

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

<b>IN RE: DICAMBA HERBICIDES LITIGATION</b>	) ) )	<b>MDL No. 2820 ALL CASES</b>
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**JOINT PROPOSED ORDER APPOINTING SPECIAL MASTER**

**I. FINDINGS AND APPOINTMENT**

At court conferences held on April 18, 2018, and June 1, 2018, the Court provided the parties with notice that it was considering the appointment of a Special Master to promptly and efficiently resolve discovery disputes. Each party was afforded opportunities to be heard and make suggestions and/or objections regarding the role and identity of a Special Master. All parties consent to appointment of a Special Master. Because of the number of Parties involved, and the numerous state and federal laws implicated, the complexity of the factual issues raised in the Crop and Antitrust Claims, the discovery disputes that have already arisen in this case and that may arise as the case progresses, and the need for an expeditious resolution of the disputes, the Court finds that the appointment of a Special Master for discovery is appropriate.<sup>1</sup> The Court now

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<sup>1</sup> MDL courts facing similar challenges have appointed Special Masters to assist with specific case-management functions such as discovery disputes. *See, e.g., In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP, Dkt. No. 69 (N.D. Ohio Jan. 11, 2018) (appointing three special masters to “assist the Court with mediating resolution of any part of the parties’ disputes”); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11-md-02299-RFD-PJH, Dkt. No. 532 (W.D. La. Apr. 11, 2012) (appointing three special masters to handle case-specific functions, including disputes over discovery); *In re Depuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, No. 3:11-MD-2244-K, Dkt. No. 81, 2012 WL 13027978, at \*3 (N.D. Tex. Jan. 9, 2012) (appointing special master to, *inter alia*, “establish discovery and other schedules, review and attempt to resolve informally any discovery conflicts . . . , and supervise discovery”); *In re Baycol Prods. Liab. Litig.*, MDL No. 1431 (MJD), 2002 WL 32156072 (D. Minn. Mar. 25, 2002) (appointing master to ensure consumer medical information obtained by the

appoints John S. Hahn, Mayer Brown LLP, 1999 K Street, N.W., Washington, DC 20006, as Special Master for Discovery for this litigation.

This appointment is made pursuant to Fed. R. Civ. P. 53 and the inherent authority of the Court. Pursuant to the requirements of Rule 53, the Court sets forth below the Special Master's duties and terms of service, as well as the reasons for the appointment. The Court orders the Special Master to proceed with all reasonable diligence.

## **II. CONFLICTS OF INTEREST**

Mr. Hahn, himself, has no conflicts in undertaking this task. Mr. Hahn has disclosed that Mayer Brown LLP does have some existing conflicts with respect to the Parties at issue in this case. The Court and the Parties, however, agree that these conflicts can be addressed by consent of the Parties as well as the creation of an ethical wall between Mr. Hahn, on the one hand, and attorneys/staff at Mayer Brown working on those matter(s), on the other hand, that would operate to wall him off from those other matter(s), including any confidential or client information relating to those matters. Should any other potential conflict arise during his tenure as Special Master, Mr. Hahn shall promptly disclose such conflicts to the Court and the Parties in order that the Court and the Parties may consider whether additional waivers are required or whether any other action is required, including the recusal of Mr. Hahn. Any party learning of such a

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defendant was utilized appropriately in litigation); *see also HM Compounding Servs., LLC v. Express Scripts, Inc.*, No. 4:14-CV-01858 JAR, Dkt. No. 390 (E.D. Mo. Aug. 14, 2017) (appointing special master to “resolve the parties’ outstanding discovery issues”). Indeed, transferee courts are encouraged to utilize special masters to effectively manage multidistrict litigation. *See* Duke Law Center for Judicial Studies, MDL Standards and Best Practices, Best Practice 1B(ii) (2014).

conflict that elects not to consent to the conflict, shall file an objection to Mr. Hahn's continued role as Special Master within ten (10) days of being notified of the existence of such a conflict.

Mr. Hahn may designate other attorneys/staff at his firm to assist him in this matter provided: (i) he discloses the names of the attorneys/staff designated to provide assistance; (ii) such attorneys/staff otherwise comply with the conflict disclosures and ethical wall referenced above and execute the protective order as specified herein; and (iii) there is no objection to such assistance lodged by the Parties.

### **III. SPECIAL MASTER'S DUTIES**

The parties consent to appointment of a Special Master to manage discovery disputes in this litigation, and the Court finds that it is appropriate to do so in this litigation. Accordingly, the Special Master shall be assigned to assist the Court with managing the discovery process in this multidistrict litigation. In particular, the Court directs the Special Master to coordinate disclosure and discovery schedules with the lawyers; promptly and efficiently resolve discovery disputes, including issues such as privilege, confidentiality, and access to records; and assist with scheduling depositions as necessary.

### **IV. COMMUNICATIONS WITH THE PARTIES AND THE COURT**

Rule 53(b)(2)(B) instructs the Court to set forth "the circumstances, if any, in which the master may communicate *ex parte* with the court or a party." Fed. R. Civ. P. 53(b)(2)(B). The Special Master may communicate *ex parte* with the Court at his discretion, without providing notice to the parties, as necessary to fulfill his duties

pursuant to this order. The Special Master may not communicate *ex parte* with any party or attorney, or any subset of all separately represented parties, without consent of all parties, except with regard to matters of scheduling or resolution of questions regarding confidentiality, trade secrets, or privilege.

**V. PROCEDURES FOR RESOLUTION OF DISCOVERY DISPUTES**

Meet and Confer Requirement: Prior to raising any discovery dispute with the Special Master, the Parties shall meet and confer in an attempt to resolve such dispute. The Parties shall promptly meet and confer once a dispute has arisen. Any party may thereafter request that the Special Master resolve a discovery dispute, and the Parties need not meet and confer again unless so requested by the Special Master. If a Party that is the subject of a discovery dispute does not promptly meet and confer within a reasonable time once a dispute has arisen, the Party raising the discovery dispute may notify the Special Master of a discovery dispute using the procedure set forth below.

Procedure for Raising Discovery Disputes: After meeting and conferring, the procedure for notifying the Special Master of a discovery dispute, and for resolution of said dispute, is as follows: (i) a party shall send the Special Master a concise summary identifying the issues to be discussed; (ii) within three business days, the Special Master shall conduct a telephone conference with the parties to address the dispute; (iii) the Special Master may issue a ruling at that time or, in his discretion, may issue a ruling within three business days later; (iv) a party may request that the Special Master allow for the parties to submit briefing on the discovery dispute as specified below, and the Special Master may decide in his discretion whether to allow for such briefing, and may in his

discretion extend the time periods for briefing. Although it is in the discretion of the Special Master to decide whether briefing or other submissions are appropriate, it is expected that complex discovery disputes and/or those requiring factual inquiries may be the types of disputes where briefing or other submissions will be deemed necessary and appropriate. If briefing is allowed, the Special Master shall use best efforts to resolve the discovery dispute within five business days of receiving the parties' briefs.

The Special Master may issue an informal ruling orally or in writing following presentation by all parties that shall, to the extent applicable, set forth the factual findings and conclusions of law that form the basis of the ruling, including a ruling on the requested relief. If the Special Master issues an informal ruling that is not on the record either orally, via email, or through other writing, and a party wishes to object to that ruling or order, the party may request the Special Master to formalize the ruling or order, and the Special Master shall thereafter do so by filing a Report and Recommendation. Such request shall be made by a party within three (3) business days of issuance of the informal ruling, or else the opportunity to object shall be waived. If no objection is raised after three (3) business days, the Special Master's informal ruling shall be deemed final. The prescribed schedule for resolving disputes may be extended *sua sponte* or at the request of a party, for good cause shown, at the Special Master's discretion.

Briefing Methodology: Where briefing is allowed, a Party raising a discovery dispute may file a letter brief with the Special Master setting forth the relief sought with supporting facts and legal argument. The responding party has five (5) business days to respond to the letter brief. Absent prior permission from the Special Master, no replies or

sur-reply letter briefs shall be permitted. Absent prior permission from the Special Master, letter briefs are to be no longer than 5 pages in length, single spaced in a font no smaller than 12 points (10 point font for footnotes). Signature blocks are not to be counted as part of the length. Parties should not attempt to avoid the page limitations through the submission of voluminous attachments. The Parties may submit supporting declarations with their letter briefs, as necessary. The Special Master shall have discretion to determine whether a hearing is appropriate to resolve any dispute.

Report and Recommendation: When issuing a formal ruling, the Special Master shall prepare and file a Report and Recommendation to the District Court on any pending discovery dispute, and that Report and Recommendation shall set forth the factual findings and conclusions of law that form the basis of the ruling, including a ruling on the requested relief. The Special Master shall electronically file the Report and Recommendation on the case docket via Electronic Case Filing (ECF). The Clerk is directed to add the Special Master to the Court's electronic service list.

Objections to the Special Master's Report and Recommendation: If a discovery dispute was formally briefed for the Special Master as specified above, any party shall file any objection within seven (7) days after the Report and Recommendation was electronically filed, and a party shall have seven (7) days thereafter to file an opposition to the objection. If a discovery dispute was resolved informally before the Special Master, any party shall file any objection within fourteen (14) days after the Report and Recommendation was electronically filed, and a party shall have fourteen (14) days thereafter to file an opposition to the objection. The Special Master or the Court may

extend these deadlines *sua sponte* or at the request of a party, for good cause shown. If no party raises a timely objection to the Special Master's orders, findings, reports, or recommendations, the order, finding, report, or recommendation will be deemed accepted and entered by the Court.

Standard of Review of the Special Master's Report and Recommendation: Any order, report, or recommendation of the Special Master on non-dispositive motions, unless it involves a finding of fact or conclusion of law, will be deemed a ruling on a procedural matter. The Court will set aside a ruling on a procedural matter only where it is clearly erroneous or contrary to law. *See* 28 U.S.C. § 636. Barring a stipulation of the Parties with the Court's consent setting some other standard of review, *see* Fed. R. Civ. P. 53(f)(3), the Court will decide *de novo* all objections to findings of fact or conclusions of law made or recommended by the Special Master. If a discovery dispute is resolved informally as specified above and no briefing and other submissions were allowed to be presented to the Special Master regarding that discovery dispute, then no Party may object to the lack of sufficient record for the District Court to review the Special Master's Report and Recommendation.

Periodic Discovery Status Conferences: The Special Master shall conduct regular conferences with the parties at least every thirty (30) days during the discovery period, although conferences may be held more frequently or less frequently at the Special Master's discretion. At least two (2) business days prior to each conference, the Parties shall submit a joint agenda identifying the issues to be discussed and the progress of discovery. The Parties are not to engage in advocacy in this joint agenda.

## **VI. COMPENSATION OF SPECIAL MASTER**

Rule 53(b)(2)(E) states that the Court's order must set forth "the basis, terms, and procedure for fixing the master's compensation under Rule 53(g)." Fed. R. Civ. P. 53(b)(2)(E). The Special Master will be paid at the rate of \$725 per hour, plus reimbursement for reasonable travel and other expenses incurred by the Special Master. Law firm associates who assist the Special Master will be paid \$560 per hour, and law firm paralegals will be paid \$260 per hour. The Special Master shall incur only such fees and expenses as may be reasonably necessary to fulfill his duties under this order, or such other orders as the Court may issue. Pure clerical work shall not be billed for by the Special Master.

Plaintiffs shall pay 50% of the Special Master's fees and expenses and Defendants shall collectively pay 50% of the Special Master's fees and expenses. Plaintiffs and Defendants may allocate their respective shares amongst themselves as necessary and appropriate.

The Special Master shall provide on a monthly basis summary fee statements to Lead Counsel for the Plaintiffs and Defendants. Absent any questions or disputes over statements, the parties shall pay their portion of the monthly invoice within thirty days of receipt.

## **VII. OTHER MATTERS**

Affidavit of Special Master: Rule 53(b)(3) states that the Court may issue the order appointing the Special Master only after "the master files an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455[.]" Fed. R. Civ. P.



53(b)(3); *see also* Fed. R. Civ. P. 53(a)(2) (setting forth grounds for disqualification of a special master). The Special Master shall forthwith submit to the Court an affidavit disclosing whether there is any ground for disqualification, and the Court shall hold this order in abeyance until the Special Master complies with this directive. Once the Special Master submits the required affidavit to the Court, the Court will file that document in the public record. The parties shall have five business days from the date the affidavit is filed in the record to apprise the Court whether there is any ground for disqualification of if the Special Master or his law firm has a conflict of interest.

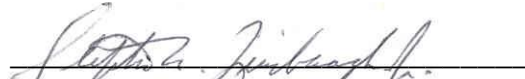
The Special Master's Record: The Special Master shall preserve, as a record of his activities, all written submissions received from the Parties, all written submissions sent to the Parties, and any transcripts of hearings before the Special Master. The Special Master shall file with the Clerk of the Court such records upon the request of any party or the Court.

Protections of the Special Master: As an agent and officer of the Court, the Special Master shall enjoy the same protections from being compelled to give testimony and from liability for damages as those enjoyed by other federal judicial adjuncts performing similar duties. *See, e.g., H.B. by Bartolini v. Abbott Labs., Inc.*, Nos. 15-CV-702-NJR-SCW, 13-CV-326-NJS-SCW, 2017 WL 2868424, at \*4 n.6 (S.D. Ill. July 5, 2017) (doctrine of absolute quasi-judicial immunity extends to special master appointed pursuant to Rule 53).

Protective Order Compliance: The Special Master agrees to be bound by the terms of the Protective Order signed by the Parties and the Court in this case on May 17, 2018 (MDL Dkt. No. 54) (attached to this Order as Attachment A).

Amendment: This Order may be amended at any time upon notice to the Parties, and an opportunity to be heard.

So ordered this 28th day of June 2018.

  
Stephen N. Limbaugh, Jr.  
United States District Judge