IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

STATE OF MISSOURI

CECIL SCOTT, et al.,	)	
	)	
Plaintiffs,	)	
	)	Cause No. 902-02008
vs.	)	
	)	Division No. 1
MONSANTO COMPANY,	)	
	)	
Defendant.	)	

DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Defendant Monsanto Company submits this supplemental Memorandum in Opposition to Plaintiffs' Motion to Compel Production of Documents. Because the production requested by plaintiffs will reveal the thought processes of Monsanto's attorneys, Monsanto's objection to Plaintiffs' Request for Production should be sustained, and Plaintiffs' Motion to Compel overruled.

I. BACKGROUND

In an earlier phase of this case, pending in federal court in Texas, Monsanto produced to plaintiffs over 75,000 pages of documents relating to PCBs. Plaintiffs also attempted to obtain production of a computerized PCB document retrieval system which had been prepared by Monsanto attorneys; the court overruled that

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production request. (Order, March 10, 1987).[1] Plaintiffs now seek production of the compilation of documents which Monsanto's counsel selected for inclusion in its PCB litigation resource library. Plaintiffs' Request For Production of Documents seeks "Any and all documents contained in the PCB document depository," which is defined as "any and all places where Monsanto has previously or presently set aside or stored any documents which in any way relate to PCBs." Plaintiffs have requested documents in this manner not because of their relation to issues in the case, but because Monsanto's attorneys have selected the documents for inclusion in a litigation support library.

II. ARGUMENT

The selection and organization of documents by counsel has long been recognized as part of the attorneys' opinion work product, protected from discovery. The leading opinion on this issue, Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985), cert. denied (1985), held that "the selection and compilation of documents by counsel . . . in preparation for pretrial discovery falls within the highly-protected category of opinion work product." The court explained that:

> "the selection process itself represents defense counsel's mental impressions and

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[1] Monsanto's computerized document retrieval system, and the compilation of documents to which it relates, are described in the Affidavits of Joseph G. Nassif, David M. Moore, II, and Thomas M. Bistline filed in the Texas case. Copies of these affidavits have been filed in this action.

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> legal opinions as to how the evidence in the documents relates to the issues and defenses in the litigation. Because identification of the documents as a group will reveal defense counsel's selection process, and thus his mental impressions . . . identification of the documents as a group must be prevented to protect defense counsel's work product."

Id. at 315. Sporck and decisions which have followed it have recognized that "allowing identification of the documents as a group would reveal counsel's mental impressions. . . namely the impressions that certain documents are important or significant." Simon v. G.D. Searle & Co., 816 F.2d 397, 402 n.3 (8th Cir. 1987).

Monsanto's PCB litigation resource library is the type of attorney document compilation which is protected under the Sporck line of cases. Not all of Monsanto's documents relating to PCBs were placed in the litigation resource library. The library contains only documents which Monsanto's counsel considered relevant and significant to PCB litigation then pending or anticipated. (Nassif affidavit, ¶ 7; Moore affidavit, ¶ 6). Many of these documents may be discoverable by plaintiffs by proper requests for production of documents. Production of the PCB litigation resource library as a unit, however, serves no purpose other than to reveal the thought processes of Monsanto's attorneys.

Plaintiffs argue that production of the PCB litigation resource library will not reveal counsel's thought processes, because plaintiffs do not have the entire set of documents from

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which the resource library was selected. Even without comparing the resource library page by page against all PCB documents in Monsanto's possession, however, plaintiffs would still learn much about the thought processes of Monsanto's attorneys from a review of the PCB litigation resource library. Plaintiffs cite Gould v. Mitsui Mining & Smelting Co., Ltd., 825 F.2d. 676 (2d Cir. 1987) in support of their position. In Gould, plaintiffs served a subpoena for the production of documents which had been delivered by defendants to their counsel. The court noted that documents which are not privileged when in the client's hands do not become privileged because they are transferred to counsel. The court remanded the case to the district court because the record was insufficient to show whether or not production of the documents would expose the thought processes of counsel. The court noted that the Sporck exception might not be applicable if the documents were not available to plaintiffs in locations other than counsel's files. Inability to obtain the documents in other ways can constitute the showing of substantial need necessary to overcome the work product protection. (See Missouri Supreme Court Rule 56.01(b)(3)). In this case, however, documents in Monsanto's compilation are available to plaintiffs in response to specific requests for production of properly discoverable material - and many of them are no doubt among the 75,000 documents already produced to plaintiffs in this case.

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III. CONCLUSION

Plaintiffs' request for production of Monsanto's PCB litigation resource library serves no legitimate purpose, but rather seeks disclosure of the work product of Monsanto's attorneys. Monsanto's objection to the Request for Production should be sustained, and Plaintiffs' Motion to Compel Production overruled.

Respectfully submitted,

HUSCH & EPPENBERGER

By: Charles E Merrill

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Charles E. Merrill, MBE # 28238
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St. Louis, MO 63102
(314) 421-4800

Attorneys for Monsanto Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 31st day of March, 1992, by first class mail, postage prepaid to:

C. Joseph Murray, Esq.
Murray Law Firm
650 Poydras Street, Suite 1450
New Orleans, LA 70130

Matthew J. Padberg, Esq.
Padberg, McSweeney, Slater & Merz
1015 Locust, Suite 800
St. Louis, MO 63101

Charles E Merrill

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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

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 1974 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 a litigation attorney in Monsanto's Law Department. I am currently representing Monsanto Company in a number of matters.

4. During the period November, 1981 until January, 1985 in the course of my duties for Monsanto I was principally responsible for the management and supervision of all day-to-day litigation matters related to the manufacture and sale of polychlorinated biphenyls by Monsanto Company. As part of that responsibility I developed, with various outside counsel, Monsanto's strategy in

resolving litigation matters. This responsibility included inter alia supervising the preparation and filing of responses to requests for discovery in polychlorinated biphenyls litigation and the production of documents in response to proper requests.

5. In the performance of my duties for Monsanto Company, including the development of litigation strategy and the coordination of 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 significant effort, all documents were collected pursuant to my instructions and placed under the administration of the Law Department with principal responsibility resting in me. This collection of documents contained both discoverable and nondiscoverable (privileged) documents.

6. Following the collection, review, and consolidation of the documents, I decided that they required substantial organization in order to marshall the documents and facts which in my judgment were relevant and significant from those which were not. Also, it was necessary to organize the documents and facts in a manner which, in my opinion, would be most useful in the defense of pending and anticipated litigation. At my request, David M. Moore, II assisted me in a review and categorization of the documents that had been collected.

7. Before commencing the review of the document library, Mr. Moore and I had extensive discussions regarding those

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documents which we felt would be particularly significant and useful in current and anticipated polychlorinated biphenyls litigation. 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 selected for organization and categorization for use in ongoing and future litigation. Those documents which we determined to be relevant and significant were included in the litigation resource library. Documents not selected for this library have been retained by Monsanto.

8. Beginning in late 1982 I conducted an investigation into the use of various automated retrieval systems for litigation support. A retrieval software system was selected which, based on my judgment, most closely met our then existing and anticipated litigation support needs.

9. As part of the system design, Mr. Moore and I prepared a list of critical characteristics and classifications of documents for purposes of organizing the litigation resource library to meet existing and anticipated litigation needs. This listing 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 relating to polychlorinated biphenyls, as well as those of Mr. Moore.

10. Following the preparation of the list of critical characteristics and classifications, Mr. Moore and I personally

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trained individuals as our representatives to work under our supervision for purposes of completing the classification of the documents pursuant to the characteristics and classifications established by Mr. Moore and myself. The full text of the selected documents was not placed on the automated retrieval system.

11. Following completion of the classification of the documents in the polychlorinated biphenyls litigation resource library, and until my responsibilities for this litigation were transferred to Mr. Bistline in January, 1985, the litigation support system was used exclusively in support of Monsanto's litigation needs. All aspects of the development and use of the system were controlled and conducted by counsel for 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 characteristics and classifications. At no time while I was responsible for the polychlorinated biphenyls litigation was the list of characteristics and classifications produced or otherwise made available in any litigation to any person other than counsel for Monsanto or their direct representatives. Upon transfer of my responsibilities I turned my only copy of the list over to my successor, Mr. Bistline.

12. At the time the preparation of the litigation support system was accomplished, lawsuits were pending in Indiana wherein Leo Haganman, Leon Mullis and possibly others who are plaintiffs

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in the above captioned case, asserted claims that appear to be the same as the claims alleged on their behalf in this lawsuit.

13. The selection of documents for inclusion in the litigation resource library, and the list of critical characteristics and classifications are my opinion attorney work product. Their disclosure would certainly reveal my mental impressions, conclusions, opinions and legal theories as an attorney representing Monsanto Company in litigation relating to the manufacture and sale of polychlorinated biphenyls by Monsanto Company. Neither documentation relating to the system nor any aspect of the system itself, including the list of critical characteristics and classifications, can be made available to counsel for plaintiffs without revealing those mental impressions, conclusions, opinions, legal theories and thought processes.

Joseph G. Nassif

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority, on this 25th day of February, 1987.

Judith E. Gonzalez
Notary Public in and for
The State of Missouri

My commission expires:

JUDITH E. GONZALEZ
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES 9/3/88
CITY OF ST. LOUIS

JUDITH E. GONZALEZ
(print name)

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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

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, Helm, 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 a litigation attorney in Monsanto

Company's Law Department, 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 numbers 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 polychlorinated biphenyls litigation.

6. Upon completion of the process of selecting documents as described above and following discussion of various legal and fact issues, Mr. Nassif and I prepared a list of characteristics and classifications to be used in organization and retrieval of the documents which had been selected by us. That list was based upon our perception of potential factual and legal issues which, in our judgment as attorneys representing Monsanto Company, might arise in pending or anticipated polychlorinated biphenyls litigation.

7. After the classification list had been substantially completed, representatives trained by Mr. Nassif and me, and working under our supervision, classified according to the list and our instructions each of the documents which we had selected.

8. In my opinion, the Monsanto litigation support system involves and reflects in all of its aspects my mental impressions,

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conclusions, opinions, legal theories, and thought processes formed in my representation of Monsanto in connection with the polychlorinated biphenyls litigation, as well as those of Mr. Nassif. The selection of documents for the system and the documentation pertaining to the system, including the list of critical characteristics and classifications, reflect my mental impressions, conclusions, opinions, legal theories, and thought processes, and is in my opinion attorney work product. Neither documentation pertaining to the system nor any aspect of the system itself, including the list of critical characteristics 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 30th day of Feb., 1987.

Deborah J. Fitch
Notary Public in and for
The State of Oklahoma

My commission expires:
Nov. 7, 1988

Deborah J. Fitch
(print name)

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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

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 New York. I am currently an employee of Monsanto Company, the defendant in the captioned case. I am an attorney in Monsanto's litigation department with responsibility, inter alia, 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. My responsibilities include supervising the preparation and filing of responses on behalf of Monsanto to requests for discovery in polychlorinated biphenyls litigation and the production of documents in response to proper document requests.

3. In the course of my duties, I have become familiar with the litigation support system prepared by Mr. Nassif and Mr. Moore

which identified organized and classified documents in Monsanto's possession concerning polychlorinated biphenyls. Under my direct supervision, this system has been used, as it was by Mr. Nassif, solely in connection with the defense of pending and anticipated polychlorinated biphenyls litigation.

4. The computerized litigation support system and related documents have been held entirely in confidence by counsel for Monsanto and their representatives working under their control and direction. The system and related documents have never been produced or otherwise made available in any litigation or to any person other than counsel for Monsanto or their direct representatives.

5. The original documents generated by Monsanto in the course of its business of manufacturing and selling polychlorinated biphenyls are in my custody and are available for production to plaintiffs upon proper demand pursuant to the Federal Rules of Civil Procedure.

Thomas M. Bistline

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority, on this 12th day of Feb., 1987.

Deborah J. Fitch
Notary Public in and for
The State of Oklahoma

My commission expires:
Nov. 7, 1987

Deborah J. Fitch
(print name)

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