

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION**

**IN RE: DICAMBA HERBICIDES)
LITIGATION)**

**MDL No. 2820
ALL CASES**

ORDER SETTING INITIAL SCHEDULING CONFERENCE

Thirteen cases in this multi-district case are now pending in in the Eastern District of Missouri, four of which were initially filed in this district. In fashioning a scheduling order, this Court takes in account the reasons for combining these cases, as stated in the MDL transfer order:

On the basis of the papers filed and the hearing session held, we find that these actions involve common questions of fact, and that centralization in the Eastern District of Missouri will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. The actions share factual questions arising from allegations concerning the development, testing, and marketing of Monsanto’s dicamba-resistant Xtend seeds and three dicamba herbicides – XtendiMax, Engenia, and FeXapan – as well as allegations of injury from the use of those herbicides, either alone or in conjunction with the Xtend seeds. Centralization will eliminate duplicative discovery, the possibility of inconsistent rulings on class-certification, *Daubert* motions, and other pretrial matters, and conserve judicial and party resources. In particular, discovery concerning the development, testing, marketing, and regulatory histories of the herbicides and seed products – including expert discovery on such matters as the chemical composition of the herbicides and the mechanism of injury – appears likely to be extensive. Plaintiffs’ allegations that defendants conspired with one another to conceal the risks and misrepresent the characteristics of their products to regulators and the public also may necessitate significant discovery into defendants’ various business agreements and arrangements.

At the outset this Court recognizes that this MDL is somewhat more complicated than others. To be sure, each of the combined cases appears to have at least one claim that is common to all the cases, that is, negligence on the part of Monsanto. In other respects, however, the claims vary widely. Some claims involve damages from non-Monsanto dicamba products both before and after the release of Monsanto's dicamba herbicide, XtendiMax. Other claims focus on alleged deficiencies in XtendiMax, itself.

Some claims are brought individually. Others are class actions, some of which are nationwide, and some statewide only. Some cases have multiple state law claims in addition to the claims common with the other MDL cases. And significantly, three cases – brought exclusively by purchasers of the dicamba-resistant Xtend seeds – are based primarily on alleged Sherman Act and Lanham Act violations, and only secondarily on the tort-based claims of dicamba crop damage. In an attempt to sort out the various parties, claims and classes, and for the convenience of counsel, a chart is attached to this order.

This Court also notes that all cases have pending motions that will be subject to new briefing schedules, unless, of course, they have been fully briefed, in which case they will be considered by the Court forthwith. There are several pending motions to dismiss that undoubtedly will present legal issues common to some or all of the cases, and the resolution of those motions will undoubtedly result in efficiencies gained. It bears mention as well that the Bader and Landers cases are farther along than the other cases, and in fact, Bader has a pending and fully briefed motion for partial summary judgment. In addition, a major discovery dispute has already arisen in the Bader and Landers cases. There is a likelihood that the discovery issues in Bader and Landers are representative, at least in part, of those that will arise in most or all of the cases, and that another efficiency can be gained by consolidated discovery. But should the case become bogged down in discovery disputes, and though this Court will strive to resolve those disputes expeditiously, it may be necessary to appoint a special master for that purpose.

With these concerns in mind, it may be unfeasible to develop a firm case management order for the MDL at the initial scheduling conference. However, the selection of lead counsel (or counsels) and an executive committee for the combined plaintiffs should be achievable. This Court assumes that counsel for Monsanto will be lead counsel for all defendants. Within three weeks or so after the initial conference, a second scheduling conference will be held to finalize the case management order. All that said, this Court will certainly entertain any agreed-on matters pertaining to scheduling and administration at the initial conference.

Accordingly,

IT IS HEREBY ORDERED that the counsel for all parties shall appear for an initial scheduling conference on ***Wednesday, March 28, 2018 at 1:00 p.m. in Courtroom 4B of the Rush Hudson Limbaugh, Sr. United States Courthouse in Cape Girardeau, Missouri.*** At least one counsel for each party shall appear in person at the conference.

No telephone appearances will be allowed.

Well in advance of this conference, plaintiffs' counsel shall meet and confer in an attempt to reach agreement on which lawyers should be appointed as plaintiffs' lead counsel, whether a plaintiffs' steering committee should be appointed, and whether any subgroups should be formed. In the absence of agreement on lead counsel, the Court will accept individual applications to become lead counsel. In any event, counsel shall attempt to agree on a method for resolving any disputes, including a proposal for motions and briefs, and counsel should be prepared to present that to the Court at the conference.

At their meeting, plaintiffs' counsel shall attempt to reach agreement at least on an outline for a proposed schedule for conducting discovery, class certification proceedings, and motion practice. Additionally, plaintiffs' counsel are specifically asked to discuss among themselves whether a consolidated class action complaint should be filed that would include the claims of all plaintiffs in one pleading.

Attorney **Don M. Downing** of Gray, Ritter & Graham is appointed plaintiffs' temporary liaison counsel. He shall arrange for the conference of plaintiffs' counsel, to be held no later than **Friday, March 16, 2018**, and shall make all reasonable efforts to include in the conference any counsel representing plaintiffs in related cases that have not yet been transferred to the MDL, but that are expected to become a part of it.

Thompson Coburn is appointed defendants' temporary liaison counsel. The firm shall be responsible for filing any matters required of defendants in this order.

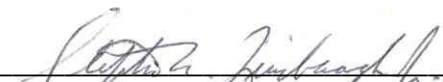
Defendants should be prepared to report at the initial conference whether any of their counsel will withdraw, whether any defendants intend to file motions to dismiss based on

jurisdiction or service issues, and whether they believe the appropriate defendants have been named.

Not later than **Friday, March 23, 2018**, plaintiffs and defendants shall separately submit to the Court *brief* written statements indicating their preliminary understanding of the facts involved in the litigation and the critical factual and legal issues. These statements should address, among other things, whether any additional defendants are likely to be joined, the various class definitions that have been proposed, what class certification discovery is expected to be necessary, the types of expert testimony that are likely, and the ranges of damages that are likely to be claimed. These statements are simply for this Court's information: they will not be binding, they will not waive claims or defenses, and they may not be offered in evidence against any party in later proceedings. The parties' statements also shall identify any cases that either side knows about that have not been transferred to the MDL by that time.

The provisions of this Court's order of February 14, 2018 remain in effect.

Dated this 2nd day of March, 2018.



STEPHEN N. LIMBAUGH, JR.
UNITED STATES DISTRICT JUDGE