BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

IN RE: DICAMBA HERBICIDES LITIGATION	:	MDL NO. _____

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR TRANSFER OF ACTIONS PURSUANT TO 28 U.S.C. §1407

Plaintiffs Brian Warren and Warren Farms (collectively, the "Plaintiffs" or "Movants"), respectfully submit this memorandum of law in support of their motion for transfer of all currently filed federal cases in this litigation, and any subsequent "tag along" cases involving similar claims, to the United States District Court for the Southern District of Illinois for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407.

For the reasons set forth below, Movants respectfully request that the Panel transfer the actions implicated by this motion to the United States District Court for the Southern District of Illinois.

I. INTRODUCTION AND BACKGROUND

The cases at issue result from injuries to crops, timber, and plant life caused by the off-target movement of dicamba herbicides. Since the release of dicamba resistant crop systems, and dicamba formulations intended for in crop uses, farmers planting non-dicamba resistant crops have suffered extensive damages from dicamba herbicides. During last year's growing season, millions of acres of crops and other vegetation have been damaged by off target movement of dicamba, resulting in serious economic losses to farmers, timber producers, and other businesses throughout the United States.

Dicamba is a volatile auxin herbicide that has been sold for limited uses since the 1960s. Because of dicamba's extreme volatility—its propensity to vaporize and move off the application

target as a gas—and high toxicity to commodity crops, dicamba has not traditionally been used during the crop growing season. Dicamba has traditionally been used only for controlling weeds before planting or after harvest, when there is minimal risk of exposing commodity crops. However, defendants in these actions recently began marketing dicamba herbicides for novel and unsafe uses during the crop growing season.

In response to the impending loss of patent protections for its Roundup herbicide and genetically modified Roundup resistant crops, and to the proliferation of weeds that have grown resistant to Roundup, Monsanto began developing new genetically modified crops that would be resistant to the herbicide dicamba. BASF, which had a long history manufacturing and formulating various dicamba herbicides, entered into several joint licensing agreements with Monsanto to formulate new dicamba herbicides that could be used during the growing season in Monsanto's dicamba resistant crops. Through these joint licensing agreements, Monsanto and BASF jointly developed, tested, and manufactured new formulations of dicamba that were intended to be used during the crop growing season as in-crop, over the top herbicides. Pursuant to these efforts and agreements, Monsanto would go on to sell the dicamba herbicide Xtendimax, and BASF would go on to sell the dicamba herbicide Engenia. Monsanto further licensed its dicamba formulation to Dupont for sale as the herbicide Fexapan.

Before the 2017 growing season, Monsanto, BASF, and Dupont received approval to sell these new dicamba formulations for in-crop usage with Monsanto's dicamba resistant soybean and cotton varieties. Dupont also received licenses from Monsanto to sell varieties containing Monsanto's dicamba resistant technology. Monsanto, BASF, and Dupont marketed Xtendimax, Engenia, and Fexapan, claiming that they were low volatility herbicides that could be used safely and effectively without fear of off-target movement. In response to such claims, farmers

purchased Monsanto's dicamba resistant Xtend seeds and applied Xtendimax, Engenia, and Fexapan to vast acreages of farmland in 2017. However, there are no peer reviewed trials demonstrating that Xtendimax, Engenia, or Fexapan are appreciably less volatile than older formulations of dicamba, and such claims have not been demonstrated to regulators or independent researchers. In fact, some evidence suggests that there is little difference in the total volatility of Xtendimax, Engenia, or Fexapan, as compared with previously available formulations of dicamba.

The inherent volatility of Xtendimax, Engenia, and Fexapan has caused millions of acres of damage to valuable agricultural commodities and other vegetation. This has resulted in significant economic losses and hardship to farmers, timber producers, and businesses throughout the United States. As of October 15, 2017, there were thousands of complaints reported to Departments of Agriculture across more than 20 States, including Illinois, Indiana, Wisconsin, Iowa, Kentucky, Missouri, Arkansas, Tennessee, Michigan, Ohio, West Virginia, North Carolina, South Carolina, Mississippi, Alabama, Louisiana, Oklahoma, Kansas, Nebraska, South Dakota, North Dakota, and Minnesota. Several States imposed bans or restrictions on the use of dicamba during the 2017, and at least one State has proposed a full ban on dicamba use during the 2018 growing season.

There are nine pending federal cases alleging similar conduct in the following jurisdictions, all of which have been filed in the last year: Southern District of Illinois, District of Kansas, Western District of Missouri, Eastern District of Arkansas, and Eastern District of Missouri. Plaintiffs in these pending actions are geographically diverse, residing in Illinois, Missouri, Arkansas, Mississippi, Kansas and Nebraska. In addition, plaintiffs are represented by a regionally diverse group of law firms from Arkansas, Illinois, Kansas, Louisiana, Minnesota,

and Missouri. None of these cases has advanced significantly through discovery, nor toward trial such that transfer would be unduly prejudicial or inefficient. It is anticipated that more cases will be filed nationwide.

Each of these pending federal cases presents a common core of facts, in that each asserts (i) that defendants' dicamba herbicides and dicamba resistant crop systems are defective, and cannot be used safely without egregious risk of harm, (ii) that defendants' dicamba herbicides caused injury to non-target vegetation, and resulted in economic losses to plaintiffs, and (iii) that defendants knew or should have known that such damage was likely to occur, and conspired to cause such damage in order to capture additional market share.

Transfer for coordinated or consolidated pretrial proceedings under 28 U.S.C. §1407 is needed to eliminate duplication, enhance efficiency, convenience the parties and witnesses, and conserve judicial resources. In addition, based on the numerous complex and common questions of fact involved, the compelling need to establish uniform and consistent standards in conducting pretrial discovery and motion practice, and the risk of inconsistent and conflicting rulings on critical procedural and substantive issues, transfer of these actions under 28 U.S.C. §1407 is warranted.

The United States District Court for the Southern District of Illinois is the most appropriate venue for transfer because Illinois is a large soybean producing State, and has seen the second highest amount of acreage damaged by defendants' dicamba herbicides in 2017. The strongest interests in this case are in large soybean producing states like Illinois, and largely rural districts such as the Southern District of Illinois, where a case is pending. Furthermore, the Southern District of Illinois is geographically central to the areas in which dicamba damage has been reported.

The Southern District of Illinois has significant experience handling agricultural disputes, and has demonstrated considerable skill and expertise presiding over complex multidistrict litigation. Accordingly, the Panel should transfer and centralize the related actions currently pending and hereafter filed to the Southern District of Illinois for coordinated or consolidated proceedings.

II. ARGUMENT

The Dicamba actions currently pending in different federal districts meet the requirements for transfer pursuant to 28 U.S.C. §1407, and therefore, transfer of the above-referenced actions is warranted. Section 1407 authorizes the transfer of two or more civil actions, pending in different districts, for coordinated or consolidated pretrial proceedings, when (1) the "actions involve one or more common questions of fact" (2) transfer "will be for the convenience of parties and witnesses" and (3) transfer "will promote the just and efficient conduct of such actions."

"The multidistrict litigation statute, 28 U.S.C. §1407, was enacted as a means of conserving judicial resources in situations where multiple cases involving common questions of fact were filed in different districts." *Royster v. Food Lion (In re Food Lion)*, 73 F.3d 528, 531-32 (4th Cir. 1996). Two critical goals of Section 1407 are to promote efficiency and consistency. *Illinois Municipal Retirement Fun v. Citigroup, Inc.*, 391 F.3d 844, 852 (7th Cir. 2004). The statute "was [also] meant to 'assure uniform and expeditious treatment in the pretrial procedures in multidistrict litigation" and "without it, 'conflicting pretrial discovery demands for documents and witnesses' might 'disrupt the functions of the Federal courts.'" *In re Phenylpropanolamine Prod. Liab. Litig.*, 460 F.3d 1217, 1230 (9th Cir. 2006) (quoting H.R. Rep. No. 1130, 90th Cong., 2d Sess. 1 (1968) *reprinted in* 1968 U.S.C.C.A.N. 1898, 1899). The alternative to appropriate

transfer is "multiplied delay, confusion, conflict, inordinate expense and inefficiency." *Id.* (quoting *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 495 (J.P.M.L. 1968)).

These actions assert overlapping claims, based on multiple common factual allegations, and will involve several common defenses. Consolidated pretrial treatment under Section 1407 will assist the parties and the courts in avoiding duplicative and conflicting rulings on the common issues in dispute. Granting this motion will also serve the convenience of the parties and witnesses and promote the just and efficient resolution of the litigation.

This Panel has frequently ordered the multidistrict transfer of multiple actions involving genetically modified crops or herbicides. *See In re Starlink Corn Prods. Liab. Litig.*, 152 F. Supp. 2d 1378 (J.P.M.L. 2001), *In re Genetically Modified Rice Litig.*, 543 F. Supp. 2d 1375 (J.P.M.L. 2008), *In re Monsanto Co. Genetically-Engineered Wheat Litig.*, 978 F. Supp. 2d 1373 (J.P.M.L. 2013), *In re Syngenta AG MIR162 Corn Litig.*, 65 F. Supp. 3d 1401 (J.P.M.L. 2014), *In re Roundup Prod. Liab. Litig.*, 214 F. Supp. 3d (J.P.M.L. 2016). As with past litigation involving improper dissemination of genetically modified crops or unsafe herbicides, centralization will eliminate duplicative discovery; avoid inconsistent pretrial rulings; and conserve the resources of the parties, their counsel and the judiciary.

A. These Cases Involve Common Questions of Fact

The first element of the Section 1407 transfer analysis is whether there are one or more common questions of fact. *See* 28 U.S.C. §1407. The statute, however, does not require a complete identity or even a majority of common questions of fact to justify transfer. *In re Zyprexa Prods. Liab. Litig.*, 314 F. Supp. 2d 1380, 1381 (J.P.M.L. 2004).

Here, there is no question that these cases share a common core of operative factual allegations. Plaintiffs all bring action for damages caused by defendants' defective herbicides

and crop systems. Each plaintiff claims that defendants knew of the inherent risks of dicamba herbicides and dicamba resistant crop systems, yet failed to properly inform regulators, customers, or the general public. Plaintiffs similarly rely on the same conduct, marketing, labeling, and regulatory history as a basis for their claims. Plaintiffs each contend that defendants improperly designed, manufactured, and marketed dicamba herbicides and dicamba resistant crops. Because the factual assertions in each of the instant actions are similar, and many important legal issues in dispute will also be nearly identical, transfer and coordination or consolidation of these actions is highly appropriate. *See In re "Factor VII or IX Concentrate Blood Prods." Prod. Liab. Litig.*, 853 F. Supp. 454, 455 (J.P.M.L. 1993).

Not all fact questions raised by these actions are common, but while it is relevant to the transfer analysis, it is not necessary that the cases allege all of the exact same claims or injuries resulting from defendants' marketing and sale of defective dicamba herbicides and dicamba resistant crop systems. As the Panel has observed, "transfer under Section 1407 has the salutary effect of placing related actions before a single judge who can formulate a pretrial program that: (1) allows discovery with respect to any individual issues or claims to proceed concurrently with pretrial proceedings on common issues…and (2) ensures that pretrial proceedings will be conducted in a streamlined manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties." *In re Genetically Modified Rice Litig.*, 543 F. Supp. 2d 1375 (J.P.M.L. 2008). *See also, In re Kugel Mesh Hernia Patch Prods. Liab. Litig.*, 493 F. Supp. 2d 1371 (J.P.M.L. 2007) ("we have often found centralization appropriate where a common defect was alleged, even where the alleged injuries, varied.").

B. Transfer Will Serve the Convenience of the Parties and Prevent Duplicative Discovery.

The convenience of the parties and prevention of duplicative discovery also favor transfer. *See* 28 U.S.C. §1407. The discovery between all actions will be largely the same, as they all concern defendants' common actions with respect to the commercialization of dicamba herbicides and dicamba resistant crop systems. If these cases continue to proceed separately, there will be substantial duplicative discovery because of the many overlapping issues of fact and law. Multiple cases could involve the repetitive depositions of the same company representatives, other current and former employees, and expert witnesses, as well as production of the same records, and responses to duplicative interrogatories and document requests in jurisdictions around the country. *See, e.g., In re Pilot Flying J Fuel Rebate Contract Litigation (No. II),* 11 F. Supp. 3d 1351, 1352 (J.P.M.L. 2014).

These actions also involve complicated issues concerning the chemistry of defendants' dicamba herbicides, the effect of exposure on a variety of non-target vegetation, and the adequacy of defendants' pre-market testing and regulatory submissions, which will likely require extensive expert discovery and several Daubert hearings. While movants anticipate additional filings, even the current level of litigation would benefit from transfer and coordinated proceedings, given the allegations of these complaints and the complexities presented by the common and overlapping issues. *See In re Roundup Prod. Liab. Litig.*, 214 F. Supp. 3d (J.P.M.L. 2016) ("Even if no additional actions are filed, the present number of cases, districts, and involved counsel, as well as the complexity of the issues presented, warrants centralization.") Absent transfer, the federal court system will be forced to administer related actions across multiple venues, all proceeding on potentially different pretrial schedules and subject to different judicial decision-making and local procedural requirements.

None of the pending cases have progressed to the point where significant efficiencies will be forfeited through transfer to an MDL proceeding. This Panel has routinely recognized that consolidating litigation in one court benefits both plaintiffs and defendants. For example, pretrial transfer would reduce discovery delays and costs for plaintiffs, and permit plaintiffs' counsel to coordinate their efforts and share the pretrial workload. *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 173 F. Supp. 2d 1377, 1379 (J.P.M.L. 2001) ("And it is most logical to assume that prudent counsel will combine their forces and apportion their workload in order to streamline the efforts of the parties and witnesses, their counsel and the judiciary, thereby effectuating an overall savings of cost and a minimum of inconvenience to all concerned.") For defendants, national or general expert depositions will be coordinated, document production will be centralized, and travel for its current and former employees will be minimized, since they will only have to appear in one location rather than multiple districts around the country. *See, e.g., In re Enfamil Lipil*, 764 F. Supp. 2d 1356, 1357 (J.P.M.L. 2011) ("Centralizing the actions will allow for the efficient resolution of common issues and prevent unnecessary or duplicative pretrial burdens from being placed on the common parties and witnesses.").

C. Transfer Will Promote the Just and Efficient Conduct of These Actions.

The panel recognizes multiple factors as informing whether the just and efficient conduct of a litigation will be advanced by transfer, including: (i) avoidance of conflicting rulings in various cases; (ii) prevention of duplication of discovery on common issues; (iii) avoidance of conflicting and duplicative pretrial conferences; (iv) advancing judicial economy; and (v) reducing the burden on the parties by allowing division of workload among several attorneys. *See, e.g., In re Endangered Species Act Section 4 Deadline Litig.*, 716 F. Supp. 2d 1369

(J.P.M.L. 2010); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litigation*, 424 F. Supp. 504, 506 (J.P.M.L. 1976).

All of these factors will be advanced by transfer here. As the litigation stands now, there are nine federal cases spread across five jurisdictions. It is likely that more cases will be filed in additional jurisdictions. Under this status quo, several federal courts will be ruling on many common factual and legal issues presented in these cases. The presence of numerous counsel, plaintiffs, and courts currently involved in this litigation throughout the country raises a clear risk of conflicting rulings, with the potential to generate significant confusion among the parties, as well as inconsistent obligations on the defendants.

By contrast, a single MDL judge coordinating pretrial discovery and ruling on pretrial motions in all of these federal cases at once will help reduce witness inconvenience, the cumulative burden on the courts, and the litigation's overall expense, as well as minimizing the potential for conflicting rulings. *See e.g., In re Starlink Corn Prods. Liab. Litig.*, 152 F. Supp. 2d 1378 (J.P.M.L. 2001), *In re Genetically Modified Rice Litig.*, 543 F. Supp. 2d 1375 (J.P.M.L. 2008), *In re Monsanto Co. Genetically-Engineered Wheat Litig.*, 978 F. Supp. 2d 1373 (J.P.M.L. 2013), *In re Syngenta AG MIR162 Corn Litig.*, 65 F. Supp. 3d 1401 (J.P.M.L. 2014), *In re Roundup Prod. Liab. Litig.*, 214 F. Supp. 3d (J.P.M.L. 2016). Centralization will also eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary. As the Panel has recognized, "centralization will enable the transferee judge to make consistent rulings on such discovery disputes from a global vantage point" and will otherwise prevent inconsistent pretrial rulings on common factual issues. *In re Yamaha*, 597 F. Supp. 2d 1377, 1378.

D. The Proper Transferee Forum is the Southern District of Illinois.

The Southern District of Illinois best meets the objective of a forum that advances "the convenience of the parties and will promote the just and efficient conduct" of these actions. 28 U.S.C. §1407.

The Southern District of Illinois' geographically central location and accessibility commend it for this nationwide products liability litigation. *See In re Pradaxa (Dabigatran Etexilate) Prods.*, 883 F. Supp. 2d 1355 (J.P.M.L. 2012). The strongest interests in this case are in large soybean producing states like Illinois, and largely rural areas such as the Southern District of Illinois, where a case is pending. Illinois is annually one of the largest soybean producing States in the nation, and has been heavily affected by the manufacture and sale of dicamba herbicides and dicamba resistant crop systems. In 2017, there were 245 reports of dicamba damage in Illinois, representing an estimated 600,000 acres of damage. Only one State is estimated to have suffered more damaged acres than Illinois. Other States reporting dicamba damage in 2017 include Illinois, Indiana, Wisconsin, Iowa, Kentucky, Missouri, Arkansas, Tennessee, Michigan, Ohio, West Virginia, North Carolina, South Carolina, Mississippi, Alabama, Louisiana, Oklahoma, Kansas, Nebraska, South Dakota, North Dakota, and Minnesota. The Southern District of Illinois is geographically central to these affected areas. The Southern District of Illinois is also within close proximity to Monsanto's Corporate Headquarters in St. Louis, MO and Monsanto's research facility in Monmouth, IL, at which Monsanto and BASF conducted joint testing and development prior to the marketing of Xtendimax and Engenia. Due to its close proximity to these locations, and to areas affected by dicamba damage, the Southern District of Illinois is geographically central to the locations in which a significant portion of the witnesses, documents, and physical damage at issue in this litigation are likely to be located. The

Southern District of Illinois is also geographically accessible to counsel and parties involved in this litigation.

Finally, the Panel has analyzed the experience of a potential transferee forum in managing complex multidistrict litigation. *See, e.g., In re Janus Mutual Funds Investment Litig.,* 310 F. Supp. 2d 1359, 1361 (J.P.M.L. 2004) ("Thus we have searched for a transferee district with the capacity and experience to steer this litigation on a prudent course".) The Southern District of Illinois has considerable experience in conducting numerous consolidated and complex actions. *See In re Yasmin, Yaz (Drospirenone) Marketing, Sales*, 655 F. Supp. 2d 1343 (J.P.M.L. 2009), *In re Pradaxa (Dabigatran Etexilate) Prods.*, 883 F. Supp. 2d 1355 (J.P.M.L. 2012). While centralization before any of the skilled judges currently assigned to the Southern District of Illinois would be appropriate, the Panel has recognized that Judge Herndon is "an experienced MDL judge" who "has deftly presided over" other complex products liability litigations. *In re Pradaxa (Dabigatran Etexilate) Prods.*, 883 F. Supp. 2d 1355 (J.P.M.L. 2012).

III. CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that the Panel transfer the Dicamba actions described herein, as well as any similar "tag along" cases subsequently filed, to the Southern District of Illinois, for coordinated pretrial proceedings.

Dated: November 22, 2017

Respectfully submitted,

/s/ René F. Rocha III

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