

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
SOUTHEASTERN DIVISION

IN RE: DICAMBA HERBICIDES  
LITIGATION

)  
)

MDL No. 2820 SNLJ  
ALL CASES

**ORDER APPOINTING PLAINTIFFS' LEADERSHIP COUNSEL**

Plaintiffs propose two leadership structures. The first is the Downing Group, which has the support of counsel who represent 135 of the 136 plaintiffs currently in the MDL and who raise both crop damage and antitrust claims. The Downing Group proposes one Executive Committee of seven members led by a single chairperson, Mr. Downing. The second proposal is from Paul LLP, Gustafson Gluek PLLC, and Wexler Wallace LLP, that represent plaintiff Forest River Farms in a claim for antitrust violations only. The "Paul Group" (led by Mr. Paul) recommends two plaintiffs' steering committees, one for crop damage claims and the other for antitrust claims, the latter to be chaired by the Paul Group.

Having considered all of the factors in the *Manual for Complex Litigation (Fourth)*, Federal Rule of Civil Procedure 23, and other accepted guidance respecting appointment of leadership counsel in cases of this kind, and upon careful consideration of the leadership application submissions in the case, this Court adopts the proposal submitted by the Downing Group. At the outset, this Court finds that counsel for both groups are well-qualified to prosecute their respective claims. But this Court also finds that the Downing Group's proposal of an executive committee with one member serving both as liaison counsel and lead counsel is the most fair, efficacious, and economical management structure, in addition to being the proposal favored by all but the one

plaintiff represented by the Paul Group. Furthermore, the Downing Group is up and running, pointing out that “[e]ven separate teams already have been established and each has been actively working on the issues to which it has been assigned, including those relating to both crop damage and antitrust claims.”

Nonetheless, Mr. Paul claims the plaintiffs’ interests are best served by separate steering committees based on three reasons. First, he argues that separate steering committees will allow the most experienced attorneys to work in their respective areas of expertise and that the Paul Group has extensive experience in antitrust claims. He correctly points out that everyone agrees the crop damage and antitrust claims should have separate complaints, scheduling tracks, and trials. He also is concerned that Mr. Downing is the only member of the Downing Group’s proposed slate who also filed an antitrust claim on behalf of those who purchased Monsanto seed. But given Mr. Downing’s experience handling antitrust claims, this Court concludes that one Executive Committee—with the addition of Mr. Paul—will adequately represent those plaintiffs who purchased Monsanto seed and allege antitrust injuries.

Second, Mr. Paul argues separate steering committees are necessary to avoid the risk of potential conflicts of interest. Specifically, he notes that “[o]ne of Monsanto’s primary defenses to the Crop Damage claims is to blame farmers who sprayed dicamba, i.e., members of the Antitrust class.” (#32 at 2.) But this finger-pointing does not necessarily mean the interests of the two groups will be at odds, and Mr. Paul does little more than raise the issue. He relies on *Sample v. Monsanto Co.*, 218 F.R.D. 644 (E.D. Mo. 2001), where Monsanto argued that plaintiffs’ counsel had a conflict in representing both a tort class and an antitrust class “because the tort claimants wanted Monsanto not to

sell certain seeds while the antitrust claimants wanted the seeds to be sold more cheaply.” (#32 at 15–16.) But Mr. Paul still fails to explain how one position affects the other, much less how that would constitute a conflict. Indeed, Mr. Downing represented crop damage plaintiffs *and* antitrust plaintiffs before this MDL was formed, but Mr. Paul does not argue that representation was improper.

As part of the same conflict-of-interest argument, Mr. Paul also argues that separate counsel should handle settlement discussions, but this Court is convinced that any potential settlement committee or committees will adequately represent the interests of all the plaintiffs. Finally, Mr. Paul argues the expenses should be tracked separately. That is, some expenses will relate to one set of claims only. But as Mr. Downing explains, “expenses relating solely to antitrust . . . can be recorded as such” (#31 at 5), while expenses relating to both sets of claims can be properly allocated.

Third, Mr. Paul reiterates that cooperation between crop damage and antitrust claims is important. Given Mr. Downing’s wealth of experience in managing MDLs as lead counsel, this Court is convinced that one Executive Committee best facilitates cooperation between the two sets of claims.

Accordingly, Plaintiffs’ Executive Committee shall be comprised as follows:

**I. PLAINTIFFS’ EXECUTIVE COMMITTEE, CHAIR OF THE EXECUTIVE COMMITTEE, AND INTERIM CLASS COUNSEL**

The Court appoints Don M. Downing of Gray, Ritter & Graham, P.C. to serve as Chair of the Plaintiffs Executive Committee and Interim Class Counsel for all putative classes. In addition to Mr. Downing, the Court appoints the following attorneys to the Plaintiffs’ Executive Committee:

James (Jacksy) Bilborrow (Weitz & Luxenberg, P.C.)  
Paul Byrd (Paul Byrd Law Firm, PLLC)  
Paul A. Lesko (Peiffer Rosca Wolf Abdullah Carr & Kane, APLC)  
Scott E. Poynter (Poynter Law Group)  
Beverly T. (Bev) Randles (Randles & Splittgerber LLP)  
Rene F. Rocha (Morgan & Morgan)  
Charles S. (Bucky) Zimmerman (Zimmerman Reed LLP)  
Richard M. Paul, III (Paul, LLP)

The Plaintiffs' Executive Committee will operate under the direction of the Chair of the Executive Committee and assist the Chair in all aspects of the case. The duties and responsibilities of the Executive Committee, under the direction of Mr. Downing, are as follows:

1. Determine and present (in pleadings, motions, briefs, oral argument, or such other fashion as may be appropriate, personally or by a designee) to the court and opposing parties the position of the plaintiffs on all matters arising during the proceedings;
2. Initiate, coordinate, and conduct all discovery on behalf of plaintiffs in this consolidated litigation consistent with the Federal Rules of Civil Procedure, including the preparation of joint interrogatories and requests for production of documents, and the examination of witnesses in depositions, and direct and coordinate the conduct of all types of discovery proceedings;
3. Seek the assistance of other plaintiffs' counsel, including but not limited to other attorneys in the Executive Committee Members' firms and associated firms, in performance of all work necessary for the prosecution of the case, including investigation, research, briefing, and discovery, with particular attention to using efficiently the resources of other plaintiffs' counsel in a manner commensurate with those lawyers' resources and experience, and in a manner to ensure efficiency and effectiveness;
4. Make all work assignments on behalf of plaintiffs in a manner to promote the orderly and efficient conduct of this litigation and to avoid unnecessary duplication and expense;
5. Direct and execute on behalf of plaintiffs the filing of pleadings and other documents with the Court;
6. Appear at hearings and conferences regarding the case as most appropriate for effective and efficient presentation, while avoiding unnecessary expense;

7. Negotiate and enter into stipulations and agreements with opposing counsel as necessary throughout the litigation, including discovery, mediation and other pretrial matters;
8. Consult with and employ experts as necessary;
9. Conduct settlement negotiations on behalf of all plaintiffs;
10. Prepare and distribute periodic status reports to the Court, as requested, and to the parties.
11. Develop and recommend for Court approval practices and procedures pertaining to attorneys' fees and expenses as further detailed below and, on an ongoing basis, monitor and administer such procedures; and
12. Otherwise direct, coordinate, and supervise the prosecution of plaintiffs' claims in the consolidated action and perform such other duties as may be needed to proper coordination of plaintiffs' pretrial activities and prosecution of the claims or as may be further directed by the Court.

As Chair of the Executive Committee, Mr. Downing will have the authority that is customary in that role, including scheduling meetings, providing agenda items, assigning work, following up on work assignments to make sure the work is conducted in a timely fashion, and other similar tasks. Mr. Downing shall exercise this authority cooperatively with the other members of the Executive Committee. Major decisions in the litigation shall be presented to the entire Executive Committee for approval and reasonable efforts shall be made to reach consensus. If consensus is not reached, the vote of the majority of Executive Committee Members controls.

## **II. PLAINTIFFS' LIAISON COUNSEL**

The Court appoints Don M. Downing of Gray, Ritter & Graham, P.C. to serve as Plaintiffs' Liaison Counsel. The duties and responsibilities of liaison counsel are:

1. Receive orders and notices from this Court and from the JPML pursuant to Rule of the Panel's Rules of Procedure on behalf of all parties;

2. To the extent certain orders and notices are not available electronically to all parties, prepare and transmit copies of such orders and notices to such parties;
3. Maintain and make available to all counsel and the court and up-to-date service list;
4. Maintain complete files with copies of all documents served upon liaison counsel and make such files available to parties upon request; and
5. Other responsibilities as may be deemed appropriate by the Executive Committee including but not limited to scheduling leadership meetings and keeping minutes thereof, preparing agendas for status conferences and/or reporting on the status of the case as requested by the Court, and performing other necessary administrative or logistic functions for the effective and efficient functioning of the MDL.

### **III. OTHER MATTERS**

*1. Limitation on Outside Filings.* No papers shall be served or filed and no process, discovery or other procedure shall be commenced by any plaintiff's counsel other than the Chair of the Executive Committee or his designee(s), with the exception of: 1) entries or withdrawals of appearance; 2) motions to remand to state court; and 3) briefs responding to defense motions filed in the individual cases. This is intended to prevent duplication of pleadings, discovery or tasks by plaintiffs' counsel. Any attorney may file other motions for relief from or to modify this or any other order of the Court, but are cautioned that they should do so only if there is a matter of utmost importance that they have already unsuccessfully sought to have raised by the Plaintiffs' Executive Committee.


*2. Personal Appointments.* The appointment to leadership positions is of a personal nature. Accordingly, an appointee may not substitute others to perform the functions indicated. This is not intended to prevent appointees from delegating tasks or



making assignments of particular work. The task, however, must remain under the appointee's supervision and responsibility and the appointee may not transfer responsibility to a non-member of the Plaintiffs' Executive Committee without prior Court approval.

3. *Privileges Preserved.* The communication of information among and between counsel shall not be deemed a waiver of the attorney-client privilege or the protection afforded attorney work product, and cooperative efforts contemplated above shall not in any way be used against any party by any other party. Nothing contained in this provision shall be construed to limit the rights of any party or counsel to assert the attorney-client privilege or attorney work product doctrine.

So ordered this 17th day of April 2018.

  
\_\_\_\_\_  
STEPHEN N. LIMBAUGH, JR.  
UNITED STATES DISTRICT JUDGE