

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

**IN RE: DICAMBA HERBICIDES
LITIGATION**

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**MDL No. 2820 SNLJ
ALL CASES**

ORDER ALLOWING CONSOLIDATED MASTER COMPLAINTS

From the beginning of this multidistrict litigation (“MDL”), plaintiffs—who (as represented to this Court) all agree—have asked to file substantive consolidated master complaints. Defendants strongly oppose the substantive consolidated master complaints and claim the complaints may be used only if they consent, which they refuse to do.

After the initial scheduling conference, the parties filed briefs addressing the master-complaint issue. (#29, 30, 33, 34.) At the second scheduling conference, this Court—with only minor objection from the defendants—granted plaintiffs’ request to file substantive consolidated master complaints for their antitrust claims. (#39.) After the second conference, the parties met and conferred on potential substantive consolidated master complaints for plaintiffs’ crop damage claims. Then, unable to agree, they filed status updates that summarized the meet-and-confer discussions. (#41, 42.) After extensive briefing, the issue is ripe. The Court grants plaintiffs’ request to file substantive consolidated master complaints for their crop damage claims.

I. Legality of Substantive Consolidated Master Complaints

Defendants make four legality-based arguments, and the Court will consider each separately.

First, defendants rely on language in a footnote of a Supreme Court opinion to support their proposition that a consolidated complaint should be treated as the operative

complaint only when the parties have agreed to this arrangement. (#34 at 6.) The footnote reads as follows:

Parties may elect to file a “master complaint” and a corresponding “consolidated answer,” which supersede prior individual pleadings. In such a case, the transferee court may treat the master pleadings as merging the discrete actions for the duration of the MDL pretrial proceedings. *In re Refrigerant Compressors Antitrust Litigation*, 731 F.3d 586, 590–592 (C.A.6 2013). No merger occurs, however, when “the master complaint is not meant to be a pleading with legal effect but only an administrative summary of the claims brought by all the plaintiffs.” *Id.*, at 590.

Gelboim v. Bank of Am. Corp., 135 S. Ct. 897, 905 (2015). These statements do not support defendants’ propositions for two reasons. One, the footnote simply does not say that a consolidated complaint should be treated as the operative complaint *only if* the parties agree. Two, the Supreme Court cited *In re Refrigerant Compressors Antitrust Litigation*, 731 F.3d 586 (6th Cir. 2013), as support for both statements. In that case, the Sixth Circuit explained its holding “rests on the *plaintiffs’* decision to file a *legally operative* combined complaint.” *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d at 592. The emphasis is on plaintiffs’ decision, not plaintiffs’ decision and defendants’ decision. This argument fails.

Second, defendants argue “[t]he filing of a superseding master complaint requires the consent of defendants where, as here, it would alter the choice of law analysis.” (#33 at 8.) But under plaintiffs’ proposal, “plaintiffs who already have a case in the MDL shall be deemed to have filed in the jurisdiction where their case was originally filed.” (#30 at 7.) Thus, the Court will apply Missouri’s choice-of-law analysis to the claims that were originally filed in a Missouri court alleging violations of Missouri law. And

likewise for the claims that were originally filed in other states alleging violations of those states' laws. This argument fails.

Third, defendants argue “superseding master complaint[s] can also significantly complicate the subsequent remand of the cases back to their transferor courts, which is required if the cases are not dismissed or settled. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 39 (1998) (cases transferred to an MDL must be remanded to the transferor court for trial).” (#33 at 9.) But nothing in plaintiffs’ proposal “could be used to circumvent the remand requirement of 28 U.S.C. § 1407[.]” *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 141–42 (E.D. La. 2002). When the time comes, the individual cases and any certified class action subclasses will be severed and transferred back to the districts where they were originally filed and where the pertinent state law applies. Thus, there is no violation of the *Lexecon* mandate.

Fourth, defendants argue new plaintiffs cannot be added to the MDL unless they file their own lawsuits and request transfer to this MDL.¹ (#42 at 5–6.) It is true that plaintiffs requested the ability “to add new parties, facts, allegations, and claims to any Master Complaint without having to amend previously filed complaints or file new cases.” (#30-1 at 2, ¶1.) To the extent plaintiffs propose to add new party plaintiffs to the master complaint, there are at least two reasons the proposal should be denied.

One, “Congress authorized multidistrict litigation to ‘consolidate []’ existing ‘civil actions . . . pending in different districts,’ not to create new actions[.]” *In re FCA US*

¹ Defendants actually made this argument in opposition to plaintiffs’ suggestion that, if the Court does not allow substantive consolidated master complaints, the Court should allow plaintiffs to basically create a comprehensive master complaint by amending an existing one. But the argument still applies to any attempt to add new plaintiffs to a master complaint, for all the reasons defendants noted.

LLC Monostable Elec. Gearshift Litig., No. 16-MD-02744, 2017 WL 6402992, at *1 (E.D. Mich. Mar. 21, 2017) (alterations in original) (internal citation omitted) (*quoting* 28 U.S.C. § 1407(a)), *reconsideration denied*, No. 16-MD-02744, 2017 WL 6402991 (E.D. Mich. Mar. 23, 2017). Two, under plaintiffs’ proposal, “[a]ny plaintiff appearing in the first instance in the master complaint, and therefore not already named in a complaint in the MDL, would be deemed to have filed in the first instance in the Eastern District of Missouri, subject to all arguments as to whether jurisdiction exists in this district.” (#41 at 3.) But it’s possible that, had these newly added plaintiffs filed their own cases, they would have filed their cases in a district other than this one. If that district is outside Missouri, another state’s choice-of-law analysis will apply. In that case, plaintiffs’ proposal would alter defendants’ substantive rights, which is not permissible. All that said, the Court will entertain supplemental briefing on this issue at either party’s request.

Although the Court denies plaintiffs’ request to add new party plaintiffs, this does not change the Court’s conclusion that plaintiffs may file substantive consolidated master complaints without defendants’ consent.

Finally, the Court notes there is no substantive difference in using substantive consolidated master complaints instead of individual complaints. As explained above, defendants will not lose any rights under the substantive-consolidated-master-complaints approach. After all, as this Court has previously advised, if the parties used only individual complaints, the Court would have allowed plaintiffs at this early stage to amend each complaint before defendants filed any motions to dismiss, or any response to motions to dismiss.

II. Efficiency of Substantive Consolidated Master Complaints

Defendants also argue using master complaints will unnecessarily delay rulings on threshold liability issues. (#33 at 13.) While it's true that some motions to dismiss are fully briefed, defendants will likely be able to recycle their briefing. And even if the Court ruled on pending motions to dismiss and granted them, plaintiffs would have the chance to re-plead, prompting another round of motions to dismiss. Instead, plaintiffs will put their best pleading foot forward under the substantive-consolidated-master-complaint approach.

The main difference is, under the individual-complaint approach, there would be several operative complaints, with some alleging the same facts and causes of actions as others. But under the substantive-consolidated-master-complaint approach, these allegations and causes of action will be streamlined in one document, maximizing both the parties' and the Court's resources.

III. Discovery Under Substantive Consolidated Master Complaints

The parties have agreed on the content of a "long-form" plaintiff fact sheet that will replace formal written discovery for the crop damage claims. (#44-1.) The parties disagree on who must answer the "long-form" plaintiff fact sheet. On the one hand, plaintiffs argue that only named class representatives should be required to engage in full discovery before the class certification stage. (#44 at 1.) They claim "it would be unnecessarily burdensome and premature to subject what is likely to be hundreds of plaintiffs to this level of discovery." (#44-1.) Alternatively, if discovery is required, plaintiffs argue non-lead plaintiffs should only be required to answer a condensed version of the plaintiff fact sheet. (#44-2.)

On the other hand, defendants argue limiting discovery under plaintiffs' approach would cause evidence to go stale as to plaintiffs who are not lead plaintiffs in the master complaints. They also claim plaintiffs' approach would "deny Defendants the opportunity to oppose class certification using discovery from [p]laintiffs that have filed suit" and would "improperly hamstring Defendants' ability to demonstrate that the named [p]laintiffs are not sufficiently representative of the proposed class to support class certification." (#45 at 3.) The Court agrees. At last count, there are fewer than 150 plaintiffs whose cases are in the MDL. And although plaintiffs argue they will be unable to complete the "long-form" fact sheet without the assistance of counsel (#44 at 3), all plaintiffs are currently represented by counsel. Thus, complying with discovery will not be overly burdensome. And after all, these plaintiffs who filed individual lawsuits would otherwise have been subject to this level of discovery. Accordingly, all plaintiffs who have already filed a case must answer the agreed-to "long-form" plaintiff fact sheet.

IV. Procedures for and Effects of Substantive Consolidated Master Complaints

In view of the foregoing, the Court enters the following order establishing procedures for the case:

1. Plaintiffs shall file one or more consolidated complaints designated as Master Complaint(s) and further designated to identify the claims and/or categories of plaintiffs to which they relate (antitrust, crop injury, soybean producers, or other relevant descriptive designation). Plaintiffs shall be permitted to add new parties, facts, allegations, and claims to any Master Complaint without having to amend previously filed complaints or file new cases, except new party plaintiffs will not be permitted. The Master Complaint(s) shall be deemed to supersede by amendment, under Rule 15(a) of

the Federal Rules of Civil Procedure, the constituent complaints as to any plaintiff who is named in it. As to plaintiffs in any constituent complaint who are not named in a Master Complaint, that constituent complaint shall remain operative only as to those plaintiffs not named in a Master Complaint and such plaintiffs will have an opportunity to elect to dismiss their claims or file a Notice to Conform to a Master Complaint as set forth below. Plaintiffs shall file any Master Complaint by June 8, 2018.

2. Any current plaintiff in the MDL that is not named in a Master Complaint shall be provided an opportunity to dismiss without prejudice or conform their operative pleading to a Master Complaint by filing a Notice of Dismissal pursuant to this Order or by filing a Notice to Conform. Plaintiffs shall file any Notice of Dismissal or Notice to Conform by July 9, 2018. Any plaintiff whose case is transferred into this MDL after the deadline shall file any such notice by the established deadline or within 30 days of transfer into this MDL, whichever is later.

3. The Master Complaint shall also be deemed to amend the individual claims of any plaintiff who files a Notice to Conform to the appropriate Master Complaint on the MDL docket and in their constituent case. Together, the Notice to Conform and Master Complaint shall be treated as the operative Complaint in any constituent case for any individual plaintiff. Any responsive pleading filed by the defendants to the Master Complaint, whether filed before or after a Notice to Conform by the plaintiff is filed, shall apply. If a plaintiff's constituent case names a defendant that is not named in the Master Complaint, the absent defendant shall be deemed to have been voluntarily dismissed without prejudice under Rule 41 of the Federal Rules of Civil Procedure. If a defendant is named in the Master Complaint who is not named in the constituent case, by

filing a Notice to Conform, the plaintiff shall be deemed to have added that defendant to their constituent case pursuant to Rule 21 of the Federal Rules of Civil Procedure.

Amendments to the Master Complaint shall be deemed to automatically apply and amend any case brought by a plaintiff who has filed a Notice to Conform.

4. Nothing in this Order, the filing of a Master Complaint, or a plaintiff's filing a Notice to Conform shall be deemed to affect where that plaintiff's case is ultimately set for trial, and both sides reserve all of their respective rights and arguments (under *Lexecon* and otherwise) as to venue at the conclusion of pretrial proceedings in this MDL. Whether named in a Master Complaint or having conformed their pleading to a Master Complaint, plaintiffs who already have a case in the MDL shall be deemed to have filed in the jurisdiction where their case was originally filed.

5. By filing a Notice to Conform, no individual plaintiff shall be deemed to have adopted any class-action allegations, nor shall he or she be deemed to have waived any right to object to class certification or to opt out of any class that the Court may certify. By filing a Notice to Conform, no individual Plaintiff shall be deemed to have opted out of any class that the Court may certify. If necessary, the Court will provide procedures and deadlines for opting out of any class by further order.

6. All actions other than the Master Complaint(s) that are not dismissed without prejudice shall remain stayed, with the exception of the filing of a motion to remand and the opportunity to file a Notice of Dismissal Without Prejudice under this Order or a Notice to Conform. The Court will enter an order addressing the conduct of pretrial proceedings related to individual claims at a later time, after first addressing the claims set forth in the Master Complaint(s). Orders resulting from motion practice

directed at the Master Complaint(s) shall be deemed to apply to the parties in any case where a Notice to Conform has been filed.

7. As for any action of a plaintiff who is not named in the Master Complaint(s) and who elects not to file a Notice to Conform, such matter will be stayed, including the requirement for defendants to file any responsive pleading or motion, except with regard to motions to remand to state court or objections to the application of Orders directed at the Master Complaint(s). Any Orders issued by the Court that are directed to a Master Complaint shall be deemed to apply to all cases to the extent the issues have the same subject matter as the allegations, claims, and parties in the individual cases. The failure by a plaintiff to file an objection within 14 days of an Order explaining why that Order directed to a Master Complaint should not apply to his or her individual case shall be deemed a waiver.

8. All pending motions to dismiss shall be stayed until the expiration of the deadline to file a Notice of Dismissal under this Order or a Notice to Conform, at which time any such motion directed only at plaintiffs who have been named in a Master Complaint or who filed a Notice of Dismissal or Notice to Conform shall be denied as moot.

So ordered this 8th day of May 2018.



STEPHEN N. LIMBAUGH, JR.
UNITED STATES DISTRICT JUDGE