turnpike Auth. v. Bruner, 259 F.3d 1236, 1241-43 (10th Cir. 2001) (internal quotations and additional citations omitted).

Plaintiffs have not shown that any of the relevant factors favor entry of a final judgment with respect to the federal claims. First, the federal claims are based on the same alleged facts that underlie their other claims, and plaintiffs seek essentially the same relief on all claims (the forfeiture of fees); thus, all of the claims are so intertwined, with so much factual and legal overlap, as to be inseparable. *See id.* at 1243. Accordingly, the Court is not persuaded that its order dismissing the federal claims represents a final order for purposes of this rule. Second, plaintiffs have not shown that they would suffer undue hardship without an immediate appeal, such that there is no just reason for delay. Plaintiffs note that they might have to go to trial twice if successful in a posttrial appeal. The prevailing policy is to avoid multiple appeals, however, and because of the MDL process, an immediate appeal in this case would raise the specter of multiple appeals to *multiple appellate courts* – first to the Tenth Circuit upon interlocutory appeal, then to the Eighth Circuit after conclusion of this case upon remand of this case to the District of Minnesota (the MDL transferor court).[8] Accordingly, the Court denies the motion for entry of final judgment under Rule 54(b).

---

[8] Plaintiffs cite *In re Food Lion, Inc., Fair Labor Standards Act "Effective Scheduling" Litigation*, 73 F.3d 528 (4th Cir. 1996), in which the court required entry of final judgment under Rule 54(b) so that multiple appeals in an MDL could be considered by the same appellate court. *See id.* In plaintiffs' case, however, the issue for appeal (dismissal of the federal claims for lack of standing) affects only a single case in the MDL, and thus there is no risk that multiple appellate courts will face the same issue after

B. Certification for Interlocutory Appeal – Section 1291(b)

In the alternative, plaintiffs seek certification for interlocutory appeal from the dismissal of the federal claims pursuant to 28 U.S.C. § 1292(b), which provides as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such an order.

See id. Upon such certification by the district court, the Court of Appeals may or may not decide to permit the interlocutory appeal in its discretion. *See id.* Certification under this section is within the discretion of the district court. *See Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995). In deciding whether to exercise its discretion under Section 1292(b), the Court is mindful of the "long-established policy preference in the federal courts disfavoring piecemeal appeals." *See Conrad v. Phone Directories Co.*, 585 F.3d 1376, 1382 (10th Cir. 2009).

---

remand. Indeed, the risk of having appeals before different appellate courts only arises here if Rule 54(b) certification is *granted.* Thus, *Food Lion*, because of its court's advocacy of a policy of avoiding appeals to multiple appellate courts, actually favors denial of the motion here.

The Court declines in its discretion to issue the requested certification. Plaintiffs have never cited a case involving no pecuniary loss in which a mere breach of fiduciary duty was held to be sufficient to confer standing to pursue RICO claims; thus, the Court cannot conclude that there is substantial ground for difference of opinion on the issue. Moreover, even if the plaintiffs were deemed to have constitutional standing, the RICO claims would still be subject to dismissal – RICO requires proof of an injury to "business or property," *see* 18 U.S.C. § 1964(c), and thus plaintiffs' failure plausibly to allege a pecuniary injury (discussed above) would also doom the federal claims. Thus, a contrary decision on the issue of constitutional standing would not materially advance the ultimate termination of this litigation.

C. Request to Vacate and for Suggestion of Remand

Finally, plaintiffs ask the Court to vacate the order dismissing the federal claims and to suggest to the MDL Panel that this case should be remanded to the transferor court. First, there is no basis for vacating the Court's dismissal order, and that request is therefore denied. Second, the Court declines plaintiffs' invitation to suggest remand at this time. The Panel has decided (and reaffirmed) that this case belongs in the MDL, and there is no basis for remand before pretrial proceedings are concluded in this case. Moreover, the Court rejects plaintiffs' argument that remand is warranted because this Court has become a fact witness

concerning defendants' misrepresentations and deceptions in the MDL litigation. Although 28 U.S.C. § 455(b) requires recusal if a judge has personal knowledge of evidentiary facts or is likely to be a material witness, *see id.* § 455(b)(1), (5)(iv), that statute does not apply to knowledge obtained in the course of related judicial proceedings. *See United States v. Page*, 828 F.2d 1476, 1481 (10th Cir. 1987). Thus, there is no basis for recusal here, and therefore no basis for suggestion of remand. Accordingly, the Court denies this motion in its entirety.

IT IS THEREFORE ORDERED BY THE COURT THAT the motions to dismiss filed by defendants Watts Guerra, LLP, Mikal Watts, and Francisco Guerra (Doc. # 140), in which other defendants have joined (Doc. ## 142, 143, 144, 146), and by defendant Lowe Eklund Wakefield Co. (Doc. # 149) are hereby **granted in part and denied in part**, as set forth herein. The motions are granted with respect to Counts I, IV, V, VI, IX, X, XI, XII, and XIV of the amended complaint, and with respect to Count XIII to the extent based on an underlying fraud claim, and those claims are hereby dismissed. The motion is denied with respect to the other remaining counts.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiffs' motion for certification of a question to the Minnesota Supreme Court (Doc. # 197) is hereby **denied**.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiffs motion for certification for interlocutory appeal or for remand (Doc. # 203) is hereby **denied**.

IT IS FURTHER ORDERED THAT the motion by Joanna and John Burke for reconsideration or review of the Magistrate Judge's order denying their motion to intervene in the action (Doc. # 167) is no longer moot. Any response to that motion shall be filed on or before **August 26, 2019**, and any reply brief shall be filed on or before **September 9, 2019**.

IT IS SO ORDERED.

Dated this 13th day of August, 2019, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: SYNGENTA AG MIR 162 CORN LITIGATION This Document Relates To: *Kellogg, et al. v. Watts Guerra, LLP, et al.*, No. 18-2408-JWL	MDL No. 2591 Case No. 14-md-2591-JWL

MEMORANDUM AND ORDER

(Filed Dec. 18, 2019)

On August 13, 2019, the Court ruled on motions to dismiss filed by most defendants. This matter now comes before the Court on the motion by those defendants for reconsideration of that order (Doc. # 229).[1] For the reasons set forth below, the motion is **granted in part and denied in part**. The motion is granted with respect to plaintiffs' claim for aiding and abetting a breach of fiduciary duty (Count XIII), and that claim is hereby dismissed. The motion is otherwise denied.

In addition, plaintiffs have moved for reconsideration of that order and for other relief (Doc. # 227). That motion too is **granted in part and denied in part**.

[1] Defendant Givens Law, LLC has not appeared in the action, and no proof of service has been filed for that defendant. Defendant Cross Law Firm, LLC, has not appeared, but plaintiffs have filed a notice indicating service on that defendant. Defendants' present motion is purportedly filed on behalf of "all Defendants," but no signature block is included for attorneys for either the Givens firm or the Cross firm.

The motion is granted with respect to plaintiffs' request for correction concerning whether a particular defendant has been served. The motion is otherwise denied.

I. Background

This action has been transferred into multi-district litigation (MDL), over which this Court presides, involving claims by farmers and others in the corn industry against various related entities known collectively as Syngenta. On December 7, 2018, the Court certified a settlement class and approved a global settlement[2] of claims against Syngenta, including claims that had been pending in the MDL, in a similar consolidated proceeding in Minnesota state court, and in federal court in Illinois. *See In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094 (D. Kan. 2018), *appeals filed.* The Court also awarded one third of the settlement fund as attorney fees. *See id.* On December 31, 2018, the Court allocated the attorney fee award among various pools of attorneys (with further allocation within the pools to be completed by the three courts). *See In re Syngenta AG MIR 162 Corn Litig.*, 2018 WL 6839380 (D. Kan. Dec. 31, 2018), *appeals filed.* In so doing, the Court allocated a portion of the fee award to a pool to compensate individually-retained private attorneys (IRPAs), and it held that

[2] The settlement did not include claims against Syngenta by a few grain handlers and exporters, but did include all claims by corn producers (except for claims asserted by those who opted out of the settlement class).

any attorney representing a client on a contingent fee basis relating to the settled claims could recover attorney fees only from the Court's fee award and the allocation pools. *See id.*

Watts Guerra and various associated counsel filed individual lawsuits against Syngenta in Minnesota state court on behalf of a large number of clients. Those clients were generally excluded from the litigation classes certified in the MDL and in Minnesota state court. Watts Guerra agreed to the settlement, however, and its clients were included in the settlement class. Watts Guerra and associated counsel have been awarded attorney fees from the Minnesota pool allocation, *see In re Syngenta AG MIR 162 Corn Litig.*, 2019 WL 3203356 (D. Kan. July 16, 2019), and they seek further awards of fees from the IRPA pool allocation.

In the present suit (*Kellogg*), plaintiffs are six sets of corn growers who were formerly represented by Watts Guerra and associated counsel in the Syngenta litigation. Plaintiffs have asserted claims against those attorneys, including claims under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act, Minnesota statutes, and Minnesota common law. Plaintiffs also seek to assert claims on behalf of a class of approximately 60,000 farmers who signed retainer agreements with defendants relating to the Syngenta litigation. In general, plaintiffs allege that defendants engaged in a fraudulent scheme to maximize their attorney fees, in which defendants pursued individual lawsuits while misrepresenting or failing to disclose

the possibility and benefits of participating in class actions.

On March 1, 2019, the Court dismissed this action in its entirety for lack of standing. *See In re Syngenta AG MIR 162 Corn Litig.* (*Kellogg*), 2019 WL 1002352 (D. Kan. Mar. 1, 2019). On May 21, 2019, however, the Court reconsidered that decision, and it vacated the dismissal with respect to plaintiffs' state-law claims, while reaffirming its dismissal of plaintiffs' claims under federal law for lack of standing. *See In re Syngenta AG MIR 162 Corn Litig.* (*Kellogg*), 2019 WL 2184863 (D. Kan. May 21, 2019). On August 13, 2019, the Court issued a Memorandum and Order in which it addressed defendants' additional arguments for dismissal of plaintiffs' state-law claims. *See In re Syngenta AG MIR 162 Corn Litig.* (*Kellogg*), 2019 WL 3801719 (D. Kan. Aug. 13, 2019). The Court dismissed all claims except plaintiffs' claim for breach of fiduciary duty (Count VIII) and their claim for aiding and abetting such a breach (Count XIII). *See id.* In that order, the Court also denied the following requests by plaintiffs: for certification of a question to the Minnesota Supreme Court; for entry of final judgment on the federal claims under Rule 54(b); for certification for interlocutory appeal from the dismissal of the federal claims; to vacate the dismissal of the federal claims; for recusal; and for suggestion of remand. *See id.* Both sides have now filed motions seeking relief with respect to this latest order.

II. Standard for Reconsideration

The parties once again disagree about the proper bases for their motions. Plaintiffs challenge dispositive rulings (rulings dismissing claims), and D. Kan. R. 7.3(a) demands that a motion for reconsideration of such a ruling be brought under Fed. R. Civ. P. 59(e) or Fed. R. Civ. P. 60 (whether or not a judgment has been issued). The Tenth Circuit has instructed that the timing of the motion for reconsideration effectively determines the applicable rule. *See Van Skiver v. United States*, 952 F.2d 1241, 1244-45 (10th Cir. 1991). Plaintiffs have filed their motion in a timely fashion after the Court issued its August 13 order. Accordingly, the Court will consider plaintiffs' motion under Rule 59(e).

Defendants cite Rule 59(e) as the basis for their motion, but they challenge nondispositive rulings (rulings in which the Court declined to dismiss claims). Thus, the Court will consider defendants' motion pursuant to D. Kan. Rule 7.3(b).

Regardless of the rules cited, the Court in its discretion will consider each motion on the merits, as it has done previously in this case, so that each side may have a full opportunity to argue its positions. Grounds warranting reconsideration include a change in controlling law, newly-available evidence, and the need to correct clear error or prevent manifest injustice. *See Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (standard under Rule 59(e)); D. Kan. Rule 7.3(b). "Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a

party's position, or the controlling *law.*" *See Servants of Paraclete*, 204 F.3d at 1012. It is generally not appropriate on a motion for reconsideration "to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *See id.*

III. Plaintiffs' Motion

A. Request for Correction

Plaintiffs first request correction of a statement by the Court in its August 13 order. Defendants do not oppose this request, which the Court grants.

In its March 1 order, the Court noted that defendant Cross Law Firm, LLC had not appeared and that no proof of service had been filed for that defendant. The Court repeated that note in its August 13 order. In fact, however, on March 27, 2019, plaintiffs filed an affidavit stating that service on that defendant was effected in July 2018. Thus, the Court agrees with plaintiffs, and the record reflects, that this defendant has been served.

B. Civil Conspiracy Claim

Plaintiffs next seek reconsideration of the Court's dismissal of the conspiracy claim (Count XIV) to the extent based on an underlying breach of fiduciary duty. In its dismissal order, the Court dismissed this claim with the fraud-based claims, on the basis that such claims failed because plaintiffs could not show a pecuniary loss as a matter of law. *See Kellogg*, 2019 WL

3801719, at *2-3. The Court agrees with plaintiffs, however, that the conspiracy claim was based not only on an underlying claim of fraud, but also on an underlying claim of breach of fiduciary duty (the only primary claim that withstood dismissal).

Nevertheless, the Court concludes that this claim should remain dismissed, as the Court agrees with defendants that the absence of any pecuniary loss also dooms the claim to the extent based on an underlying breach of fiduciary duty. *Harding v. Ohio Casualty Insurance Co. of Hamilton, Ohio*, 41 N.W.2d 818 (Minn. 1950), is the case most often cited for Minnesota law on civil conspiracy. In that case, the court noted that conspiracy liability must be based on an underlying tort. *See id.* at 824-25. The court also stated that "Nile true office of allegations of conspiracy is to show facts for vicarious liability of defendants for acts committed by others, joinder of joint tortfeasors, and aggravation of damages." *See id.* at 825 (citations omitted); *see also*, *e.g.*, *Bank of Montreal v. Avalon Capital Group, Inc.*, 743 F. Supp. 2d 1021, 1033 (D. Minn. 2010) ("Under Minnesota law, a civil conspiracy claim is merely a vehicle for asserting joint and several liability. . . .") (internal quotation omitted). In this case, there is no liability for actual damages; rather, plaintiffs' claim for breach of fiduciary duty arises only under the *Perl* cases, for forfeiture of attorney fees (the sole injury for which plaintiffs can meet the requirements of standing). Thus, there cannot be joint and several liability here – there are no damages for some conspirator to pay (or contribute to) based on a breach by an attorney

in a fiduciary relationship with a particular plaintiff.[3] Accordingly, there is no basis for a conspiracy claim in this case, in which actual damages are absent. The Court therefore denies the motion for reconsideration of the dismissal of the conspiracy claim in its entirety.

C. Fraud-Based Claims

Plaintiffs seek reconsideration of the Court's dismissal of their fraud-based claims (Counts IX, X, XI, XIV). In its order, the Court noted that these claims under Minnesota law require proof of pecuniary loss – a statement of the law that plaintiffs did not dispute. *See Kellogg*, 2019 WL 3801719, at *2. Because plaintiffs cannot show pecuniary loss on the facts as alleged, the Court dismissed these claims. *See id.* at *2-3.

In arguing the instant motion, plaintiffs still do not dispute that these claims require proof pecuniary loss under Minnesota law. Moreover, they repeatedly confirm in their most recent briefs that that do not allege that they suffered any actual loss with respect to the transactions at issue. Accordingly, there is no basis for reconsideration of the Court's dismissal of these claims.

Plaintiffs do insist that they suffered "monetary damage" in the form of the compensation that the attorneys should forfeit. They cite *Perl II* to support such

[3] The cases cited by plaintiffs, consisting almost entirely of cases from the Tenth Circuit under Kansas law, involved claims of actual damages, and did not involve a *Perl*-type claim for forfeiture only.

an argument, but in that case the court merely held that a forfeiture of fees did constitute "money damages" for purposes of an insurance policy. *See Perl v. St. Paul Fire and Marine Ins. Co.* (*Perl II*), 345 N.W.2d 209, 211-13 (Minn. 1984). The court in *Perl II* did not suggest that fraud claims do not require proof of an actual pecuniary loss. *See id.* Indeed, in the *Perl* cases, all fraud claims were dismissed because of the absence of actual loss. *See Rice v. Perl* (*Perl I*), 320 N.W.2d 407, 410 (Minn. 1982). Plaintiffs insist that they be permitted to pursue their claim for forfeiture of fees, but they may seek such a remedy based on their surviving claim under *Perl* for breach of fiduciary duty. The Court denies plaintiffs' motion as it relates to these fraud-based claims.

D. RICO Claims

Plaintiffs seek reconsideration of the Court's statement in its dismissal order that plaintiffs have not plausibly alleged an injury to "business or property" as required for a claim under RICO. *See Kellogg*, 2019 WL 3801719, at *7. In its May 21 order, in which the Court reaffirmed its ruling that the RICO claims failed for lack of constitutional standing, the Court further noted that plaintiff had not identified any injury to satisfy RICO's particular standing requirement of an injury to "business or property." *See Kellogg*, 2019 WL 2184863, at *4 (citing 18 U.S.C. § 1964(c)). In its August 13 order, the Court again noted that deficiency in denying plaintiffs' request for certification for

interlocutory appeal from the dismissal of the RICO claims. *See Kellogg*, 2019 WL 3801719, at *7.

There is no basis for reconsideration of the Court's statements regarding this requirement of RICO, as plaintiffs have conceded that they did not suffer pecuniary loss in this case. Plaintiffs' only argument on this point is that the Court's award of attorney fees in the *Syngenta* litigation came from a settlement fund belonging to the settlement class (and thus to these plaintiffs). Plaintiffs have not explained, however, how they will receive any less money from the settlement fund because of defendants' conduct. In essence, plaintiffs are continuing to argue the standing issue with respect to these claims, which the Court considered previously. The Court reaffirms that ruling once again, and it therefore denies the motion for reconsideration with respect to the RICO claims.

E. Minnesota Statutory Claims

1. PUBLIC BENEFIT

Plaintiffs seek reconsideration of the Court's dismissal of the Minnesota statutory claims (Counts IV, V, VI). The Court dismissed those claims on the basis of its ruling that the claims did not serve the public benefit, and thus plaintiffs could not pursue a private action under Minn. Stat. § 8.31. *See Kellogg*, 2019 WL 3801719, at *3-4.

Plaintiffs argue that the Court erred in ruling that a claim for injunctive relief was required before these

statutory claims could serve the public benefit. The Court imposed no such requirement, however; rather, the Court considered and weighed the lack of a claim for meaningful injunctive relief in this case. *See id.* The Court certainly did not state that a claim solely for damages could not serve the public benefit for purposes of this inquiry. *See id.* Specifically, the Court noted that plaintiffs in this case seek only to remedy past wrongs, and they do not seek to enjoin continuing misrepresentations or deceptions by defendants (who are no longer soliciting clients for the Syngenta litigation). *See id.* at *4.

Plaintiffs also argue that it is sufficient under Minnesota law that they have alleged deceptive advertisements to the public, but the Minnesota Supreme Court made no such rule in the cases on which plaintiffs rely. *See Curtis v. Altria Group, Inc.*, 813 N.W.2d 891, 900-01 (Minn. 2012); *Collins v. Minnesota Sch. of Bus., Inc.*, 655 N.W.2d 320, 32930 (Minn. 2003). In its August 13 order, the Court relied on its analysis in the *Syngenta* litigation of the public-benefit requirement. *See Kellogg*, 2019 WL 3801719, at *3-4 (citing *In re Syngenta AG MIR 162 Corn Litig.*, 131 F. Supp. 3d 1177, 1229-31 (D. Kan. 2015) (Lungstrum, J.)). In *Syngenta*, the Court addressed and distinguished the Minnesota Supreme Court's opinion in *Collins;* the Court noted that while *Collins* involved misrepresentations to the public at large, *Syngenta* involved misstatements directed at most to a specific industry, and that this factor therefore weighed against a finding of a

public benefit. *See Syngenta*, 131 F. Supp. 3d at 1230-31.

In *Curtis*, the supreme court declined to address the issue, and it just assumed for the purpose of its ruling that there was a public benefit in that case. *See Curtis*, 813 N.W.2d at 901 n.6. The Minnesota Court of Appeals, in finding a public benefit in *Curtis*, relied on the fact that the alleged misrepresentations were made to the public at large over a long period of time, affecting hundreds of thousands of consumers in Minnesota. *See Curtis v. Altria Group, Inc.*, 792 N.W.2d 836, 850 (Minn. Ct. App. 2010), *rev'd on other grounds*, 813 N.W.2d 891 (Minn. 2012). That court generally refused to apply any hard-and-fast rules in conducting the public-benefit analysis. *See id.* at 851.

In the present action, the Court noted that Minnesota courts had not set forth a concrete test for determining whether a claim serves a public benefit under Section 8.31, and thus it proceeded to weigh the factors most often considered by those courts. *See Kellogg*, 2019 WL 3801719, at *3-4. The Court concluded that the fact that the alleged misrepresentations were made only to a specific group within a specific industry, and not to the public at large, weighed against plaintiffs in this case. *See id.* at *4. Plaintiffs have not shown that Minnesota law compels a different result. Accordingly, the Court rejects the bases for reconsideration argued by plaintiffs, and it denies the motion as it relates to the Minnesota statutory claims.

2. CERTIFICATION TO MINNESOTA SUPREME COURT

Plaintiffs also request that the Court certify a question to the Minnesota Supreme Court concerning whether plaintiffs' claims in this case serve a public benefit. Under Minnesota law, the Minnesota Supreme Court may answer a question of law certified to it by another court "if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this state." *See* Minn. Stat. § 480.065, subd. 3. The Court pays heed to the following standard for certification set by the Tenth Circuit:

> Under our own federal jurisprudence, we will not trouble our sister state courts every time an arguably unsettled question of state law comes across our desks. When we see a reasonably clear and principled course, we will seek to follow it ourselves. While we apply judgment and restraint before certifying, however, we will nonetheless employ the device in circumstances where the question before us (1) may be determinative of the case at hand and (2) is sufficiently novel that we feel uncomfortable attempting to decide it without further guidance.

See Pino v. United States, 507 F.3d 1233, 1236 (10th Cir. 2007) (citations omitted).

Minnesota caselaw provides sufficient guidance for application in this case of the public-benefit requirement. Minnesota cases have not announced a

bright-line test, and this Court has properly considered the factors considered by Minnesota courts. The Minnesota Supreme Court has had opportunities to refine the existing test, but it has chosen not to do so. The Court is not uncomfortable applying the guidance already given by Minnesota courts, and thus it declines in its discretion to certify a question to the Minnesota Supreme Court. Plaintiffs' motion is denied in this respect.

F. Recusal

Finally, plaintiffs request that the Court vacate its prior dismissal orders, recuse itself, and allow the case to be stayed until it may be remanded to the transferor court. Plaintiffs argue that the Court has a conflict because it is a witness concerning misrepresentations made by defendants. The Court has already rejected this argument. *See Kellogg*, 2019 WL 3801719, at *7. Plaintiffs argue that the Court gained the relevant information in a different case and therefore from an extrajudicial source. The Tenth Circuit has held however, that the applicable statute does not apply to knowledge obtained "in the course of related judicial proceedings." *See United States v. Page*, 828 F.2d 1476, 1481 (10th Cir. 1987) (cited in *Kellogg*, 2019 WL 3801719, at *7). Because the *Syngenta* litigation is a related proceeding, the Court cannot be a witness in this way, and there is no conflict requiring recusal.

Plaintiffs also suggest that the Court should recuse because of bias. There is no actual bias against

plaintiffs, however. Plaintiffs suggest an appearance of bias, but they have identified no basis for that suggestion other than the fact that the Court has issued rulings with which they disagree.[4] Accordingly, the Court does not agree that there is an objective appearance of impermissible bias here, and it therefore declines to recuse. Plaintiffs' motion is denied as it relates to this request.

IV. Defendants' Motion

A. Waiver of Objection

In seeking reconsideration of the Court's August 13 order, in which the Court refused to dismiss plaintiffs' claim for breach of fiduciary duty, defendants again argue that plaintiffs have waived any such claim. The Court previously rejected this argument as follows:

> The Court also rejects defendants' argument that plaintiffs have waived these claims by failing to object in the MDL with respect to awards of attorney fees. The Court agrees with the MDL Panel that plaintiffs' claims are separate from that fee process. Plaintiffs are seeking a forfeiture of fees awarded to defendants, and there was no mechanism for plaintiffs to assert such a claim in that process.

See Kellogg, 2019 WL 3801719, at *5.

---

[4] Of course, the Court also reconsidered its original standing ruling and revived plaintiffs' state-law claims.

Relying on two cases, defendants essentially argue issue preclusion – that the issue of their competence as attorneys was necessarily decided in the *Syngenta* litigation, when the Court approved the settlement and awarded attorney fees to counsel, including defendants, without objection by these plaintiffs. In the cited cases, the courts ruled that claims attacking attorneys' performance represented impermissible collateral attacks on settlement approvals and attorney fee awards. *See Wyly v. Weiss*, 697 F.3d 131, 139-44 (2d Cir. 2012); *Koehler v. Brody*, 483 F.3d 590, 597-99 (8th Cir. 2007). Those cases are distinguishable from the present case, however.

First, in those cases, the class members' attacks on the attorneys' performance were based on the settlement achieved by those attorneys. In the present case, plaintiffs have not complained about the terms of the settlement with Syngenta or defendants' conduct in securing or agreeing to that settlement; rather, they complain about conduct during the course of the underlying litigation. Thus, when the Court approved the settlement and awarded fees, its findings were limited to the adequacy of that settlement and the adequacy of the attorneys' representation of the settlement class in procuring that settlement.

Second, the cited cases involved claims that the attorneys' performance breached the applicable standard of care. In the present case, the surviving claim (under *Perl*) involves allegations that the attorneys breached duties of loyalty, such that the attorneys should forfeit their fees. In approving the settlement

and awarding fees, the Court may have necessarily found that attorneys for farmers in the underlying litigation deserved fees (for work benefitting the settlement class) and were adequate with respect to procuring this settlement; the Court did not find – and was not necessarily required to find – that attorneys never breached any duty of loyalty while representing farmers throughout the entire course of the underlying litigation.

Accordingly, there is no basis for application of issue preclusion in this case. The Court again rules that plaintiffs did not waive their breach claim by failing to object in the settlement proceedings, and it therefore denies defendants' motion to this extent.

B. Aiding-and-Abetting Claim

Defendants also seek reconsideration of the Court's ruling in the August 13 order that allowed plaintiffs' aiding-and-abetting claim (Count XIII) to survive to the extent based on plaintiffs' underlying claim of breach of fiduciary duty under *Perl*. *See Kellogg*, 2019 WL 3801719, at *5. Defendants argue that that claim should be dismissed because of the absence of any pecuniary loss here.

In its August 13 order, the Court dismissed the aiding-and-abetting claim to the extent based on fraud, along with the other fraud-based claims, because of the absence of any pecuniary loss, but it did not consider that argument as applied to the claim based on an underlying breach of fiduciary duty. *See Kellogg*, 2019 WL

3801719, at *3, 5. The Court construed defendants' argument in that way because defendants addressed this claim in the sections of their briefs in which they challenged the fraud-based claims. Upon further consideration, however, it does appear that defendants also challenged this claim on the same basis to the extent based on a breach of fiduciary duty. The Court thus considers that argument at this time.

Defendants argue that any aiding-and-abetting claim must be supported by a showing of pecuniary loss. In responding to defendants' motion, plaintiffs have not addressed this argument. Thus, the Court agrees with defendants that, by failing to oppose dismissal, plaintiffs have effectively abandoned this claim.

Moreover, the Court concludes that defendants' argument also succeeds on its merits, for essentially the same reasons cited above with respect to plaintiffs' conspiracy claim. The Minnesota Supreme Court, in recognizing a claim for aiding and abetting another's tortious conduct, noted that such a claim allows for joint and several liability for the injury resulting from the underlying tort. *See Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 185-86 (Minn. 1999). Thus, it would not be enough for plaintiffs to show that certain defendants aided a breach of fiduciary duty; plaintiffs would also need actual damages as a basis to seek the joint liability of those defendants. *See In re Senior Cottages of Am., LLC*, 438 B.R. 414, 426 (Bankr. D. Minn. 2010) (rejecting claim of aiding and abetting breach of fiduciary duty because of an absence of actual damages). In this case, plaintiffs concede that they have not

suffered pecuniary loss, and thus there is no basis for a claim, such as aiding and abetting (or civil conspiracy), the purpose of which is to allow for joint liability for damages. Accordingly, the Court grants defendants' motion to this extent, and the Court dismisses plaintiffs' aiding-and-abetting claim in its entirety.

IT IS THEREFORE ORDERED BY THE COURT THAT the motion by certain defendants for reconsideration of the Court's Order of August 13, 2019 (Doc. # 229), is hereby **granted in part and denied in part**. The motion is granted with respect to plaintiffs' claim for aiding and abetting a breach of fiduciary duty (Count XIII), and that claim is hereby dismissed. The motion is otherwise denied.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiffs' motion for reconsideration of the Court's Order of August 13, 2019, and for other relief (Doc. # 227) is hereby **granted in part and denied in part**. The motion is granted with respect to plaintiffs' request for correction concerning whether a particular defendant has been served. The motion is otherwise denied.

IT IS SO ORDERED.

Dated this 18th day of December, 2019, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: SYNGENTA AG MIR 162 CORN LITIGATION This Document Relates To: *Kellogg, et al. v. Watts Guerra, LLP, et al.*, No. 18-2408-JWL	MDL No. 2591 Case No. 14-md-2591-JWL

ORDER

(Filed Jan. 14, 2020)

On October 1, 2019, the Court granted plaintiffs' unopposed motion to stay discovery pending rulings by this Court on plaintiffs' motion to vacate and by the Tenth Circuit on plaintiffs' appeals. On December 18, 2019, the Court issued its ruling on plaintiffs' motion to vacate. On December 31, 2019, the Tenth Circuit issued an order dismissing plaintiffs' appeals, in which the court stated that because claims remained pending, the case was not final for purposes of permitting an appeal. Thus, the stay has been lifted, and by the terms of the October 1 order, the parties are required to have conferred and to make certain submissions to the Magistrate Judge by this date, January 14, 2020.

On Saturday, January 11, 2020, plaintiffs filed the instant motion (Doc. # 250) for a continued stay, including a stay of briefing on certain defendants' motion for judgment on the pleadings (filed on January 10, 2020), pending resolution of plaintiffs' forthcoming appeal to

the Tenth Circuit from the Court's December 18 order. Plaintiffs state that defendants do not oppose the motion. Nevertheless, the Court concludes in its discretion that the stay should not be continued. The Tenth Circuit made clear in its latest order that this case is not yet final, and thus there is no basis to believe that the Tenth Circuit will entertain an interlocutory appeal at this time. Accordingly, the Court denies plaintiffs' motion for a stay. It is time for this case to proceed. The Court will extend the pending deadline for the submissions to the Magistrate Judge to January 17, 2020.

IT IS SO ORDERED.

Dated this 14th day of January, 2020, in Kansas City, Kansas.

s/ John W. Lungtrum
John W. Lugstrum
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KENNETH P. KELLOGG, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 18-2408-JWL
WATTS GUERRA, LLP, et al.,	)	MDL 14-md-2591-JWL
Defendants.	)	

ORDER

(Filed Feb. 4, 2020)

The question before the court is whether this case may move forward at the district level despite plaintiffs having filed a notice of appeal to the Tenth Circuit. Because plaintiffs' most recent appeal challenges non-final decisions that are not immediately appealable, the court concludes the notice of appeal is a nullity that did not divest it of jurisdiction. The case may—and will—proceed in this court. Defendants' motion asking the court to order plaintiffs to participate in a case-planning conference (ECF No. 253) is granted, with new deadlines set below.

I. Background

The notice of appeal at issue today is not the first filed by plaintiffs in this case. The Tenth Circuit

recently addressed plaintiffs' earlier appeal[1] of three orders issued by the presiding U.S. District Judge, John W. Lungstrum:

1. A March 1, 2019 order dismissing the case in its entirety for lack of standing;[2]

2. A May 21, 2019 order vacating the dismissal of plaintiffs' state-law claims but affirming the dismissal of their federal claims,[3] and

3. An August 13, 2019 order dismissing all remaining claims except for a breach-of-fiduciary-duty claim and a claim for aiding and abetting such breach, denying a motion to recuse, and denying a request to remand the case to the District of Minnesota (where it originated and proceeded until the Judicial Panel on Multidistrict Litigation ("JPML") transferred it to this court).[4]

While the first appeal was pending, on December 18, 2019, Judge Lungstrum granted, in part, a motion for reconsideration of the August 13, 2019 order and dismissed the aiding-and-abetting claim. In the same order, Judge Lungstrum denied plaintiffs' repeated request to recuse and stay the case until it could be remanded to the District of Minnesota.[5]

---

[1] *See* ECF Nos. 174, 200, 201, 235. The appeal was assigned Tenth Circuit Case No. 19-3066.

[2] ECF No. 168.

[3] ECF No. 196.

[4] ECF No. 213.

[5] ECF No. 245.

Plaintiffs submitted a status report to the Tenth Circuit on December 21, 2019, noting Judge Lungstrum's order and arguing his "decisions are final for an appeal."[6] Plaintiffs asserted "[t]he decisions destroy [plaintiffs'] due process rights to proceed with their claims to protect and preserve their property interest in the Syngenta MDL common fund."[7] Plaintiffs noted they would amend their appeal to seek review of the December 18, 2019 order and to "request that the Court disqualify the district court" and suggest to the JPML that the case be remanded to the District of Minnesota.[8]

On December 31, 2019, the Tenth Circuit dismissed plaintiffs' first appeal as premature.[9] The Circuit noted its "jurisdiction is limited to review of final decisions of the district court" and that "[p]roceedings in the district court are ongoing."[10] It then held, "Appellants have not established that the district court's decisions are final or immediately appealable."[11] The Circuit reached this conclusion despite its knowledge from plaintiffs' status report that Judge Lungstrum had issued an order on December 18, 2019. Plaintiffs

---

[6] Document 010110278638 at 2, Case No. 19-3066 (10th Cir. Dec. 21, 2019).

[7] *Id.*

[8] *Id.* at 2-3 (also asserting the district court is "conflicted" and "likely to be called as a witness").

[9] ECF No. 246.

[10] *Id.* at 1, 2.

[11] *Id.* at 2.

filed a "petition for panel rehearing," which the Circuit denied on January 31, 2020.[12]

Noting the Tenth Circuit's dismissal of plaintiffs' appeal, Judge Lungstrum entered an order on January 14, 2020, stating it was "time for this case to proceed."[13] He specifically denied plaintiffs' request to stay the case pending the filing of a new appeal, and he ordered the parties to submit the completed report of their Fed. R. Civ. P. 26(f) planning conference by January 17, 2020.[14]

On January 16, 2020, however, plaintiffs filed their second notice of appeal[15] and adopted the position that the notice "suspends all pretrial proceedings and deadlines before the district court."[16] Plaintiffs' new appeal challenges Judge Lungstrum's orders of March 1, 2019; May 21, 2019; August 13, 2019; and December 18, 2019. According to the notice, the appeal also "will request that the Tenth Circuit disqualify the district court . . . and suggest to the [JPML] that [the case] should be remanded to the District of Minnesota."[17]

---

[12] Document 010110298148, Case No. 19-3066 (10th Cir. January 31, 2020).

[13] ECF No. 251 at 2.

[14] *Id.*

[15] ECF No. 252. The appeal was docketed on January 22, 2020, and assigned Tenth Circuit Case No. 20-3006. ECF No. 258.

[16] ECF No. 255-13.

[17] ECF No. 252 at 3.

Plaintiffs assert Judge Lungstrum "likely will be called as a witness" in the case and that he is "conflicted."[18]

II. The Jurisdictional Question

On January 20, 2020, defendants filed a motion asking the court to order plaintiffs to participate in good faith in the Rule 26(f) planning conference as ordered by Judge Lungstrum.[19] Plaintiffs responded that the motion must be denied because their January 16, 2020 notice of appeal "depriv[ed] the district court of jurisdiction over any further pretrial proceedings in the District of Kansas."[20]

Plaintiffs cite the general divestiture rule that "an effective notice of appeal transfers jurisdiction from the district court to the court of appeals" over all maters involved in the appeal.[21] Plaintiffs contend that because their notice of appeal "asserts the district

---

[18] *Id.* at 4.

[19] ECF No. 253. Plaintiffs initially agreed to meet for a planning conference but would "not agree to a scheduling motion or further proceedings in the district court." ECF No. 255-13 at 1. Later, plaintiffs took the position that "a planning conference is inappropriate" pending resolution of their notice of appeal. ECF No. 261-1 at 1.

[20] ECF No. 259 at 5.

[21] *Id.* at 6 (quoting *Howard v. Mail-Well Envelope Co.*, 150 F.3d 1227, 1229 (10th Cir. 1998)). *See also Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").

court is conflicted and a likely witness at trial and requests a stay pending remand to the District of Minnesota . . . all aspects of the case [are] involved in the appeal," thus divesting this court of all jurisdiction.[22]

Plaintiffs' argument is misplaced. Although plaintiffs are correct that an *effective* notice of appeal would transfer jurisdiction from this court to the appellate court, "no transfer occurs if the appeal is taken from a nonappealable order."[23] A valid appeal may only be taken "from a true final judgment or from a decision within the collateral order exception."[24] When a notice of appeal is filed as to a "nonappealable order," the notice "is a nullity and does not divest the trial court of its jurisdiction."[25]

The Tenth Circuit already has confirmed Judge Lungstrum's orders of March 1, 2019; May 21, 2019; and August 13, 2019 were not final, appealable orders.[26] The Circuit stated,

> The district court's August 13, 2019 memorandum and order denied [plaintiffs'] requests for Rule 54(b) certification and 28 U.S.C. § 1292(b) certification and noted that "claims

---

[22] ECF No. 259 at 6.

[23] *Howard*, 150 F.3d at 1229.

[24] *Stewart v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990).

[25] *Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563, 567 (10th Cir. 1979). *See also id.* ("We have held that a district court retains jurisdiction if the notice of appeal is untimely filed or refers to a non-appealable order.").

[26] Document 010110281961 at 1, Case No. 19-3066 (10th Cir. Dec. 31, 2019).

> remain in this case." As this court's May 29, 2019 order states, generally, this court's jurisdiction is limited to review of final decisions of the district courts. A final decision resolves all claims against all parties.[27]

Although Judge Lungstrum's December 18, 2019 order was not technically before the Circuit on appeal, the Circuit was made aware of it by plaintiffs' December 21, 2019 status report. Nevertheless, the Circuit dismissed plaintiffs' appeal because "[p]roceedings in the district court are ongoing."[28] The Circuit specifically noted that plaintiffs' state-law claims remained, thereby depriving it of jurisdiction.[29] Judge Lungstrum's December 18, 2019 order did not alter this determinative fact—although it dismissed plaintiffs' aiding-and-abetting claim, it again "refused to dismiss plaintiffs' claim for breach of fiduciary duty."[30] Thus, the procedural posture of the case is unchanged—because a claim remains in the case, there is no final decision of this court that would confer jurisdiction upon the Tenth Circuit.

---

[27] Document 010110227124 at 1-2, Case No. 19-3066 (10th Cir. Sept. 12, 2019) (internal citations omitted). *See also* Fed. R. Civ. P. 54(b); *Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 204 (1999) (ruling that a final decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment").

[28] Document 010110281961 at 1, Case No. 19-3066 (10th Cir. Dec. 31, 2019).

[29] *Id.* at 2.

[30] ECF No. 245 at 13.

Under a liberal reading of plaintiffs' response to the instant motion, plaintiffs could be asserting that by appealing Judge Lungstrum's refusal to recuse and to recommend the case be remanded to the District of Minnesota, their appeal seeks interlocutory relief to which the collateral-order exception applies. This argument also is flawed. Judge Lungstrum's decisions on recusal and remand were included in his August 13, 2019 order.[31] As noted above, the Tenth Circuit dismissed plaintiffs' appeal of that order as premature. It is therefore axiomatic that the Tenth Circuit does not view plaintiffs' requests to deem Judge Lungstrum "conflicted" and to remand the case as immediately appealable. This conclusion is consistent with Tenth Circuit caselaw holding, "An order denying a motion to recuse is interlocutory and is, therefore, not immediately appealable."[32] The collateral order doctrine simply does not apply here.

---

[31] ECF No. 213 at 17 ("[T]he Court declines plaintiffs' invitation to suggest remand at this time. The [JPML] has decided (and reaffirmed) that this case belongs in the MDL, and there is no basis for remand before pretrial proceedings are concluded in this case. Moreover, the Court rejects plaintiffs' argument that remand is warranted because this Court has become a fact witness concerning defendants' misrepresentations and deceptions in the MDL litigation. Although 28 U.S.C. § 455(b) requires recusal if a judge has personal knowledge of evidentiary facts or is likely to be a material witness, *see id.* § 455(b)(1), (5)(iv), that statute does not apply to knowledge obtained in the course of related judicial proceedings. *See United States v. Page*, 828 F.2d 1476, 1481 (10th Cir. 1987). Thus, there is no basis for recusal here, and therefore no basis for suggestion of remand.").

[32] *Nichols v. Alley*, 71 F.3d 347, 350 (10th Cir. 1995). The court flatly rejects plaintiffs' meritless attempt to distinguish *Nichols.*

The court has not been divested of jurisdiction by either of plaintiffs' two notices of appeal. The case may proceed in this court.

IT IS THEREFORE ORDERED that the motion to order plaintiffs to proceed in this court is granted. The parties are ordered to meet for an in-person planning conference on February 11, 2020 (a date on which counsel for both sides have stated they are available). They shall then submit their completed planning-meeting report to the chambers of the undersigned by February 18, 2020. The scheduling conference will be held on February 25, 2020, at 3:00 p.m. in Courtroom 223 of the U.S. Courthouse at 500 State Avenue in Kansas City, Kansas.

Dated February 4, 2020, at Kansas City, Kansas.

s/ James P. O'Hara
James P. O'Haras
U.S. Magistrate Judge

Plaintiffs could, of course, challenge Judge Lungstrum's denial of their recusal request by filing a petition for writ of mandamus, *see id.*, but they have not.

Full docket text for document 269:

ORDER (Relates to Case No: 2: 18-cv-02408-JWL-JPO) Plaintiffs' motion to suspend the briefing schedule for certain defendants' motion for judgment on the pleadings [262] is hereby denied. The Magistrate Judge has effectively denied plaintiffs' request for a stay and rejected plaintiffs' argument that their latest notice of appeal deprives this Court of jurisdiction. The Court agrees with that ruling, and it believes that the case should proceed. Any future stay must come from the Tenth Circuit itself. Plaintiffs shall file any response to the pending motion **on or before February 10, 2020**. Any reply brief should be filed in accordance with local rule. Signed by District Judge John W. Lungstrum on 02/04/2020.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KENNETH P. KELLOGG, et al., Plaintiffs, v. WATTS GUERRA, LLP, et al., Defendants.	)	Case No. 18-2408-JWL MDL 14-md-2591-JWL

ORDER

(Filed Mar. 3, 2020)

Defendants have filed a motion asking the court to sanction plaintiffs for their failure to comply with court orders and prosecute this case (ECF No. 280).[1] Defendants seek dismissal of plaintiffs' case with prejudice pursuant to Fed. R. Civ. P. 37(b) and 41(b). Although the court does not find the severe sanction of dismissal warranted (at least, not at this juncture), the court grants the motion and awards defendants their attorneys' fees and costs incurred as a result of plaintiffs' counsel's recalcitrance.

[1] The motion was filed by counsel for defendants Daniel M. Homolka, P.A. and Yira Law Office, Ltd., ostensibly on behalf of all defendants. Other defendants later filed notices of joinder. *See* ECF Nos. 286, 288, 291, 292, and 295.

I. Background

Plaintiffs filed this case on April 24, 2018, in the District of Minnesota. The Judicial Panel on Multidistrict Litigation ("JPML") transferred it to this court in August 2018. Since that time, plaintiffs have fought this court's jurisdiction and sought to have the case remanded to the District of Minnesota. To this end, plaintiffs moved for reconsideration of the JPML's transfer order,[2] filed a writ of mandamus in the Tenth Circuit challenging the JPML's transfer,[3] twice appealed (with multiple amendments to each appeal) orders of this court to the Tenth Circuit, challenging this court's jurisdiction,[4] and sought panel rehearing of the Tenth Circuit's order dismissing the first appeal.[5] After a year-and-a-half of trying, plaintiffs have been unsuccessful in their attempts to have the case remanded.

On January 14, 2020, the presiding U.S. District Judge, John W. Lungstrum, determined it was "time for this case to proceed" and denied plaintiffs' request to stay the case pending their planned second appeal to the Tenth Circuit.[6] He ordered the parties to meet and submit their Fed. R. Civ. P. 26(f) planning report by January 17, 2020.[7] On January 16, 2020, plaintiffs filed

---

[2] *See* ECF No. 91.

[3] *See* ECF Nos. 100, 118, 124.

[4] *See* ECF Nos. 174, 252.

[5] *See* Doc. 010110298148, Case No. 19-3066 (10th Cir. Jan. 31, 2020) (denying the petition).

[6] ECF No. 251 at 2.

[7] *Id.*

their second notice of appeal.[8] Thereafter, plaintiffs refused to meet for the planning conference, asserting the appeal divested the court of jurisdiction to proceed. Defendants filed a motion asking the court either to compel plaintiffs' participation or to dismiss the case as a sanction for plaintiffs' failure to follow court orders.[9] On February 4, 2020, the undersigned U.S. Magistrate Judge, James P. O'Hara, granted defendants' motion, specifically holding this "court has not been divested of jurisdiction by either of plaintiffs' two notices of appeal."[10] The undersigned ordered the parties "to meet for an in-person planning conference on **February 11, 2020** (a date on which counsel for both sides [had] stated they [were] available)" and set the scheduling conference for February 25, 2020, at the courthouse.[11]

Plaintiffs' counsel did not appear at the planning conference. Defendants filed the instant motion for sanctions the following day. With their motion, defendants submitted a copy of a February 4, 2020 e-mail to plaintiffs' counsel confirming the location (a mere six minutes from plaintiffs' counsel's office), time, and call-in information for the planning conference.[12] It is not disputed that plaintiffs' counsel did not respond to the e-mail, attend the conference, or respond to defense

---

[8] ECF No. 252.

[9] ECF Nos. 253, 254.

[10] ECF No. 268 at 8.

[11] *Id.* at 8-9 (emphasis in original).

[12] ECF No. 282-1.

counsel's attempts to reach him during the conference. Six attorneys representing various defendants appeared at the conference in person, and one appeared by telephone.[13] Two of the attorneys—Kelly A. Ricke and Teresa M. Young—traveled from out-of-state to attend the conference, incurring flight and hotel costs.[14]

II. Sanctions

In response to the motion for sanctions, plaintiffs assert only that the motion must be denied because this court had no jurisdiction to issue the February 4, 2020 order mandating a planning conference.[15] Plaintiffs contend—*again*—that their January 16, 2020 appeal divested this court of jurisdiction. The undersigned already addressed and rejected that argument before ordering attendance at the planning conference in the February 4, 2020 order. Plaintiffs did not seek reconsideration or review of the order. Instead, plaintiffs brazenly ignored the order and effectively stopped this case from proceeding toward resolution. With no planning-meeting report submitted and faced with the likely possibility plaintiffs' counsel would fail to appear at the February 25, 2020 scheduling conference, the court canceled the scheduling conference.[16]

The question now is what should be done to sanction plaintiffs' past and continuing violations of the

---

[13] ECF No. 282-2.

[14] ECF Nos. 283, 284.

[15] ECF No. 293 at 3.

[16] ECF No. 294.

court's orders. As mentioned above, defendants assert dismissal is mandated by the present circumstances. The Federal Rules of Civil Procedure do permit dismissal as a sanction for a plaintiff's failure to prosecute a case, participate in discovery, or comply with court orders.[17] The Tenth Circuit has directed, however, that dismissal is a "severe sanction" that should only be used when lesser sanctions would be ineffective.[18] In other words, dismissal is a "weapon of last, rather than first, resort."[19]

In determining whether a plaintiff's failure to prosecute or comply with court orders warrants dismissal as a sanction, the court considers the five

---

[17] *See*, *e.g.*, Fed. R. Civ. P. 16(f)(1)(C) ("On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party . . . fails to obey a scheduling or other pretrial order."); Fed. R. Civ. P. 37(b)(2)(A)(v) ("If a party . . . fails to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders. They may include the following: . . . dismissing the action or proceeding in whole or in part."); Fed. R. Civ. P. 41(b) ("If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.").

[18] *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1143 (10th Cir. 2007) (quoting *Jones v. Thompson*, 996 F.2d 261, 265 (10th Cir. 1993)); *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992).

[19] *Meade v. Grubbs*, 941 F.2d 1512, 1520 n.6 (overruled in part on other grounds) (10th Cir. 1988); *see also Jones*, 996 F.2d at 264-65 (it was not until discovery deadlines had been continued seven times, plaintiffs continually failed to appear for depositions, and plaintiffs failed to pay attorneys' fees despite a court order, that case was dismissed).

factors set out by the Tenth Circuit in *Ehrenhaus v. Reynolds:* (1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the plaintiff; (4) whether the court warned the plaintiff that noncompliance likely would result in dismissal; and (5) whether lesser sanctions would be appropriate and effective.[20] This list of factors is non-exhaustive, and the factors are not necessarily weighted equally.[21] Dismissal is warranted only when aggravating factors outweigh the judicial system's "strong predisposition to resolve cases on their merits."[22] As discussed below, after weighing the *Ehrenhaus* factors in whole, the court does not find the extreme sanction of dismissal warranted at this time.

The degree of actual prejudice to defendants. Turning to the first factor, defendants clearly have been prejudiced. They have had to devote significant resources, including time and attorneys' fees, in a case that has made little progress since it was filed two years ago. Defendants have incurred unnecessary expense by having to respond to arguments plaintiffs asserted a second time after the court rejected them.

---

[20] *Ecclesiastes*, 497 F.3d at 1143-44 (citing *Ehrenhaus*, 965 F.2d at 920-21).

[21] *Trevizo v. DG Retail, L.L.C.*, No. 14-1028, 2015 WL 134301 at *2 (D. Kan. Jan. 9, 2015) (citing *Anthony v. Alorica, Inc.*, Nos. 08-2437 & 08-2438, 2009 WL 4611456, at *5 (D. Kan. Dec. 4, 2009)).

[22] *Davis v. Miller*, 571 F.3d 1058, 1061 (10th Cir. 2009) (quoting *Ehrenhaus*, 965 F.2d at 921); *see also Rogers v. Andrus Transp. Servs.*, 502 F.3d 1147, 1152 (10th Cir. 2007).

Defendants' counsel were forced to expend time and incur travel expenses to attend the in-person planning conference mandated by the court's February 4, 2020 order. Defendants have also incurred expenses in briefing their motion for sanctions. Finally, plaintiffs' failure to participate in drafting a planning-meeting report led the court to vacate the scheduling conference, thus delaying resolution of the case for defendant.[23] The first *Ehrenhaus* factor weighs in favor of dismissal.

The amount of interference with the judicial process. Plaintiffs' conduct also has interfered with the orderly and timely processing of this case, and led to otherwise unnecessary judicial intervention. The court has had to repeatedly address plaintiffs' refusal to recognize the court's jurisdiction, move this case forward, and participate in a planning conference. Raising the same arguments—for a different venue and decision maker—in multiple motions to this court and on appeal has delayed the start of discovery by almost two years. Likewise, plaintiffs' recent refusal to participate in a Rule 26(f) planning meeting, after the court twice addressed and rejected plaintiffs' request to stay the case instead, has delayed the setting of deadlines to move this case toward final resolution. Plaintiffs have

---

[23] *See Jones*, 996 F.2d at 264–65 (affirming dismissal of action in part because plaintiff's conduct, including failure to submit a proposed pretrial order, caused delay and increased attorneys' fees); *Faircloth v. Hickenlooper*, 758 F. App'x 659, 662 (10th Cir. 2018) ("[W]e have recognized prejudice from delay and mounting attorney's fees." (internal quotation and citation omitted)).

"demonstrated time and again that [they have] no respect for the judicial process and continue[] to flout the court's authority."[24] This has "impact[ed] the court's ability to manage its docket and move forward with the case[] before it."[25] The second factor supports dismissal.

The culpability of the litigant. Under the third factor, the court considers plaintiffs' culpability. Plaintiffs are willfully refusing to participate in the litigation before this court. They offer no excuse for ignoring court orders, other than to reassert their argument that this court has no jurisdiction to issue orders while their appeals are pending. The court previously rejected plaintiffs' jurisdictional argument regarding their non-final appeals. Plaintiffs therefore are culpable in deciding to defy the court's orders that the case proceed. The court further faults plaintiffs' counsel for not informing defense counsel in advance that he would not attend the planning conference. Had he extended that courtesy, defense counsel would not have spent time and resources to attend the conference. Plaintiffs' culpability supports dismissal.

Whether the court warned the litigant that noncompliance would likely result in dismissal. The court did not warn plaintiffs that the case would be dismissed if plaintiffs ignored the court's two orders to confer with defendants in developing a schedule for

---

[24] *De Foe v. Sprint/United Mgmt. Co.*, 196 F.R.D. 392, 394 (D. Kan. 2000).

[25] *Davis*, 571 F.3d at 1062.

this case. The court takes the opportunity now to warn plaintiffs that **future noncompliance with court orders or continued refusal to move forward with this case (which has not been stayed by either this court or the Tenth Circuit) likely will result in dismissal.**

Whether lesser sanctions would be appropriate and effective. Although three of the *Ehrenhaus* factors support dismissing plaintiffs' remaining claim, the court finds the final factor the most significant in this case. *Ehrenhaus* makes clear that before the court may dismiss a case as a sanction, it must explain why lesser sanctions would be ineffective.[26] Defendants argue that plaintiffs' pattern of ignoring court orders indicates they will ignore any lesser sanction the court imposes today. But the court cannot say with a degree of certainty that a sanction short of dismissal would not spur plaintiffs to begin prosecuting this case in this court. "The Court has not imposed any previous sanctions upon plaintiff."[27]

Fed. R. Civ. P. 37(b) empowers the court to sanction litigants who fail to obey discovery orders. "When, as here, a litigant's conduct abuses the judicial process, imposition of sanctions in the form of an award of attorney fees and costs is a remedy provided for by law

---

[26] *Ehrenhaus*, 965 F.2d at 920, 922.

[27] *Leo v. Garmin Int'l.*, No. 09-2139, 2010 WL 1418586, at *5 (D. Kan. April 7, 2010) (declining to dismiss case as a sanction but upholding $2,000 sanction against a pro se plaintiff).

and within the inherent power of the court."[28] "Sanctions under Rule 37 are intended to ensure that a party does not benefit from its failure to comply, and to deter those who might be tempted to such conduct in the absence of such a deterrent."[29]

The court finds it just, for the reasons stated above, to impose monetary sanctions on plaintiffs based on their refusal to participate in the court-scheduled case-planning meeting. The court awards defendants their out-of-pocket expenses and attorneys' fees incurred in attending the February 11, 2020 meeting. The court further awards defendants their attorneys' fees incurred in bringing the instant motion for sanctions.[30] By **March 10, 2020**, defense counsel shall file their travel receipts and detailed billing records that support such an award. Plaintiffs may then file a response to the fee submissions by **March 17, 2020**.[31]

III. Resetting Deadlines

On February 18, 2020, the court vacated the scheduling-conference setting pending a ruling on the instant motion for sanctions.[32] Because the court has

---

[28] *Beilue v. Int'l Bhd. of Teamsters, Local No. 492*, 13 F. App'x 810, 813 (10th Cir. 2001).

[29] *Starlight Int'l Inc. v. Herlihy*, 186 F.R.D. 626, 647 (D. Kan. 1999) (internal quotations and citation omitted).

[30] This includes time incurred in drafting ECF Nos. 280-284, 286-288, 291, 292, 295, and 297.

[31] The response may only address the fee submissions; it may not rehash the substance of defendants' motion for sanctions.

[32] ECF No. 294.

determined that the case will not presently be dismissed as a sanction, the case must be put back on the path toward trial. The court hereby orders the parties to meet for an in-person planning conference on a mutually agreeable date on or before **April 1, 2020.** They shall then submit their completed planning-meeting report to the chambers of the undersigned by **April 8, 2020. Plaintiffs are warned that if they again fail to attend the planning meeting or participate in submission of the planning-meeting report, the undersigned will recommend the presiding judge dismiss this case.**

The scheduling conference is reset for **April 15, 2020, at 2:00 p.m.** in Courtroom 223 of the U.S. Courthouse at 500 State Avenue in Kansas City, Kansas.

IT IS THEREFORE ORDERED that defendants' motion for sanctions (ECF No. 280) is granted and monetary sanctions are awarded defendants in an amount later to be set by the court.

IT IS FURTHER ORDERED that the parties conduct a planning meeting by April 1, 2020, and submit their planning-meeting report to the chambers of the undersigned by April 8, 2020. The scheduling conference is reset for April 15, 2020, at 2:00 p.m.

Dated March 3, 2020, at Kansas City, Kansas.

s/ James P. O'Hara

James P. O'Hara
U.S. Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: SYNGENTA AG MIR 162 CORN LITIGATION	MDL No. 2591
This Document Relates To: *Kellogg, et al. v. Watts Guerra, LLP, et al.*, No. 18-2408-JWL	Case No. 14-md-2591-JWL

MEMORANDUM AND ORDER

(Filed Apr. 3, 2020)

This matter comes before the Court on plaintiffs' motion for recusal (Doc. # 278). By that motion, plaintiffs also request that the Court vacate previous orders and suggest remand to the MDL transferor court. For the reasons set forth below, the Court denies the motion.

I. Request for Stay

While the instant motion was pending, plaintiffs filed yet another motion in which they also ask the Court to recuse and to vacate orders (Doc. # 319). In that motion, plaintiffs additionally request a stay of proceedings in this Court during the pendency of plaintiffs' latest direct appeal and their petition for mandamus to the Tenth Circuit. The Court declines to stay this matter and will proceed to decide this motion.

As the Tenth Circuit has already ruled and as this Court has repeatedly held, the Court retains jurisdiction over this matter because the case is not yet final. Plaintiffs have not argued that their mandamus petition automatically robs this Court of jurisdiction. *See*, *e.g.*, *Moore v. Busby*, 92 F. App'x 699, 702 (10th Cir. 2004) (unpub. op.) (rejecting argument that a mandamus proceeding divests the district court of jurisdiction in the absence of a stay). Moreover, the Court concludes in its discretion that a stay is not warranted and that the case should proceed.

As the Court has previously noted, the litigation of this case has been delayed far too long, and any stay to allow for proceedings in the Tenth Circuit must now come from the Circuit itself. In addition, plaintiffs rely on their new expert report in seeking mandamus, and this Court has not yet had the opportunity to consider that report.[1] Accordingly, it is appropriate for this Court to address that report in the first instance and thus to rule on this motion.[2]

II. Basis for the Motion

Plaintiffs cite Fed. R. Civ. P. 60 as the basis for the instant motion. Plaintiffs have not shown a proper basis from that rule, however, for their relitigation of the

---

[1] In fact, plaintiffs have requested that the Tenth Circuit abate proceedings in their latest appeal to allow this Court first to consider the recusal issue and the expert report.

[2] The Court will consider the latest motion in its entirety once it has been fully briefed.

recusal issue. *See In re Syngenta AG MIR 162 Corn Litig. (Kellogg)*, 2019 WL 3801719, at * 7 (D. Kan. Aug. 13, 2019) (Lungstrum, J.) (rejecting argument that recusal is warranted); *Kellogg*, 2019 WL 6894675, at *6 (D. Kan. Dec. 18, 2019) (Lungstrum, J.) (again rejecting recusal argument). Plaintiffs do not address the issue concerning Rule 60 in their reply, even though defendants devoted most of their response brief to it. In addition, a motion for reconsideration of the Court's prior recusal rulings under D. Kan. 7.3(b) could be denied as untimely.

Nevertheless, even though the Court has twice rejected plaintiffs' recusal arguments, and the motion could be denied on a procedural basis, the Court prefers to address the merits of plaintiffs' motion. As it has stated before, the Court is intent on giving the parties every opportunity to argue their positions, *see Kellogg*, 2019 WL 6894675, at *2, and this motion adds a new element, namely an expert report. While that report may not constitute newly-discovered evidence, it does provide a sufficient reason to address this issue again.

III. Merits of the Motion for Recusal

Plaintiffs have now supported their request for recusal with an expert report by Richard Painter, a law school professor, who opines that the Court should recuse. Prof. Painter discusses recusal to satisfy constitutional due process and recusal under 28 U.S.C. § 455. He states that he does not opine on ultimate questions of law, including whether due process requires recusal

here. Prof. Painter nevertheless states in his report that the undersigned judge's "participation in this case will destroy the due process rights of the parties." Prof. Painter also opines that various bases for mandatory recusal under Section 455 have been met. Accordingly, the Court will consider the concerns raised by Prof. Painter. In doing so, the Court notes that the moving party bears a heavy burden to show a basis for recusal supported by relevant facts. *See Burke v. Regalado*, 935 F.3d 960, 1054 (10th Cir. 2019). Rumor, speculation, and opinions are not sufficient bases for recusal. *See Cauthon v. Rogers*, 116 F.3d 1334, 1336 (10th Cir. 1997).

The Court first considers the issue of recusal to satisfy due process. Prof. Painter cites four cases from the Supreme Court concerning recusal, although in none did that Court address the circumstances present in this case. In *In re Murchison*, 349 U.S. 133 (1955), the Court held that a judge who had acted as a "one-man grand jury" could not also preside over the contempt hearing for charges arising out of the grand jury process without violating due process. *See id.* In *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), the Court held that although not every attack on a judge disqualifies him from presiding over the resulting contempt proceeding, that case involved highly personal aspersions and "fighting words" directed at the judge, and due process therefore required a judge other than the one reviled by the contemnor. *See id.* at 465-66.

In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), the Court held that due process had been

violated when an appellate judge participated in an appeal involving a company whose executives had made significant financial contributions to the judge's campaign for election. *See id.* The Court noted and applied its previously-stated objective standard requiring recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *See id.* at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The Court began its analysis by stating that although due process requires a fair trial in a fair tribunal, "most matters relating to judicial disqualification do not rise to a constitutional level." *See id.* at 876 (quoting *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948)). The Court proceeded to discuss two instances in which it had required recusal: when the judge has a financial interest in the outcome of a case; and in the criminal contempt context, when the judge has participated in the earlier proceeding, as in *Murchison* and *Mayberry. See id.* at 877-81. The Court also noted that because of the difficulties in inquiring into actual bias, an objective standard applies. *See id.* at 883-84. Finally, in deciding that the circumstances before it required recusal, the Court stressed that it was an "exceptional case," involving "extreme facts" and an "extraordinary situation." *See id.* at 884, 886-87, 887.

Most recently, in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), the Supreme Court held that due process required the recusal of an appellate-court justice in a case in which the justice had been the district attorney who had approved the decision to seek the

death penalty for that defendant. *See id.* The Court applied the same objective standard from its previous cases, which requires recusal when the likelihood of bias is "too high to be constitutionally tolerable." *See id.* at 1903 (internal quotations and citations omitted). The Court noted that its precedents did not set forth a specific test, but it concluded that there was "an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision involving the defendant's case." *See id.* at 1905.

These cases involved circumstances that differ greatly from the circumstances present in this case, and thus they provide very little support for plaintiffs' request for recusal. Certainly, the cases establish that an objective standard applies, although there is no specific test under due process. The cases also make clear that not every instance of personal interest rises to a constitutional level; rather, the circumstances must be extreme, exceptional, extraordinary. The Supreme Court has found such extreme circumstances in cases involving a direct and significant financial interest, but no such financial interest is alleged here. The Supreme Court has also found such circumstances in criminal cases in which the judge was involved in the charged conduct or in prosecuting the defendant. This is a civil case, however, and no person's liberty is stake. Finally, as the Court will discuss further, the present case does not involve extreme circumstances that create a reasonable and significant likelihood of actual bias that is

too great to be constitutionally tolerable. Accordingly, due process does not require recusal in this case.

As set forth in the expert report's summary, a primary basis for Prof. Painter's opinion is plaintiffs' allegation that the undersigned "breached his fiduciary duty to the individual corn growers (approximately 60,000) who were automatically opted-out of the Syngenta class pursuant to his order because [he], among other things, did not address factual evidence that the defendants were colluding with class counsel and exchanging money and favors while ignoring the best interest of their individual clients and class members." The relevant history of the underlying Syngenta MDL litigation, however, belies the suggestion that the Court breached any duty to these plaintiffs.

It became clear during the proceedings to appoint lead MDL plaintiffs' counsel, very soon after the creation of the MDL, that the various plaintiffs' attorneys were divided concerning whether the claims against Syngenta were best litigated as a class action or in a large number of individual actions. The Court concluded that it was in the best interests of all plaintiffs to allow both approaches to proceed, at least that stage, and thus the Court, in appointing lead counsel and members of the plaintiffs' executive committee, included representatives of both camps. *See* Order Concerning Appointment of Counsel (Jan. 22, 2015) (MDL Doc. # 67).

Shortly thereafter, the Court heard arguments concerning a common benefit order (CBO), intended to

address assessments for expenses for work undertaken on behalf of all those asserting claims against Syngenta, which MDL lead counsel proposed after conferring with Syngenta and various plaintiffs' counsel. The resulting order (MDL Doc. # 936) contained provisions that specifically favored certain plaintiffs' counsel, including the Watts firm (defendant in the present action, hereafter "Watts"), pursuant to a joint-prosecution agreement (JPA) between Watts and MDL lead counsel. The Court concluded that unique considerations justified the JPA with Watts that included preferential CBO terms. Specifically, the Court noted that the particular terms were not unreasonable and benefitted the litigation of the MDL, particularly because the JPA allowed for the participation of a group with a large number of cases (Watts) that may not otherwise be subject to *any* assessment (because those cases were pending in state court, outside the MDL). *See* Memorandum and Order of May 8, 2015 (MDL Doc. # 403). The Court also made the point, both in its written opinion and at hearings, that it was not approving the JPA, as there was no basis for its involvement in private contractual relationships, but that it was merely approving terms in the CBO that resulted from the JPA. *See id.* Thus, the fact that the JPA allowed for favorable CBO treatment did not create any suspicion of misconduct by Watts with respect to its clients.

Plaintiffs complain in the present case that they were excluded from the certified class by virtue of the class definition, as a result of the JPA between Watts and MDL lead counsel. Indeed, lead MDL counsel

sought certification of a class that did not include Watts's clients for whom individual suits against Syngenta had been filed in Minnesota state court. Thus, until a settlement class was requested and certified, plaintiffs were not members of the putative or certified class. Again, these plaintiffs were represented by counsel and had their own individual cases pending in a different forum, outside the scope of the MDL and the reach of this Court. A district court does have a duty to protect absent class members from unfair or unreasonable terms to which they may become bound by a judgment. These plaintiffs were not members of the class, however, and thus they needed no such protection from unfair terms, and they remained free to pursue their own cases against Syngenta. Neither Prof. Painter nor plaintiffs have cited any authority to support the claim that this Court owed a duty to such plaintiffs who had filed cases outside the MDL.

Moreover, although a district court has the power to modify a class definition (for instance, to make sure that the class is sufficiently discernable), it has no duty or obligation to do so. For instance, in *Lundquist v. Security Pacific Automotive Financial Services Corp.*, 993 F.2d 11 (2d Cir. 1993), the Second Circuit held that a district court is empowered by Fed. R. Civ. P. 23(c) to carve out an appropriate class or subclasses, but the district court is not obligated to implement the rule on its own initiative. *See id.* at 14-15. The Second Circuit cited *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), in which the Supreme Court stated that the party, not the court, had the burden of

constructing appropriate subclasses in that case. *See id.* at 407-08 (cited in *Lundquist*, 993 F.2d at 14-15). In *Bertulli v. Independent Association of Continental Pilots*, 242 F.3d 290 (5th Cir. 2001), a party had argued that a class definition was underinclusive, but the Fifth Circuit (citing *Lundquist* and Rule 23(c)(5)) stated that a district court may choose one possible class definition over another to ensure that Rule 23 is best satisfied. *See id.* at 296 & n.24. The Fifth Circuit further noted that persons left out of the class definition remained free to assert their rights as they saw fit. *See id.* at 296 n.25.

Finally, the exclusion of Watts's clients from the class definition (to which no party objected at the class certification stage) served the best interests of all plaintiffs in the litigation against Syngenta. Watts had indicated that its clients intended to opt out of any certified class that included them; thus, it was far more efficient not to certify a class that would impose such a significant burden to effect those opt-outs (and thus increase the risk that a party who wished to opt out would fail to do so). More importantly, the construction of the class again meant that the litigation against Syngenta could proceed on two separate tracks, thereby more efficiently allowing counsel in all cases to proceed against Syngenta as they best saw fit. As the Court has discussed in the context of fee awards, the litigation on multiple fronts added to Syngenta's defense burden and thus created more pressure on Syngenta to settle all claims by producers. Of course, once such a settlement had been reached, plaintiffs in

this case were included in the settlement class, with the right to opt out as desired.

Throughout these proceedings at the CBO and class certification stages, the Court was never given a reasonable basis to question whether Watts or its associated counsel were being disloyal to their clients or whether those attorneys were lying to or misleading the clients or the Court with respect to the JPA or the approach to class certification. Neither Prof. Painter nor plaintiffs have identified any such basis. Accordingly, Prof. Painter's reliance on a theory that the Court breached a fiduciary duty to plaintiffs is misguided.

As a separate basis for concern, Prof. Painter argues that the Court is a fact witness, specifically concerning statements that defendant attorneys may have made to the Court *ex parte.* This is pure speculation, however, as neither Prof. Painter nor plaintiffs have cited evidence that any such *ex parte* communications occurred. In fact, beyond the bare submission of agreements for the Court's consideration *in camera*, **the Court did not have any *ex parte* communications with defendants or any other counsel regarding joint-prosecution agreements or any party's position concerning class certification**. There is certainly no basis for Prof. Painter's hypothesis that the Court was told by someone that defendants had lied to or misled their clients, and yet did nothing to address such misconduct; plaintiffs have not made such a factual allegation, and any argument to that effect by defendants would be patently frivolous.

Accordingly, this speculation does not provide a reasonable basis for believing that the undersigned judge is biased or has a conflict, and thus it does not provide a basis for recusal to satisfy due process. *See Cauthon*, 116 F.3d at 1336 (mere speculation is not sufficient to support recusal).

In addition, the undersigned will have no occasion to decide what defendants actually told the Court – any such communications are contained in the public record, and because a remand to the MDL transferor court would precede any trial, the merits of plaintiffs' claims will not be tried in this Court. Thus, there is no likelihood that the undersigned would become a fact witness, even if there were no privilege for information obtained during the course of related litigation (as discussed below).[3]

Prof. Painter also appears to suggest that the Court will be required to testify concerning the impact of defendants' misrepresentations to the Court, including whether the Court relied on those misrepresentations. Neither Prof. Painter nor plaintiffs, however, have shown why any such impact would be relevant here. Plaintiffs claim that defendants breached duties to them; whether some conduct before the Court constitutes a breach by defendants will not depend on the

[3] In their mandamus petition, plaintiffs state that the JPA was presented to the Court in sealed class certification filings. The content of documents filed under seal, however, would still be determined from the documents themselves, and thus there would be no need for testimony from the undersigned.

Court's reaction (which is a matter of public record at any rate).

Accordingly, there is no reasonable basis to believe that the Court has a conflict of interest or harbors some actual bias against plaintiffs. This is not a case involving extreme circumstances that implicate due process. Recusal is not required by the Constitution here, and there is no reasonable basis for recusal even if not required.

Prof. Painter also opines that three bases for mandatory recusal under 28 U.S.C. § 455 are satisfied here, but the Court does not agree. For the reasons discussed above, the Court does not have personal knowledge of disputed evidentiary facts and is not likely to be a material witness. *See id.* § 455(b)(1), (5)(iv). Moreover, as the Court has already twice ruled, those provisions of Section 455 do not apply to knowledge obtained in the course of related judicial proceedings. *See Kellogg*, 2019 WL 3801719, at *7 (citing *United States v. Page*, 828 F.2d 1476, 1481 (10th Cir. 1987)); *Kellogg*, 2019 WL 6894675, at *6 (citing *Page*). Prof. Painter has not directly addressed these prior rulings or *Page.* Prof. Painter stresses that the present case is separate from the underlying Syngenta litigation, but the cases are unquestionably related, as evidenced by the fact that the Judicial Panel on Multidistrict Litigation transferred this case to the undersigned on that basis. In addition, as discussed above, there is no reasonable basis to question the impartiality of the undersigned in this matter. *See* 28 U.S.C. § 455(a).

In previously rejecting plaintiffs' request for recusal, the Court noted that plaintiffs had identified no basis for finding an appearance of bias here other than the fact that the Court had issued rulings with which they did not agree. *See Kellogg*, 2019 WL 6894675, at *6. That ground is insufficient. *See United States v. Cooley*, 1 F.3d 985, 994 (10th Cir. 1993) (adverse rulings do not provide a basis for disqualification of a judge). Indeed, the timing of plaintiffs' recusal motions strongly suggests that plaintiffs actually object to the undersigned's continued involvement in this case because of adverse rulings by the Court. The purported bases for recusal cited by plaintiffs in their motions and by Prof. Painter in his report have been known to plaintiffs since the time the case was transferred into the MDL in early 2018. Nevertheless, plaintiffs did not raise any such concern in proceedings before the MDL Panel or in early proceedings before this Court (although they did repeatedly express their respect and admiration for the undersigned). Plaintiffs did not argue any of these issues relating to a conflict or the Court's position as a fact witness until June 27, 2019 (in a motion for certification for interlocutory appeal, in which plaintiffs also sought a suggestion of remand) – after the Court had issued its rulings that resulted in the dismissal of most of plaintiffs' claims. Plaintiffs did not move for recusal until September 10, 2019 (the first of multiple recusal motions).

As the Tenth Circuit has recognized on more than one occasion, "[t]here is as much obligation for a judge not to recuse when there is no occasion for him to do so

as there is for him to do so when there is." *See David v. City of County of Denver*, 101 F.3d 1344, 1351 (10th Cir. 1996) (quoting *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987)). There is no basis for recusal here. Plaintiffs opposed transfer to this MDL, which was their right. They have consistently sought to return to their home forum, which is understandable. But, as noted, they did not raise the question of a conflict of interest or the need for this Court to recuse until after they had received adverse rulings. That is telling. They have built an argument based on speculation and faulty reason, bolstered by an expert report that adds little to the analysis. Once again, this Court finds it must deny their motion to recuse. Plaintiffs' additional requests for orders to be vacated and for a suggestion of remand to their preferred forum are based on their arguments for recusal. Therefore, the Court denies the instant motion in its entirety.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiffs' motion for recusal and for other relief (Doc. # 278) is hereby **denied**.

IT IS SO ORDERED.

Dated this 3rd day of April, 2020, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: SYNGENTA AG MIR 162 CORN LITIGATION	MDL No. 2591
This Document Relates To: *Kellogg, et al. v. Watts Guerra, LLP, et al.*, No. 18-2408-JWL	Case No. 14-md-2591-JWL

MEMORANDUM AND ORDER

(Filed Apr. 6, 2020)

This matter comes before the Court on the motion for judgment on the pleadings (Doc. # 248) filed by the following seven defendants (collectively, "movants"): Hovland and Rasmus, PLLC; Dewald Deaver, P.C., LLO; Patton, Hoversten & Berg, P.A.; Wojtalewicz Law Firm, Ltd.; Johnson Law Group; VanDerGinst Law, P.C.; and Wagner Reese, LLP. For the reasons set forth below, the Court grants the motion, and all remaining claims against these defendants are hereby dismissed. The Court also denies plaintiffs' motion for leave to file a sur-reply in opposition to the instant motion (Doc. # 306).

I. Pending Motion for Stay

While the instant motion was pending, plaintiffs filed a motion that includes a request for a stay of proceedings during the pendency of proceedings in the Tenth Circuit, although that motion is not yet ripe for

decision. For the reasons discussed in the Court's recent opinion denying plaintiffs' recusal motion, *see* Memorandum and Order of April 3, 2020 (Doc. # 323), there is no basis to delay consideration of the instant motion for judgment on the pleadings.

II. Plaintiffs' Motion for Leave to File a Sur-Reply

Plaintiffs seek leave to file a sur-reply brief in opposition to the motion for judgment on the pleadings. As this Court has previously stated, leave to file a sur-reply is generally granted only in rare circumstances, for instance when the movant has improperly raised new arguments in the reply brief. *See Jackson v. U.S. Postal Service*, 162 F. Supp. 2d 1246, 1249 (D. Kan. 2001) (Lungstrum, J.). In their motion for leave, plaintiffs have not identified any new arguments in movants' reply brief to which a response is warranted; rather, plaintiffs have merely summarized the contents of their proposed sur-reply and stated that they proceed with the motion for leave "in the interest of achieving a healthy legal system" (while quoting from a Supreme Court case that did not address this issue).

Plaintiffs' proposed sur-reply does not contain any relevant arguments that were not made or could not have been made in plaintiffs' response brief. In Section I.A, plaintiffs argue that the Court should recuse under 28 U.S.C. § 455; but that issue is not relevant to the merits of the instant motion for judgment on the pleadings, and the Court has addressed that issue in

multiple other rulings. In Section I.B., plaintiffs argue that this Court has lost jurisdiction to act because of proceedings in the Tenth Circuit; again, the Court has addressed that issue (which does not relate to the merits of the instant motion) on multiple occasions, including above. In Section I.C, plaintiffs repeat their arguments on the merits from their response brief. They also cite an expert report, but the expert did not address the relevant issue here, namely, whether defendants had a duty under Minnesota law to plaintiffs with whom they had no attorney-client relationship. In Section I.D., plaintiffs repeat the argument from their response brief concerning a Minnesota rule of professional conduct. In Section I.E, plaintiffs repeat the argument from their response brief that movants are asking the Court to disregard Fed. R. Civ. P. 23.[1] In Section I.F, plaintiffs repeat and elaborate on the argument from their response brief concerning an expert review affidavit.[2]

---

[1] Movants devote much of their reply to their argument that plaintiffs cannot meet the requirements for class certification under Rule 23. Plaintiffs have not responded to that argument in their proposed reply. Moreover, the Court has not relied on that argument in granting movants' motion.

[2] In the proposed sur-reply, plaintiffs also refer to movants' reply brief as untimely. At the deadline for that brief, movants succeeded in filing only the first page of their reply. The next morning, movants filed a motion for leave to file the entire reply brief out of time, as something had caused a defective filing the day before. Plaintiffs did not file any opposition to the motion for leave, which the Court subsequently granted. Accordingly, movants' reply brief is considered timely filed.

To this point, the Court has been very solicitous in considering any argument made by plaintiffs. In this instance, however, there is no basis to allow an additional brief by plaintiffs, and the proposed sur-reply does not add anything relevant to the analysis (and the arguments would not change the outcome here at any rate). Accordingly, the Court in its discretion denies plaintiffs leave to file the proposed sur-reply brief.

III. Analysis

After prior rulings by the Court, plaintiffs' only remaining claim is their claim for breach of fiduciary duty under Minnesota law pursuant the Minnesota Supreme Court's rulings in the *Perl* cases. Movants now seek judgment on the pleadings with respect to that remaining claim, pursuant to Fed. R. Civ. P. 12(c). A motion for judgment on the pleadings under Rule 12(c) is analyzed under the same standard that applies to a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See Park Univ. Enterprises, Inc. v. American Cas. Co.*, 442 F.3d 1239, 1244 (10th Cir. 2006). The Court will dismiss a cause of action for failure to state a claim only when the factual allegations fail to "state a claim to relief that is plausible on its face," *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), or when an issue of law is dispositive, *see Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

In the *Perl* cases, the Minnesota Supreme Court confirmed that a client could pursue a claim against an attorney for breach of fiduciary duty, seeking forfeiture

of attorney fees, even in the absence of an actual injury. *See In re Syngenta AG MIR 162 Corn Litig. (Kellogg)*, 2019 WL 2184863, at *3 (D. Kan. May 21, 2019) (Lungstrum, J.) (discussing *Perl* cases). Movants argue that plaintiffs cannot assert such a claim against them in light of the undisputed fact that they did not represent any of the named plaintiffs in the Syngenta litigation. In their amended complaint, the six groups of named plaintiffs have alleged that they signed retainer contracts with various other defendant attorneys, but movants are not included among those attorneys for any named plaintiff. Plaintiffs have not alleged elsewhere in the complaint that any of them entered into an attorney-client relationship with any of the moving defendants. In sworn declarations filed previously in this action, plaintiffs confirmed that they executed retainer contracts with particular attorneys as alleged in the complaint, but again movants were not included in those lists of attorneys. Finally, in response to the instant motion, plaintiffs have not disputed that they did not enter into any attorney-client relationship with any of the movants.

The Court agrees with movants that the lack of such a relationship dooms plaintiffs' remaining claim against these defendants for breach of fiduciary duty under the *Perl* cases. As a general rule under Minnesota law, no such duty is owed to non-clients. *See*, *e.g.*, *McIntosh County Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 545 (Minn. 2008). As the Minnesota Supreme Court explained, "[i]f an attorney were to owe a duty to a nonclient, it could result in potential ethical

conflicts for the attorney and compromise the attorney-client relationship, with its attendant duties of confidentiality, loyalty, and care." *See id.* The supreme court has recognized an exception that allows a third party to pursue a legal malpractice action if the party was a direct and intended beneficiary of the attorney's services, meaning that the transaction at issue had as a central purpose an effect on the third party. *See id.* at 547. Plaintiffs have not alleged, however, that movants, in representing other farmers, actually had a central purpose not merely of seeking relief for those other farmers, but instead of affecting these named plaintiffs who were represented by other attorneys. Thus, this narrow exception does not apply here. The *Perl* cases involved claims that an attorney breached duties to his client, and thus they do not support extending the cause of action to non-clients. Finally, any claim that would not require such privity, such as fraud, has already been dismissed from this case.

In response, plaintiffs cite their allegations that movants entered into agreements with the Watts firm (who represented each of the named plaintiffs), that all defendants were partners in a joint venture, and that movants have sought to recover fee awards from the Syngenta settlement fund on the basis of the agreements with Watts. Plaintiffs argue that all defendants, including movants, "undertook a responsibility to adequately advise their clients." Again, however, plaintiffs were not movants' clients. Plaintiffs cite to their allegation that attorneys other than those listed on plaintiffs' retainer contracts conspired to pursue a

fraudulent scheme, but plaintiffs' fraud and conspiracy claims are no longer in the case. Plaintiffs have not cited any authority suggesting that they may pursue a claim for breach of fiduciary duty under Minnesota law against any attorneys other than those with whom they entered into attorney-client relationships. Plaintiffs have not alleged (or disputed the lack of) such a relationship with movants. Nor have plaintiffs alleged or shown that movants have sought or received any attorney fee award for work specifically undertaken for these named plaintiffs.

Plaintiffs' other arguments are similarly unavailing. As they have done repeatedly throughout this litigation, plaintiffs argue that they have a property interest in these claims. As the MDL Panel pointed out in rejecting such an argument, however, plaintiffs are merely guaranteed a fair opportunity to assert their claims; plaintiffs do not have a right to pursue a claim that is not cognizable under the applicable law.

Plaintiffs argue that movants, by this motion, are attempting an end-run around Fed. R. Civ. P. 23. Thus, plaintiffs appear to be arguing that unnamed members of a putative class may have cognizable claims against movants (based on attorney-client relationships with those defendants). The Court rejects that argument, as it is black-letter law that there must be a valid claim by a named plaintiff against each defendant. *See* 1 William B. Rubenstein, *Newberg on Class Actions* § 2:5 (5th ed. 2011 & Supp.) ("In multidefendant class actions, the named plaintiffs must show that each defendant has harmed at least one of them.") (citing

cases); *see also Warth v. Seldin*, 422 U.S. 490 (1975) (injury to absent class member does not satisfy standing requirement).[3]

Plaintiffs cite Fed. R. Civ. P. 12(g)(2), which provides that a party may not make a second motion under Rule 12 raising a defense that was omitted from the party's first motion under the rule. Rule 12(g)(2), however, is explicitly made subject to Rule 12(h)(2), which allows for the failure to state a claim to be raised in a motion pursuant to Rule 12(c) (or even at trial). *See Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1101-02 (10th Cir. 2017) (rejecting this same argument).[4]

Plaintiffs argue that because Rule 12(c) provides for a motion filed "[a]fter the pleadings are closed," the instant motion is premature, and the motion cannot be filed until after discovery and plaintiffs' motion for class certification. This argument too is patently without merit, as the rule makes no mention of such other proceedings. The pleadings were closed in this case after answers were filed. *See* Fed. R. Civ. P. 7(a) (listing

---

[3] The Court need not address movants' argument that plaintiffs cannot satisfy certain requirements under Rule 23 for class certification. Such issues would be better addressed in this case after full briefing on a motion for class certification, should one be filed at some point.

[4] Moreover, movants did technically assert this argument in the briefing on defendants' motion to dismiss. Because the issue was raised only in summary fashion in footnotes, the Court did not address it as a separate basis for dismissal in ruling on the prior motion. Movants have appropriately raised the issue, in a properly fleshed-out manner, in the instant motion.

allowed pleadings). Courts routinely resolve Rule 12(c) motions at an early stage of the litigation. Indeed, there is no reason to require a defendant to participate in discovery or other proceedings if no valid claim has been stated against that defendant.

Finally, plaintiffs cite the expert review affidavit filed by their counsel with the complaint in accordance with Minn. Stat. 544.42. Plaintiffs argue that the expert has opined that all defendants violated fiduciary obligations to plaintiffs. In fact, the affidavit attached to the complaint does not reference any violation of fiduciary duties, but only states the opinion that defendants deviated from the applicable standard of care and caused injury to plaintiffs (parroting the language of the Minnesota statute). The affidavit thus addresses factual matters; it does not address the legal question at issue in this motion. Plaintiffs have not submitted any expert report addressing whether Minnesota law permits a claim against an attorney for breach of fiduciary duty in the absence of an attorney-client relationship.

Accordingly, plaintiffs have not shown that they have asserted a valid claim for breach of fiduciary duty against these defendants with whom no named plaintiff had an attorney-client relationship. The Court therefore grants the instant motion, and the moving defendants are hereby dismissed from the case entirely.

IT IS THEREFORE ORDERED BY THE COURT THAT the motion for judgment on the pleadings (Doc.

248) filed by defendants Hovland and Rasmus, PLLC; Dewald Deaver, P.C., LLO; Patton, Hoversten & Berg, P.A.; Wojtalewicz Law Firm, Ltd.; Johnson Law Group; VanDerGinst Law, P.C.; and Wagner Reese, LLP, is hereby **granted**, and all remaining claims against these defendants are hereby **dismissed**.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiffs' motion for leave to file a sur-reply in opposition to the instant motion (Doc. # 306) is hereby **denied**.

IT IS SO ORDERED.

Dated this 6th day of April, 2020, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: SYNGENTA AG MIR 162 CORN LITIGATION This Document Relates To: *Kellogg, et al. v. Watts Guerra, LLP, et al.*, No. 18-2408-JWL	MDL No. 2591 Case No. 14-md-2591-JWL

MEMORANDUM AND ORDER

(Filed Apr. 15, 2020)

This matter comes before the Court on plaintiffs' Motions to Vacate Orders and Recuse and Stay District Court Proceedings (Doc. #319). For the reasons set forth below, the motions are denied. In addition, pursuant to 28 U.S.C. § 1927, defendants are awarded their reasonable attorney fees and expenses incurred in responding to the instant motions.

I. Motion to Vacate Orders – District Court's Jurisdiction

Plaintiffs move to vacate all orders issued by the Court since January 16, 2020. Plaintiffs argue that the Court had no jurisdiction to enter such orders after they filed their notice of appeal to the Tenth Circuit on that date. The Court has addressed and rejected this same jurisdictional argument on multiple occasions, including in the Court's latest Memorandum and Order of April 3, 2020. Plaintiffs have still not appealed

from a final order of this Court, and thus the Court retains jurisdiction to act. Plaintiffs argue that the issue of finality is for the Tenth Circuit to decide. The Tenth Circuit will indeed decide that issue in considering plaintiffs' present appeals. This Court must also determine its own jurisdiction, however, and because it has not issued a final order, it has not lost jurisdiction. The Court denies this motion once again.[1]

II. Motion for Review of Magistrate Judge's Order of March 3, 2020

Plaintiffs seek to vacate or overturn the Magistrate Judge's Order of March 3, 2020, by which the Magistrate Judge sanctioned plaintiffs for their failure to comply with orders of the Court. Defendants had requested dismissal as a sanction, but the Magistrate Judge denied that request and instead awarded defendants attorney fees, while warning that further failure to comply with the Court's orders could result in dismissal.

---

[1] In their reply brief, plaintiffs argue for the first time that the Court should have conducted a hearing pursuant to *McCauley v. Halliburton Energy Services, Inc.*, 413 F.3d 1158 (10th Cir. 2005), to determine whether plaintiffs' appeal was frivolous and thus failed to divest the Court of jurisdiction. In *McCauley*, however, the court was specifically addressing an interlocutory appeal from the denial of a motion to compel arbitration pursuant to a particular statute. *See id.* Plaintiffs have not cited any authority requiring additional proceedings before the Court may continue to exercise its jurisdiction after an attempt to appeal from a non-final order.

Plaintiffs argue that their appeals robbed the Magistrate Judge of jurisdiction to issue various orders. The Court rejects that argument for the reasons stated above and in its prior orders.

Plaintiffs argue that an Order of February 18, 2020, by which the Magistrate Judge canceled a scheduling conference, objectively shows the Magistrate Judge's bias in favor of defendants. The Court rejects this argument. As stated in that order, the Magistrate Judge canceled the conference because plaintiffs had indicated that they would not attend. That logical decision would not cause a reasonable person to believe that the Magistrate Judge was improperly biased in this case.

The Court also rejects plaintiffs' argument that the Magistrate Judge sought to punish plaintiffs for exercising their right to pursue appeals. The Magistrate Judge did no such thing. As set forth in the Magistrate Judge's opinion, plaintiffs were sanctioned because they repeatedly refused to comply with the Court's orders.

In seeking review of the Magistrate Judge's Order, plaintiffs have not shown that the Magistrate Judge made an error of law or fact; indeed, plaintiffs have not challenged any particular portion of the substance of the order.[2] Plaintiffs argue generally that their counsel

---

[2] In a footnote, plaintiffs argue that defendants have requested an excessive amount of fees, but that argument does not go to the merits of any order, as the Magistrate Judge has not yet determined the amount of fees awarded as a sanction.

has an obligation to represent his clients zealously, which includes the obligation to resist "bullying" by opposing counsel and the Court. The Court's insistence that plaintiffs comply with orders and prosecute this case, however, does not constitute bullying, and zealous representation in this case does not require counsel's willful violation of those orders. Plaintiffs' motion to vacate the Magistrate Judge's order is denied, and any objections to that order are hereby overruled.

III. Motion for Recusal

Citing an expert report, plaintiffs move for recusal pursuant to 28 U.S.C. § 455. The Court has addressed and rejected this argument on multiple occasions, including in its Memorandum and Order of April 3, 2020, in which the Court addressed the expert report at length. The Court denies this motion for the same reasons stated in that opinion.

IV. Motion for Stay

Plaintiffs move for a stay of proceedings in this Court pending the Tenth Circuit's resolution of plaintiffs' appeals and petition for mandamus. Plaintiffs argue that a stay should be issued because the Court should recuse and because it lacks jurisdiction, but the Court has rejected such arguments. As the Court has stated multiple times, this case has been delayed long enough, and any stay must now come from the Tenth Circuit itself. Plaintiffs have not indicated in their

briefs that they have made such a request. The Court again denies the motion for a stay.

V. Defendants' Request for Fees and Costs

Pursuant to 28 U.S.C. § 1927, defendants request an award of attorney fees and expenses incurred in responding to plaintiffs' "repetitive and vexatious filings." That statute provides that an attorney who "multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." *See id.* Such a sanction may be warranted by "conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." *See Miera v. Dairyland Ins. Co.*, 143 F.3d 1337, 1342 (10th Cir. 1998) (quoting *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987)). Defendants also invoke the Court's inherent power to impose to attorney fees as a sanction for bad-faith conduct. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991).

The Court agrees that plaintiffs' counsel, by filing the instant motions, has unreasonably and vexatiously multiplied proceedings in this case, and that an award of attorney fees and costs as a sanction is appropriate pursuant to 28 U.S.C. § 1927. The Court has previously rejected these same arguments on multiple occasions regarding the Court's jurisdiction, recusal under 28 U.S.C. § 455, and a stay of proceedings. For instance, on February 12, 2020, plaintiffs filed a motion for

recusal under Section 455 based on a new expert report, and they even asked the Tenth Circuit to abate their pending appeal to allow this Court the opportunity to address that motion in the first instance. On March 12, 2020, plaintiffs seemingly shifted course by filing a petition for mandamus in the Tenth Circuit on the issue of recusal, based on that expert report. Then, on March 17, 2020, despite those previous filings, and despite the fact that the Court had not yet ruled on the February 12 motion for recusal, plaintiffs filed the instant motions, in which they make the same arguments based on the same expert report. Making the same arguments again without even waiting for a ruling, and without citing any material change in circumstances, is the very definition of conduct that unreasonably and vexatiously multiplies the proceedings.

In the instant motions, plaintiffs have made a new argument seeking review of the Magistrate Judge's sanctions order. As noted above, however, plaintiffs did not address the merits of that order or claim an error of law or fact, but instead made the same argument concerning jurisdiction that the Court has repeatedly rejected. Plantiffs' new argument that the Magistrate Judge acted under an appearance of bias or sought to punish plaintiffs for filing appeals is frivolous.

This conduct by plaintiffs' counsel, Mr. Nill, has caused defendants to bear unnecessary expense, and the Court concludes that an award of attorney fees and expenses, to be paid by Mr. Nill as a sanction, is appropriate. Defendants request fees and expenses incurred

in responding to various filings, but they have not specified those filings. The Court concludes that the award will be limited to the attorney fees and expenses reasonably incurred by defendants' counsel only in preparing and filing its brief in response to the instant motions (Doc. #319). On or before **April 17, 2020**, defendants shall file a response to this order in which they request and support a specific amount of fees and expenses. Mr. Nill may file any objection to that request, relating only to the amount of fees and costs reasonably incurred in preparing and filing defendants' response brief, on or before **April 21, 2020**. No reply will be permitted. The Court will then determine an award by separate order.

IT IS THEREFORE ORDERED BY THE COURT THAT plaintiffs' Motions to Vacate Orders and Recuse and Stay District Court Proceedings (Doc. #319) are hereby **denied**.

IT IS FURTHER ORDERED BY THE COURT THAT defendants are awarded their reasonable attorney fees and expenses incurred in responding to the instant motions, with the amount to be determined by separate order after further submissions as set forth herein.

IT IS SO ORDERED.

Dated this 15th day of April, 2020, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: SYNGENTA AG MIR 162 CORN LITIGATION This Document Relates To: *Kellogg, et al. v. Watts Guerra, LLP, et al.*, No. 18-2408-JWL	MDL No. 2591 Case No. 14-md-2591-JWL

MEMORANDUM AND ORDER

(Filed Apr. 27, 2020)

On April 15, 2020, the Court issued a Memorandum and Order (Doc. # 335) by which it denied plaintiffs' Motions to Vacate Orders and Recuse and Stay District Court Proceedings (Doc. # 319). In addition, pursuant to 28 U.S.C. § 1927, the Court found that Douglas Nill, plaintiffs' counsel, had multiplied proceedings in this case unreasonably and vexatiously by filing the motions being ruled, and the Court ordered Mr. Nill to pay the attorney fees and costs reasonably incurred by defendants in preparing and filing their brief in opposition to the motions (Doc. # 321). The Court ordered defendants to submit requests in specific amounts by April 17, 2020, and it gave Mr. Nill until April 21, 2020, to file any objection "relating only to the amount of fees and costs" sought by defendants. Three sets of defendants' counsel have now submitted specific requests (Doc. ## 339, 340, 341), and Mr. Nill has submitted a response (Doc. # 343). The Court is thus prepared to award fees in a specific amount.

First, however, the Court must address Mr. Nill's response to the Court's Order of April 15, 2020. Although Mr. Nill was instructed to limit his response to the amount of fees reasonably incurred by defendants in preparing their brief, the response does not address that issue a single time in its 21 pages (supported by 22 pages of exhibits). The response instead raises or reargues a number of other issues, a few of which merit discussion here.

Mr. Nill argues that the Court's sanction violates due process. He notes that defendants did not file a separate motion seeking sanctions, and he cites the Tenth Circuit's requirement that an attorney be given notice and an opportunity to respond before a sanction is imposed. *See G.J.B. & Assocs., Inc. v. Singleton*, 913 F.2d 824, 830 (10th Cir. 1990). Due process has been satisfied here, however. Mr. Nill did receive notice of a possible sanction under Section 1927, as defendants' response brief contained explicit requests for fees under that statute (in the brief's introduction and in two full pages devoted to the request under a separate heading). Mr. Nill had the opportunity to oppose sanctions in plaintiffs' reply brief, but he declined to address the issue. Mr. Nill was also given the opportunity to object to specific amounts requested by defense counsel after the Court's April 15 Order, but he declined to address that issue in his latest filing.

Mr. Nill offers additional arguments against a sanction (and this additional opportunity to have such arguments considered further comports with due process). Mr. Nill argues that the Court, by addressing the

argument in its April 3 Order, has conceded the "merit" of plaintiffs' argument based on the Painter expert report. In fact, the Court rejected that argument on its merits. Perhaps Mr. Nill means to argue that the argument was properly raised by plaintiffs. The Court did address the argument in its April 3 Order, and Mr. Nill was not sanctioned for raising the argument in the motion at issue there (which was filed on February 12, 2020). The present sanction is based in part on the fact that Mr. Nill filed another motion, with the same request for recusal under 28 U.S.C. § 455, based on the same arguments and the same expert report, without waiting for the Court to rule on the same issue raised in a still-pending motion. That second filing based on the Painter report multiplied proceedings in this case vexatiously and unreasonably.

Mr. Nill notes that the purpose of an award under Section 1927 is "to compensate victims of abusive litigation practices, not to deter and punish offenders." *See Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1205 (10th Cir. 2008). The Court's intent in presently awarding fees is indeed to compensate defendants for Mr. Nill's abusive practices, as evidenced by the Court's limiting the award to fees incurred by defendants in preparing a response brief that should not have been required.

Finally, Mr. Nill argues that this sanction is prohibited by the Court's loss of jurisdiction and by the conflict and bias that require the undersigned's recusal. The Court stands by its repeated rejections of

these arguments. Accordingly, the Court denies Mr. Nill's request that the Court's latest order be vacated.

The rest of Mr. Nill's brief is devoted to previously-rejected arguments concerning other issues, including jurisdiction, recusal, the need for a *McCauley* hearing, and even standing. Thus, Mr. Nill follows a familiar pattern of refusing to accept or address the Court's rulings. For instance, Mr. Nill again argues the issue of jurisdiction, but he does not address the fact that the case is ongoing and thus no final order has been issued. He again argues that the Court should have conducted a *McCauley* hearing to determine whether plaintiffs' appeals are frivolous, but he has not addressed the Court's reason for rejecting that argument in its last order. Moreover, Mr. Nill resurrects these arguments in contravention of the Court's order that his response be limited to the issue of the amount of fees sought by defendants. Thus, Mr. Nill's latest brief (apparently unironically) illustrates perfectly how he has multiplied – and continues to multiply – proceedings in this case vexatiously and unreasonably.

The Court now turns to the issue at hand, namely, the amounts of the awards to defendants' counsel. The Court has received specific requests for attorney fees from counsel for three sets of defendants. The Court finds that defendants properly worked together to submit a joint brief in opposition to plaintiffs' underlying motions (thereby minimizing their expense and the burden on the Court), and thus they reasonably incurred expenses relating to coordination and communication among counsel concerning the drafting of the

brief. The Court finds that the attorneys' hourly rates are reasonable, as are the 30.1 total hours expended on the brief for which defendants seek reimbursement. *See Hamilton*, 519 F.3d at 1206-07 (district court has discretion in awarding fees under Section 1927 to use a lodestar or to award actual fees reasonably incurred). As noted above, Mr. Nill has not objected to these amounts.

Thus, the Court awards reasonable attorney fees in the amount of $5,060.00 to the firm of Thompson, Coe, Cousins & Irons, L.L.P., counsel for defendants Watts Guerra, L.L.P. and Messrs. Watts and Guerra.

The Court awards reasonable attorney fees in the amount of $1,637.50 to the firm of Taft Stettinius & Hollister, counsel for defendants Hovland and Rasmus, PLLC; Dewald Deaver, P.C., LLO; Patton, Hoversten & Berg, P.A.; and Wojtalewicz Law Firm, Ltd.

The Court awards reasonable attorney fees in the amount of $474.00 to the firm of Lind, Jensen, Sullivan & Peterson, P.A., counsel for defendants Daniel M. Homolka, P.A. and Yira Law Office, Ltd. That amount represents fees incurred for work relating to the filing of defendants' joint response brief. This firm also sought fees for work performed after that filing (reviewing plaintiffs' reply brief and the Court's subsequent order, preparing the fee amount submission); but the Court expressly limited its award to fees incurred in preparing the response brief, and no defendant has objected to that limitation. The Court's award to this firm is limited accordingly.

The Court thus grants a total award of $7,171.50, as set forth herein. Mr. Nill is ordered to pay these awards (and file with the Court a notice of compliance) by **May 11, 2020**, unless that obligation is expressly stayed by this Court or by the Tenth Circuit. Failure to comply may result in further sanction.

IT IS THEREFORE ORDERED BY THE COURT THAT Douglas Nill, plaintiffs' counsel, shall pay the attorney fee awards as set forth herein, and file with the Court a notice of compliance, on or before **May 11, 2020**.

IT IS SO ORDERED.

Dated this 27th day of April, 2020, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KENNETH P. KELLOGG, et al., Plaintiffs, v. WATTS GUERRA, LLP, et al., Defendants.	)	Case No. 18-2408-JWL MDL 14-md-2591-JWL

ORDER

(Filed Apr. 28, 2020)

On March 3, 2020, the court entered an order sanctioning plaintiffs and awarding defendants their attorneys' fees and costs incurred in attending a February 11, 2020 planning conference (which plaintiffs' counsel failed to attend) and in bringing a subsequent motion for sanctions.[1] The court directed defense counsel to submit their travel receipts and detailed billing records for time spent attending the conference and briefing the sanctions motion. Counsel for five groups of defendants filed submissions.[2] Despite an invitation from the court to file a response to the fee submissions,[3] plaintiffs' only challenge to a specific submission was asserted in a footnote to a memorandum in

[1] ECF No. 308 at 9-10.

[2] ECF Nos. 309-313.

[3] ECF No. 308 at 10.

support of a motion to vacate various orders (which was ultimately denied).[4] Because the court finds the fee submissions reasonable, the court now sets the specific amount, of the sanctions award.

The court has reviewed the fee submissions in detail. They reflect that defendants properly worked together in their briefing related to the motion for sanctions, and thereby reasonably incurred expenses related to coordination and communication among counsel.[5] The travel expenses incurred by three defense counsel to attend the planning conference were well-founded. In addition, as Judge Lungstrum recently found in awarding sanctions in a specific amount, "the attorneys' hourly rates are reasonable."[6] Finally, the hours expended by counsel to attend the conference and to brief the motion for sanctions were reasonable. Where counsel has sought fees for work beyond these two events, those requests are denied below.

Thus, the court awards reasonable attorney fees in the amount of **$3,060** and travel expenses in the amount of **$1,161** to the firm of Evans & Dixon, LLC, counsel for defendant Pagel Weikum, PLLP.[7]

---

[4] ECF No. 320 at 19-20 n.2. The motion to vacate orders, including the order awarding sanctions, was denied by Judge Lungstrum on April 15, 2020. ECF No. 335.

[5] *See* ECF No. 345 at 4 (order finding such coordination and communication reasonable).

[6] *Id.*

[7] *See* ECF Nos. 310, 310-1, and 310-2.

The court awards reasonable attorney fees in the amount of **$4,566** to the firm of Lind, Jensen, Sullivan & Peterson, P.A., counsel for defendants Daniel M. Homolka, P.A. and Yira Law Office, Ltd.[8] That amount represents fees incurred for time spent attending the planning conference, and work related to briefing the motion for sanctions and the reply thereto. This firm also sought fees for work performed before the February 11, 2020 conference and performed after the court's order granting sanctions (such as preparing the fee submission);[9] but the court expressly limited its award to fees incurred in attending the conference and drafting related to the sanctions motion.[10] The court's award to this firm is limited accordingly.

The court awards reasonable attorney fees in the amount of **$1,440** to the firm of Taft Stettinius & Hollister, counsel for defendants Hovland and Rasmus, PLLC; Dewald Deaver, P.C., LLO; Patton, Hoversten & Berg, P.A.; and Wojtalewicz Law Firm, Ltd.[11] That amount does not include fees requested for time spent preparing for the planning conference because such time was not included in the court's fee award.

The court awards reasonable attorney fees in the amount of **$4,278** and travel expenses in the amount of **$34** to the firm of Thompson, Coe, Cousins & Irons,

---

[8] *See* ECF No. 309.

[9] This "overreaching" is the only objection plaintiffs raised to any fee submission. *See* ECF No. 320 at 19-20 n.2.

[10] ECF No 308 at 9-10 and n.30.

[11] *See* ECF No. 311.

L.L.P., counsel for defendants Watts Guerra, L.L.P. and Messrs. Watts and Guerra.[12] The attorney-fee award does not include fees requested for time spent preparing for the planning conference or for worked performed after the court's order granting sanctions (such as preparing the fee submission), as such time was not included in the court's fee award. Similarly, that amount does not include expenses incurred as a result of the court's cancellation of the February 25, 2020 scheduling conference, which also was not included in the court's fee award.

Finally, the court awards reasonable attorney fees in the amount of **$2,926**, and travel expenses in the amount of **$1,073** to the firm of Brown and James, P.C., counsel for defendant Lowes Eklund Wakefield Co., LPA.[13]

IT IS THEREFORE ORDERED that plaintiffs are sanctioned in a total amount of **$18,538**, as set forth herein. Plaintiffs are ordered to pay the awards (and file with the court a notice of compliance) by **May 11, 2020**, unless that obligation is expressly stayed by this court or by the Tenth Circuit. Failure to comply may result in further sanction.

---

[12] *See* ECF No. 312.

[13] *See* ECF Nos. 313, 313-1, and 313-2.

Dated April 28, 2020, at Kansas City, Kansas.

s/ James P. O'Hara

James P. O'Hara
U.S. Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: SYNGENTA AG MIR 162 CORN LITIGATION This Document Relates To: *Kellogg, et al. v. Watts Guerra, LLP, et al.*, No. 18-2408-JWL	MDL No. 2591 Case No. 14-md-2591-JWL

ORDER TO SHOW CAUSE

(Filed May 13, 2020)

On April 27, 2020 (Doc. # 345), the undersigned ordered Douglas Nill, plaintiffs' counsel, to pay certain awards of attorney fees to defendants' counsel as a sanction. Mr. Nill was ordered to pay those awards and file a notice of compliance with the Court by May 11, 2020. Also, on April 28, 2020 (Doc. # 348), the Magistrate Judge ordered plaintiffs to pay certain awards of attorney fees and expenses to defendants' counsel as a sanction. Plaintiffs were ordered to pay those awards and file a notice of compliance with the Court by May 11, 2020. In each case, the Court ordered that the awards be paid and the notices be filed unless the payment obligation was expressly stayed by this Court or by the Tenth Circuit. Moreover, the Court warned plaintiffs and Mr. Nill in those orders that failure to comply could result in further sanction.

The required notices of compliance have not been filed, and no stay has been issued. Accordingly,

plaintiffs and Mr. Nill are ordered to show cause, in a written submission filed with the Court by **May 18, 2020**, why this case should not be dismissed as a further sanction.

IT IS SO ORDERED.

Dated this 13th day of May, 2020, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE: SYNGENTA AG MIR 162 CORN LITIGATION	MDL No. 2591
This Document Relates To: *Kellogg, et al. v. Watts Guerra, LLP, et al.*, No. 18-2408-JWL	Case No. 14-md-2591-JWL

MEMORANDUM AND ORDER

(Filed Jul. 28, 2020)

Plaintiffs and their counsel have repeatedly, obstinately refused to accept the Court's rulings or to comply with its orders, even after warnings that continued noncompliance could result in dismissal. Accordingly, the Court **dismisses** this action as a sanction for that noncompliance. Plaintiffs' objections (Doc. # 362) to the Magistrate Judge's Report and Recommendation in favor of dismissal are hereby **overruled**, the Report and Recommendation (Doc. # 357) is hereby adopted, and defendants' motion to dismiss (Doc. # 327) is hereby **granted**. Plaintiffs' motion for a stay or for other relief (Doc. # 363) is hereby **denied**.

I. Background

The failures by plaintiffs and their counsel, Mr. Nill, are well documented in the Court's prior orders. The Court summarizes the most pertinent rulings here.

On January 14, 2020, the Court denied plaintiffs' motion for a stay pending resolution of a soon-to-be-filed appeal to the Tenth Circuit. The Court ordered the parties to submit by January 17 their planning report pursuant to Fed. R. Civ. P. 26(f).

On January 16, 2020, plaintiffs filed a second interlocutory appeal in this matter, and plaintiffs refused to participate in any planning meeting based on their argument that the appeal divested this Court of jurisdiction. By Order of February 4, 2020, the Magistrate Judge granted defendants' motion to compel plaintiffs' participation. The Magistrate Judge rejected plaintiffs' jurisdictional argument, ordered the parties to hold their planning meeting on February 11, 2020 (a date for which both sides' counsel had indicated availability), and reset the court scheduling conference.

After plaintiffs' counsel failed to attend the ordered meeting, defendants moved for dismissal as a sanction, and by Order of March 3, 2020, the Magistrate Judge ruled that motion. The Magistrate Judge concluded that dismissal was not warranted at that juncture, but he awarded defendants attorney fees and costs as a sanction against plaintiffs for the failure of plaintiffs' counsel to participate in the court-ordered meeting. The Magistrate Judge found as a matter of undisputed fact that Mr. Nill had failed to respond to defense counsel's emails confirming the location of the meeting near Mr. Nill's office; had failed to attend the meeting; and had failed to respond to defense counsel's attempts to reach him during the scheduled meeting time. The Magistrate Judge again rejected plaintiffs'

jurisdictional argument. He noted that plaintiffs had not sought reconsideration or review of his February 4 Order, but had instead "brazenly ignored the order and effectively stopped this case from proceeding toward resolution." The Magistrate Judge concluded that two of the applicable *Ehrenhaus* factors did not weigh in favor of dismissal – the Court had not yet warned plaintiffs that dismissal would result from noncompliance, and the Magistrate Judge could not say with certainty that "a sanction short of dismissal would not spur plaintiffs to begin prosecuting this case in this court." The Magistrate Judge did warn plaintiffs as follows:

> The court takes the opportunity now to warn plaintiffs that **future noncompliance with court orders or continued refusal to move forward with this case (which has not been stayed by either this court or the Tenth Circuit) likely will result in dismissal**.

(Emphasis in original.) The Magistrate Judge awarded defendants their fees and costs incurred in attending the February 11 planning meeting and in filing their motion for sanctions, with the amounts to be determined by further briefing. The Magistrate Judge also ordered the parties to conduct a planning meeting by April 1 and to submit a completed report by April 8, while warning plaintiffs that if they again failed to attend the meeting or to participate in the submission of the report, he would recommend dismissal of the case.

By Memorandum and Order of April 15, 2020, the Court denied plaintiffs' motion for various relief. *See In re Syngenta AG MIR 162 Corn Litig. (Kellogg)*, 2020 WL 1873601 (D. Kan. Apr. 15, 2020) (Lungstrum, J.). It again rejected plaintiffs' jurisdictional argument, and it therefore denied plaintiffs' motion to vacate orders issued since the January 16 appeal. The Court overruled plaintiffs' objections to the Magistrate Judge's March 3 Order. In doing so, the Court noted that plaintiffs had not challenged any particular portion of that order, and it rejected plaintiffs' arguments that the Magistrate Judge lacked jurisdiction to act, was biased, or sought to punish plaintiffs for exercising their right to appeal. The Court denied plaintiffs' motion for recusal, which was based in part on an expert report, for the same reasons set forth in a prior order, by which the Court had denied an identical motion for recusal. The Court also denied yet another motion for a stay pending the Tenth Circuit's resolution of plaintiffs' appeal and mandamus petitions.

Finally, the Court granted defendants' request for an award of attorney fees pursuant to 28 U.S.C. § 1927. The Court concluded that plaintiffs' counsel, by filing the motion at issue, had unreasonably and vexatiously multiplied proceedings in the case, causing defendants to incur fees unnecessarily. The Court noted that it had previously rejected the same arguments concerning jurisdiction, recusal, and a stay. The Court noted in particular that plaintiffs had filed the same motion seeking recusal, based on the same expert report, without waiting for a ruling on their previous motion. The

Court noted that plaintiffs had made a new argument seeking review of the Magistrate Judge's March 3 Order, but it found that plaintiffs had not addressed the merits of that order, and it deemed plaintiffs' new accusation of bias to be frivolous. The Court ordered further briefing on the amount of the fees to be awarded, while warning Mr. Nill that his response should address only that issue.

By Memorandum and Order of April 27, 2020, the Court awarded fees in favor of defendants against Mr. Nill in the total amount of $7,171.50. *See Kellogg*, 2020 WL 1984264 (D. Kan. Apr. 27, 2020) (Lungstrum, J.). The Court noted that, despite the Court's instruction, Mr. Nill did not address the requested fee amounts in his response, but instead challenged the basis for the sanctions (after having failed to address defendants' request for sanctions in briefing the pervious motion) and resurrected previously-rejected arguments concerning jurisdiction, recusal, and standing. The Court stated: "Thus, Mr. Nill's latest brief (apparently unironically) illustrates perfectly how he has multiplied – and continues to multiply – proceedings in this case vexatiously and unreasonably." The Court ordered Mr. Nill to pay the attorney fee awards and file a notice of compliance by May 11, 2020 (unless the obligation be expressly stayed by this Court or the Tenth Circuit), and it warned Mr. Nill that failure to comply could result in further sanction.

By Order of April 28, 2020, the Magistrate Judge set the amount of his previously-ordered sanctions. He awarded fees in favor of defendants against plaintiffs

in the total amount of $18,538.00; ordered that the fees be paid and a notice of compliance filed by May 11, 2020 (unless the order be stayed); and warned that the failure to comply could result in further sanction.

By Order of May 12, 2020, the Tenth Circuit dismissed plaintiffs' January 16 appeal, for the reasons that the case continued in the district court and thus was not final, and that under "clear" caselaw of the Tenth Circuit, an order denying a motion for recusal is not final and thus not immediately appealable. The Tenth Circuit concluded by citing Section 1927 and stating that plaintiffs' counsel "is cautioned to carefully reflect on the legitimacy of any future actions brought in [that] court."[1]

Neither plaintiffs nor Mr. Nill filed the required notice of compliance with the fee award orders. On May 13, 2020, the Court ordered plaintiffs and Mr. Nill to show cause why the case should not be dismissed as a sanction.

Also on May 13, 2020, the Magistrate Judge issued a Report and Recommendation by which he recommended the dismissal of the case as a sanction for the continued failure to comply with court orders by plaintiffs and their counsel. The Magistrate Judge found that plaintiffs had continued to defy the Court's orders and had refused to prosecute the case meaningfully

[1] In addition, by Order of June 1, 2020, the Tenth Circuit denied plaintiffs' three pending mandamus petitions. Plaintiffs have conceded that the filing of such petitions do not affect a district court's jurisdiction.

since the Magistrate Judge's March 3 Order. The Magistrate Judge found that although Mr. Nill called into the April 1 planning meeting, he did so with no intent to develop a discovery plan pursuant to Rule 26(f), as evidenced by Mr. Nill's statements to opposing counsel before and after the call and his subsequent statements in plaintiffs' written report to the Court. The Magistrate Judge also found that plaintiffs had not worked with defendants to submit a joint planning report, but had instead submitted their own report that failed to address the required subjects. The Magistrate Judge further noted that plaintiffs had not paid the attorney fee awards as ordered by the Court. The Magistrate Judge then concluded that all five *Ehrenhaus* factors weighed in favor of dismissal. With respect to the fifth factor, the Magistrate Judge concluded that, in light of the misconduct leading up to the March 3 Order and plaintiffs' failure to change their conduct in response to the order, plaintiffs had made clear that "they will neither recognize this court's jurisdiction nor prosecute this case at this time."

On May 27, 2020, plaintiffs filed a response to the show cause order and objections to the Magistrate Judge's Report and Recommendation. In that response, plaintiffs also requested that the Court vacate the monetary sanction orders; vacate all orders during the pendency of their appeal between January 16 and May 12, 2020; stay proceedings pending the Tenth Circuit's decisions on plaintiffs' mandamus petitions; and suggest remand to the MDL transferor court. Plaintiffs also filed a separate motion for a stay or, alternatively,

requesting that orders be vacated and remand be suggested. Defendants filed a brief in response, and plaintiffs filed a brief in reply. The matter is now ripe for ruling.

II. Analysis

A. Applicable Standards

Because plaintiffs[2] have objected to the Magistrate Judge's Report and Recommendation, the Court determines all issues *de novo*. *See* Fed. R. Civ. P. 72(b)(3).

The Magistrate Judge sanctioned plaintiffs and awarded attorney fees to defendants pursuant to Fed. R. Civ. P. 37(b). That rule provides that if a party fails to comply with an order relating to discovery, the court may issue further just orders, including an order dismissing the action. *See id.* The rule also provides that the court "must" order the disobedient party to pay reasonable expenses (including attorney fees) caused by the failure "unless the failure was substantially justified or other circumstances make an award of expenses unjust." *See id.*

The undersigned sanctioned Mr. Nill pursuant to 28 U.S.C. § 1927. That statute provides that an attorney who "multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and

[2] The Court refers to plaintiffs and Mr. Nill collectively as "plaintiffs".

attorneys' fees reasonably incurred because of such conduct." *See id.*

In addition, Fed. R. Civ. P. 16(f)(1) provides that a court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney fails to obey a scheduling or other pretrial order. *See id.* Fed. R. Civ. P. 41(b) provides that a defendant may move for dismissal of the action if the plaintiff refuses to prosecute or to comply with the rules or a court order. *See id.*

Dismissal "represents an extreme sanction appropriate only in cases of willful misconduct," and it should be used only as a last resort when a lesser sanction will not deter future misconduct. *See Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992). The Tenth Circuit set forth has the following non-exhaustive list of factors (the *Ehrenhaus* factors) to be considered in determining whether an action should be dismissed for failure to comply with court orders: "(1) the degree of actual prejudice to the other party; (2) the amount of interference with the judicial process; (3) the litigant's culpability; (4) whether the court warned the party in advance that dismissal would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions." *See Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1140-41 (10th Cir. 2007) (citing *Ehrenhaus*, 965 F.2d at 921). "[D]ismissal is warranted when the aggravating factors outweigh the judicial system's strong predisposition to resolve cases on their merits." *See id.* at 1141 (internal quotations omitted) (quoting *Ehrenhaus*, 965 F.2d at 921).

Plaintiffs cite *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), for the position that a case may not be dismissed because of the pursuit of a legal strategy in good faith. That case contains no such holding, however. In *Rogers*, the Supreme Court held that dismissal under Fed. R. Civ. P. 37(b) for failure to comply with a court order (to produce certain documents) was not permitted in that case because the failure to comply was "due to inability, not to willfulness, bad faith, or any fault of [the plaintiff]." *See id.* at 212. The Court noted that the failure was not a result of the plaintiff's own conduct or circumstances within its control, but resulted from an inability to comply without violating Swiss law. *See id* at 211. This holding would not prohibit dismissal in this case, as plaintiffs were not prevented from complying with this Court's orders by circumstances outside their control; rather, they (and their counsel) chose not to comply. Plaintiffs' insistence that their decision was part of a good-faith legal strategy does not alter that conclusion.

B. Plaintiffs' Arguments Against the Underlying Sanctions and Orders

Plaintiffs argue that the case should not be dismissed on the basis of noncompliance with orders because those underlying orders, including the prior sanction orders, were improper. For their primary argument, plaintiffs repeat their oft-rejected claim that this Court lost jurisdiction to act when plaintiffs filed their appeal to the Tenth Circuit on January 16, 2020.

Included within that claim is the argument that this Court could not retain jurisdiction during the appeal without an initial finding that the appeal was frivolous after a *McCauley* hearing. Plaintiffs also argue that, whatever the eventual merits of that jurisdictional claim, the claim was substantially justified, and plaintiffs should not be sanctioned for zealously pursuing such a claim.

The Court rejects this argument. As it has ruled over and over, under clear Tenth Circuit law the Court did not automatically lose jurisdiction when plaintiffs attempted to appeal a non-final order. No applicable authority required the Court to conduct a hearing in this case to retain jurisdiction. Plaintiffs' position was not substantially justified given the clear Tenth Circuit precedent governing these issues.

First, plaintiffs had no right to an interlocutory appeal from a non-final order in this case. As conceded in their reply brief, plaintiffs filed its January 2020 appeal to challenge this Court's denial of plaintiffs' motion for recusal. The Tenth Circuit, however, has stated unequivocally that "[a]n order denying a motion to recuse or disqualify a judge is interlocutory, not final, and is not immediately appealable." *See In re American Ready Mix, Inc.*, 14 F.3d 1497, 1499 (10th Cir. 1994). Indeed, the Tenth Circuit had already dismissed plaintiffs' earlier appeal in this case on the ground that

plaintiffs had not established that the challenged decisions were final or immediately appealable.[3]

Moreover, under Tenth Circuit precedent, the filing of a notice of appeal does not necessarily divest the district court of jurisdiction; if the notice is deficient, including because it references a non-appealable order, the district court may ignore it and proceed with the *case. See Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338, 340-41 (10th Cir. 1976). Plaintiffs, as they have all along, rely solely on the general rule that an appeal divests the district court of jurisdiction; they refuse to recognize or address, however, this exception for an appeal from a non-appealable order.

Plaintiffs argue again that this Court could not retain jurisdiction during the pendency of their appeal because the Court failed to conduct a hearing pursuant to *McCauley v. Halliburton Energy Services, Inc.*, 413 F.3d 1158 (10th Cir. 2005), to determine whether the appeal was frivolous. The Court rejected this argument in its April 15 Memorandum and Order, noting that *McCauley* involved an interlocutory appeal authorized by a particular statute. *See Kellogg*, 2020 WL 1873601, at *1 n. 1. In its April 27 Memorandum and Order, the Court again rejected this argument, noting that plaintiffs had failed to address the Court's prior reasoning. *See Kellogg*, 2020 WL 1984264, at *2. Yet again,

[3] Plaintiffs argue that the Tenth Circuit's order of dismissal in December 2019 was an unpublished, non-precedential order that did not address the underlying merits of the appeal. Nevertheless, the order made clear the Tenth Circuit's view in this case that only a final order would be appealable.

plaintiffs have made this argument without addressing the Court's reasons for previously rejecting this argument. Even in their reply brief here, plaintiffs have refused to address defendants' argument that plaintiffs' cited cases do not apply here because they involved permissible interlocutory appeals.

The Court again rejects this argument, for the reasons argued by defendants. As noted above, *McCauley* involved an appeal under the Arbitration Act, which permits certain interlocutory appeals. *See McCauley*, 413 F.3d at 1159 (citing 9 U.S.C. § 16(a)(1)(C)). In *Stewart v. Donges*, 915 F.2d 572 (10th Cir. 1990), the court held that an interlocutory appeal from the denial of summary judgment based on qualified immunity divested the district court of jurisdiction, in light of the Supreme Court's authorization of interlocutory appeals from such orders. *See id.* at 574-75 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). Plaintiffs' other cases similarly involved appeals from rulings involving qualified immunity. *See Martinez v. Mares*, 2014 WL 12650970, at *1-2 (D.N.M. Sept. 22, 2014); *Howards v. Reichle*, 2009 WL 2338086, at *1..2 (D. Colo. July 28, 2009). Plaintiffs have not cited any authority to support the argument that a hearing is required before the Court may proceed in the face a deficient appeal from a non-appealable order.

Thus, because plaintiffs appealed a non-appealable order, this Court did not lose jurisdiction, and there is no cause to vacate the Court's prior orders on that basis. No Tenth Circuit authority required an initial hearing or determination of frivolousness. Because

Tenth Circuit law was clear on these points, plaintiffs' refusal to recognize this Court's jurisdiction and their refusal to comply with the Court's orders were not substantially justified. Plaintiffs were free to challenge the Court's jurisdiction, but once the Court ruled on that issue, plaintiffs were obligated to prosecute the case and to comply with the Court's orders. Plaintiffs could – and did – challenge the Court's ruling by way of a mandamus petition, but plaintiffs concede that such a petition does not affect the district court's jurisdiction (and the Tenth Circuit has now denied plaintiffs' petitions).

Plaintiffs also argue that the Magistrate Judge's March 3 sanction was not justified. Again, however, the Magistrate Judge did not lack jurisdiction to act. Plaintiffs also repeat their argument for the Court's recusal, but those merits are not relevant to this issue – the Court rejected that argument, and plaintiffs were ordered to proceed. Notably, plaintiffs have not offered any argument why their violation of the February 4 Order and their refusal to attend the February 11 planning meeting – including the refusal even to answer emails or take calls concerning the meeting – was excusable or did not warrant sanctions.

Plaintiffs also challenge this Court's award of fees pursuant to Section 1927. Plaintiffs argue that attorney fees may be awarded as a sanction under Section 1927 or under the inherent power of the court only for conduct in bad faith. The cases cited by plaintiffs, however, do not support such a limitation. Plaintiffs *cite Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), in which

the Supreme Court addressed courts' inherent power to award attorney fees as a sanction. *See id.* In this case, the Court awarded sanctions pursuant to Section 1927, without invoking its inherent power; thus, *Chambers* is not directly applicable. Moreover, the Supreme Court stated that a court may assess attorney fees as a sanction for the willful disobedience of a court order; or when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, including when the party has shown bad faith by delaying or disrupting the litigation. *See id.* at 45. Plaintiffs also cite various Tenth Circuit cases involving awards under Section 1927, including *Baca v. Berry*, 806 F.3d 1262 (10th Cir. 2015). In *Baca*, the Tenth Circuit stated that although a court should guard against dampening the legitimate zeal of an attorney in representing a client, the court need not find that an attorney acted in bad faith. *See id.* at 1268. Rather, any conduct that "manifests either intentional or reckless disregard of the attorney's duties to the court is sanctionable." *See id.* (internal quotation omitted).

Plaintiffs argue that their conduct in filing the underlying motion was not vexatious and unreasonable. They argue that they first had to raise issues in this Court, including their objections to the Magistrate Judge's March 3 Order, before such issues could be raised on appeal. As the Court ruled in its April 15 Order, however, plaintiffs failed to address the merits of the March 3 Order and made a frivolous argument based on bias. In addition, plaintiffs in that motion resurrected several arguments that the Court had

already rejected multiple times – including the same argument for recusal, based on the same expert report, that was already pending before the Court in a prior motion. Plaintiffs have not offered any justification for raising the same arguments again and again, or for refusing to wait for a ruling before filing the same motion.

Plaintiffs also offer excuses for the instances of misconduct cited by the Magistrate Judge that occurred after the issuance of the March 3 Order. Plaintiffs challenge the Magistrate Judge's finding that they failed to participate in the April 1 planning meeting call. Plaintiffs argue that they did participate in good faith, although they disagreed with defense counsel concerning the need for class discovery and discovery on fraud-related issues. As the Magistrate Judge pointed out, however, plaintiffs made clear to defense counsel and to the Court, before and after the call, that their participation in the planning meeting was *pro forma* at best. Specifically, in their unilateral report to the Court and in a post-meeting letter to defense counsel, plaintiffs' counsel stated that he had been clear, at the outset of the meeting, that plaintiffs were "unwilling to proceed with discovery and pretrial proceedings while awaiting a disposition" of plaintiffs' appeal and mandamus petitions. Moreover, as the Magistrate Judge pointed out, plaintiffs did not attempt to submit a joint report as orderd, and their own report did not address all of the required issues. In that report, plaintiffs repeated their claims that the Court lacked jurisdiction, was conflicted, and was biased, and they offered no

hint that they intended to participate in discovery going forward until the Tenth Circuit had ruled. For these reasons, the Court concludes that plaintiffs and their counsel did willfully refuse to comply with the Court's March 3 Order requiring participation in the planning meeting and the submission of the planning report, and that such noncompliance was not justified.

Finally, plaintiffs and Mr. Nill failed to comply with the Court's orders to pay certain attorney fee awards by a certain date. With respect to that failure, plaintiffs argue only that the Court could have stayed that requirement until the conclusion of the litigation and allowed plaintiffs to post a bond instead. Plaintiffs did not seek any such stay, however, either from this Court or from the Tenth Circuit. Plaintiffs were explicitly warned that in the absence of such a stay, the failure to comply could result in further sanction. Despite that warning, plaintiffs elected simply to ignore the Court's orders. Such willful noncompliance provides another basis for the sanction of dismissal.

C. Consideration of the Ehrenhaus *Factors*

The Court proceeds to a consideration of the *Ehrenhaus* factors. The Court concludes that all five factors weigh in favor of dismissal in this case.

First, defendants have suffered prejudice from plaintiffs' noncompliance. This case has been pending in this Court for almost two years, and yet no scheduling conference has been conducted and discovery has

not commenced. Defendants have the right to have this case proceed, and plaintiffs' refusal to accept the jurisdiction of the Court or to participate in the discovery process has delayed the prosecution of the case. Throughout this case, defendants have been forced to incur attorney fees to address the same meritless arguments made by plaintiffs and their counsel. Indeed, plaintiffs' failure to pay the fee awards causes prejudice in a direct and tangible way, as defendants must otherwise pay those fees that were incurred unnecessarily.

Plaintiffs argue that these defendants who committed the underlying torts and who have misled this Court should not be deemed to have suffered prejudice, but the underlying merits of the case are not relevant to this consideration. Whatever those merits, defendants have suffered prejudice from plaintiffs' violations.[4] Plaintiffs also argue that a four-month delay during the pendency of plaintiffs' appeal is not sufficiently prejudicial, but the Court disagrees. Plaintiffs' lack of respect for the rulings of this Court and their excessive briefing practice has gone on much longer; as the Court noted in its prior order, the recent conduct by plaintiffs and their attorney was merely the culmination of a pattern of behavior. Plaintiffs have not explained how defendants suffered no prejudice in having to respond to arguments repeatedly or in

[4] Moreover, plaintiffs' insistence that defendants were not merely incorrect in their jurisdictional arguments, but that they "misrepresented" the governing law to the Court, is beyond the pale, in light of the clear law favoring defendants' position.

having shown up at a court-ordered meeting that plaintiffs chose not to attend.

Second, by their conduct, plaintiffs and their counsel have continually interfered with the judicial process. Plaintiffs have not argued that this factor does not weigh in favor of dismissal. The Magistrate Judge has had to cancel and reschedule the scheduling conference more than once because of plaintiffs' failure to participate meaningfully in a planning meeting. The Court has had to address the same arguments on multiple occasions. Moreover, plaintiffs' undisguised lack of respect and even contempt for the rulings and authority of this Court, evident in plaintiffs' claims and briefing since they first received adverse rulings from the Court – undermines the Court's ability to preside over the case.

Third, the culpability of plaintiffs and their counsel weighs in favor of dismissal. As discussed above, plaintiffs' primary argument, that the Court lacked jurisdiction, had no reasonable basis in the law. Plaintiffs' counsel insists that he participated in the April 1 planning conference in good faith, but he conceded by his written statements that plaintiffs had no intention of engaging in discovery as ordered. Not only did plaintiffs repeat the same unsuccessful arguments in multiple briefs, they did so seemingly by cutting-and-pasting from previous briefs, without bothering to address the Court's reasoning or defendants' arguments. Plaintiffs' counsel repeatedly refused to limit his arguments as instructed, even while arguing that he had not vexatiously multiplied proceedings. On one

occasion, plaintiffs filed a motion while an identical motion, seeking the same relief and based on the same expert report, was already pending before the Court. Plaintiffs have continually refused to accept adverse rulings by the Court, while accusing the Court of actual bias and breaches of duty. Not only did plaintiffs' counsel fail to attend, the original planning meeting; he refused to answer an email confirmation of the meeting place, and he refused to answer calls at the time of the meeting. Finally, plaintiffs simply refused to pay sanctions as ordered, without seeking a stay or offering any excuse for not complying. This conduct goes far beyond a case of zealous, though ultimately unsuccessful, advocacy. Plaintiffs by this conduct have displayed a willful refusal to abide by the Court's orders, based on (at best) a reckless disregard of the law concerning jurisdiction.

Fourth, plaintiffs were explicitly warned in the March 3 Order that future noncompliance would likely result in dismissal. Plaintiffs were similarly warned in the orders imposing the monetary sanctions that the failure to pay those sanctions could result in further sanction. Thus, this factor weighs in favor of dismissal here.[5]

---

[5] Although plaintiffs have not addressed this factor directly, they state in their brief that the fifth factor is "[t]he only conceivable *Ehrenhaus* factor that may apply here." Plaintiffs refusal to concede the fourth factor's applicability, given the Court's express warnings, is indicative of the attitude of plaintiffs' counsel and his lack of respect for this Court.

Fifth, plaintiffs' recalcitrance demonstrates that a lesser sanction would not be sufficient to provoke future compliance. The Magistrate Judge declined to recommend dismissal on March 3 only because plaintiffs had not been explicitly threatened with dismissal and he could not be certain that a lesser sanction would not work. Despite that close call and the Magistrate Judge's explicit warning, plaintiffs again defied the Court's order to participate meaningfully in a planning meeting, while clinging to their meritless and rejected jurisdictional argument. Plaintiffs then refused to pay sanctions as ordered. Plaintiffs have not shown any remorse for their noncompliance; nor have plaintiffs or their counsel promised compliance in the future. They have not even indicated that they will pay the ordered sanctions in the future. Plaintiffs are not guilty of an isolated misguided act; as noted, plaintiffs and their counsel have exhibited a pattern of willful behavior.

Plaintiffs only argue that the Court should impose the lesser "sanction" of staying the case to allow the Tenth Circuit to address their mandamus petitions (which have now been denied) – the very relief plaintiffs have been seeking for some time. Of course, that request demonstrates the problem here – plaintiffs all along have believed that this Court should not act at all while there were issues before the Tenth Circuit. This Court did not lose jurisdiction, however, and plaintiffs and their counsel are not entitled simply to choose whether to obey an order of this Court.

Although the Court would always prefer to have a case decided on its merits, the conduct of a party and

its attorney may prevent such consideration, as the Tenth Circuit has recognized. All of the *Ehrenhaus* factors weigh in favor of dismissal as a sanction in this case. Plaintiffs have shown unequivocally that warnings and monetary sanctions are not sufficient to induce their compliance. Thus, this is the time of last resort. The Court hereby dismisses this action with prejudice.[6]

IT IS THEREFORE ORDERED BY THE COURT THAT this action is hereby **dismissed**. Plaintiffs' objections (Doc. # 362) to the Magistrate Judge's Report and Recommendation in favor of dismissal are hereby **overruled**, the Report and Recommendation (Doc. # 357) is hereby adopted, and defendants' motion to dismiss (Doc. # 327) is hereby **granted**.

IT IS FURTHER ORDERED BY THE COURT THAT plaintiffs' motion for a stay or for other relief (Doc. # 363) is hereby **denied**.

IT IS SO ORDERED.

---

[6] Because the Tenth Circuit has dismissed plaintiffs' latest appeal and denied their petitions for mandamus, plaintiffs' motion for a stay is denied as moot. For the reasons set forth herein, the Court denies plaintiffs' alternative request that the Court's prior orders be vacated. In light of the dismissal of this action, plaintiffs' alternative request for a suggestion of remand is denied as moot.

Dated this 28th day of July, 2020, in Kansas City, Kansas.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge

United States District Court
----------DISTRICT OF KANSAS----------

Kenneth P. Kellogg, Rachel Kellogg and Kellogg Farms, Inc., Roland B. Bromley and Bromley Ranch, LLC, John F. Heitkamp, Dean Holtorf Garth J. Kruger, Charles Blake Stringer and Stringer Farms, Inc., individually, and on behalf of all others similarly situated,

Plaintiff,

v. **Case No: 18-cv-2408-JWL**

Watts Guerra, LLP, Daniel M. Homolka, P.A., Yira Law Office LTD, Hovland and Rasmus, PLLC, Dewald Deaver, P.C., LLO, Mauro, Archer & Associates, LLC, Johnson Law Group, Wagner Reese, LLP, VanDerGinst Law P.C., Patton, Hoversten & Berg, P.A., Cross Law Firm, LLC, Law Office of Michael Miller, Pagel Weikum PLLP, Wojtalewicz Law Firm, Ltd., Lowe Eklund Wakefield Co., LPA, Mikal C. Watts, Francisco Guerra, and Jon Does, 1-250,

Defendants.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a jury trial. The issues have been tried and the jury has rendered its verdict.

☒ Decision by the Court. This action came before the Court. The issues have been considered and a decision has been rendered.

The claims of the Plaintiffs Kenneth P. Kellogg, Rachel Kellogg, and Kellogg Farms, Inc., Roland B. Bromley and Bromley Ranch, LLC, John F. Heitkamp, Dean Holtorf, Garth J. Kruger, Charles Blake Stringer and Stringer Farms, Inc., individually, and on behalf of all others similarly situated, are dismissed with prejudice pursuant to the following orders: Memorandum and Order filed March 1, 2019 (doc. 168); Memorandum and Order filed on May 21, 2019 (doc. 196) ; Memorandum and Order filed on August 13, 2019 (doc. 213); Memorandum and Order filed on December 18, 2019 (doc. 245); Memorandum and Order filed on April 6, 2020 (doc. 324); and Memorandum and Order filed on July 28, 2020 (doc. 368).

07/28/2020
Date

TIMOTHY M. O'BRIEN
CLERK OF THE
DISTRICT COURT

by: *s/ Sharon Scheurer*
Deputy Clerk

United States District Court
----------DISTRICT OF KANSAS----------

Kenneth P. Kellogg, Rachel Kellogg and Kellogg Farms, Inc., Roland B. Bromley and Bromley Ranch, LLC, John F. Heitkamp, Dean Holtorf Garth J. Kruger, Charles Blake Stringer and Stringer Farms, Inc., individually, and on behalf of all others similarly situated,

Plaintiff,

v. **Case No: 18-cv-2408-JWL**

Watts Guerra, LLP, Daniel M. Homolka, P.A., Yira Law Office LTD, Hovland and Rasmus, PLLC, Dewald Deaver, P.C., LLO, Mauro, Archer & Associates, LLC, Johnson Law Group, Wagner Reese, LLP, VanDerGinst Law P.C., Patton, Hoversten & Berg, P.A., Cross Law Firm, LLC, Law Office of Michael Miller, Pagel Weikum PLLP, Wojtalewicz Law Firm, Ltd., Lowe Eklund Wakefield Co., LPA, Mikal C. Watts, Francisco Guerra, and Jon Does, 1-250,

Defendants.

AMENDED JUDGMENT

☐ Jury Verdict. This action came before the Court for a jury trial. The issues have been tried and the jury has rendered its verdict.

☒ Decision by the Court. This action came before the Court. The issues have been considered and a decision has been rendered.

The claims of the Plaintiffs Kenneth P. Kellogg, Rachel Kellogg, and Kellogg Farms, Inc., Roland B. Bromley and Bromley Ranch, LLC, John F. Heitkamp, Dean Holtorf, Garth J. Kruger, Charles Blake Stringer and Stringer Farms, Inc., individually, and on behalf of all others similarly situated, are dismissed with prejudice pursuant to the following orders: Memorandum and Order filed March 1, 2019 (doc. 168); Memorandum and Order filed on May 21, 2019 (doc. 196); Memorandum and Order filed on August 13, 2019 (doc. 213); Memorandum and Order filed on December 18, 2019 (doc. 245); Memorandum and Order filed on April 6, 2020 (doc. 324); and Memorandum and Order filed on July 28, 2020 (doc. 368).

Pursuant to the Memorandum and Order filed April 15, 2020 (doc. 335), and the Memorandum and Order filed April 27, 2020 (doc. 345), judgment for payment of attorney fees is awarded against Mr. Douglas Nill, plaintiffs' counsel, in favor of defendants Watts Guerra, L.L.P.; Mikal C. Watts; and Francisco Guerra, in the amount of $5,060.00.

Pursuant to the Memorandum and Order filed April 15, 2020 (doc. 335), and the Memorandum and Order

filed April 27, 2020 (doc. 345), judgment for payment of attorney fees is awarded against Mr. Douglas Nill, plaintiffs' counsel, in favor of defendants Hovland and Rasmus, PLLC; Dewarld Deaver, PC., LLO; Patton, Hoversten & Berg, P.A.; and Wojtalewicz Law Firm, Ltd., in the amount of $1,637.50.

Pursuant to the Memorandum and Order filed April 15, 2020 (doc. 335), and the Memorandum and Order filed April 27, 2020 (doc. 345), judgment for payment of attorney fees is awarded against Mr. Douglas Nill, plaintiffs' counsel, in favor of defendants Daniel M. Homolka, P.A.; and Yira Law Office, Ltd., in the amount of $474.00.

Pursuant to the Order filed March 3, 2020 (doc. 308), and the Order filed April 28, 2020 (doc. 348), judgment for payment of attorney fees and expenses is awarded against plaintiffs in favor of defendant Pagel Weikum, PLLP, in the amount of $4,221.00.

Pursuant to the Order filed March 3, 2020 (doc. 308), and the Order filed April 28, 2020 (doc. 348), judgment for payment of attorney fees and expenses is awarded against plaintiffs in favor of defendants Daniel M. Homolka, P.A.; and Yir Law Office, Ltd., in the amount of $4,566.00.

Pursuant to the Order filed March 3, 2020 (doc. 308), and the Order filed April 28, 2020 (doc. 348), judgment for payment of attorney fees and expenses is awarded against plaintiffs in favor of defendants Hovland and Rasmus, PLLC; Dewald Deaver, P.C., LLO; Patton,

Hoversten & Berg, P.A.; and Wojtalewicz Law Firm, Ltd., in the amount of $1,440.00.

Pursuant to the Order filed March 3, 2020 (doc. 308), and the Order filed April 28, 2020 (doc. 348), judgment for payment of attorney fees and expenses is awarded against plaintiffs in favor of defendants Watts Guerra, L.L.P.; Mikal C. Watts; and Francisco Guerra, in the amount of $4,312.00.

Pursuant to the Order filed March 3, 2020 (doc. 308), and the Order filed April 28, 2020 (doc. 348), judgment for payment of attorney fees and expenses is awarded against plaintiffs in favor of defendant Lowes Eklund Wakefield Co., LPA, in the amount of $3,999.00.

10/01/2020
Date

TIMOTHY M. O'BRIEN
CLERK OF THE
DISTRICT COURT

by: *s/ Sharon Scheurer*
Deputy Clerk

EXPERT REPORT OF RICHARD PAINTER

I. Expert Qualifications

1. I am the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School. I received a B.A. from Harvard University in 1984 and a J.D. from Yale Law School in 1987. My professional experience includes a year of clerking for Judge John T. Noonan, Jr. of the Ninth Circuit Court of Appeals, 2 'A years of law practice with Sullivan & Cromwell in New York City, another 2 1/2 years of law practice with Finn Dixon & Herling in Stamford, Connecticut and approximately 25 years of law teaching. My practice has been principally in corporate and securities law, securities litigation, commercial litigation and government and legal ethics. From February 2005 to July 2007, I was the chief ethics lawyer for the President and the White House staff. At the White House I supervised work on ethics agreements and financial disclosure statements for the President's nominees for Senate confirmed positions in the Executive Branch, I advised the President and his staff on federal conflict of interest regulations and other ethics issues, and I worked on conflict of interest and other ethics matters that arose in the selection and confirmation of Chief Justice John Roberts and Justice Samuel Alito to the Supreme Court.

2. I have published books and articles on corporate law, securities lap, and ethics. See, e.g., SECURITIES LITIGATION AND ENFORCEMENT: CASES AND MATERIALS (with Donna Nagy and Margaret Sachs) (West

Publishing 2003); SECOND EDITION (2007); THIRD EDITION (2011); FOURTH EDITION (2017); PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER (with Judge John T. Noonan, Jr., USCA 9); SECOND EDITION (2001); THIRD EDITION (2011); GETTING THE GOVERNMENT AMERICA DESERVES: HOW ETHICS REFORM CAN MAKE A DIFFERENCE (2009); BETTER BANKERS, BETTER BANKS (2015) (with Claire A. Hill); TAXATION ONLY WITH REPRESENTATION: THE CONSERVATIVE CONSCIENCE AND CAMPAIGN FINANCE REFORM (2016). I am a member of the bar of the State of New York and am a reporter for the American Law Institute project on government ethics. I have testified six times before the United States House of Representatives and the United States Senate on legislation pertaining to securities litigation and government ethics. A copy of my curriculum vitae is attached hereto as Exhibit A. I am being compensated for my time in respect to my work on this matter at a rate of $575 per hour.

3. From 2014 to 2015, I was a Fellow at Harvard University's Safra Center for Ethics where I devoted the majority of my time to writing a book on campaign finance, TAXATION ONLY WITH REPRESENTATION: THE CONSERVATIVE CONSCIENCE AND CAMPAIGN FINANCE REFORM (2016). I am a director of Take Back our Republic, a 501(c)(3) organization dedicated to campaign finance reform. From 2016 to 2018 I was also a director and vice chairman of Citizens for Responsibility and Ethics in Washington, a government reform organization that focuses on, among other things, campaign finance.

4. I base my opinions in this case on, among other things, my education, training and experience in the legal ethics field, publications, knowledge of scholarly literature and case law. I assume for purposes of this opinion that the factual allegations in the plaintiffs' complaint and amended complaint are true.

II. Summary of Opinions

5. The issues upon which I opine below is whether Judge Lungstrum should recuse from this case to avoid an appearance of bias and a violation of due process. For the reasons stated below I believe that Judge Lungstrum should recuse.

6. I understand that plaintiffs' counsel has alleged based on specific facts that Judge Lungstrum breached his fiduciary duty to the individual corn growers (approximately 60,000) who were automatically opted-out of the Syngenta class pursuant to his order because Judge Lungstrum, among other things, did not address factual evidence that the defendants were colluding with class counsel and exchanging money and favors while ignoring the best interest of their individual clients and class members. I do not opine at this time as to whether or not Judge Lungstrum breached his fiduciary duty to the individual corn growers opted out of the Syngenta class. If Judge Lungstrum did in fact breach his fiduciary duty in the Syngenta class action, that would be an additional ground for his recusal in this case where his own conduct would be at issue. My opinion here, however, is

limited to the other compelling reasons for Judge Lungstrum to recuse from this case regardless of the propriety of the decisions that he made in the Syngenta class action.

III. Opinion

A. Factual background

7. The class action before Judge Lungstrum (the "Syngenta MDL class action") is a multidistrict litigation by a class of hundreds of thousands of corn growers alleging misrepresentation and negligence by Syngenta in dissemination of genetically modified corn seed, causing substantial losses to corn growers impacted by international import bans and a price decline for their crops.

8. This separate class action alleges that defendant attorneys misrepresented material facts and defrauded plaintiffs and breached their fiduciary duties to plaintiffs, whom the defendant attorneys signed up to "represent" as counsel in individual suits against Syngenta that were later consolidated with the Syngenta MDL class action before Judge Lungstrum. The plaintiffs in this action are a subset of the class in the Syngenta MDL class action, but their claim in this suit is entirely different – and against entirely different defendants – from the claims in the Syngenta litigation. These plaintiffs allege that the defendant attorneys lied to them at the time they were signed up as individual clients with retainer contracts, concealed the fact that the plaintiffs already were represented in the

Syngenta MDL class action, that the plaintiffs did not need additional counsel, that the defendant's legal fees were excessive, that the defendant attorneys lied to the judge in the class action and committed other acts in order to enrich themselves at the plaintiffs' expense.

9. In December 7 and December 31, 2018 opinions in the Syngenta class action case Judge Lungstrum set aside $503 million for attorneys' fees and established fee allocation pools – a Kansas pool, a Minnesota pool, an Illinois pool and a pool to compensate lawyers with contingent fee contracts with individual clients. Nothing in those orders did anything to address the claims made against the defendant lawyers in this case.

10. This case is about whether the defendant lawyers in this case – who are laying claim to a portion of the attorney fee pools in the Syngenta litigation – committed fraud and deceit and breaches of fiduciary duty toward their individual clients at the time they were retained and then again through the course of their representation of those clients. The clients, all class members in this action but individual clients of the defendant lawyers in the Syngenta litigation, seek damages and equitable relief including forfeiture of the fees set aside for these lawyers by Judge Lungstrum.

B. The legal and factual issues in this case are important and separate from the legal and factual issues in the Syngenta MDL Litigation.

11. *Syngenta* and this case are two different cases. The MDL panel has recognized that these are two independent cases. See October 3, 2018 Order.

12. The legal and factual issues in this case – fraud, misrepresentation and breach of fiduciary duty by lawyers – go to the heart of the integrity of our legal system. Lawyers are expected to represent their clients zealously within the bounds of the law.' Lawyers are expected to put their clients' interests ahead of their own interests and to decline to represent a client when a conflict of interest between their own interest and Client interest interferes with loyal and zealous representation of clients. See ABA Model Rules of Professional Conduct, Rule 1.7. Lawyers are expected to be truthful with their clients, disclosing information clients need to make informed decisions about the representation. Rule 1.4. Lawyers are expected not to lie to people, much less to their own clients. Rule 4.1. Lawyers must be honest with the tribunal. Rule 3.3. These ethics rules – and the fiduciary and principle-agent law underlying them – are critical to the due process clients expect in litigation and the fiduciary loyalty they expect from their lawyers even outside of litigation. Failure to enforce these rules – including when civil actions are brought by clients against their lawyers – will invite future breaches by other lawyers and bring about the eventual demise of the advocacy

system. Courts, in both disciplinary proceedings against lawyers and lawsuits by clients against lawyers, play an important part in assuring that lawyers abide by their duties to clients.

13. Far from being tag along proceedings – submerged in larger cases against other nonlawyer defendants – fraud and breach of fiduciary duty cases against lawyers stand on their own two feet and should be decided separately. A client may have a weak position in underlying litigation but an excellent fraud and breach of fiduciary duty case against his lawyers in that same litigation. Alternatively, a client may have a strong position in underlying litigation but a weak claim against his lawyers. And yet another client could have both a strong case in the underlying litigation, and a strong case against his own lawyers who reduced the size of his recovery net of legal fees because they lied to him and breached fiduciary duties.

14. While client suits against lawyers for fraud and breach of fiduciary duty usually seek monetary damages, the money is not the only point. Unless the case is settled or dismissed the client is entitled to a finding as to whether the lawyers aid or did not breach legal duties to the client. The "no harm, no foul" argument would not save the lawyers from disciplinary proceedings, and – unless there is no conceivable way the client could be entitled to damages or any other relief – courts should be reticent to accept such results oriented arguments in cases brought by clients against their lawyers. It is critical that these cases be heard on the merits by a neutral decision maker dedicated to

objective assessment of the conduct of the lawyers toward the client – not just the question of how much money the client ends up with as a result of the matter in which the lawyer was retained to represent the client.

15. The legal and factual issues in this case – fraud, misrepresentation and breach of fiduciary duty by lawyers – thus are entirely separate legal and factual issues from the issues in the MDL Syngenta litigation misrepresentation and negligence by Syngenta in dissemination of genetically modified corn seed. The alleged fraud was by plaintiffs' lawyers – the lawyers suing Syngenta – and did not involve any of the defendants in the Syngenta MDL class action.

16. This case thus is remotely related to the Syngenta MDL class action in a way that any dispute between an attorney and a client over breach of fiduciary duty related to the underlying subject matter of legal representation. Clients hire lawyers in criminal cases, trusts and estates cases, divorce cases and individual suits against corn seed manufacturers and many other cases, and sometimes these clients also are victimized by misrepresentation, fraud and breach of fiduciary duty committed by their own lawyers. Their legal causes of action against their lawyers are separate from their position as plaintiff or defendant in the underlying actions for which they retained the lawyers.

17. Breach of fiduciary duty and fraud claims against lawyers are not routinely sent to the same judge who heard the underlying case. There is

absolutely no need for the same judge to hear the case, and breach of fiduciary duty and fraud cases against lawyers are usually placed into the random assignment system, or whatever other, system, is routinely used to assign cases to judges. I have been an expert witness in at least a dozen cases brought by clients against their own lawyers and I do not recall one that was assigned to the same judge that heard the underlying case in which the lawyers represented the client.

18. Indeed, if this case does proceed to trial it will very likely be tried before a jury in federal court in the District of Minnesota. It would not be tried in Judge Lungstrum's courtroom. Under the MDL transfer statute, 28 U.S.C. 1407 a "tag along" case must return to the court where it was originally filed for trial.

19. The issue presented at this time, and the issue upon which I am opining in this report, is whether Judge Lungstrum should have this case on his docket now, and with it the power to make procedural and substantive rulings that could prevent this case from ever reaching a different judge and a jury in Minnesota. For the reasons explained below, my opinion is that he should not, and that for Judge Lungstrum to participate in this case would present a serious impediment to the due process that plaintiffs are entitled to.

C. Judge Lungstrum has an untenable conflict of interest that interferes with the due process that the parties are entitled to.

20. In most circumstances, cases that arise out of related fact patterns can be assigned to the same judge without need for recusal. The judge's knowledge of facts or of the parties from a previous case does not create an appearance of bias or another conflict preventing the judge from being impartial in the new case. However, the present case – a case by clients against their own lawyers who are accused of lying to both the clients and to the judge – is related to the case Judge Lungstrum already heard in a way that makes it inappropriate to send this case to him.

21. When, as is the case here, an important part of the fraud and breach of fiduciary duty claim is that the lawyers lied to the judge about the nature of their retention agreement with their clients, their communication with the clients and their representation of the clients, the judge is in an untenable situation of having to determine whether the lawyers lied to him in a case that he has already heard and concluded. Did the lawyers violate their duty of candor to the tribunal under the Federal Rules of Civil Procedure and ABA Rule 3.3 (Candor the Tribunal) or did the judge fail to ask the questions that the judge should have asked the lawyers to prevent them from deceiving and defrauding their own clients, or did the deception result from a mixture of the two? These questions should not have to be answered by the same judge.

22. Here the lawyers are accused by plaintiffs of lying to the court in the Syngenta MDL class action when the lawyers told Judge Lungstrum that they obtained informed consent from their clients to opt out of the class. According to the plaintiffs, these lawyers did nothing of the kind; they did not even inform the plaintiffs about their status in the class action. The plaintiffs also allege that the defendant lawyers concealed from the plaintiffs the content of their joint prosecution agreements (JPAs) with the class lawyers. The lawyers might counter with the argument that the class action lawyers presented the JPAs to Judge Lungstrum and that he read them, that the lawyers representing individual plaintiffs in the Syngenta litigation were present in the courtroom, and that Judge Lungstrum could have and should have asked more questions if he had concerns about whether the lawyers were adequately representing individual plaintiffs. Still, the JPAs themselves might have contained outright false statements about the lawyers' relationship with their clients, statements that Judge Lungstrum was entitled to take at face value unless the lawyers appearing before him told him otherwise.

23. The Joint Prosecution Agreement, which the defendants presented to Judge Lungstrum and included in the record, but filed under seal, specifically stated:

> "By including a client on the Excluded Client List, the applicable member of the [Group of defendant lawyers in this case] represents and warrants that (1) it believes that it is in

> such client's best interest to be excluded from the proposed class and (2) would recommend to such client that he/she/it opt out of the proposed class, if such client was included in the applicable class definition."

24. This JPA, submitted to Judge Lungstrum, was signed by the defendants in this case including Watts Guerra LLP,

25. I am not aware of evidence in the record that the defendant lawyers who entered into this JPA and submitted it to Judge Lungstrum believed that it was in their clients' best interest to be excluded from the class, or that they ever consulted with their clients about the advantages and disadvantages of being included or excluded from the class. According to the plaintiffs, this statement in the JPA was flatly false. If this statement was false, when the JPA containing this false representation was submitted by the defendants and by class counsel to Judge Lungstrum, lawyers who knew that this language was false lied to the Judge. Whether Judge Lungstrum should have asked more questions of the lawyers about the JPA is beside the point if the lawyers outright lied to the Judge. If, on the other hand, the lawyers are able to show based on the evidence in this case that their failure was at most an omission to disclose certain facts to Judge Lungstrum, then the question of where the fault lies (with them, Judge Lungstrum or both) is more nuanced. This is not an issue that should be decided by Judge Lungstrum.

26. The JPA also stated that "The Parties agree that it is in the best interests of the Producers and

Non-Producers [together the individual clients including the corn growers] for the Federal MDL, Co-Leads and the MN MDL Leadership to coordinate in the prosecution of the Syngenta Claims and focus their energies on such prosecution rather than strategies to compete with one another."

27. However, I am aware of no evidence in the record that the defendants formed a professional judgment that it was in the best interests of their clients to be opted out of the class action pursuant to the JPA. I am aware of no evidence that they discussed the JPA, the coordination contemplated by the JPA or opting out of the class action with their clients – there is simply no way they could "agree" with class counsel that something was in the best interests of their clients that they never discussed with the clients. Once again, a critically important fact in this case is whether the untruth of this statement in the JPA was something that was hidden from Judge Lungstrum intentionally by the lawyers, or whether the lawyers disclosed to Judge Lungstrum enough information that he could have asked about it if he wished. This factual question should not be decided by Judge Lungstrum.

28. In sum, based on my review of the record, there is strong evidence that by, among other things submitting the WA to the court, defendants lied to Judge Lungstrum in order to get him to approve of opting out 60,000 plaintiffs from the class action. There is evidence that the defendants showed blatant disregard for their obligations to the court under the Federal Rules of Civil Procedure, including Rule 11, and their

ethical obligations as lawyers. See ABA Model Rule 3.3 (candor to the tribunal). I do not opine here on the truth of these allegations, but they are supported by evidence in the record and are extremely serious.

29. Whether or not defendants themselves formally presented the JPAs to Judge Lungstrum or left this task to class counsel (the other party to the JPA), defendants knew that the JPAs were being presented to Judge Lungstrum for the purpose of persuading him to allow 60,000 individual corn growers to opt out the class. In fact, defendant Watts Guerra LLP had a lawyer (Lewis Remele) present in the courtroom and appearing on the record for the April 27, 2015 hearing on the Sealed Motion by Plaintiffs' for Approval of Joint Prosecution Agreement. At this hearing Don Dowling, class counsel asked for an order that "the Court finds that treating Watts and Phipps separately is in the best interests of all plaintiffs." Transcript of Hearing April 27, 2015, page 9, lines 9-16.

30. Judge Lungstrum at this same hearing specifically asked about the conflict of interest problem.

> The Court: But I'm just trying to work through, in my own mind, the economic likelihood that a corn farmer in Arkansas or Alabama is really going to want to go file suit in Minnesota just to avoid having to be part of the MDL, if it's really just how much money their lawyer might get. Because I assume their lawyer is going to give them some advice

> about what's in their best interest not in the lawyers' best interest."

Transcript page 23-24

31. It is clear from this transcript in the Syngenta case that the Court was assuming that the lawyers – both class counsel and the counsel for individual plaintiffs – were complying with their ethical and fiduciary obligations to their clients and not just putting the lawyers' financial interests first. There is substantial evidence in this case that Judge Lungstrum was working on the basis of a false assumption and that some of the lawyers in the courtroom that day were well aware of that.

32. According to the Complaint and Amended Complaint in this action the lawyers who are defendants in this action were well aware that the individual plaintiffs had never been told that they were putative members of the MDL class, that the marketing materials used to sign up these individual clients were highly misleading and that the JPA was an exchange of money and favors with class counsel whereby class counsel would allow the automatic opt outs of the plaintiffs from the MDL class and not object to the 40% contingent fee contracts. Any lawyers who were aware of these facts who sat silent in Judge Lungstrum's courtroom while he assumed the exact opposite perpetrated a fraud upon the Court.

33. Nobody in the courtroom – neither class counsel nor the Watts Guerra firm – advised Judge Lungstrum that his assumptions were incorrect, that

the plaintiffs in this case were not given any such advice by any of the lawyers purporting to represent them.

34. Judge Lungstrum did not formally approve the JPA, which had been filed under seal, because he viewed the JPA as a private contract. He did, however, rely upon these representations in the JPA to opt-out the 60,000 corn growers. See page 30, April 27, 2015 transcript ("I see no reason to disclose it [the WA] to anybody else nor am I going to approve it. . . . It's a private agreement among private parties I have read it. I'm not troubled by it, but I'm not approving it.") Judge Lungstrum issued his order on May 8, 2015, declining to approve the JPA, even though he later relied upon it to allow the plaintiffs to be opted out of the class.

35. Indeed, I am not aware of evidence in the record that the defendants ever told these 60,000 corn growers that they were members of the class and were being opted out. This fact also was concealed from Judge Lungstrum. He was only given the JPA which claimed in no uncertain terms that the defendant lawyers would recommend to these clients that they opt out of the class.

36 .When lawyers misrepresent material facts to a tribunal, the judge's knowledge of the material facts is critically important for assessing the overall impact of the misrepresentation. If the judge did not know the truth or most of the truth and relied upon the lawyers to tell the truth, the impact of the misrepresentation to the judge can be quite severe.

37. When a judge acts a fiduciary – here as fiduciary for a class or plaintiffs – the impact of misrepresentations to the Court can be even more severe. The Judge is in an untenable position. If he knew the truth – that the parties to whom he owed a fiduciary duty were being deceived by their own lawyers – the judge violated his fiduciary duty to these parties if he did not do something about It. If he did not know the truth, he was duped into failing to fulfill his fiduciary duties by the lawyers who lied to him. Whether the lawyers, the judge or both are at fault turns on the knowledge of the judge. What did the judge know and when did he know it?

38. In this situation it is in the interests of the defendant lawyers to show that the judge knew all or most of the relevant facts. They will argue that whatever facts they did not disclose to their 60,000 individual clients they disclosed to the judge. If these relevant facts known to the judge include the fact that the lawyers were deceiving their own clients, this would put the defendant lawyers in the position of throwing the judge under the bus as a co-conspirator or willing accomplice or enabler of their own conspiracy.

39. Regardless of how this plays out – which will only become clear as facts are established at trial – this is an untenable situation for the judge. He cannot without a disabling personal conflict of interest decide procedural or substantive issues in a case where a critically important underlying factual issue is whether the lawyers (i) lied to their clients but told the truth to the judge (himself), (ii) lied to their clients and to the

judge, or (iii) told the truth to both their clients and to the judge. Of course, defendants want Judge Lungstrum, without examining the underlying facts, not to recuse from this case and to make determination (iii) and dismiss all or most of this case. But I am not aware of evidence in the record that would support determination (iii) – that the defendant lawyers were honest with both their clients and the court. Such a determination – made by a Judge who faces a personal conflict of interest with respect to determinations (i) and (ii) – is a serious violation of due process.

40. Alternatively, defendants would want Judge Lungstrum to keep this case on his docket but through procedural determinations, such as refusing to certify the class and dismissing certain claims, end the case. Once again this is a fundamental violation of due process if such procedural determinations, avoiding a decision on the merits, are made by a Judge who faces the above-mentioned conflict of interest in factual determinations were the case to go to trial.

41. Yet another risk is presented by ex-parte communications that may have occurred between Judge Lungstrum and lawyers who are defendants in this case or class counsel in the Syngenta litigation who are virtually certain to be witnesses in this case. Many of those communications were very likely about the substantive and procedural issues in the Syngenta case. But some of these communications particularly if they concerned the JPAs were about the substantive issues in this case – e.g. whether defendants were acting in the best interests of their individual clients (the

plaintiffs in this case) who they signed up as clients and then opted out of the Syngenta class action. Likely Judge Lungstrum was told that these lawyers were looking out after the best interests of their individual clients or he would not have allowed these lawyers to opt their clients out of the class. But there is no record of what he was told in side bar conversations and/or conversations in chambers that are not in the record. Counsel for Syngenta probably knows, assuming counsel for Syngenta was there, but those conversations with Judge Lungstrum were ex-parte insofar as *this case* is concerned. Counsel for plaintiffs in this case was not there.

42. This ex-parte communication problem is easily solved if a different judge hears this case. If Judge Lungstrum keeps this case, his procedural and substantive rulings in this case could be influenced by communications made to him by defendants, or by class counsel acting in coordination with defendants under the JPA, without counsel for the plaintiffs being present. That in itself is a serious impediment to the due process that plaintiffs are entitled to expect in a fair and impartial hearing of their claims.

43. Finally, Judge Lungstrum likely could be called as a witness in this case at trial. Defendants are very likely to argue that whatever facts they did not disclose to their individual clients – approximately 60,000 corn growers – they disclosed to Judge Lungstrum who was acting as a fiduciary for all class members, including for these plaintiffs.

44. I do not opine on the legal validity of such an argument ("whether or not we lied to our clients, we told the judge the entire truth"), but based on the facts in the record it is possible if not probable that the defendants will make it. The factual validity of such an argument would turn almost entirely upon what Judge Lungstrum was and was not told about the defendants' relationship with their clients, about the JPAs and other matters, during the Syngenta litigation. Because at least some relevant communications were likely made off the record, the only reliable witness on these factual questions is Judge Lungstrum. If this case proceeds to trial it will likely be tried before a federal district court in Minnesota, and Judge Lungstrum will be an important witness.

45. It is fundamental that the same person cannot be a judge and a witness in the same proceeding. For this reason alone, Judge Lungstrum should recuse from this case now.

46. For these reasons Judge Lungstrum's participation in this case will destroy the due process rights of the parties. The damage will likely be irrevocable. I am not opining here on the validity of his rulings, but their impact on this case is substantial and irrevocable unless and until these rulings are reversed, which could take years.

47. And for practical purposes the passage of time will destroy the due process rights of the plaintiffs. This case is presently the basis for imposing a constructive trust upon the defendants' attorney fee

awards from the Syngenta MDL Common Fund. The MDL Panel recognized this and held that the Court could create an escrow fund to retain the disputed attorneys' fees until this case is resolved but the Transfer Order did not require such an escrow fund. Once the Syngenta case is concluded and the funds are released to the attorneys, it will be extremely difficult to get the money back. Once the defendant lawyers obtain fees from the common fund – without a fair and impartial hearing of the claims in this case – it will be virtually impossible to get the money back.

48. In summary, Judge Lungstrum has presided over the Syngenta MDL class action and the settlement proceedings. This case, however, is against the lawyers who allegedly opted the plaintiffs out of the Syngenta MDL class without their knowledge, lied to the plaintiffs about the nature of the action and the services they would perform and lied to the Judge about their role in the case. These lawyers – and lawyers associated with them and other lawyers who entered into joint prosecution agreements with them – have had countless opportunities to communicate exparte with Judge Lungstrum only in the presence of counsel for Syngenta, not in the presence of the clients themselves, counsel in this case or any other lawyer charged with protecting these clients against the actions of the defendants.

49. Judge Lungstrum's knowledge is from another proceeding, and the most important part of that knowledge is from something that should never occur in another proceeding – lawyers lying to a judge and

the judge not conducting an inquiry sufficient to detect the lie. All of this was done at a time when there were no lawyers present in the courtroom to protect the interests of the plaintiffs (the class action counsel present at these hearings was focused on the case against Syngenta and had entered into the JPA's with the defendant lawyers that were not reviewed by Judge Lungstrum for evidence of collusion).

50. Fairness requires that this case against the lawyers be heard by a separate judge who does not (i) have a conflict of interest because the case requires him to assess his own conduct, what he knew in separate proceedings that occurred several years ago and whether lawyers had lied to him in those proceedings, (ii) does not have knowledge of disputed evidentiary facts from among other things ex-parte communications in another proceeding, and (iii) is not likely to be a witness at trial. Judge Lungstrum should recuse.

51. Although I do not opine here on ultimate questions of law, I have considered the recusal statute for federal judges in forming my opinion that Judge Lungstrum should recuse. 28 U.S. Code § 455 provides:

> **28 U.S. Code § 455. Disqualification of justice, judge, or magistrate judge, provides:**
>
> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

52. For the reasons set forth above I am of the opinion that Judge Lungstrum should reuse himself from this case because (1) his "impartiality might reasonably be questioned, (2) he has "personal knowledge of disputed evidentiary facts concerning the proceeding," and (3) he is "likely to be a material witness in the proceeding."

53. Judge Lungstrum's impartiality might reasonably be questioned. Judge Lungstrum has interacted with the lawyers in this case – principally class counsel but also some of the defendant lawyers who represented plaintiffs individually – in the course of the Syngenta litigation. Judge Lungstrum already has set aside $503 million in total fees including fees for the lawyers who are defendants in this case. This case concerns in part whether those lawyers are deserving of those fees or whether they should hold those fees in constructive trust, forfeiting them to the clients who they deceived in the course of the Syngenta litigation.

54. More important, this case concerns the question of who breached their fiduciary duty to the plaintiffs who were putative class members in the Syngenta case. Did the defendant lawyers breach their fiduciary duty by lying to the plaintiffs and lying to Judge

Lungstrum, did class counsel breach their fiduciary duty to the plaintiffs by lying to Judge Lungstrum about the JPAs or sitting silently while the defendant lawyers lied, did Judge Lungstrum breach his fiduciary duty to protect the plaintiff class members, or was there no fiduciary breach at all? Judge Lungstrum is not the appropriate judge to hear this case without at least the appearance of bias if not actual bias.

55. Judge Lungstrum has extrajudicial knowledge of information material to this proceeding. This includes the specific ex-parte statements made to him by the Syngenta class counsel about their relationship with defendant lawyers in this case. That relationship – the subject of the joint prosecution agreements – is one of the issues that is critical to this case. Plaintiffs allege that they were never told about these joint prosecution agreements by defendants – who they had retained to be their lawyers in individual lawsuits – or by class counsel. Plaintiffs also allege that Judge Lungstrum did not rule on the validity of the joint prosecution agreements because defendants and class counsel represented to him that these were private contracts that conformed with rules of professional conduct. Factual and legal determinations about these joint prosecution agreements, what Judge Lungstrum was told about them, and other aspects of this case should be made by a different judge.

56. Furthermore, Judge Lungstrum could be called as a witness in this proceeding. Defendants may claim that they fully disclosed the terms of the joint prosecution agreements, and what they told the

plaintiffs, to the Court in the Syngenta litigation. Determining exactly what was disclosed could require the testimony of Judge Lungstrum, particularly if there were conversations between him and class counsel or the defendants outside the presence of the court reporter.

57. Finally, there are serious constitutional due process concerns if Judge Lungstrum does not recuse from this case. The Constitutional due process issue is distinct from the recusal standard for federal judges set forth in 28 U.S. Code § 455. The Fifth Amendment requires constitutional due process in federal courts and the Fourteenth Amendment applies to the states. The Supreme Court has ruled that a federal or state judge's failure to recuse himself can in some instances violate the constitutional right of the parties to due process.

58. There are circumstances in which a judge should not hear a case involving conduct that occurred in another case 'before the same judge. The Supreme Court has held that a judge who had previously acted as a "one-man grand jury" – compelling witnesses to appear before him in secret to testify about suspected crimes – cannot consistent with the Due Process Clause of the Fourteenth Amendment convict a witness of contempt for conduct in the secret hearings. In the Matters of Lee Roy Murchison and John White, Petitioners, 349 U.S. 133 (1955), citing In re Oliver, 333 U.S. 257 (1948). The contempt case must be tried before a different judge. Id.

59. As the Court in *Murchison* observed, "Thus the judge, whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination. . . . If the Charge should be heard before that judge, the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant." *Murchison* at 138-39.

60. The Supreme Court also held in Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971) "that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor." Similar logic should apply to a criminal or civil action brought against a lawyer or witness for conduct that involved lying to a judge in another case. The new case should be heard before a different judge.

61. Indeed, in Caperton v. Massey Coal, 556 U.S. 868 (2009) the Supreme Court cited and quoted both *Murchison* and *Mayberry* in expounding upon the impact of judicial bias on constitutional due process in a civil case. "The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules.

Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case." Id.

62. In *Williams v. Pennsylvania*, 579 U.S.(2016) (holding that a prosecutor who approved seeking the death penalty cannot even decades later as a judge hear the same case on appeal) the Court said:

> "Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether the judge harbors an actual, subjective bias, but instead whether, as an objective matter, "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional "potential for bias.' *Caperton*, 556 U.S., at 881."

63. *Caperton* and *Williams* involve different facts from this case, but these broad principles defining the relationship between judicial bias and due process apply in all cases, including this one. Whether or not Judge Lungstrum is biased, the average judge in Judge Lungstrum's position in this case is not likely to be neutral and likely has an unconstitutional potential for bias.

64. I do not opine here on the ultimate constitutional question – whether Judge Lungstrum is required to recuse from this case under the Fifth

Amendment. If necessary, that is a question that the courts will decide. However, for the reasons set forth above, I believe that Judge Lungstrum should recuse from this case to avoid serious due process violations. There is a substantial risk that his failure to recuse is a violation of due process rights under the Constitution.

65. There were multiple fiduciaries in the Syngenta class action who were legally obligated as fiduciaries to diligently protect the interests of the plaintiffs as putative and absent members of the Syngenta class. These fiduciaries included Judge Lungstrum himself and also the lawyers. The lawyer fiduciaries were both the class counsel and the defendant lawyers who purported to represent the plaintiffs as individual plaintiffs. Now the plaintiff class members allege breach of fiduciary duty. The fiduciary duty breach, if it occurred could have been a breach of fiduciary duty by the class counsel, a breach of fiduciary duty by the defendant lawyers who purported to represent the plaintiffs as individuals, a breach of fiduciary duty by Judge Lungstrum, or a breach of fiduciary duty by two of the above or by all three. Judge Lungstrum, as one of these fiduciaries for the plaintiff class, has an untenable conflict of interest if he sits on this case that turns upon a factual determination of whether there was a fiduciary breach and, if so, which fiduciaries were responsible for it.

66. Judge Lungstrum is in a bind in this case: he has three alternatives: (i) throw himself under the bus (for breaching his fiduciary duty to the plaintiffs as

part of the class); (ii) throw the lawyers under the bus (for lying to him); or (iii) throw the plaintiffs in this case out of court. Judge Lungstrum should not allow himself to be put in this position.

67. Due process considerations require that Judge Lungstrum recuse. Conclusion

68. For the reasons set forth above I am of the opinion that Judge Lungstrum should recuse from this case.

/s/ Richard W. Painter
Richard W. Painter
February 1, 2020

SUPPLEMENTAL REPORT OF RICHARD W. PAINTER

1. I submit this report to supplement my report in this case of February 1, 2020 (the "Report").

2. The issue upon which I opined in the Report was whether Judge Lungstrum should recuse from this case to avoid an appearance of bias and a violation of due process. For the reasons stated in the Report I concluded that Judge Lungstrum should recuse.

3. Plaintiffs' counsel in this case has alleged that Judge Lungstrum breached his fiduciary duty to the individual corn growers (approximately 60,000) who were automatically opted-out of the Syngenta class pursuant to his order because Judge Lungstrum, among other things, did not address factual evidence that the defendants were colluding with class counsel and exchanging money and favors while ignoring the best interest of their individual clients and class members. Those are the allegations made by plaintiffs' counsel, and I did not opine as to the validity of those allegations in the Report.

4. I did not in the Report, and I still do not, take a position on the question of whether Judge Lungstrum breached his fiduciary duty to the plaintiffs.

5. To the extent Judge Lungstrum in his Memorandum and Order of April 3, 2020 assumes that I opined that he breached a fiduciary duty to the plaintiffs or assumed in the Report that he breached a fiduciary duty, Judge Lungstrum is incorrect. See Memorandum

and Order, page 6 ("As set forth in the expert report's summary, a primary basis for Prof. Painter's opinion is plaintiffs' allegation that the undersigned [Judge Lungstrum] [breached a fiduciary duty]"). I made so such assumption.

6. In the Report I specifically stated that:

> "I do not opine at this time as to whether or not Judge Lungstrum breached his fiduciary duty to the individual corn growers opted out of the Syngenta class. If Judge Lungstrum did in fact breach his fiduciary duty in the Syngenta class action, that would be an additional ground for his recusal in this case where his own conduct would be at issue. My opinion here, however, is limited to the other compelling reasons for Judge Lungstrum to recuse from this case regardless of the propriety of the decisions that he made in the Syngenta class action."

7. In sum, it should be abundantly clear from the Report that I reach my conclusions on the recusal issue regardless of whether Judge Lungstrum did or did not breach a fiduciary duty to the plaintiffs.

8. What is clear from the Report is that Judge Lungstrum is in an untenable situation of having to determine whether the defendant lawyers, and potentially other lawyers, lied to him in a case that he has already heard and concluded. Did the lawyers violate their duty of candor to the tribunal under the Federal Rules of Civil Procedure and ABA Rule 3.3 (Candor the Tribunal) or did Judge Lungstrum fail to ask the questions that he should have asked the lawyers to prevent

these lawyers from deceiving and defrauding their own clients, or did the deception result from a mixture of these factors? I do not assume anything with respect to Judge Lungstrum's prior knowledge or conduct in the case, but I do conclude in my Report that these questions should not be answered by Judge Lungstrum, and that Judge Lungstrum should not be the judge who decides whether this case goes forward.

9. I also point out in the Report that this case turns in significant part on the prior knowledge of Judge Lungstrum . If Judge Lungstrum knew the truth – that the parties to whom he owed a fiduciary duty were being deceived by their own lawyers – he would have violated his fiduciary duty to these parties if he did not do something about it. If Judge Lungstrum did not know the truth, he would have been duped by the lawyers who lied to him. Whether the lawyers, Judge Lungstrum or both are at fault turns on the knowledge of Judge Lungstrum. That is an issue with respect to which Judge Lungstrum is a material witness.

10. I concluded in my Report that Judge Lungstrum cannot without a disabling personal conflict of interest decide procedural or substantive issues in this case where the underlying factual issue is whether the lawyers (i) lied to their clients but told the truth to Judge Lungstrum, (ii) lied to their clients and to Judge Lungstrum, or (iii) told the truth to both their clients and to Judge Lungstrum. Defendants want Judge Lungstrum, without examining the underlying facts, not to recuse from this case and to make determination (iii) and dismiss all or most of this case. But I am not

aware of any evidence in the record that would support determination (iii) – that the defendant lawyers were honest with both their clients and the Court. Such a determination – made by Judge Lungstrum who faces a personal conflict of interest with respect to determinations (i) and (ii) is a serious violation of due process.

11. For the reasons set forth in the Report and for the reasons set forth above, I have no opinion and do not assume anything with respect to whether Judge Lungstrum breached a fiduciary duty to the plaintiffs, but I am of the opinion that Judge Lungstrum should recuse from this case.

/s/

Richard W. Painter
April 9, 2020

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 455 – Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding, in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

> **(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

> **(i)** Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> **(ii)** Is acting as a lawyer in the proceeding;
>
> **(iii)** Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest"

in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding, could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding, could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by

the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

28 U.S.C. § 1407 – Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of

the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by –

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the

district court in which a transfer hearing is to be or has been held. The 'miler's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the

district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.