UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM R. GAFFEY,	)	CAUSE No. 91-1938-C-7/JCH
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
PETER MONTAGUE, et al	)	
	)	
Defendants.	)	
	)	

UNSWORN STATEMENT OF PAUL E. MERRELL MADE UNDER PENALTY OF PERJURY

I, PAUL E. MERRELL, declare and state:

1. My name is Paul E. Merrell. I am co-counsel in this matter for defendants Dr. Peter Montague and Environmental Research Foundation. I make this statement in support of Defendants' Motion to Disqualify Counsel and in response to the motion for protective order filed by Monsanto Company and James F. Collins, who is Director of Epidemiology in Monsanto Company's Medical Department, the position formerly held by plaintiff William R. Gaffey. (Hereafter, both Monsanto and Dr. Collins will be discussed jointly as "Monsanto.")

2. In this statement, I discuss in addition to my qualifications to make this statement: [ii] the relevance of and need for the discovery sought by defendants in this case; [ii] Monsanto's claims of expense and undue burden in responding to that discovery; and [iii] the need for disqualifying Coburn & Croft from further participation in this case.

3. My practice is focused on litigation involving a closely-related group of toxic chemicals known as chlorinated dioxins, chlorinated dibenzofurans, and polychlorinated biphenyls ("PCBs"). E.g., Van Strum v. U.S. Environmental Protection Agency, 680 F. Supp. 349, 350 n. 1 (D. Oregon 1987) (District Court noted my longstanding professional and personal interest in dioxins) (court found evidence of conspiracy between industry and EPA officials to suppress, modify, or delay results of dioxin studies).

4. This libel action was filed by plaintiff William R. Gaffey after defendants published a report that Gaffey and his co-author were accused by others of fraud in the conduct of an epidemiologic study of the mortality of Monsanto workers exposed to dioxin through their employment at Monsanto's trichlorophenol plant in Nitro, West Virginia. Defendants stand by the truth of their report and contend therefore that they have no liability for defamation.

5. Most of the discovery objected to by Monsanto is carefully crafted to support the defendants' claim of the truth of their report.[1] The discovery requested from Monsanto, while substantial, has been considerably narrowed through pre-motion consultations among counsel and in response to Monsanto's objections. Nevertheless, the charge of fraud reported by defendants arose in substantial part from an appellate brief involving the longest civil trial in U.S. history, Kemner v. Monsanto, where the subject of fraud in Mr. Gaffey's study was examined at length and where the jury imposed an award of punitive damages against Monsanto

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[1] The discovery requested does touch on other areas, for example Monsanto's files of articles and scientific publications in which similar or stronger charges were leveled against Mr. Gaffey and his co-authors of the Nitro worker studies. These articles raise a substantial issue of how Mr. Gaffey's claimed damages might plausibly be attributed in their entirety to defendants' milder charges, the subject of a pending interrogatory directed to Dr. Gaffey.

totaling some $16,250,000.00. (The verdict was subsequently set aside by the Court of Appeals on grounds not involving the scientific validity of the Gaffey study.)

6. The discovery requested is necessary to the defense of this lawsuit. While I do not discuss the relevance of every discovery category sought, the following discussion should be sufficient to assure the Court that discovery is sought on a serious matter and is reasonably calculated to lead to the discovery of evidence admissible at trial.

7. Defendants' legal team has already obtained some records of the Kemner case. I am already familiar with many issues involved in this case, having co-authored a detailed examination of fraud involved in Monsanto's Nitro worker studies that was used to support an administrative petition to EPA on behalf of an environmental organization requesting a criminal investigation. C. Van Strum & P. Merrell, Critique of Monsanto and BASF Retrospective Studies of Human Health Effects of 2,3,7,8-TCDD (October 1, 1990). (While the petition was denied on grounds of the petitioner's purported lack of standing to seek a criminal investigation, EPA did subsequently instigate such an investigation of its own volition.)

8. Monsanto stresses in its motion for protective order that it has no stake in the outcome of this litigation. While it is true that Monsanto has not been named as a party, this lawsuit was filed by Monsanto's former Director of Epidemiology Dr. Gaffey and involves work he performed for Monsanto. The fact is that Monsanto has an enormous stake in the truth or falsity of the allegations of fraud in the conduct of studies by Dr. Gaffey and his co-workers, an issue to be tried in this case. In response to such allegations, a Monsanto vice president stated in a letter to EPA that "[g]iven the Company's science-based focus, preservation of Monsanto's reputation for performing accurate world-class research is of critical importance to our business

and research operations." EXHIBIT S, pg. 1. Monsanto therefore requested an audit of the studies by EPA. Id. Likewise, Monsanto also at least claimed to welcome EPA's criminal investigation, as "the only way to put this matter to rest." EXHIBIT T (article in Science). Given such statements, Monsanto's efforts to handicap determination of the truth by seeking prohibitive costs and attorney fees are indeed ironic.

9. There are strong reasons to believe that the results of the Gaffey study were a foregone conclusion before the study was ever performed, i.e., that Dr. Gaffey's "study" was a conclusion in search of supporting data. The existence of such evidence in Monsanto's files, discussed below, is consistent with the historical backdrop for the Gaffey study and is probative of "intent" to defraud. When the Gaffey study was actually performed in 1978-1979, Monsanto had been named as a co-defendant in a massive class-action lawsuit brought by Vietnam War veterans exposed to dioxin in the notorious defoliant Agent Orange and therefore had reason to whitewash dioxin's human health effects. E.g., In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 1223 (E.D. N.Y. 1985) (dismissing claims of veterans who opted out of settlement and discussing importance of negative epidemiologic evidence to decision). The U.S. Environmental Protection Agency had taken regulatory action against the dioxin-contaminated herbicide 2,4,5-T, one of the ingredients of Agent Orange widely used as an herbicide in the U.S. The EPA action was largely based on animal studies and a study associating 2,4,5-T exposure with "spontaneous" (involuntary) human abortions among residents in a 1,600-square-mile area of the Oregon Coast Range. USEPA. Decision & Emergency Order Suspending Registrations for the Forest, Rights-of-way, and Pasture Uses of 2,4,5-Trichlorophenoxyacetic Acid (2,4,5-T). 44 Fed. Reg. 15874 (March 15, 1979). In addition,

the Steel Workers Union, bargaining body for the Monsanto plant workers at Nitro, had persuaded Mt. Sinai Hospital officials to perform an epidemiologic study of Nitro plant workers. EXHIBIT U hereto (Monsanto document produced in Kemner, acknowledging that its Nitro workers "became of significant worldwide interest in attempting to answer questions about the long-term health effects, if any, of dioxin exposure"). All of these factors gave Monsanto an incentive to perform fraudulent studies of its workers.

10. Indeed, Monsanto's internal documents also indicate that its Nitro worker studies, including Dr. Gaffey's, were performed because Monsanto was "vulnerable to [a Mt. Sinai researcher's] announcements and/or allegations of potential health problems which he may relate to dioxins." Id. Such statements raise a strong inference that Dr. Gaffey's study was intended, before work ever began, to refute "allegations of potential health problems . . . relate[d] to dioxins" and provide evidence of Dr. Gaffey's motive in altering his study in ways that resulted in misclassifications of exposed and unexposed workers. In addition, another Monsanto document indicates that its researchers were advised that a two-year statute of limitations applied to potential suits brought by the Nitro workers, providing a plausible explanation for Mr. Gaffey's reasons for cutting off his study period to exclude later worker deaths. EXHIBIT V hereto, pg. 2. Having shown the existence of such compelling evidence prior to taking discovery of Monsanto, defendants should be permitted to discover related materials.

11. Monsanto has suggested that only records relating to Dr. Gaffey's study are relevant to this lawsuit. However, Dr. Gaffey's study has been controversial ever since independent scientists noted in a 1985 article in the influential scientific journal Nature that Dr.

Gaffey and his co-author Dr. Judith Zack had included in their "unexposed" group four deceased workers that had been classified as "exposed" in a concurrent study by Zack and Dr. Raymond Suskind.[2] The truth, as examined in depth in the Kemner case, is that the "earlier" Zack-Suskind study was only part of the "larger" Zack-Gaffey study being conducted at the same time.[3] There are strong reasons for extensively probing the Monsanto records involved with all simultaneous studies being performed on the Nitro population by Monsanto researchers. It was in truth part of what Monsanto itself has portrayed as a studied effort by a single group of Monsanto researchers and contractors called "the Nitro Health Study Task Force" to test the singular hypothesis that dioxin causes adverse human health effects.[4] The state of mind and activities of the researchers involved in the Nitro Health Study Task Force -- and of their employer Monsanto that established it -- is probative of Dr. Gaffey's actual intent in publishing his study.[5]

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[2] A. Hay & E. Silbergeld, Assessing the Risk of Dioxin Exposure. 315 Nature 102-03 (May 9, 1985). They also noted that Dr. Gaffey had omitted from his study "some 19 individuals who died of circulatory disease or cancer whilst in employment at the company, and who meet the criteria for inclusion in the exposed group," basing that part of their report on records they obtained as expert witnesses in the Nitro workers' litigation. Id.

[3] According to the Zack-Suskind study, it was only part of a "larger study," later identified by Dr. Roush in the Kemner litigation as the Zack-Gaffey study. J. Zack & R. Suskind, The Mortality Experience of Workers Exposed to Tetrachlorodibenzodioxin in a Trichlorophenol Process Accident. 22(1) J. of Occupational Medicine 11 (January, 1980) ("The results of this study will be incorporated with those of a larger study which will include plant workers exposed in the course of 2,4,5-trichlorophenoxyacetic acid production").

[4] A memorandum describing a July 20, 1979 meeting of the Nitro Health Study Task Force is mentioned in the transcript of one of the Nitro worker cases, Boggess transcript, pg. 28573.

[5] There is also a substantial question whether the study is actually Dr. Gaffey's own work. For example, testimony by Monsanto's Dr. George Roush in the Kemner case states that the data for the Zack-Gaffey study was gathered during 1978 and 1979 at the same time as the

12. Monsanto also contends without explanation that records generated after the publication of the Zack-Gaffey are irrelevant, reasoning that only Dr. Gaffey's state of mind prior to publication relates to this lawsuit. The argument ignores the fact that some discovery is sought to challenge Dr. Gaffey's claim that he suffered damages years after publication when defendants published their article, as discussed elsewhere in this statement. The Monsanto argument also ignores the fact that subsequently generated documents often contain discussions of prior events and impressions, and that subsequent conduct may be probative of a prior state of mind. Grandstaff v. City of Borger, Texas, 767 F.2d 161, 171 (5th Cir. 1985; cert. den., 480 U.S. 916.

13. Monsanto has seriously exaggerated the burden and expense of retrieving records involved in defendants' discovery requests. As part of my professional activities, I operate a litigation clearinghouse for dioxin-PCB-related litigation. In that role, I have been intimately involved in discovery activities in many lawsuits brought against Monsanto Company because of its manufacture of PCBs and other chemicals contaminated with the ultra-toxins dioxins or dibenzofurans. I have also litigated such cases myself. E.g., Nevada Power Co. v. Monsanto, 955 F.2d 1304 (9th Cir. 1992) (finding jury issue on when Nevada Power should have known Monsanto had fraudulently misrepresented safety of PCBs contaminated with dioxins and dibenzofurans).[6]

Zack-Suskind study, which is inconsistent with Dr. Gaffey's answers to interrogatories in this case stating that he himself "initiated the idea for the study, and it was approved by his superior, Dr. George Roush." Gaffey response to defendants' interrogatory 8(a). The problem with Dr. Gaffey's statement is that he also states he did not begin working for Monsanto until 1979.

[6] See also Save Our ecoSystems/Merrell v. Clark, 747 F.2d 1240 (9th Cir. 1984) (Monsanto appeared as amicus party) (court found "widespread fraud" in tests submitted to EPA

14. I coordinated all trial preparation activities for the plaintiff in the Nevada Power litigation for more than a year. During that time, Monsanto produced hundreds of thousands of pages of documents, often on extremely short notice in response to court orders. Because of the rapidity of response to detailed discovery requests, I became convinced that Monsanto was operating a computerized document retrieval system for its records involving dioxins, dibenzofurans, and PCBs, as is common in major toxic tort litigation, a belief that was subsequently confirmed by conversations with Monsanto's outside counsel and by production of documents referring to such a system.

15. I am in accord with Mr. Kenneth Heineman's affidavit wherein he states his belief that the Kemner v. Monsanto lawsuit was the longest civil trial in the history of the American court system.[7] Kemner was a companion case to the lawsuit brought by the workers at Monsanto's Nitro plant, whose mortality experience is the subject of this litigation. Materials developed in the Nitro workers' case were examined extensively in the Kemner case. From my experience in major litigation with Monsanto involving dioxin, dibenzofurans, and PCBs, I would consider it highly unlikely that Monsanto did not have its litigation materials for Kemner and the Nitro workers' case indexed extensively with document retrieval software.

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to obtain pesticide registrations); Merrell v. Thomas, 608 F. Supp. 644 (D. Oregon, 1985) (Monsanto was defendant-intervenor), affirmed on other grounds sub nom. Merrell v. Ruckelshaus, 807 F.2d 776 (9th Cir. 1986), cert. den., 484 U.S. 848 (1987) (lawsuit to enjoin fraudulently-obtained government pesticide registrations).

[7] I do question, however, his statement that the Kemner transcript exceeds 100,000 pages. According to the appellate opinion in that case, it is only some 91,000 pages long. There is no dispute, however, that the transcript is lengthy.

16. I am also less than persuaded by Monsanto's claims of its need to conduct an extensive review of documents for potential privilege claims. The lion's share of the discovery materials sought through defendants' subpoenas are for trial transcripts, exhibits, and documents already produced in the antecedent Kemner and Nitro worker cases. Monsanto has no need to review for privilege claims documents already revealed to other adverse parties. Republic of the Philippines v. Westinghouse Electric Corp., 132 F.R.D. 384, 388 (D.N.J. 1990) (once documents are produced to any adversary, even under shelter of a protective order, all privilege claims are waived against all adversaries, as a matter of law), aff'd., 951 F.2d 1414 (3rd Cir. 1991) (surveying authorities).

17. The discovery sought by defendants in this case focuses narrowly on records of Monsanto Company's Medical Department and their use in related litigation. During the Nevada Power litigation, my law partner Ralph Bradley took the deposition of Ms. Sue Ann Jacobson, Supervisor of Monsanto's Medical Department Library. In her deposition, which I have reviewed in drafting this statement, Ms. Jacobson described in some detail the computerized records system she developed for the Medical Department after she assumed her position in 1989, upon the retirement of her predecessor, Mary L. Gaffey, wife of plaintiff William R. Gaffey.

18. Because of my experience and such information as is discussed above, I am convinced that Monsanto is seriously exaggerating the expense and effort entailed by responding to the discovery subpoenas propounded by defendants in this litigation. I am highly

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familiar with sophisticated file and text retrieval software now used in major litigation; based on that experience, I believe the Kemner and Nitro workers' litigation transcripts could be produced in electronic format with fewer than five hours' effort on the part of an experienced computer user familiar with the software system involved. I also believe that retrieval of other documents requested involves only a few hours with software using Westlaw- or Lexis-type search capabilities that is commonly available and almost certainly used by Monsanto and by Coburn & Croft.

19. I stress that Monsanto has never before sought compensation for providing copies of its discovery documents in any case in which I was involved. (Monsanto in fact ordinarily indexes and produces copies of all requested documents rather than producing them for inspection and copying, in order to avoid creating the automatic "business records" exception to the hearsay rule created by exercising the Fed.R.Civ.P. 34(b) option of producing documents as they are kept in the ordinary course of business.) Moreover, when all parties are well financed, it is the custom in major litigation not to charge for producing discovery documents. Monsanto's demand for costs and attorney fees is an obvious tactical maneuver, fairly raising the question of why Monsanto believes such a tactic would be successful in this case. The answer to that question raises a "risk" that Coburn & Croft have obtained and are acting on the basis of information about defendants' modest litigation budget unfairly acquired by Coburn & Croft's Mr. Wray during his earlier representation of defendants in this case. A "risk" of such divulgence is all that defendants are required to show in order to be entitled to Coburn & Croft's

disqualification from further involvement in this litigation.[8] Indeed, Monsanto may not presume to charge defendants for their requested discovery without compounding Coburn & Croft's apparent ethical violation in representing Monsanto's interests against defendants.[9]

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[8] This Court need not find that Mr. Wray in fact disclosed client confidences in order to require Coburn & Croft's disqualification. All the Court need find is that there is a risk that client confidences could be used against defendants. C. Wolfram, Modern Legal Ethics § 7.4, pg. 369 (1986) ("once the former client shows the substantial relationship that is necessary to invoke the rule, a nonrebuttable presumption arises that the lawyer obtained in the former representation confidential information relating to each of its elements. Because of the presumption, the lawyer is disqualified in a later representation if a risk exists that any of the presumed confidential information could be used against the interests of the former client") (emphasis added), citing Westinghouse v. Gulf Oil Corp., 588 F.2d 221, 224 n.3 (7th Cir. 1978); Emle Industries v. Patentex, 478 F.2d 562, 571 (2nd Cir. 1973). But note, however, that some courts have questioned whether the presumption should be irrebuttable. Id.

[9] See e.g., ABA Rules of Professional Conduct § 1.10:

> "(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7, 1.8(c), 1.9 or 2.2.
>
> "(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 1.6 and 1.9(b) that is material to the matter."

20. Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED THIS TWENTY-FIRST DAY OF NOVEMBER, 1993.

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PAUL E. MERRELL

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