

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

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U. S. DISTRICT COURT

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CECIL SCOTT, ET AL

VS.

MONSANTO COMPANY

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CIVIL ACTION NO.

B-84-1103-CA

TEXAS - EASTERN

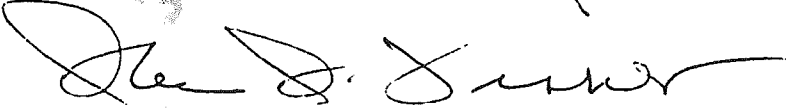
BY

ORDER OVERRULING MOTION TO COMPEL DISCOVERY

Came on for consideration this day the Plaintiffs' Motion to Compel Discovery. Upon consideration of the Motion and the Response to Plaintiffs' Motion to Compel Discovery and Supporting Affidavits and Brief, the Court was of the opinion that the Plaintiffs' Motion to Compel Discovery should be in all things overruled and denied. It is therefore

ORDERED that the Plaintiffs' Motion to Compel Discovery is in all things overruled and denied.

SIGNED and ENTERED this 10 day of March, 1987.


United States District Judge

JBS/SCOTTorder

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CECIL SCOTT, ET AL

VS.

MONSANTO COMPANY

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CIVIL ACTION NO.

B-84-1103-CA

BRIEF OF MONSANTO COMPANY IN SUPPORT OF
RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY

COMES NOW Monsanto Company, Defendant in the captioned case,
and files this Brief in Support of its Response to the
Plaintiffs' Motion to Compel:

Factual Background

1. The Plaintiffs' Motion to Compel is yet another in a continuing series of actions by the Plaintiffs which are designed to impose upon both Monsanto Company and the Court. Monsanto Company has had discovery outstanding to the Plaintiffs for over a year to which the Plaintiffs have failed and refused and continue to fail and refuse to properly respond. For example, at this time only three of the ten designated trial plaintiffs have filed sworn answers to interrogatories although these interrogatories have been outstanding for over one year. None of the ten trial plaintiffs have filed responses to the Joint Request for Production of Documents which was filed over one year ago, and the only documents which have been produced by the Plaintiffs to Monsanto Company in response to this document request have been a few items produced at the initial depositions of the Plaintiffs. Questioning of the Plaintiffs at their

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depositions indicates that additional documents are available which have not been produced, and in one instance documents had not been produced which had actually been supplied to the Houston attorneys for the Plaintiffs. In the face of this flagrant refusal to respond to discovery for a period of over one year, the Plaintiffs now feel it is appropriate to take the Court's time with a Motion to Compel which seeks to obtain a document which is so clearly immune from discovery and subject to privilege as to leave little room for even a good faith argument by the Plaintiffs. This Motion to Compel is supported only by the affidavit of David M. Lacey, one of the Plaintiffs' attorneys, which affidavit is based in large part upon informal conversations with the undersigned counsel for Monsanto Company. This affidavit in some instances misstates those informal conversations with counsel for Monsanto Company, and in other instances contains only the extrapolations and suppositions of Plaintiffs' counsel which are apparently offered as sworn testimony.

2. Monsanto Company has filed in support of its response to the Plaintiffs' Motion to Compel three affidavits. These are the affidavits of Joseph G. Nassif, David M. Moore, II, and Thomas M. Bistline, each of which is incorporated herein by reference. Unlike Mr. Lacey's affidavit, each of these affidavits is based upon personal knowledge and each of the affiants testifies as to facts. The facts as established by these affidavits are as

follows.

3. Since 1974 Mr. Joseph G. Nassif has been an attorney licensed to practice law in the State of Missouri. From 1975 through May, 1986 he was employed by Monsanto Company as an attorney in their Law Department. Mr. Nassif was Litigation Counsel for Monsanto Company from November, 1981 thorough May, 1985 with principal responsibility for management and supervision of litigation matters related to the manufacture and sale of polychlorinated biphenyls by Monsanto Company. As part of that responsibility Mr. Nassif reviewed and coordinated discovery matters, including the preparation of responses to document requests and production of documents in response to proper document requests.

4. During 1982 and 1983 there were ongoing cases against Monsanto Company in which Plaintiffs made allegations concerning the manufacture and sale of polychlorinated biphenyls, and Mr. Nassif in his judgment as Litigation Counsel anticipated the filing of additional cases of this type against Monsanto Company. Accordingly, Mr. Nassif instructed his representatives within the Law Department to assist him in the consolidation and collection of all documents that could be then identified relating in any way to the sale and manufacture of polychlorinated biphenyls. After a significant period of time, all such documents were collected pursuant to the instructions of Mr. Nassif and placed under administration by the Monsanto

Company Law Department. This collection of documents contained both discoverable documents as well as documents which were and are privileged from production.

5. Following the collection and consolidation of the documents, Mr. Nassif decided that they required substantial organization in order to attempt to marshall the documents and facts which in the judgment of Mr. Nassif as Litigation Counsel were relevant and significant from those which were not, and to allow for retrieval and organization of the documents in a manner which would, in the judgment of Mr. Nassif, be useful in the defense and handling of pending and anticipated litigation.

6. At the request of Mr. Nassif, Mr. David M. Moore, II was retained as counsel for Monsanto Company to assist in a review and categorization of the documents which had been collected. Mr. Moore was retained as a result of his knowledge and experience about litigation involving polychlorinated biphenyls. Mr. Moore was retained to assist during 1982 and 1983 in the review, analysis, organization, and categorization of documents for purposes of litigation support in connection with pending and anticipated polychlorinated biphenyls litigation.

7. Before commencing review of the document library, Mr. Moore and Mr. Nassif had extensive discussions regarding those documents which they felt would be particularly significant and useful in current and anticipated litigation matters related to the manufacture and sale of polychlorinated biphenyls by Monsanto

Company based upon their knowledge and understanding of litigation related to polychlorinated biphenyls. During the course of their review of the documents, they were required on many occasions to determine whether or not particular documents were in fact significant enough to be included within the collection of documents which would eventually be selected for organization and categorization for use in ongoing and future litigation. Mr. Nassif and Mr. Moore personally reviewed large quantities of documents based upon their knowledge and experience gained in the representation of Monsanto Company in polychlorinated biphenyls litigation, and selected approximately 50% of the documents to be organized and classified for inclusion in the litigation resource library. This selection was accomplished following the personal review of the document collection by Mr. Nassif and Mr. Moore, in many instances on a page-by-page basis.

8. Beginning in late 1982, Mr. Nassif conducted an investigation into the use of various automated retrieval systems for litigation support, and in particular systems for fact and document collection, organization, categorization, and retrieval. After considering several alternatives and based upon his analysis of the then existing and future polychlorinated biphenyls litigation support needs, Mr. Moore and Mr. Nassif devised a system for fact and document organization, categorization, and retrieval. The final system was based upon a

software program which Mr. Nassif selected which most closely met the then existing and anticipated litigation support needs of Monsanto Company.

9. Mr. Moore then prepared, at the request of Mr. Nassif, a list reflecting critical potential legal and factual issues that might arise in pending and projected polychlorinated biphenyls litigation and classifications of documents which would be relevant to such issues, to be used in organization and retrieval of the documents selected by Mr. Nassif and Mr. Moore. The draft list of critical fields and classifications was prepared in May, 1983 by Mr. Moore, and sent to Mr. Nassif for his review. The draft was finalized by Mr. Moore and Mr. Nassif in June of 1983. Prior to the preparation of the draft list of critical fields and classifications, Mr. Moore and Mr. Nassif considered and discussed critical fact and legal issues presented or anticipated in ongoing as well as anticipated polychlorinated biphenyls litigation that should be taken into account in the preparation of the list of critical fields and classifications. These discussions were based upon the experience of Mr. Nassif and Mr. Moore in past and then ongoing polychlorinated biphenyls litigation matters and their review of the documents. The list of critical fields and classifications accordingly contains and continues to reflect the mental impressions, conclusions, opinion, and legal theories of Mr. Nassif and Mr. Moore concerning the defense of Monsanto Company in then existing and

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anticipated litigation related to the manufacture and sale of polychlorinated biphenyls by Monsanto Company.

10. Following preparation of the list of critical fields and classifications, Mr. Moore and Mr. Nassif personally trained individuals as their representatives to work under their supervision for purposes of completing the classification of the documents pursuant to the fields and classifications established by Mr. Moore and Mr. Nassif. However, the full text of the selected documents was not placed on computer.

11. As reflected in the affidavits of Mr. Nassif and Mr. Bistline, the litigation support system has been used exclusively in support of Monsanto's litigation needs. All aspects of the development of this system were controlled and conducted by counsel retained by Monsanto Company, and all aspects of the use of such system were and are controlled and conducted by counsel retained by Monsanto Company. Strict confidentiality with regard to all aspects of the system, including the list of critical fields and classifications, has been required at all times by counsel and their representatives. At no time has the list of fields and classifications prepared by Mr. Moore and Mr. Nassif been given to anyone other than Mr. Nassif, Mr. Moore, and Mr. Bistline and their direct representatives, including even other counsel representing Monsanto Company. The only access point to the system is exclusively retained within the litigation support group in the Monsanto Company Law Department in St. Louis,

Missouri, and the system has never been used by anyone other than the Monsanto counsel submitting affidavits herewith and their direct representatives in connection with ongoing or projected litigation involving Monsanto Company.

12. Mr. Lacey is accordingly incorrect in his musings which are offered as sworn testimony. There is no index to polychlorinated biphenyls documents, as Mr. Lacey was clearly advised in conversations with the undersigned counsel and is clearly established in the affidavits of Mr. Nassif, Mr. Moore, and Mr. Bistline.

13. As clearly reflected in the affidavits of Mr. Nassif, Mr. Moore, and Mr. Bistline, the thought processes leading up to the decision by Mr. Nassif to prepare and develop an automated litigation support system and the format for prioritizing key facts and documents and classification of key facts and documents contains and reflects the mental impressions, conclusions, opinions, legal theories, and thought processes of Mr. Nassif and Mr. Moore as attorneys representing Monsanto Company at the time in then ongoing and anticipated litigation involving Monsanto Company. All documentation pertaining to this system, including the list of critical fields and classifications, is the opinion attorney work product of Mr. Nassif and Mr. Moore. Neither documentation pertain to this system nor any aspect of the system itself including the list of critical fields and classifications can be produced or otherwise made available to counsel for

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Plaintiffs without revealing those mental impressions, conclusions, opinions, legal theories, and thought processes.

14. The affidavits of Mr. Nassif, Mr. Moore, and Mr. Bistline clearly reflect that the documents sought by the attorneys for the Plaintiffs are privileged and immune from discovery on three grounds:

(a) the documentation sought is the opinion attorney work product of Mr. Nassif and Mr. Moore,

(b) the documentation sought is subject to the attorney/client privilege, and

(c) the documentation sought is confidential and proprietary.

The documentation sought is opinion attorney work product.

15. The United States Supreme Court first established the work product doctrine in the case of Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385 (1947). In Hickman v. Taylor, the United States Supreme Court stated that "not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney." 329 U.S. at 510. The United States Supreme Court further explained the rationale for protecting attorney work product against discovery as follows:

In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant

facts, prepare his legal theories and plan a strategy without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and protect their clients' interests. The work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways Were such material open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

16. The attorney work product doctrine is now codified at Rule 26(b)(3) of the Federal Rules of Civil Procedure. The rule extends the protection against discovery not only to materials prepared by a lawyer but also to materials prepared by a party or by representatives of the party or of his lawyer, such as consultants and accountants. Rule 26(b)(3) provides in pertinent part as follows:

" . . . a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

17. The language of Rule 26(b)(3) makes clear that there are two tiers of protection against discovery. Under the first tier of protection, disclosure will not be ordered unless the requesting party demonstrates "substantial need of the materials" and an inability to obtain equivalent information through other means without "undue hardship". The second and higher tier of protection covers materials that reflect the thoughts of the preparer about the litigation. These materials, which are often referred to in the cases as "opinion attorney work product" should be protected against discovery even when the requesting party demonstrates "substantial need" and "undue hardship". Upjohn Company v. United States, 449 U.S. 383, 101 S.Ct. 677 (1981).

18. Rule 26(b)(3) states that courts "shall protect" against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. This language provides a virtually absolute protection for opinion attorney work product. Upjohn Company v. United States, supra; Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d.730 (4th Cir. 1974); United States v. Leggett & Platt, Inc., 542 F.2d. 655 (6th Cir. 1976); Duffy v. United States, 473 F.2d. 840 (8th Cir. 1973); First Wisconsin Mortgage Trust v. First Wisconsin Corporation, 86 F.R.D. 160 (E.D.Wis. 1980). As noted by the United States Supreme Court in Upjohn Co. v. United States, "Rule 26 accords

special protection to work product revealing the attorney's mental processes. . . . As Rule 26 and Hickman made clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." 449 U.S. at 400-401. In Duplan Corp. v. Moulinage et Retorderie de Chavanoz, supra, the United States Court of Appeals for the Fourth Circuit held that no showing of relevance, substantial need, or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions, or legal theories, analyzing Rule 26(b)(3) as follows:

The first sentence grants a qualified immunity to 'documents and tangible things . . . prepared in anticipation of litigation.' The second sentence, however, provides '[i]n ordering discovery of such materials . . . the court shall protect against disclosure of the mental impressions. . . .' (emphasis added in opinion). By their terms, the two sentences are complementary. Thus, it is apparent that the clear command of the second sentence to 'protect against disclosure' applies to all the materials referred to in the first sentence. In our view, no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions, or legal theories. This is made clear by the Rule's use of the term 'shall' as opposed to 'may'.

19. The United States Court of Appeals for the Eight Circuit in In Re Murphy, Jr., 560 F.2d 326 (8th Cir. 1977) held that opinion attorney work product enjoys a "nearly absolute immunity" and can be discovered only in very rare and extraordinary circumstances as follows:

It is clear that opinion work product is entitled to substantially greater protection than ordinary work product. Therefore, unlike ordinary work product, opinion work product cannot be discovered upon a showing of substantial need and an inability to secure the substantial equivalent of the materials without alternative means without undue hardship. See Fed. R. Civ. P. 26(b)(3). In our view, opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances. See Hickman v. Taylor, supra. Our unwillingness to recognize an absolute immunity for opinion work product stems from the concern that there may be rare circumstances, yet unencountered by this court, where weighty considerations of public policy and a proper administration of justice would militate against the non-discovery of an attorney's mental impressions. Absent such a compelling showing, the attorney's opinion work product should remain immune from discovery. 560 F.2d. at 336.

The Court gave as an example of such rare and extraordinary circumstances which might compel discovery of opinion attorney work product if such work product "contains inculpatory evidence of the attorney's own illegal or fraudulent activities." The Court also noted that the type of proceeding in which discovery is sought, such as a grand jury proceeding, is a relevant consideration. There certainly has been no allegation in this civil case, nor could there be, that the opinion attorney work product at issue contains inculpatory evidence of some alleged crime or fraud of Monsanto's attorneys.

20. The affidavits of Mr. Nassif, Mr. Moore, and Mr. Bistline establish clearly that the documentation sought by the Plaintiffs is opinion attorney work product. The documentation was prepared in connection with then ongoing litigation concerning polychlorinated biphenyls and anticipated litigation

concerning polychlorinated biphenyls. The selection and compilation of documents by counsel in preparation for pre-trial discovery falls within the highly protected category of opinion attorney work product. Sporck v. Peil, 759 F.2d. 312, 316 (3rd Cir. 1985); Omaha Public Power District v. Foster Wheeler Corporation, 109 F.R.D. 615 (D. Neb. 1986); In Re LTV Securities Litigation, 89 F.R.D. 595, 612 (N.D.Tex. 1981). As stated by the United States Court of Appeals for the Third Circuit in Sporck v. Peil at page 316:

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 from interviews of the witnesses. . . . Such material is accorded in almost absolute protection from discovery because any slight factual content that such items may have is generally outweighed by the adversary systems' interest in maintaining the privacy of an attorney's thought processes and in insuring 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. As the court succinctly stated in James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144 (D. Del. 1982):

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. . . .

In an analogous situation, Berkey Photo, Inc. v. Eastman Kodak, 74 F.R.D. 613 (S.D.N.Y. 1977) held the trial notebook of an attorney to be immune from discovery as opinion work product as

it contained his organization of documents and data in connection with litigation.

21. In their Motion to Compel, Plaintiffs' counsel further argues that the documentation prepared by Mr. Nassif and Mr. Moore is not entitled to immunity as opinion attorney work product for the reason that it was prepared in connection with cases other than the captioned case. This argument is specious for a number of reasons. First, as established by the affidavit of Mr. Nassif, at least four plaintiffs in the captioned case had cases pending against Monsanto Company at the time of the preparation of the privileged documentation sought by the Plaintiffs. The documentation was in fact prepared in connection with the claims of those four plaintiffs which were pending at that time, as well as other then pending litigation and anticipated litigation. Second, the United States Supreme Court and other courts which have considered the issue have held that the immunity afforded to opinion work product extends beyond the specific litigation for which the documents at issue were prepared. In F.T.C. v. Grolier, Inc., 462 U.S. 19, 103 S. Ct. 2209 (1983), the United States Supreme Court held as follows at page 25-26 of the opinion:

. . . But the literal language of the Rule protects materials prepared for any litigation or trial as long as they were prepared by or for an party to the subsequent litigation. 462 U.S. 26.

. . . .
At the time this case came to the Court of Appeals, all of the Courts of Appeals that had decided the issue under Rule 26(b)(3) had determined that work product

materials retain their immunity from discovery after termination of the litigation for which the documents were prepared, without regard to whether other related litigation is pending or is contemplated.

The concurring opinion in F.T.C. v. Grolier, Inc. contains the following language at page 31 of the opinion which is particularly applicable to the case at bar:

. . . Any litigants who face litigation of a commonly recurring type - liability insurers, manufacturers of consumer products or machinery, large scale employers, securities brokers, regulated industries, civil rights or civil liberties organizations, and so on - have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes. Counsel for such a client would naturally feel some inhibition in creating and retaining written work product that could later be used by an 'unrelated' opponent against him and his client.

In Re Murphy, Jr., supra, cited by the United States Supreme Court in F.T.C. v. Grolier, Inc., supra, held that work product prepared in connection with ongoing litigation will remain protected even in unrelated future cases, noting as follows at page 335 of the opinion:

. . . If work product is protected in related, but not unrelated future cases, an attorney would be hesitant to assemble extensive work product materials because of the concern that the materials will not be protected in later, unrelated litigation. The relatedness of the subsequent litigation provides an insufficient basis for disregarding the privilege articulated in Hickman and incorporated in Rule 26(b)(3). The mischief engendered by allowing discovery of work product recognized in Hickman would apply with equal vigor to discovery in future, unrelated litigation."

See also: Duplan Corp. v. Moulinage et Retorderie de Chavanoz, supra.

22. Those courts which have specifically considered computerized litigation support systems such as that described in the affidavits of Mr. Nassif, Mr. Moore, and Mr. Bistline have squarely held that such document organization systems are immune from discovery as work product. In the case of In Re IBM Peripherals, 5 Computer Law Service Reporter 878 (N.D. Cal. 1975) IBM's counsel had developed a computerized trial support system which included summaries and analyses of IBM documents. IBM filed a memorandum and affidavits in opposition to a motion to compel with respect to discovery concerning the computerized trial support system. The court denied the Plaintiffs' motion to compel, holding that the computerized litigation support system was attorney work product. Similarly, discovery of a computerized litigation support system was denied in United States v. American Telephone & Telegraph Co., 642 F.2d. 1285, 1297-1298 (D.C. Cir. 1980). Other courts have also indicated in dicta that they would deny discovery of a computerized litigation support system such as that created by the Monsanto Company attorneys Mr. Nassif and Mr. Moore. United States v. IBM, 58 F.R.D. 556 (S.D.N.Y. 1973); Control Data Corp. v. IBM, 3 Computer Law Serv. Rep. 1136, 1144 (D.Minn. 1973).

23. The affidavits of Mr. Nassif, Mr. Moore, and Mr. Bistline clearly establish that the documentation sought by the Plaintiffs' Motion to Compel is entitled to the almost absolute immunity afforded to opinion attorney work product. Nonetheless,

counsel for Plaintiffs in their Motion to Compel further argue that they have demonstrated "substantial need" of the documentation in the preparation of their case and that they are unable without "undue hardship" to obtain the substantial equivalent of the materials by other means. As noted above, these arguments are irrelevant, as even such findings do not justify the discovery of opinion attorney work product. F.T.C. v. Grolier, Inc., supra; In Re Murphy, Jr., supra. Even if such findings could justify discovery of opinion attorney work product, the Plaintiffs have totally failed to make such a showing in this case. The Plaintiffs basic argument is that it would be less time-consuming, less expensive, and more convenient to the Plaintiffs to conduct discovery if they were provided documentation concerning the Monsanto Company litigation support system. Such allegations do not establish substantial need and undue hardship under Rule 26(b)(3). It is not enough that discovery would aid counsel's preparation and help him to ascertain whether he has missed anything. Hickman v. Taylor, supra at 513. 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 (5th Cir. 1973); Republic Gear Co. v. Borg Warner Corp., 381 F.2d. 551, 558 (2nd Cir. 1967). The desire to take advantage of an adversary's preparation in order bolster one's own preparation or provide reassurance that nothing has been

overlooked cannot be indications of special need, since these factors are present in every case. Alltmont v. United States, 177 F.2d. 971, 978 (3rd Cir. 1949). Similarly, broad assertions by the discovering party that the requested documentation or information will expedite the litigation or facilitate production of proof are not sufficient to demonstrate substantial need. Brennan v. Engineered Products, Inc., 506 F.2d. 299, 303 (8th Cir. 1974).

24. It should be emphasized that the computerized litigation support system devised by counsel for Monsanto Company in no way deprives plaintiffs of an opportunity to obtain the underlying documents and in no way changes the discoverability of the underlying documents which were categorized by Mr. Nassif and Mr. Moore. Those non-privileged documents which have been organized and categorized by Mr. Nassif and Mr. Moore remain available to the Plaintiffs upon proper document request in accordance with the Federal Rules of Civil Procedure. In fact, Monsanto Company, unlike the Plaintiffs, has responded to document requests directed to it in this case and has already provided or made available to the Plaintiffs some seven boxes of documents. When other discovery devices are available to obtain documentation or information without intruding into protected work product, the requirements of substantial need and undue hardship have not been met and the attorney work product should not be discovered. United States v. Chatham City Corp., 72 F.R.D. 640 (S.D. Ga.

1976). Likewise alleged expense and inconvenience to the discovering party will not justify production of work product. United States v. Chatham City Corp., supra.

25. The affidavits of Mr. Nassif, Mr. Moore, and Mr. Bistline clearly establish that the Monsanto litigation support system was established for ongoing and contemplated litigation, and has at all times been used exclusively for such purpose. The system and documentation in connection with the system reflects the mental impressions, conclusions, opinions, legal theories, and thought processes of Mr. Nassif and Mr. Moore, and so is clearly opinion attorney work product. The system and related documentation is accordingly immune from discovery under Rule 26(b)(3) of the Federal Rules of Civil Procedure. While Plaintiffs have not made a showing of substantial need and undue hardship, even if such a showing had been made by the Plaintiffs, production of the opinion attorney work product would not be justified.

Attorney/Client Privilege

26. The affidavits of Mr. Nassif and Mr. Moore state that prior to and during the creation of the Monsanto Company litigation support system, Mr. Nassif and Mr. Moore considered and discussed critical fact and legal issues presented or anticipated in ongoing as well as projected polychlorinated biphenyls litigation that should be taken into account in the preparation of the list of critical fields and classifications.

These discussions were based upon the experience of Mr. Nassif and Mr. Moore in past and ongoing polychlorinated biphenyls litigation matters and upon their prior review of the documents. The listing of critical fields and classifications contains and reflects the mental impressions, conclusions, opinions, and legal theories concerning the defense of Monsanto Company in then existing and projected litigation relating to its manufacture and sale of polychlorinated biphenyls of both Mr. Nassif and Mr. Moore. To the extent that these mental impressions, conclusions, opinions, legal theories, and thought processes of Mr. Nassif and Mr. Moore were established by the discussions which took place between Mr. Nassif and Mr. Moore during the review, selection, and organization of the documents for inclusion in the system and the preparation of the list of critical fields and classifications, such documents are subject to the attorney/client privilege. Mr. Nassif and Mr. Moore were both attorneys representing Monsanto Company at that time, and any documents which reflect communications between Mr. Nassif and Mr. Moore within the scope of their representation are subject to the attorney/client privilege.

Trade Secret Privilege

27. The Monsanto litigation support system was developed by Mr. Nassif and Mr. Moore based upon their unique knowledge of polychlorinated biphenyls litigation. The system was prepared and implemented by Mr. Nassif and Mr. Moore at a cost of

approximately \$1 million. The listing of critical fields and classifications and the litigation support system is unique, one of a kind, and was tailored and designed by Mr. Nassif and Mr. Moore for litigation support in connection with the polychlorinated biphenyls litigation then ongoing and anticipated. Computer software programs have been held to be trade secrets. Com-Share, Inc. v. Computer Complex, Inc., 338 F.Supp. 1229 (E.D. Mich. 1971), aff'd. 458 F.2d 1341 (6th Cir. 1972). The litigation support system prepared and implemented by Mr. Nassif and Mr. Moore is unique and is in fact a trade secret which should not be disclosed to the Plaintiffs.

WHEREFORE, PREMISES CONSIDERED, Defendant Monsanto Company respectfully requests that the Plaintiffs' Motion to Compel be in all things overruled and denied; and that Defendant Monsanto Company have such other and further relief, both general and special, legal and equitable, to which it may show itself justly entitled.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANT
MONSANTO COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of February, 1987, a true and correct copy of the above and foregoing was served upon counsel of record by placing same in the United States mail, certified mail, return receipt requested, postage prepaid and addressed as follows:

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JBS/MONSbrief

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CECIL SCOTT, ET AL	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	
MONSANTO COMPANY	§	B-84-1103-CA

RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY

COMES NOW Monsanto Company, Defendant in the captioned case, and files this Response to Plaintiffs' Motion to Compel Discovery:

1. Plaintiffs' Motion to Compel Discovery requests the Court to enter an order providing that Monsanto Company provide all indexes, file organization documents, or any other documents in any way providing any information about what documents Monsanto currently has regarding its production, manufacture, sale and/or distribution of PCBs or any studies or tests done concerning PCBs or the appropriateness of warnings related to PCBs. Plaintiffs further request that Monsanto make available all files of Monsanto that have previously been numbered for use in PCB litigation at whatever place those files may be. Monsanto opposes in its entirety the Plaintiffs' Motion to Compel Discovery, and in particular opposes any and all portions of the Plaintiffs' Motion to Compel Discovery which seek disclosure or production of any documentation concerning the review, organization, categorization, and method of retrieval of its polychlorinated biphenyls documents and any portion of the

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Plaintiffs' Motion to Compel Discovery which seeks a wholesale review of all such files which have been selected for inclusion in the organization.

2. In support of this response, Monsanto Company files herewith the affidavits of Joseph G. Nassif, David M. Moore, II, and Thomas M. Bistline. These affidavits are incorporated herein by reference for any and all pertinent purposes. In further support of this response, Monsanto Company files herewith its Brief of Monsanto Company in support of Response to Plaintiffs' Motion to Compel Discovery, which Brief is also incorporated herein by reference for any and all pertinent purposes.

3. As reflected in the attached affidavits of Mr. Nassif, Mr. Moore, and Mr. Bistline, and pursuant to the authorities cited in the Brief, all documentation pertaining to the review, organization, and categorization of Monsanto Company's documents concerning polychlorinated biphenyls are immune from discovery as opinion attorney work product under Rule 26(b)(3) of the Federal Rules of Civil Procedure, and privileged from discovery pursuant to the attorney-client privilege and trade secrets privilege. The request by the Plaintiffs to examine all files of Monsanto Company pertaining to polychlorinated biphenyls is clearly overly broad, burdensome, and not a proper and particularized request for production of documents pursuant to the Federal Rules of Civil Procedure. Such underlying documents as are discoverable are freely available to the Plaintiffs upon the filing of proper

and particularized requests for production of documents pursuant to the Federal Rules of Civil Procedure. In fact, some seven boxes of documents have been produced to or made available to the Plaintiffs pursuant to such prior document requests by the Plaintiffs.

WHEREFORE, PREMISES CONSIDERED, Defendant Monsanto Company respectfully requests that the Plaintiffs' Motion to Compel Discovery be in all thing overruled and denied; and that Defendant Monsanto Company have such other and further relief, both general and special, legal and equitable, to which it may show itself justly entitled.

Respectfully submitted,

By: _____

Robert A. Hall
Jonathan B. Shoebottom
Woodard, Hall & Primm
4700 Texas Commerce Tower
Houston, Texas 77002
(713) 221-3800

By: _____

Walter J. Crawford, Jr.
Wells, Peyton, Beard,
Greenberg, Hunt & Crawford
P. O. Box 3709
Beaumont, Texas 77704
(409) 838-2644

ATTORNEYS FOR DEFENDANT
MONSANTO COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of February, 1987, a true and correct copy of the above and foregoing was served upon counsel of record by placing same in the United States mail, certified mail, return receipt requested, postage prepaid and addressed as follows:

Mr. David M. Lacey
Gilpin, Maynard, Parsons, Pohl & Bennett
Allied Bank Tower, 24th Floor
1300 Post Oak Blvd.
Houston, Texas 77056

Mr. Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002

Mr. Joseph Blanks
1119 First Texas Building
470 Orleans
Beaumont, Texas 77701

Mr. Thomas Henderson
Henderson & Goldberg, P.C.
1612 Frick Building
Pittsburgh, Pennsylvania 15219

Robert A. Hall

JBS/SCOTTresp

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CECIL SCOTT, ET AL

VS.

MONSANTO COMPANY

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CIVIL ACTION NO.

B-84-1103-CA

AFFIDAVIT OF JOSEPH G. NASSIF

JOSEPH G. NASSIF, having first been duly sworn, upon his oath deposes and says as follows:

1. My name is Joseph G. Nassif. I am over 21 years of age and am fully competent to make this affidavit. Each statement made herein is upon my personal knowledge unless otherwise stated.

2. Since 1974 I have been an attorney licensed to practice in the State of Missouri. I am currently a partner in the law firm of Coburn, Croft, & Putzell in St. Louis, Missouri.

3. From 1975 until May, 1986 I was employed by the defendant Monsanto Company as an attorney in their Law Department. Beginning in November, 1981 until my departure, I was Litigation Counsel in Monsanto's Litigation Department. I am currently representing Monsanto Company in a number of matters.

4. During the period November, 1981 until May, 1985 as Litigation Counsel for Monsanto I was principally responsible for the management and supervision of all litigation matters related to the manufacture and sale of polychlorinated biphenyls by Monsanto Company. As part of that responsibility I developed,

with outside counsel, Monsanto's strategy in resolving litigation matters. This responsibility included review and coordination of pleadings and discovery matters, including the preparation and filing of responses to requests for production of documents which might be filed by plaintiffs alleging cases against Monsanto Company related to the manufacture and sale of polychlorinated biphenyls and production of documents in response to proper document requests.

5. During 1980 through 1983 there were cases filed by plaintiffs against Monsanto Company which made allegations related to the manufacture and sale by Monsanto Company of polychlorinated biphenyls. Numerous document requests were made by plaintiffs in these cases, and it was within my responsibility as Litigation Counsel to coordinate responses to these document requests and coordinate production of documents in response to proper document requests. I anticipated during this time that further cases would be filed in the future which would make allegations related to the manufacture and sale by Monsanto Company of polychlorinated biphenyls.

6. In the performance of my responsibility as Litigation Counsel for Monsanto Company to develop litigation strategy and to coordinate litigation matters, I instructed my representatives within the Law Department to assist me in the consolidation and collection of all documents that could be then identified relating in any way to the sale and manufacture of

polychlorinated biphenyls. After a significant period of time, all documents were collected pursuant to my instructions and placed under administration by the Law Department with principal responsibility resting in me. This collection of documents contained both discoverable documents as well as documents which were and are privileged from production.

7. Following the collection and consolidation of the documents, I decided that they required substantial organization in order to attempt to marshall the documents and facts which in my judgment as Litigation Counsel were relevant and significant from those which were not, and to allow for retrieval and organization in a manner which would, in my opinion, be most useful, in the defense and handling of pending and anticipated litigation. At my request, David M. Moore, II, was retained as counsel for Monsanto Company to assist me in a review and categorization of the documents that had been collected.

8. Before commencing the review of the document library, Mr. Moore and I had extensive discussions regarding those documents which we felt would be particularly significant and useful in current and anticipated litigation matters related to the manufacture of polychlorinated biphenyls by Monsanto Company based upon our knowledge and understanding of litigation relating to polychlorinated biphenyls. During the course of our review of the documents, we were required on many occasions to determine whether or not particular documents were in fact significant

enough to be included within the collection of documents which would be selected for organization and categorization for use in ongoing and future litigation.

9. As a result of the review, analysis and categorization of the collected documents by counsel, approximately 50% of the documents reviewed were selected for inclusion in the litigation resource library. This selection was accomplished following the personal review of the document collection by Mr. Moore and myself, in many instances on a page-by-page basis.

10. Beginning in late 1982 I conducted an investigation into the use of various automated retrieval systems for litigation support, and in particular systems for fact and document collection, organization, categorization, and retrieval. After considering several alternatives and based on my experience and my analysis of the then existing and anticipated polychlorinated biphenyls litigation support needs, David Moore and I devised a system for fact and document organization, categorization and retrieval. The final system was based upon a software program which I selected which most closely met our then existing and anticipated litigation support needs.

11. Following the system design, Mr. Moore, at my instruction, prepared a list of critical fields and classifications of documents from a polychlorinated biphenyls litigation standpoint for purposes of organizing the documents in the litigation resource library consistent with then existing and

anticipated litigation needs.

12. The draft list of critical fields and classifications was prepared in May, 1983 by counsel for Monsanto Company, Mr. David Moore, and sent from Mr. Moore to me for my review. The draft was finalized by Mr. Moore and me in June, 1983. Prior to the preparation of the draft list of critical fields and classifications, Mr. Moore and I considered and discussed critical fact and legal issues presented or anticipated in ongoing as well as anticipated polychlorinated biphenyls litigation that should be taken into account in the preparation of the list of critical fields and classifications. These discussions were based upon our experience in past and then ongoing polychlorinated biphenyls litigation matters and our prior review of the documents. The listing of critical fields and classifications contains and continues to reflect my mental impressions, conclusions, opinions and legal theories concerning the defense of Monsanto Company in then existing and anticipated litigation related to its manufacture and sale of polychlorinated biphenyls.

13. Following the preparation of the list of critical fields and classifications, Mr. Moore and I personally trained individuals as our representatives to work under our supervision for purposes of completing the classification of the documents pursuant to the fields and classifications established by Mr. Moore and myself. However, the full text of the selected

documents was not placed on computer.

14. Following completion of the classification of the documents in the polychlorinated biphenyls litigation resource library, and until my departure as Litigation Counsel in May, 1985, the litigation support system was used exclusively in support of Monsanto's litigation needs. All aspects of the development of the system were controlled and conducted by counsel retained by Monsanto Company, and all aspects of the use of such system until my departure as Litigation Counsel were controlled and conducted by counsel retained by Monsanto Company. At all times all counsel for Monsanto and their representatives were required to maintain strict confidentiality with regards to all aspects of the system and, in particular, the list of critical fields and classifications. At no time while I was Litigation Counsel was the list of fields and classifications prepared by Mr. Moore and me given to anyone, including other counsel representing Monsanto Company, other than our direct representatives. Upon my departure as Litigation Counsel I turned my only copy of the list over to my successor with Monsanto Company.

15. To my direct knowledge up until May, 1985, the only access point to the system was exclusively retained within Monsanto's litigation support group in the Monsanto Law Department in St. Louis and was never used by anyone other than Monsanto counsel or their immediate representatives in connection

with ongoing or anticipated litigation involving Monsanto Company.

16. At the time the preparation of the computerized litigation support system was accomplished, lawsuits were pending in Indiana wherein Leo Haganman, Nancy Haganman, Ralph Evans, and Montgomery Toon, all plaintiffs in the above captioned case, asserted claims that appear to be the same as the claims alleged on their behalf in this lawsuit.

17. There is no question in my mind that the thought processes leading up to my decision to prepare and develop an automated retrieval system and the format for prioritizing key facts and documents and classification of key facts and documents contains my mental impressions, conclusions, opinions, and legal theories as an attorney representing Monsanto Company at the time in then ongoing and projected litigation involving Monsanto Company. The list of critical fields and classifications is my opinion attorney work product, and its disclosure would certainly reveal my mental impressions, conclusions, opinions and legal theories as an attorney representing Monsanto Company in then

ongoing and projected litigation relating to the manufacture and sale of polychlorinated biphenyls by Monsanto Company.

Joseph G. Nassif

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority,
on this _____ day of _____, 1987.

Notary Public in and for
The State of _____

My commission expires:

(print name)

JBS/SCOTTaff3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CECIL SCOTT, ET AL

VS.

MONSANTO COMPANY

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CIVIL ACTION NO.

B-84-1103-CA

AFFIDAVIT OF THOMAS M. BISTLINE

THOMAS M. BISTLINE, having first been duly sworn, upon his oath deposes and says as follows:

1. My name is Thomas M. Bistline. I am over 21 years of age and am fully competent to make this affidavit. Each statement made herein is upon my personal knowledge unless otherwise stated.

2. I am an attorney licensed to practice in the State of Missouri. I am currently an employee of Monsanto Company, the defendant in the captioned case. I am Litigation Counsel in Monsanto's litigation department with responsibility for the management and supervision of litigation matters related to the manufacture and sale of polychlorinated biphenyls by Monsanto Company. I was and am the successor to Mr. Joseph G. Nassif in this position. Our responsibilities include review and coordination of pleadings and discovery matters in polychlorinated biphenyls litigation, including the preparation and filing of responses to requests for production of documents which might be filed by plaintiffs having cases against Monsanto Company related to the manufacture and sale of polychlorinated

biphenyls and production of documents in response to proper document requests.

3. As a result of my position as litigation counsel, I have become familiar with the litigation support system prepared by Mr. Nassif and Mr. Moore which organized and classified documents concerning polychlorinated biphenyls. Despite the creation of this system, the documents themselves must be physically retrieved, identification of the documents verified and determination made by counsel as to whether a particular document is useful in connection with particular legal and factual issues or appropriate for production in response to a proper document request. The system's computerized data base does not contain the full text of documents. A request or inquiry that calls for a significant number of documents remains a burdensome and expensive undertaking.

4. The Monsanto litigation support system was prepared and has been used solely in connection with the defense of pending and anticipated litigation, and for no other purposes. The original documents remain available for production in response to proper and particular document requests.

5. The computerized litigation support system and related documents have been held entirely in confidence by counsel for Monsanto and by their representatives working under their control and direction. They have not been made available to any other

persons. They have never been produced or otherwise made available in any litigation or to any witness or other person.

Thomas M. Bistline

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority,
on this _____ day of _____, 1987.

Notary Public in and for
The State of _____

My commission expires:

(print name)

JBS/SCOTTaff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CECIL SCOTT, ET AL

VS.

MONSANTO COMPANY

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CIVIL ACTION NO.

B-84-1103-CA

AFFIDAVIT OF DAVID M. MOORE, II

DAVID M. MOORE, II, having first been duly sworn, upon his oath deposes and says as follows:

1. My name is David M. Moore, II. I am over 21 years of age and am fully competent to make this affidavit. Each statement made herein is upon my personal knowledge unless otherwise stated.

2. I am an attorney licensed to practice in North Carolina and admitted to practice before the Courts of the State of North Carolina and before the United States District Court for the Middle District of North Carolina and the United States Court of Appeals, Fourth Circuit. I am a partner in the law firm of Smith, Helms, Mullis & Moore, in Greensboro, North Carolina.

3. Since 1971 I have represented Monsanto Company as an attorney in connection with various litigation, including litigation involving manufacture and sale by Monsanto Company of polychlorinated biphenyls.

4. As a result of my knowledge and experience about litigation involving polychlorinated biphenyls, I was asked by Mr. Joseph G. Nassif, then Litigation Counsel for Monsanto

Company, to assist during 1982 and 1983 in the review, analysis, organization, and categorization of documents for purposes of litigation support in connection with pending and anticipated polychlorinated biphenyls litigation.

5. Mr. Nassif and I personally reviewed large quantities of documents that had been gathered under Mr. Nassif's supervision and, based upon our knowledge and experience gained in the representation of Monsanto Company in polychlorinated biphenyl litigation, selected documents to be organized and classified for use in both pending and anticipated litigation.

6. Upon completion of the process of selecting documents as described above, Mr. Nassif asked that I prepare a list reflecting critical potential legal and factual issues that might arise in pending and anticipated polychlorinated biphenyls litigation and classifications of the documents which would be relevant to such issues, to be used in organization and retrieval of the documents which had been selected by us. I sent the first draft, prepared by me, to Mr. Nassif on or about May 3, 1983. Thereafter, Mr. Nassif and I further revised and refined the classification list so that it was finalized by the end of June, 1983. After the classification list had been substantially completed, representatives trained by Mr. Nassif and me working under our supervision, classified each of the documents which we had selected.

7. In my opinion, the Monsanto litigation support system involved and reflected in all of its aspects my mental impressions, conclusions, opinions, legal theories, and thought processes formed in my representation of Monsanto in connection with the polychlorinated biphenyls litigation. Documentation pertaining to the system, including the list of critical fields and classifications, reflects my mental impressions, conclusions, opinions, legal theories, and thought processes, and is my opinion attorney work product. Neither documentation pertaining to the system nor any aspect of the system itself including the list of critical fields and classifications can be produced or otherwise made available to counsel for plaintiffs without revealing those mental impressions, conclusions, opinions, legal theories, and thought processes.

David M. Moore, II

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority,
on this _____ day of _____, 1987.

Notary Public in and for
The State of _____

My commission expires:

(print name)

JBS/SCOTTaff2

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CECIL SCOTT, ET AL

VS.

MONSANTO COMPANY, ET AL

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C.A. NO. 84-1103-CA

MOTION TO COMPEL DISCOVERY

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, CECIL SCOTT, et al, Plaintiffs herein, and file this their Motion to Compel Discovery, and would show unto the Court as follows:

FACTUAL BACKGROUND

This case has been on file since 1984, and involves seventy-six Plaintiffs who have been exposed to polychlorinated byphenyls ("PCBs"), chemicals manufactured by Monsanto Company ("Monsanto") that are so toxic that they have been banned by United States statute. Since the beginning of this litigation, Plaintiffs have been attempting to obtain information about PCBs and the extent of information that Monsanto had concerning PCBs from the Defendant. As in most complex litigation against corporate Defendants, a stalemate has characterized the discovery process up to the present time. When the Plaintiffs have attempted to obtain information through discovery, Monsanto has claimed that their requests are too broad and unduly burdensome for the corporation. Plaintiffs now enlist the

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aid of this Honorable Court in breaking this stalemate, and in putting this litigation on track for rapid disposition. Only careful control and sequencing of the discovery process by this Court can economically and expeditiously facilitate the final disposition of this litigation.

1. Plaintiffs have learned that Monsanto has established a numbered master file for documents relating to PCBs, and in the past has prepared a master index cataloging that numbered file. See the attached Affidavit of David M. Lacey.

2. As a refinement of Plaintiffs' previous discovery requests concerning PCBs which requests Monsanto has repeatedly objected to as overly broad and burdensome, counsel for the Plaintiffs requested by letter dated December 31, 1986 that Monsanto provide Plaintiffs with a copy of any "master index" to Monsanto's PCB document files by January 9, 1987. See the December 31, 1986 letter signed by David M. Lacey to John Shoebottom, dated December 31, 1986, and attached as Exhibit A to the attached affidavit.

3. By letter of January 9, 1987, counsel for Monsanto advised counsel for the Plaintiffs that Monsanto did not intend to produce a PCB index document to the Plaintiffs on the ground that to the extent such an index existed, it was "clearly privileged from production as . . . either attorney

work product or attorney-client communications, or both."

See Exhibit B to attached affidavit.

4. Under the Federal Rules of Civil Procedure, no absolute attorney work product privilege exists, because Rule 26(b)(3) allows a party to obtain discovery of documents and tangible things otherwise discoverable as being relevant to the subject matter involved in the pending action, even though such documents or things were prepared in anticipation of litigation, if a showing of substantial need and inability without undue hardship to obtain the equivalent of the materials is made.

5. Rule 26(b)(3) instructs the court to protect against disclosure of mental impressions, opinions, conclusions or legal theories of an attorney concerning the litigation, the litigation in question clearly being the litigation before the court in which discovery is requested.

6. Monsanto has not met the heavy burden of proof imposed by the case law interpreting Federal Rule 26(b)(3) in establishing the qualified immunity of the index they refused to produce, because:

a) there has been no showing that the index was prepared by an attorney in preparation for the instant litigation; and

b) there has been no showing of the way in which such an index might conceivably disclose the mental

impressions, conclusions, opinions or legal theories of an attorney.

7. To allow a corporate defendant to protect any document whatsoever by having outside counsel direct its cataloging into a file and index would subvert the purposes of discovery.

8. As set forth in the attached Affidavit of David M. Lacey, Plaintiffs have substantial need of the index prepared in order to quickly, expeditiously and economically conduct discovery in this case without unduly burdening Monsanto, within the spirit of the federal rules.

9. As set forth in the attached Affidavit of David M. Lacey, Plaintiffs are unable to obtain the substantial equivalent of an index to these documents by any other means. Mere examination of a great volume of documents without reference to their file index would impose great economic hardship on the Plaintiffs because of the vast number of hours that would be required to go through such a group of documents, and would impose a time hardship upon these Plaintiffs by further delaying the course of discovery in this lawsuit.

10. Monsanto has frequently claimed undue burden in response to Plaintiffs' previous broad discovery requests, and is estopped to claim that production of this index would

not substantially limit the burden of voluminous production that discovery in this case might otherwise impose on it.

11. Monsanto's refusal to voluntarily comply in a timely manner with Plaintiffs' reasonable request for production of the index to its PCB files has placed Plaintiffs under time constraints that require Plaintiffs' counsel to be given personal access to Monsanto's PCB files on site, once Monsanto has produced the required index. Plaintiffs also require on site or off site copying privileges.

12. To the extent that Monsanto claims that review of its PCB files may waive a true attorney-client privilege or require the invasion of an immunity from created by disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney concerning this litigation, its objections can be cured by having it submit all documents for which it requests protection to this Court for in camera inspection along with evidence proving the existence of the privilege or qualified immunity with respect to each document.

13. By letter of February 5, 1987, counsel for Monsanto has requested Plaintiffs' execution of an Agreed Protective Order as a condition precedent to Monsanto's production of certain documents.

13. Monsanto's demand for a Protective Order sets conditions on production that are not available to Monsanto without a motion and showing of good cause to this Court.

14. Proprietary protection is unjustifiably requested for documents relating to chemicals whose manufacture has been prohibited by the federal statute since 1979.

15. Federal authority does not support a grant of protection against dissemination of documents among potential litigants.

16. Monsanto has made no showing of entitlement to protection sufficient under case law interpreting Rule 26(c).

17. Plaintiffs hereby reserve the right to file memoranda of law supporting the granting of the relief requested herein.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request this Court to enter an order providing that:

1. Monsanto shall produce to counsel for Plaintiffs by 10:00 a.m. on Tuesday, February 24, 1987, all indexes, file organization documents, or any other documents in any way providing any information about what documents Monsanto currently has regarding its production, manufacture, sale and/or distribution of PCBs or any studies or tests done concerning PCBs or the appropriateness of warnings related to PCBs.

Specifically, Monsanto is ordered to produce those file organization documents that it has previously claimed are privilege as "attorney work product" and which this Court has specifically found are subject to no work product "privilege" as a matter of law and are not subject to attorney-client privilege or the qualified immunity provided for in Rule 26(b)(3) of the Federal Rules of Civil Procedure, there having been no showing that the index impermissibly reveals the mental impressions, conclusions, opinions or legal theories of an attorney regarding specific litigation. To the extent that any qualified immunity might be claimed for indexing or file organization, Plaintiffs have met the requirements of Federal Rule of Civil Procedure 26(b)(3) by showing substantial need for use of the index and undue hardship in finding any substitute for the index and are entitled to production of the document.

2. Monsanto shall produce to counsel for Plaintiffs those documents which it has previously selected for document production pursuant to the request for document production contained in the letter of December 31, 1986 from counsel for Plaintiffs to counsel for Monsanto without requiring Plaintiffs' agreement to any protective order. Specifically, the Court finds that

since the manufacture and sale of PCBs was banned by federal law effective 1979, that Monsanto has failed to meet its burden of proof showing any proprietary or other sufficient interest in preventing disclosure of these documents to any party as required by the authority interpreting Rule 26(c).

3. Monsanto shall make available for inspection by counsel for the Plaintiffs, all files of Monsanto that have previously been numbered for use in PCB litigation at whatever place those files may be beginning at 9:00 a.m. on February 25, 1987, for the purpose of allowing counsel for Plaintiffs to make a cursory review of the types of documents therein with the assistance of the file organization materials referred to above. It is, however, specifically ordered that Monsanto shall not be required to produce for inspection any specific documents for which it claims privilege or qualified immunity, other than the file index or organization documents which it has been ordered above to produce. Rather, Monsanto shall submit any documents from its numbered PCB files for which it claims attorney-client privilege or any qualified immunity to this Court for in camera inspection on or before Friday, February 27, 1987, together with evidence showing the privilege or immunity.

4. that Monsanto shall provide Plaintiffs with copies of all documents from the numbered PCB files that Plaintiffs request to be copied within twenty-four (24) hours of the request for copying, or alternatively, permit counsel for the Plaintiffs to take those documents off premises for purposes of having them commercially copied at the expense of Plaintiffs' counsel.

and that it be granted such other and further relief as this Court in its wisdom may deem appropriate.

Respectfully submitted,



DAVID M. LACEY
GILPIN, POHL & BENNETT
Allied Bank Tower, 23rd Floor
1300 Post Oak Boulevard
Houston, Texas 77056
(713) 623-8800

ATTORNEY IN CHARGE FOR
PLAINTIFFS CECIL SCOTT,
ET AL

OF COUNSEL:



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THOMAS HENDERSON
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1030 5th Avenue, 3rd Floor
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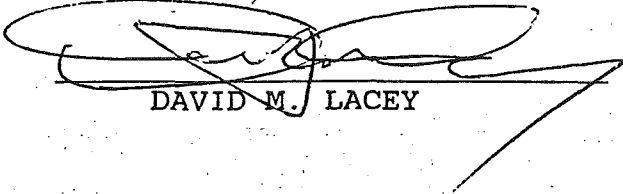
BENTON MUSSLEWHITE
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McCREA & McCREA
119 South Walnut Street
Box 1310
Bloomington, Indiana 47402

JOSEPH BLANKS
1119 First Texas Building
470 Orleans
Beaumont, Texas 77701

CERTIFICATE OF SERVICE

I, David M. Lacey, do hereby certify that a true and correct copy of the above and foregoing instrument has been hand delivered to Mr. Jonathan Shoebottom and Mr. Walter Crawford on this the 11th day of February, 1987.


DAVID M. LACEY

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CECIL SCOTT, ET AL

VS.

MONSANTO COMPANY, ET AL

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C.A. NO. 84-1103-CA

ORDER COMPELLING PRODUCTION

Came on for oral hearing Plaintiffs' Motion to Compel Discovery, and having considered the Motion and all responses filed, the arguments of counsel, and the entire record in the case, the Court is of the opinion that the motion is with merit and should be granted. It is hereby,

ORDERED, ADJUDGED AND DECREED, that Monsanto Company shall produce to counsel for Plaintiffs by 10:00 a.m. on Tuesday, February 24, 1987, all indexes, file organization documents, or any other documents in any way providing any information about what documents Monsanto currently has regarding its production, manufacture, sale and/or distribution of PCBs or any studies or tests done concerning PCBs or the appropriateness of warnings related to PCBs. Specifically, Monsanto Company is ordered to produce those file organization documents that it has previously claimed are privileged as "attorney work product" and which this Court has specifically found are subject to no work product "privilege" as a matter of law and are not subject to attorney-client privilege or the qualified immunity provided

for in Rule 26(b)(3) of the Federal Rules of Civil Procedure, there having been no showing that the index impermissibly reveals the mental impressions, conclusions, opinions or legal theories of an attorney formed in anticipation of specific litigation. To the extent that any qualified immunity might be claimed for indexing or file organization, Plaintiffs have met the requirements of Federal Rule of Civil Procedure 26(b)(3) by showing substantial need for use of the index and undue hardship in finding any substitute for the index and are entitled to production of the document. It is further,

ORDERED, ADJUDGED AND DECREED, that Monsanto Company shall produce to counsel for Plaintiffs those documents which it has previously selected for document production pursuant to the request for document production contained in the letter of December 31, 1986 from counsel for Plaintiffs to counsel for Monsanto Company without requiring Plaintiffs' agreement to any protective order. Specifically, the Court finds that since the manufacture and sale of PCBs was banned by federal law effective 1979, that Monsanto Company has failed to meet its burden of proof showing any proprietary or other sufficient interest in preventing disclosure of these documents to any party as required by the authority interpreting Rule 26(c). It is further,

ORDERED, ADJUDGED AND DECREED, that Monsanto Company shall make available for inspection by counsel for the Plaintiffs all files of Monsanto Company that have previously been numbered for use in PCB litigation at whatever place those files may be beginning at 9:00 a.m. on February 25, 1987, for the purpose of allowing counsel for Plaintiffs to make a cursory review of the types of documents therein with the assistance of the file organization materials referred to above. It is, however, specifically ordered that Monsanto Company shall not be required to produce for inspection any specific documents for which it claims privilege or qualified immunity, other than the file index or organization documents which it has been ordered above to produce. Rather, Monsanto Company shall submit any documents from its numbered PCB files for which it claims attorney-client privilege or any qualified immunity to this Court for in camera inspection on or before Friday, February 27, 1987, together with evidence showing the claimed privilege or immunity. It is also,

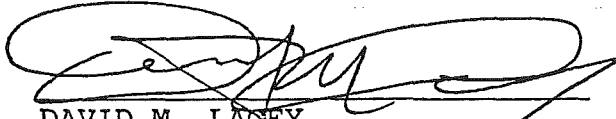
ORDERED, ADJUDGED AND DECREED, that Monsanto shall provide Plaintiffs with copies of all documents from the numbered PCB files that Plaintiffs request to be copied within twenty-four (24) hours of the request for copying, or alternatively, permit counsel for the Plaintiffs to take

those documents off premises for purposes of having them commercially copied at the expense of Plaintiffs' counsel. and that it be granted such other and further relief as this Court in its wisdom may deem appropriate.

SIGNED this the ____ day of _____, 1987.

UNITED STATES DISTRICT JUDGE

APPROVED AND ENTRY REQUESTED:



DAVID M. LACEY
GILPIN, POHL & BENNETT
Allied Bank Tower, 23rd Floor
1300 Post Oak Boulevard
Houston, Texas 77056
(713) 623-8800

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GILPIN, MAYNARD, PARSONS, POHL & BENNETT

ATTORNEYS AT LAW

ALLIED BANK TOWER 24TH FLOOR

1300 POST OAK BOULEVARD

HOUSTON, TEXAS 77056

(713) 673-6800

TOL 810 681-7173 TELELOC. NOV

970/86-551

December 31, 1986

CECIL SCOTT, ET AL.

(v. Monsanto Company, et al.

Civil Action No. B-84-1103-CA

In the United States District
Court for the Eastern District
of Texas, Beaumont Division)BY HAND DELIVERY

Mr. John Shoebbotham
Woodard, Hall & Primm
4700 Texas Commerce Tower
600 Travis Street
Houston, Texas 77002

Dear John:

I am writing to confirm our discussions last Friday concerning document production the plaintiffs seek in connection with the above-captioned matter.

First, as you know, pursuant to Judge Fisher's scheduling order, you are obligated to produce to us copies of all of the plaintiffs' medical records that you have by January 2, 1987 and then to produce any subsequent medical records that you receive after that date within forty-eight (48) hours after you receive them. I would appreciate your calling me as soon as you have the current records copied so that I can have them picked up by a messenger today or Friday.

Second, I understand from independent sources that since Monsanto has concluded its production of PCBs and previously been involved in several lawsuits arising out of its production of PCBs, that Monsanto has already collected a large portion of the documents that it has relating to PCBs into a central location and indexed them for ease of handling. If my understanding is correct, I would like for you to produce a copy of the index that has been prepared for those PCB documents, much as was done by J.O.C. Oil

EXHIBIT " A "

Aromatics in the Southbend litigation, so that I can review that index and make as narrow a request for actual document production as possible, consistent with Monsanto's documents. In the event that no such index is available, however, or such an index is available and Monsanto is unwilling to produce it voluntarily, I am setting forth more specific categories of documents that I request be produced to me.

The following are the categories of documents that we have discussed which I would request that Monsanto produce to me at the earliest possible time in the event the index referred to above is not made available to me by January 9, 1987:

- a. Documents relating to Monsanto's manufacture of PCBs, including all Aroclors, i.e. Aroclor 1221, 1231, 1016, 1242, 1248, 1254 and 1260, including any technical information on the manufacturing process, identification of the plant(s) where PCBs were manufactured and instructions provided to Monsanto workers concerning the manufacture and handling of PCBs.
- b. The customers and quantities of PCBs shipped by Monsanto to its various customers, including the particular formulation sent, i.e. Aroclor 1242, 1254, etc. I also want any summaries of these records that have been produced from the original records.
- c. The contracts for sale of PCBs by Monsanto to General Electric, Westinghouse, Ford and TVA.
- d. All product literature, warnings and similar types of information supplied by Monsanto to customers to whom it sold PCBs, including any information related to restricting the sales and/or uses of PCBs, either partially or completely.
- e. All testing of PCBs, in any formulation, by Monsanto itself or others relating to their toxicity, carcinogenicity, persistence in the environment, etc., including tests performed

by Industrial Bio-Test Laboratories, Inc. (IBT).

- f. Any results Monsanto has of epidemiological or similar studies performed on Monsanto personnel or other employees that relate in any way to possible effects of exposure to PCBs and related substances, i.e. dibenzofurans and dibenzodioxin.
- g. A list of all cases in which Monsanto has previously been sued arising out of its production of PCBs, including copies of the complaints and amendments thereto filed in those cases, as well as copies of all the depositions of current and/or former Monsanto employees who testified in those cases. As we discussed, if this is an extensive volume of material, I would ask that you contact me promptly and we will attempt to pare it down. In particular, I am especially interested in the depositions of Pappageorge; and
- h. All documents that have been produced in other cases in which Monsanto has been sued as a result of its production and/or sale of PCBs.

I trust that you will communicate our discussions in this request to your client promptly and advise me of their attitude toward a voluntary response to this document request. As you well know, in view of the accelerated discovery schedule pursuant to Judge Fisher's scheduling order, in the event that I do not have a prompt response I will have little choice but to seek assistance from the Court in arranging for appropriate document production in order as not to delay the trial scheduled by Judge Fisher.