

CITY OF PERTH AMBOY,
A Municipal Corporation,

V.

V.

Third-Party
Defendants.

PITNEY, HARDIN, KIPP & SZUCH
Attorneys for Third-Party
Defendant Monsanto Company
P.O. Box 1945
Morristown, NJ 07962-1945
(201) 966-6300

James E. Tyrrell, Jr.
Stephen G. Traflet

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	3
LEGAL ARGUMENT	5
WITCO'S DEMAND FOR A "COMPUTER INDEX" MUST BE DENIED SINCE IT SEEKS MATERIALS WHICH ARE PROTECTED FROM DISCLOSURE BY THE ATTORNEY WORK-PRODUCT DOCTRINE	5
A. The Work-Product Doctrine Applies To A Computerized System Prepared By Counsel To Organize And Retrieve Selected Documents For Litigation	6
B. Monsanto's System Should Be, And Has Been, Accorded Protection From Disclosure To An Adverse Party	9
CONCLUSION	13

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Alltmont v. United States</i> , 177 F.2d 971 (3d Cir. 1949) . . .	12
<i>Brennan v. Engineered Prods., Inc.</i> , 506 F.2d 299 (8th Cir. 1974)	12
<i>Hickman v. Taylor</i> , 329 U.S. 495 (1947)	11
<i>In Re Grand Jury Subpoena Dated November 8, 1979</i> , 622 F.2d 933 (6th Cir.)	12
<i>In Re LTV Securities Litigation</i> , 89 F.R.D. 595 (N.D.Tex. 1981)	9
<i>In Re IBM Peripheral EDP Devices Antitrust Litigation</i> , 5 Computer L. Serv. Rep. 878 (N.D. Cal. 1975)	6-7
<i>James Julian, Inc. v. Raytheon Co.</i> , 93 F.R.D. 138 (D. Del 1982)	8
<i>Jaroslawics v. Engelhard Corp.</i> , 115 F.R.D. 515 (D.N.J. 1987)	8-9
<i>Jenkins v. Rainer</i> , 69 N.J. 51 (1976)	5, 9
<i>J.H. Rutter Rex Manufacturing Co. v. NLRB</i> , 473 F.2d 223 (5th Cir. 1973)	11
<i>Montrose Chemical Corp. v. Train</i> , 491 F.2d 63 (D.C. Cir. 1974)	11
<i>Nat. Union Elec. Corp. v. Matsushita Elec. Indus. Co.</i> , 494 F. Supp. 1257 (E.D. Pa. 1980)	7
<i>Omaha Public Power Dist. v. Foster Wheeler Corp.</i> , 109 F.R.D. 615 (D. Neb. 1986)	7
<i>Republic Gear Co. v. Borg-Warner Corp.</i> , 381 F.2d 551 (2nd Cir. 1967)	11-12
<i>Sporck v. Peil</i> , 759 F.2d 312 (3d Cir.), cert. denied, 474 U.S. 903 (1985)	8
<i>Upjohn Company v. United States</i> , 449 U.S. 383 (1981)	9
<i>United States v. Amer. Tel. & Tel. Co.</i> , 642 F.2d 1285 (D.C. Cir. 1980)	7

<i>United States v. Chatham</i> , 72 F.R.D. 640 (S.D. Ga 1976)	. . . 12
<i>Wagi v. Silver Ridge Park W.</i> , 243 N.J. Super. 546 (Law Div. 1989)	. . . 6

RULES

R. 4:10-2, Comment 9	. . . 6
R. 4:10-2(c)	. . . 5, 6, 11
<i>Fed. R. Civ. P.</i> 26(b)(3)	. . . 6, 7, 11

PRELIMINARY STATEMENT

Third-Party Defendant Monsanto Company ("Monsanto") submits this Brief in opposition to defendant Witco Corporation's ("Witco") informal application to compel Monsanto to produce its computerized litigation support system prepared by counsel for the purpose of assisting in the defense of pending and anticipated litigation involving PCBs. Witco has sought access to this attorney work-product without making a formal discovery demand consistent with the Court's prior directives and, more importantly, without providing any factual or legal support for this extraordinary demand. Monsanto has, by Witco's admission,¹ satisfied its discovery obligations in this six (6)-year old case. Monsanto has produced thousands of documents which were the subject of numerous discovery agreements and court orders designed to place reasonable limits on the scope of discovery in this case, and Witco has neither complained about such productions in the approximately three (3) years since they were completed nor posed any additional discovery requests. Yet, Witco now asks this Court to be the first to compel a party to disclose a computerized system prepared by counsel to organize and retrieve documents for use in litigation. In so doing, Witco also asks this Court to disregard both New Jersey law and the prior decisions of three Courts which

¹By letter dated June 8, 1992, counsel for Witco, while demanding the production of a "computer index," specifically acknowledged that "the adequacy of [Monsanto's] discovery is not an issue at this time." As the Court is aware, Witco has consistently expressed this position at a number of Case Management Conferences held since the stay of discovery was lifted in this case in 1990.

specifically considered Monsanto's claim of work-product protection for these same materials and denied similar requests to compel disclosure.

Witco's application not only disregards applicable legal principles and case law, but also fundamentally misconstrues the nature of Monsanto's litigation support system. Monsanto does not maintain a list of documents relating to PCBs. As Monsanto has previously disclosed to Witco and the Court, Monsanto's attorneys created and maintain a litigation support system, including a taxonomy, or list of fields and classifications, used by Monsanto's counsel to retrieve attorney selected and organized documents for purposes of litigation. The taxonomy is not, as Witco suggests, a computer "listing of documents." Rather, like the entire litigation support system of which it is an integral part, it is the fundamental equivalent of a lawyer's notes of his mental impressions, conclusions, opinions and legal theories used to classify and retrieve documents for litigation purposes. What Witco seeks is the opinion work-product of Monsanto's counsel which, as discussed below, is entitled to absolute protection from disclosure under New Jersey law.

STATEMENT OF FACTS

During 1981 and 1982, Joseph G. Nassif (Monsanto's former in-house counsel principally responsible for managing the company's PCB litigation) and David M. Moore, II, Esq. (an outside attorney representing Monsanto in PCB litigation) reviewed PCB-related documents, collected and consolidated under the supervision and instruction of Mr. Nassif in connection with pending and anticipated PCB litigation. (See Affidavits of David M. Moore, II, Esq. ("Moore Aff."), ¶¶ 2-3, and Joseph Nassif, Esq. ("Nassif Aff."), ¶¶ 2-3, submitted herewith). Subsequently, Messrs. Nassif and Moore, using their knowledge and experience gained in representing Monsanto in PCB litigation, selected the documents they considered relevant and significant to be included in a litigation resource library. (Nassif Aff., ¶ 5; Moore Aff., ¶¶ 2-3). After completing this document selection, they created a subject matter classification system to organize and retrieve the documents, and also established instructions to be followed in the classification of these documents for a computerized database (Moore Aff., ¶¶ 3-4; Nassif Aff., ¶ 8).

In developing this system, Monsanto's lawyers relied on their legal judgment and experience to identify relevant and significant documents, define subject matter categories, conceptualize relationships between those subject matter categories, and finally to establish and supervise the method for classifying those documents. (Moore Aff., ¶3; Nassif Aff., ¶7). The list of fields and

classifications prepared by Mr. Moore and Mr. Nassif is referred to as the "taxonomy."

As set forth in the Affidavit of Thomas M. Bistline, Esq. ("Bistline Aff.") (Monsanto's current in-house counsel who manages the company's PCB litigation), Monsanto's law department and outside law firms have always maintained this computerized litigation support system and related documents (including the taxonomy) in strict confidence since its creation by Mr. Nassif and Mr. Moore. (Bistline Aff., ¶ 3; Nassif Aff., ¶9). This material cannot be produced without revealing the mental impressions, conclusions, opinions, legal theories and thought processes of Mr. Nassif and Mr. Moore. (Moore Aff., ¶6; Nassif Aff., ¶10).

LEGAL ARGUMENT

WITCO'S DEMAND FOR A "COMPUTER INDEX" MUST BE DENIED SINCE IT SEEKS MATERIALS WHICH ARE PROTECTED FROM DISCLOSURE BY THE ATTORNEY WORK-PRODUCT DOCTRINE.

R. 4:10-2(c) provides that a party seeking production of documents prepared in anticipation of litigation must show that (1) it has "substantial need of the materials in the preparation of [its] case," and (2) it is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." However, even where the requisite showing has been made, the Rule directs that the Court "shall protect" from disclosure "the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." *Id.* Indeed, the New Jersey Supreme Court has reaffirmed that attorney opinion work product enjoys absolute immunity from disclosure, in light of its established "sacrosanct character" under the law. *Jenkins v. Rainer*, 69 N.J. 51, 55 (1976).

Here, Witco makes no effort to demonstrate either that it has a "substantial need" for access to Monsanto's work-product, or that it cannot obtain relevant documents by other means "without undue hardship." Indeed, Witco makes no claim that it needs or is entitled to a supplementation of the massive document production which Monsanto completed in 1989. Equally important, the materials which Witco asks this Court to compel Monsanto to produce have been consistently treated as work-product by other courts, protecting

those materials from any disclosure. This result is also compelled by application of basic principles of law which guide the courts of this State in deciding the scope of protection which should be accorded attorney work-product.

A. The Work-Product Doctrine Applies To A
 Computerized System Prepared By Counsel
 To Organize and Retrieve Selected
 Documents For Litigation.

Those courts which have specifically considered computerized litigation support systems have squarely held that documents relating to such systems are protected from discovery as attorney work-product. In the case of *In Re IBM Peripherals*, 5 Computer L. Serv. Rep. 878 (N.D. Cal. 1975) (annexed as Exhibit A to accompanying Appendix). IBM's counsel had developed a computerized trial support system which included summaries and analyses of IBM documents. Relying upon *Fed. R. Civ. P. 26(b)(3)*², the Court ruled that this computerized system was attorney work-product, and denied a motion to compel discovery relating to the system. The Court reasoned as follows:

The trial support system created by IBM's counsel reflects their mental impressions, theories and thought processes, and the Court is not satisfied that information contained in

²The New Jersey work product doctrine tracks the analogous federal rule, and is derived directly from *Fed. R. Civ. P. 26(b)(3)*. See *Wagi v. Silver Right Park W.*, 243 N.J. Super. 546, 557 (Law Div. 1989) ("[o]ur own R.4:10-2(c) was based on the federal rule"); R. 4:10-2, Comment 9(R. 4:10-2(c) follows the work product privilege stated in *Fed. R. Civ. P. 26(b)(3)*). Therefore, the federal cases are persuasive authority in determining the proper scope of work product protection under New Jersey law.

that system can be segregated from such lawyers' mental impressions and theories.

Id. at 879.

Similarly, discovery of a computerized litigation support system was denied in *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1297-1298 (D.C. Cir. 1980) (ruling that computerized "database documents prepared by or for MCI's attorneys specifically in anticipation of litigation" are protected attorney work-product). See also, *Nat. Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257, 1259-1260 (E.D. Pa. 1980) (*dictum*).

The protection of a database created by counsel is consistent with the basic principle that an attorney's selection or summary of documents is immune from disclosure since it would reveal his mental processes, including his opinion of what may be relevant for purposes of litigation. See, e.g., *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974) (disclosure of summaries would improperly reveal mental processes); *Omaha Public Pioneer Dist. v. Foster Wheeler Corp.*, 109 F.R.D. 615, 616 (D. Neb. 1986) (attorney's selection and segregation of documents used to prepare witness for deposition is protected by work-product doctrine). Applying this principle, the Third Circuit has construed Rule 26(b)(3) as according the highest work-product protection to counsel's selection and compilation of documents:

Opinion work product includes such items as an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case, and the inferences he

draws for interviews of witnesses. Such material is accorded an almost absolute protection from discovery because any slight factual content that such items may have is generally outweighed by the adversary system's interest in maintaining the privacy of an attorney's thought processes and in ensuring that each side relies on its own wit in preparing their respective cases.

* * *

We believe that the selection and compilation of documents by counsel in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product.

Sporck v. Peil, 759 F.2d 312, 316 (3d Cir.), cert. denied, 474 U.S. 903 (1985) (citations omitted).

The *Sporck* opinion relied in part upon the rationale provided in *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138 (D. Del. 1982), where an attorney's selection and organization of key documents for use in preparing witnesses for discovery and trial was held to be opinion work-product:

In selecting and ordering a few documents out of thousands counsel *could not help but reveal important aspects of his understanding of the case*. Indeed, in a case such as this, involving extensive document discovery, the process of selection and distillation is often more critical than pure legal research.

James Julian, 93 F.R.D. at 144 (emphasis added). See also, *Jaroslaws v. Engelhard Corp.*, 115 F.R.D. 515, 517-518 (D.N.J. 1987) (documents selected and compiled by counsel fall within the "highly protected" category of attorney work-product; to hold

otherwise would "enable a learned professional to perform its functions . . . on the wits of its adversary" (citing *Upjohn Company v. United States*, 449 U.S. 383, 396 (1981)); *In re LTV Securities Litigation*, 89 F.R.D. 595, 612 (N.D. Tex. 1981) ("To the extent documents are 'assembled' by or for a party or his representative into a meaningful product, the contents of that assemblage is work-product sheltered from disclosure").

In light of the high degree of protection which New Jersey courts have consistently accorded opinion work-product (*Jenkins v. Rainner*, 69 N.J. at 55), and considering the long line of federal cases holding that the collection, organization and classification of documents (whether by computerized or conventional methods) reveals protected information about an attorney's mental processes, it follows necessarily that a computerized litigation support system is immune from discovery in this State.

B. Monsanto's System Should Be, And Has
Been, Accorded Protection From Disclosure
To An Adverse Party.

This case falls squarely within the rule that protects computerized litigation systems from disclosure as opinion work product. As reflected in the affidavits of Messrs. Moore, Nassif and Bistline, Monsanto's attorneys collected and consolidated documents for inclusion in a computerized litigation support system, based upon counsel's judgment of which documents would likely be needed for the defense and handling of pending and anticipated PCB litigation. Once these documents were selected, Mr. Nassif and Mr.

Moore devised a system for document organization, categorization and retrieval (including selection of a retrieval software system) which would serve Monsanto's pending and anticipated litigation needs. Mr. Moore and Mr. Nassif discussed and determined the legal and factual issues that might arise in PCB litigation based upon their experience gained in representing Monsanto in PCB litigation and their review of the documents and their forecast of issues likely to arise in the future, and established a list of characteristics and classifications of documents to be used in organizing and retrieving the documents selected by Mr. Nassif and Mr Moore. In sum, every aspect of this litigation support system and the documents relating to it contain and reflect the mental impressions, conclusions, opinions and legal theories of Mr. Nassif and Mr. Moore concerning the defense of Monsanto in then existing and anticipated litigation relating to PCBs.

In view of these facts, the three courts which have previously considered Monsanto's claim of work-product protection for its computerized litigation support system have properly concluded that the system is not subject to discovery:

- (1) United States District Court for the Southern District of Indiana -- Indianapolis Division (denying plaintiff's motion to compel "to the extent it seeks the production of an index of PCB-related documents") (annexed as Exhibit B to accompanying Appendix);
- (2) United States District Court for the Eastern District of Texas -- Beaumont Division (denying plaintiff's motion to compel production of any "index to

relevant files on PCBs") (annexed as Exhibit C to accompanying Appendix); and

- (3) Circuit Court of the State of Wisconsin -- Milwaukee County (denying plaintiff's motion to compel on the grounds that "the indexes are work product") (annexed as Exhibit D to accompanying Appendix).

Here, there is no reason to depart from the sound reasoning of these directly applicable cases, particularly in light of the absolute immunity afforded under New Jersey law for opinion work-product.

Despite the fact that Witco cites no case or authority for the proposition that Monsanto's litigation support system is discoverable *under any circumstances*, Witco argues that discovery of Monsanto's protected work-product would be of interest in identifying "additional relevant documents to request. . . ." Witco's Letter Brief at p. 3. This argument is squarely at odds with the work-product doctrine. Even where a document prepared by counsel does not contain or reflect his opinions, impressions or thought processes, a party must demonstrate substantial need and undue hardship. R. 4:10-2(c); *Fed. R. Civ. P.* 26(b)(3). It is simply not enough to argue that discovery would aid counsel's preparation and help him to ascertain whether he has missed anything. *Hickman v. Taylor*, 329 U.S. 495, 513 (1947). A showing that the materials sought might or would be helpful or make counsel's preparation more efficient also falls short. *J.H. Rutter Rex Manufacturing Co. v. NLRB*, 473 F.2d 223, 234-35 (5th Cir. 1973); *Republic Gear Co. v. Borg Warner Corp.*, 381 F.2d 551, 558 (2d Cir.

1967); *Brennan v. Engineered Prods., Inc.*, 506 F.2d 299, 303 (8th Cir. 1974); *United States v. Chatham*, 72 F.R.D. 640, 644 (S.D. Ga. 1976). The desire to take advantage of an adversary's preparation in order to bolster one's own preparation or provide reassurance that nothing has been overlooked cannot be indicative of special need, since these factors are present in every case. *Alltmont v. United States*, 177 F.2d 971, 978 (3d Cir. 1949); see also, *In re Grand Jury Subpoena Dated November 8, 1979*, 622 F.2d 933, 936 (6th Cir. 1980) (ruling that the work-product doctrine prohibits a "general fishing expedition into [counsel's] files mainly to satisfy itself that nothing has been overlooked").

Witco is also incorrect in suggesting that the "index" prepared by counsel is a "listing of documents." The "index" or taxonomy prepared by Messrs. Nassif and Moore does not list specific documents but rather lists the fields and classifications developed by Monsanto's attorneys to organize and retrieve documents for defending PCB litigation. Again, this taxonomy is the opinion work product of Mr. Nassif and Mr. Moore, and cannot be produced or otherwise made available to counsel for Witco without revealing their mental impressions, conclusions, opinions, legal theories and thought processes.

CONCLUSION

For all of the foregoing reasons, Witco's application to compel the production of a "computer index to PCB-related documents" should be denied.

PITNEY, HARDIN, KIPP & SZUCH
Attorneys for Third-Party
Defendant Monsanto Company

By: James E. Tyrrell, Jr.
JAMES E. TYRRELL, JR.
A Member of the Firm

DATED: July 21, 1992