UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THE CITY OF BLOOMINGTON, INDIANA; THE UTILITIES SERVICE BOARD OF BLOOMINGTON, INDIANA; and MONROE COUNTY, INDIANA,	)	
Plaintiffs,	)	
v.	)	Civ. No. IP 83-9-C
WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania corporation; and MONSANTO COMPANY, a Delaware corporation,	)	Judge S. Hugh Dillin
Defendants.	)	

CITY PLAINTIFFS' REPLY MEMORANDUM
IN SUPPORT OF THEIR FIRST MOTION TO COMPEL
(PRIVILEGED DOCUMENTS AND WORK PRODUCT)

I. Introduction

The City's First Motion To Compel Defendant Monsanto Company to Produce Documents -- and this Reply Memorandum -- are directed at two major areas:

1. Monsanto's Blanket, Improper Assertion of the "Work Product" Doctrine, and
2. Monsanto's wholly inadequate assertion of the attorney-client privilege.

A. Work Product

The City's concerns over Monsanto's "work product" claims in turn cover two distinct areas.

1. **Monsanto's Index of PCB Documents In Monsanto's Possession.** Despite Monsanto's newly minted claim that all the original PCB related documents are available for the City's inspection, that claim is extremely disingenuous. Contrary to the representation made by Monsanto to this Court, Monsanto has repeatedly refused to provide Plaintiff's counsel access to Monsanto's PCB related documents. Instead, Monsanto has

pursued a "damned if you do, damned if you don't" approach to document production which is designed to bar access to relevant documents.

Time and time again, Monsanto has failed to produce highly relevant documents by adopting a specious "fall through the cracks" argument. The City has thus far filed six formal and many more informal document discovery requests which Monsanto has at the same time characterized as both too broad and too narrow.

- By characterizing the requests as too broad, Monsanto has repeatedly barred the City from access to the raw documents in Monsanto's document repository -- despite Plaintiffs' repeated formal and informal requests for access to those documents.
- When the City has filed explicit requests, Monsanto has repeatedly refused to produce documents on the ground that the City failed to identify the categories with sufficient specificity.

Throughout discovery thus far, Monsanto's witnesses have testified as to the existence of documents -- highly relevant and highly incriminating to Monsanto -- but which Monsanto's counsel have failed to produce in response to Plaintiff's exhaustive document requests. When challenged on its failure to produce such documents, Monsanto claims that these incriminating documents "fall through the cracks" between Plaintiff's "too broad" and "too narrow" document requests.

In an attempt to cut through this charade, the City asked for an index of Monsanto's documents. The City is not seeking opinions, thought processes, mental impressions, conclusions, or legal theories of Monsanto's counsel. Rather, the City is seeking a list containing such hard facts as date, author, addressee, title, subject matter and other relevant information as to each of the PCB documents in Monsanto's possession.

Monsanto attempts to finesse the City's specific request for an index of Monsanto's PCB files and documents, which Monsanto has withheld under claim of work

HARTOLDMON0029439

product, by launching into an extended discussion of Monsanto's computerized PCB litigation support system. But Monsanto's argument that the computerized system itself is protected simply misses the point -- the City has *not* requested production of the system or of any details concerning the system. The City requested access to the original documents themselves, and when that was refused by Monsanto, the City requested an index of the documents and files in the repository. Even the authorities relied on by Monsanto for its claim that the computerized PCB litigation support system is protected make clear that the City should be allowed to inspect the source documents, and that the City should be given a print-out identifying the files and documents. *See, e.g., Burwell v. Ford Motor Co.*, Cause No. 81-2301, Slip Op. at 4-5 (D. Kans., Nov. 29, 1983) (attached to Monsanto's opposition brief).

Plaintiffs request an order from the Court:

- Directing Monsanto to produce an index of PCB related documents in its possession, denoting date of document, author, addressee, title, document code number, and any other factual information about each document; and
- Directing Monsanto to provide Plaintiff access to Monsanto's PCB related documents.

2. **Other Documents Withheld By Monsanto Under A Blanket Work Product Claim.** In response to virtually every document request the City has made and as to *each* specific category of the document request, Monsanto has made a blanket objection based on the "work product" doctrine without identifying the documents it was withholding under this claim.[1/] Contrary to their obligation, Monsanto has steadfastly refused to

---

1/ See e.g. Monsanto's Response to Plaintiffs' First Document Request where Monsanto stated: "General Objections to *All* Categories of the Request Monsanto objects to the request to the extent that it seeks documents protected from discovery by the attorney-client privilege or by the *work product doctrine...*" Emphasis added. At no time did Monsanto ever identify what documents in any of the categories were being withheld under the work product doctrine. Moreover this basic broad brush, unsubstantiated objection was repeated in *Monsanto's Response to Plaintiffs' First Supplemental Document Request; Monsanto's Response To Plaintiff's Third Request For Documents; Monsanto's Response To Document Requests Contained In Deposition Notices; and Monsanto's Response To Plaintiff's Fourth Document Request.*

HARTOLDMON0029440

identify which documents it is withholding under a work product claim. Monsanto's blanket "work product" objection -- filed in response to hundreds of specific document requests -- must fail for two reasons:

a. Monsanto has an obligation to identify which documents it has withheld under a claim of work product. Without identifying the specific documents withheld, Monsanto cannot meet its burden of showing that each of the documents were prepared by counsel in anticipation of litigation. Monsanto did not even attempt to make the required showing in its brief, and therefore Monsanto has no basis for withholding any original documents as work product.

b. Even as to documents which qualify as work product, the factual material contained therein is discoverable. *See Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595-596 (3d Cir. 1984).

B. Attorney-Client

The City's concerns over Monsanto's "attorney-client" claims also cover two distinct areas:

1. **The Ten Documents Specifically Identified.** As to these documents, Monsanto has persisted in its refusal to set forth the necessary facts to establish that the privilege applies. These documents were circulated to several people -- other than the lawyers and addressees. Although Monsanto's counsel has previously acknowledged that most of the ten communications had been co-copied to individuals who are *not* identified on the list Monsanto provided, Monsanto has not certified the list of distributees to the Court or shown that such distribution was reasonable and necessary to provide legal advice to the corporation. Monsanto has failed to show that the persons receiving the communication -- both those identified and those not yet identified -- were in the corporation's "control group" or were required to receive such information in order to provide the control group with legal advice. Given Monsanto's failure to meet this burden the

HARTOLDMON0029441

documents are not privileged under the attorney-client privilege. *See Independent Petrochemical Corporation v. Aetna Casualty and Surety Co.*, 654 F. Supp. 1334, 1364-1365 (D.D.C. 1986).

2. **Documents Not Identified But Withheld By Monsanto Under A Blanket "Attorney-Client" Claim.** In response to virtually every document request the City has made and as to *each* specific category of the document request, Monsanto has made a blanket objection based on an alleged "attorney-client" privilege, without identifying the documents it was withholding under this claim. Although Monsanto now acknowledges in its opposition brief that it has withheld broad categories of documents under claim of attorney-client privilege, Monsanto refuses to identify any documents other than the ten previously partially identified.

If no such documents exist for which these repeated blanket attorney-client privilege assertions exist, Monsanto should be sanctioned for its frivolous and repeated baseless assertion of this privilege. If such documents do exist, they should be immediately produced.

II. Monsanto's Attack On City Plaintiffs And Their Counsel Is Baseless

The first part of Monsanto's opposition brief consists primarily of an attack on City Plaintiffs and their counsel's discovery requests and responses. It is readily apparent that this attack is intended to divert this Court's attention from the issues raised by City Plaintiffs' motion: Monsanto's wholesale failure to meet its burden of showing that any of the documents withheld are protected from discovery by the work product doctrine or attorney-client privilege. A brief review of the actual events makes clear that Monsanto's attack is baseless; and when these events are viewed in context, they provide all the more reason for this Court to grant City Plaintiffs' Motion to Compel without further delay.

First, Monsanto lambasts the City for serving five production requests during this action. (Monsanto's Brief In Response To The City's First Motion To Compel, at pp. 1-3). Monsanto neglects to inform the Court that City Plaintiffs were required to make

HARTOLDMON0029442

successive requests because Monsanto failed and refused to make thorough and complete responses to the City's initial document requests. Monsanto's continuing effort to "hide the ball" was highlighted in the November 4, 1986 letter from the City's counsel to Monsanto's counsel, which is attached to the City's first motion to compel as Exhibit A:

> Monsanto's avoidance of document production by claiming on the one hand that the City's document requests are too specific and then objecting that a second set of document requests were too general. As you know, the City's first request for documents requested documents in specific narrow categories. In preparation for 30(b)(6) depositions the City made several general requests for PCB related documents to insure that potentially relevant documents were not missed. Monsanto has refused to produce any documents in response to the City's 30(b)(6) request for general categories of PCB documents. Yet deposition examination has disclosed the existence of several highly relevant PCB documents which you have failed to disclose in response to the City's prior document requests. When confronted with this failure to produce, you stated that these highly relevant documents were not produced in response to the City's first document request because they did not fall within the specific requests set forth therein. When asked why these highly relevant documents were not produced in response to the 30(b)(6) document request, you stated that the 30(b)(6) was too general. Monsanto's approach can only be viewed as a concerted effort to "hide the ball;" and is plainly contrary to the letter and spirit of the discovery rules.

Again, on November 13, 1986, the City complained that Monsanto was withholding highly relevant documents by using a "slip through the cracks" argument:

> As you know, the City is concerned over Monsanto's claim that the City's first document request was too narrow and that the City's last document request was too broad -- with the result that you have indicated that several documents have "slipped through the cracks". We have reviewed our prior requests and find the specific requests sufficiently broad to cover all documents related to PCBs as a contaminant and *PCB distribution, disposal and control during the period 1958 to 1977.* Similarly the City's requests are sufficiently specific to avoid your "slip through the cracks" approach to document production.

The various categories of City Plaintiffs' successive production requests required Monsanto to make available for Plaintiffs' inspection many of the documents in Monsanto's repository of original documents "related to the manufacture and sale of

HARTOLDMON0029443

polychlorinated biphenyls by Monsanto Company". (See Affidavits of Joseph G. Nassif, and Thomas Bistline, attached to Monsanto's opposition memorandum, which acknowledge the creation and maintenance of this original document repository by Monsanto.) This document repository apparently contains tens, if not hundreds of thousands of documents, including numerous documents for which Monsanto claims privilege. (*Id.*) In this litigation, however, Monsanto has produced less than 12,000 pages of documents; Monsanto has not identified any documents withheld under a claim of work product immunity; and Monsanto has partially, albeit insufficiently, identified only ten documents withheld under claim of attorney-client privilege.[2/]

Faced with Monsanto's meager response to City Plaintiffs' production requests over the years, City Plaintiffs requested an opportunity to inspect the documents at the repository itself. When Monsanto refused to allow such an inspection, City Plaintiffs requested an index of the files and documents contained in the repository, so that the City could at least make a facial determination whether Monsanto had failed to produce any responsive documents. Monsanto refused to produce or even identify any such index, asserting that all such indices are protected from discovery by the work product doctrine. When the City's further efforts to resolve this issue by conciliation were unsuccessful (see City Plaintiffs' First Motion to Compel and Supporting Memorandum at pp. 7-8), this motion necessarily followed.

Monsanto next attacks City Plaintiffs' counsel for not coming to look at Monsanto's insurance policies, when Monsanto "offered" them. Again, Monsanto conveniently ignores the underlying facts. The City had requested the policies years ago, and Monsanto consistently refused to produce them, even though it is expressly required to do so by Rule 26(b)(2), Fed. R. Civ. P. Finally, in August of 1987, less than two months before the then scheduled trial date, Monsanto finally "offered" to make them available.

[2/]Upon receipt of Monsanto's opposition brief, and accompanying affidavits, City Plaintiffs immediately requested the deposition of Thomas G. Bistline, the Monsanto employee who is currently custodian of the Monsanto document repository. Monsanto's counsel has refused to produce Mr. Bistline for deposition.

HARTOLDMON0029444

Because so many other pre-trial preparation matters had priority, the City declined to inspect them at that time -- just what Monsanto had hoped to accomplish by its delay tactics. A few weeks later, this Court stayed this action indefinitely. Now that the stay has been lifted and the trial has been re-scheduled to July 1988, the City will proceed to inspect the policies.

In view of the City's persistence in pursuing production of the documents for which Monsanto claims privilege over the past eighteen months, Monsanto's suggestion that the City might not look at them if Monsanto "offered" them is absurd. (See Monsanto's Brief In Opposition To The City's First Motion To Compel, at pp. 2-3.)[3/]

III. Monsanto Has Failed To Properly Assert A Work Product Claim

City Plaintiffs have challenged Monsanto's claim of work product immunity for two distinct categories of documents: (1) a broad group of unidentified documents withheld by Monsanto under a blanket claim of immunity; and (2) specific indices of Monsanto's PCB related documents, which have been withheld by Monsanto as work product. As discussed below, Monsanto has failed to make a showing that any of the documents withheld are work product, and therefore Monsanto must produce all the withheld documents.

A. Monsanto Cannot Withhold Numerous Unidentified Documents Under A Blanket Work Product Claim

In response to the City Plaintiffs' various production requests, Monsanto has consistently withheld documents responsive to numerous categories of documents requested on the basis of a blanket work product claim. In the year prior to the filing of this motion, the City requested Monsanto to identify the documents withheld on at least

---

[3/]Monsanto also complains about the City Plaintiffs' responses and objections to Monsanto's discovery requests (Monsanto's Brief In Opposition To The City's First Motion To Compel, at pp. 3-4), matters that are not before this Court. Monsanto has never previously made the complaints now asserted in its opposition brief. Suffice it to say that counsel for the City Plaintiffs have always been available and will continue to be available to confer with Monsanto's counsel on such matters, pursuant to Local Rule 13.

HARTOLDMON0029445

four separate occasions. Monsanto consistently refused to identify a single document. (See City Plaintiffs' First Motion To Compel and Supporting Memorandum, pp. 3-9.)

In its opposition memorandum, Monsanto has persisted in its refusal to identify the documents withheld -- and has failed to provide any factual information whatsoever which establishes that a single document is work product. Without citation of any authority, Monsanto asserts that the law does not require such an identification, but allows Monsanto to choose what it wants to list (Monsanto's opposition brief at pp. 4-5). In its infinite wisdom, Monsanto concluded that all of the documents withheld under claim of work product "are routinely exempt from production in discovery by generic description;" and Monsanto has decided that it is not worthwhile to "invest time in a detailed description". (*Id.*)

For Monsanto to take such a position at this time is absolutely incredible. Monsanto is well aware that its position has no support in the law, and has been expressly and repeatedly rejected by a long line of established precedent discussed at length in City Plaintiffs' initial memorandum. The law is clear that Monsanto could not rely on a blanket assertion of work product. Rather, Monsanto was required to identify each document withheld;[4/] and the burden was on Monsanto to set forth sufficient facts to establish that each document withheld was prepared by counsel in anticipation of litigation. (See City Plaintiffs' First Motion To Compel and Supporting Memorandum, at pp. 3-4, 10-11.)[5/]

[4/] *See, e.g., AM International v. Eastman Kodak Co.*, 100 F.R.D. 255 (N.D. Ill. 1981) (holding that documents for which privilege is claimed must be identified, because: "Without identification of documents the party against whom the privilege is claimed is completely unable to challenge the validity of the claim."

[5/] *See, e.g., Federal Trade Commission v. Shaffner*, 626 F.2d 32, 37 (7th Cir. 1980)(burden rests upon party claiming privilege to present underlying facts which demonstrate the existence of the privilege); *Binks Manufacturing Company v. National Presto Industries, Inc.*, 709 F.2d 1109 (7th Cir. 1983); *Barclaysamerican Corporation v. Kane*, 746 F.2d 653, 656 (10th Cir. 1984)(party asserting either attorney-client privilege or work product doctrine has burden of establishing that each applies); *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984), *cert. dismissed*, 469 U.S. 1199 (1985)(party asserting privilege has burden of establishing claim; baldface assertion of privilege is insufficient); *In re Uranium Antitrust Litigation*, 552 F.Supp. 517 (N.D. Ill. 1982)(burden is upon person asserting privilege to show that document falls within privilege); *Sneider v. Kimberly-Clark Corporation*, 91 F.R.D. 1, 3 (N.D. Ill. 1980)(burden falls squarely on party asserting privilege); *In re Vantage Petroleum Corp.*, 40 B.R. 34, 38-9 (E.D.N.Y. 1984)(claimant must

HARTOLDMON0029446

Monsanto may consider these well-established requirements to be a "burden, intrusion and impediment" (Monsanto opposition brief at p. 5); but they are the burden Monsanto must bear and meet to protect documents under a claim of work product immunity. Monsanto's refusal to identify the documents withheld in any way -- Plaintiffs do not even know *how many* documents have been withheld -- necessarily precludes Monsanto from meeting its burden. Inasmuch as Monsanto has failed to establish that a single document withheld is in fact work product, all of the withheld documents must be produced.

B. Monsanto Cannot Withhold Its Indices Of PCB Documents And Files Under A Blanket Work Product Claim

As discussed in Section A above, despite the breadth and detail of the City Plaintiffs' five production requests, Monsanto, by its own admission, has produced only about 12,000 pages of documents in this litigation. When Monsanto advised the City that its in-house counsel had created its own repository of documents related to the manufacture and sale of PCB documents, the City Plaintiffs requested an opportunity to inspect the documents maintained in the repository. From discussions with Monsanto's counsel, it appeared that the repository contains far more PCB related documents than Monsanto has produced in this action -- a suspicion which has now been confirmed by the affidavits attached to Monsanto's opposition brief -- and City Plaintiffs wanted to review the documents to assure that they had received all documents responsive to their requests. Monsanto flatly rejected the City Plaintiffs' request to review the documents in the repository on the basis of a vague assertion of work product immunity.

---

establish that each essential element of privilege is met); *International Paper Company v. Fibreboard Corporation*, 63 F.R.D. 88, 93 (D. Del. 1974)(claimant must establish each element of the privilege claimed); *Byrnes v. Jetnet Corporation*, 111 F.R.D. 68, 71 (M.D.N.C. 1986)(proponent of the privilege has burden of establishing that privilege exists); *North Carolina Electric Membership Corporation v. Carolina Power & Light Company*, 110 F.R.D. 511, 513 (M.D.N.C. 1986)(proponent must establish each element of the privilege claimed).

HARTOLDMON0029447

Monsanto's refusal to allow City Plaintiffs access to the original documents was improper, and is illustrative of the stonewall tactics employed by Monsanto in this case. Authority cited by Monsanto itself makes clear that original responsive documents cannot be turned into work product by putting them in the hands of their counsel. *See, e.g., In re L.T.V. Securities Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981) ("... merely securing documents or records in the role of an attorney and in anticipation of possible litigation does not remove such materials from discovery upon a proper request." 89 F.R.D. at 612). *See also Gould, Inc. v. Mitsui Mining and Smelting Co., Ltd.*, 825 F.2d 676 (2d Cir. 1987) ("... documents received by ... [a law firm] from its clients, which would not be privileged if they remained in the clients' hands, would not acquire protection merely because they were transferred to ... [the law firm]." 825 F.2d at 679-80).[6/]

In similar circumstances, document repositories like the one created and maintained by Monsanto are open to all litigants in cases involving the subject matter of the repository. For example, most companies that manufacture asbestos have been parties to a tremendous number of lawsuits in recent years. Most of these companies, individually or with other companies, have created document repositories containing virtually all of the companies' documents relevant to asbestos-related issues; and these repositories are open to all parties in asbestos-related litigation with those companies.

Rather than engage in a lengthy battle with Monsanto over access to all of Monsanto's PCB related documents, however, the City Plaintiffs took a more conciliatory

---

[6/]Monsanto's reliance on *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985), is plainly misplaced. *Sporck* involved the discoverability of a small group of individual documents selected by counsel to prepare a witness, out of hundreds of thousands of documents that had been produced in litigation. This case presents precisely the opposite situation -- whether Monsanto should have allowed the City Plaintiffs to inspect the entire group of relevant PCB related documents, after Monsanto had selectively produced only a small portion of them.

Monsanto cannot, in good faith, assert that this large group of original documents its in-house counsel has segregated is a "special" selection protected from production. The affidavits of Monsanto's own in-house counsel disclose that the repository contains virtually *all* of the original documents related to PCB manufacture and sale that may be relevant to any PCB litigation; and the repository is used as Monsanto's "library" for preparation of Monsanto's responses to production requests in all PCB related litigation. (See Affidavit of Joseph G. Nassif, attached to Monsanto's opposition brief.) In these circumstances the documents themselves are not protected, and must be produced. *See, Gould, Inc.*, 825 F.2d at 679-80.

HARTOLDMON0029448

approach, designed to obtain the necessary information in a manner less intrusive to Monsanto. The City Plaintiffs requested that Monsanto furnish an index of Monsanto's PCB files and documents which the City could check against the documents produced by Monsanto, to determine whether Monsanto had produced all of the documents the City had requested. Monsanto denied this request as well, on at least three separate occasions before this motion was filed. (See City Plaintiffs' First Motion To Compel and Supporting Memorandum at pp. 3-9). Again, Monsanto relied on a vague assertion of privilege, without ever identifying the index or indices it is withholding. (*Id.*)

In its opposition brief, Monsanto does not cite any authority at all in support of its blanket claims that the unidentified index(es) are work product protected from discovery. Instead, Monsanto devotes the last half of its brief to an argument that Monsanto's computerized litigation support system is work product that should be protected from discovery. Apparently, Monsanto made this argument successfully in another PCB-related case in Texas; and in making the same argument here, Monsanto relies on three affidavits of its counsel that Monsanto filed in the Texas cases, copies of which are attached to Monsanto's opposition brief in this case.[7]

By accident or design, Monsanto's extended arguments on the question of whether its computerized legal support system should be protected simply misses the point. Unlike the plaintiffs in the *Scott* case in Texas, the City Plaintiffs in this case have *never* requested Monsanto to produce its computerized litigation support system, tapes, programs, or any of the details concerning the programming, management, or operation of the system. The City has asked only for access to the original documents themselves, or at a minimum, for an index of the documents which would in no way reveal the opin-

---

[7] Monsanto's reliance on affidavits it filed in another case is patently inconsistent with Monsanto's refusal to produce deposition and trial testimony given in other cases on the purported ground that such sworn statements are not relevant. (See City Plaintiffs' Second Motion To Compel, and Monsanto's opposition to that motion.) Monsanto cannot have it both ways.

HARTOLDMON0029449

ions, mental impressions, conclusions, legal theories or thought processes of Monsanto's counsel.

One of the cases relied on by Monsanto itself to protect its computerized litigation support system confirms that City Plaintiffs should be given access to the original documents in Monsanto's repository, and further makes clear that Monsanto should be required to produce the index requested by City Plaintiffs. In *Burwell v. Ford Motor Company*, Cause No. 81-2301 (D. Kans. Nov. 29, 1983) (slip opinion attached to Monsanto's opposition brief), the court found that Ford's litigation system was protected in part because Ford had represented that it would give the *Scott* plaintiffs access to *all* source documents that those plaintiffs had requested (Slip Op., p. 4).[8/] The court further required Ford to produce a hard-copy print-out -- indices -- of documents that had been inputted into the system (Slip Op., p. 5).

IV. Monsanto Has Failed To Properly Assert Attorney-Client Privilege

City Plaintiffs' motion suggested that Monsanto's partial identification of *only* ten "attorney-client" documents in all of its files that are responsive to the many categories of documents requested by City Plaintiffs was highly suspect. This suspicion was based on the deep involvement of Monsanto and its counsel in PCB-related issues for three decades, together with Monsanto's counsel's own prior acknowledgment that the files of Monsanto's staff attorneys were replete with such documents (City Plaintiffs' First Motion To Compel and Supporting Memorandum at p. 12).

City Plaintiffs' suspicion has now been confirmed by Monsanto's opposition brief. The Affidavit of Joseph G. Nassif from the *Scott* case filed by Monsanto states unequivocally that Monsanto has segregated a "collection" of "nondiscoverable (privileged)"

[8/] In the *Scott* case, Monsanto similarly agreed to make the original documents available to the *Scott* plaintiffs. (See Affidavit of Thomas M. Bistline, February 26, 1987, par. 5, attached to Monsanto's opposition brief.) Monsanto's offer in *Scott* stands in stark contrast to Monsanto's continuing efforts to thwart City Plaintiffs' discovery, and to prevent City Plaintiffs from verifying the completeness of Monsanto's production in this case.

HARTOLDMON0029450

documents (par. 5). Monsanto expressly refuses, however, to identify any of these documents (other than the ten Monsanto has chosen to list) except by "generic description". (Monsanto opposition brief at pp. 4-5).

Such blanket "generic descriptions" plainly fail to satisfy Monsanto's burden of establishing that each element of the attorney-client privilege has been met for each document withheld. (See authorities collected in Plaintiffs' First Motion To Compel and Supporting Memorandum at pp. 3-4.) By deliberately electing to stand on a patently improper assertion of privilege, rather than meet its burden before this Court, Monsanto has waived any claim of privilege it might have had as to any of the unidentified documents.

With regard to the ten documents Monsanto did partially identify, Monsanto has persisted in its refusal to provide the specific factual information necessary for City Plaintiffs, and this Court, to determine whether each of the ten withheld documents satisfy all of the elements of the privilege. Monsanto string cited a series of cases applying the principles of privilege law (Monsanto opposition brief at pp. 8-9); but Monsanto made no attempt to show how any of these cases applied to even one of the ten documents.

It is well settled that documents sent from one corporate officer to another, with a copy sent to an attorney, do *not* qualify as attorney-client communications. *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 403 (8th Cir. 1987). In the City Plaintiffs' motion, Plaintiffs pointed out that at least two of the documents listed by Monsanto were not to or from an attorney: the November 17, 1969 minutes of the meeting of the Corporate Development Committee; and the May 13, 1970 memo from Olson to Bergen (City Plaintiffs' First Motion To Compel and Supporting Memorandum, p. 13, f.n.*). In its opposition brief, Monsanto failed to provide any factual information to establish any basis for protecting these *non* attorney-client communications.

Monsanto does not dispute that, to properly claim privilege, the burden is on Monsanto to show that the confidentiality of the document has been maintained. *See*

HARTOLDMON0029451

Matter of Continental Illinois Securities Litigation, 732 F.2d 1302, 1314 (7th Cir. 1984). Monsanto claims in a conclusory fashion that in this case the burden is impossible for Monsanto to meet (Monsanto opposition brief at p. 8, n.2); but Monsanto does not even attempt to meet it. In their motion, City Plaintiffs pointed out that Monsanto's counsel had disclosed in a discovery conference that many of the ten documents withheld had been co-copied to numerous Monsanto employees who are not identified on the list. (City Plaintiffs' First Motion To Compel and Supporting Memorandum at p. 13). In its opposition brief, Monsanto did not certify the list of the other distributees to the Court; nor did Monsanto provide any information to establish Monsanto's procedure for limiting distribution to persons identified on the document. In the absence of *any* showing by Monsanto that distribution of the withheld documents was, in fact, to Monsanto employees only, that the distribution was both reasonable and necessary, and that the confidence of the communication was limited to the distributees, Monsanto's claim of privilege is negated. *Compare Pitney Bowes, Inc. v. Mestre*, 86 F.R.D. 444, 446 (S.D. Fla. 1980), with *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 141 (D. Del. 1982).

Finally, Monsanto has failed to show that all those Monsanto employees who did receive or send the documents -- both those identified and those as yet unidentified -- were either: a) in the corporate control group; or b) were required to receive or transmit the communication to provide legal advice to the "control group". It is obvious that the documents for which Monsanto now claims privilege were widely circulated to other non-attorney employees. The law is clear that communication between an in-house lawyer and employees who are not members of the control group -- including the dissemination of such communication to non-control group members -- are not privileged absent conclusive proof that disclosure to non-control group members was necessary to provide legal advice to the control group. Absent such conclusive proof -- totally absent here -- the documents are not privileged.

HARTOLDMON0029452

This distinction between control group members (including lower level employees who must give or receive the communication to provide legal advice to the control group) was clearly set forth in *Independent Petrochemical Corporation v. Aetna Casualty*, 654 F. Supp. 1334, 1364-5 (D.D.C. 1986). There, the court rejected claims of attorney-client privilege for communications between a mid-level corporate executive and in-house counsel:

> Determining whether communications made between corporate employees and a corporation's counsel are privileged requires application of the guidelines set out in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677; 666 L.Ed.2d 584 (1981) and *Diversified Indus. Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977), *en banc hearing*, 572 F.2d 606 (8th Cir. 1978). The privilege exists to protect the giving of legal advice by a corporation's lawyer to those in a position to control (or to take a substantial part in control of) decisions about corporate matters which require legal advice. These people, usually directors or high-ranking officers, are the "control group." Information given by lower-level employees is also protected where such employees are directed to communicate with the corporation's lawyer to enable him to give the corporation sound and informed advice. *Upjohn*, 449 U.S. at 394, 101 S.Ct. at 685; 449 U.S. at 403, 101 S.Ct. at 689 (Burger, J. concurring); *Diversified*, 572 F.2d at 609.
>
> Gregory Browne, as just one of IPC's district managers, was not within the "control group" of the corporation: he played no role in how the corporation legally handled the dioxin incidents, *see* Deposition of Gregory F. Browne, November 7, 1985, at 349-50, and cannot be said to personify the corporation. Further, plaintiffs have failed to show that Browne was directed by corporate superiors to communicate with Baker so that Baker could provide legal advice to the corporation. Browne said that he did not recall anyone asking him to prepare the report. *Id.*, at 316, 320. Unlike in *Upjohn*, plaintiffs have also not shown that Browne was seeking legal advice or that he regarded the material to be of a confidential, legal nature. *See generally id.*, at 320, 324-25. *The burden is on plaintiffs to prove conclusively each element of the privilege. S.E.C. v. Gulf & Western Indus. Inc.*, 518 F.Supp. 675, 682 (D.D.C. 1981). *Without showing that such communications are a part of the control group's effort to secure legal advice, every memorandum and conversation between a corporate employee and corporate counsel could be confidential, which would expand the privilege far beyond its bounds and unnecessarily frustrate the efforts of others to discover corporate activity.* Therefore, this court finds that these two documents are not privileged and orders their immediate release to defendants.
>
> 654 F. Supp. at 1364-5 (emphasis added).

HARTOLDMON0029453

Because Monsanto has failed to make the required showing that each of the elements of attorney-client privilege has been met for each document withheld, all of the documents must be produced.

V. Conclusion

For all the foregoing reasons , together with those set forth in Plaintiffs' Motion and initial Supporting Memorandum, Plaintiffs, **THE CITY OF BLOOMINGTON, INDIANA and THE UTILITIES SERVICE BOARD OF BLOOMINGTON, INDIANA,** request that this Court enter an Order compelling Defendant, **MONSANTO COMPANY,** to produce all of the documents Monsanto has withheld on the basis of claims of attorney-client privilege or work product. City Plaintiffs further request that this Court impose sanctions on Monsanto, pursuant to Rule 26(a), Fed. R. Civ. P., for unreasonably refusing to produce relevant documents throughout the litigation, based on patently improper and unsupportable assertions of privilege.

Respectfully submitted,

THE CITY OF BLOOMINGTON, INDIANA and THE UTILITIES SERVICE BOARD OF BLOOMINGTON, INDIANA,
Plaintiffs

By _____
One of their attorneys

Joseph V. Karaganis
A. Bruce White
Kathleen M. Donahue
Ellen Lois Zisook
Karaganis & White Ltd.
414 North Orleans
Suite 810
Chicago, Illinois 60610
(312) 836-1177

Geoffrey M. Grodner
Law Offices of Geoffrey M. Grodner
One City Centre - Suite 100
Bloomington, Indiana 47401
(812) 333-0081
JWBL147

HARTOLDMON0029454

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **CITY PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR FIRST MOTION TO COMPEL (PRIVILEGED DOCUMENTS AND WORK PRODUCT)** was served upon the following persons by mailing a copy via first class mail, postage prepaid, on March 30, 1988:

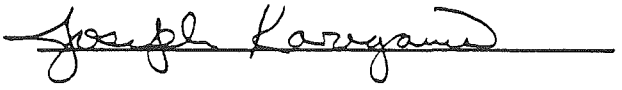
David R. Berz
Stanley M. Spracker
Weil, Gotshal & Manges
1615 L Street
Washington, D.C. 20036

Michael R. Fruehwald
Barnes & Thornburg
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, Indiana 46204

Monroe County Attorney
Monroe County Courthouse
Room 220
Bloomington, Indiana 47401

Arvin Maskin
Weil, Gotshal & Manges
767 Fifth Avenue
Room 3471
New York, New York 10153

Joseph B. Carney
Baker & Daniels
810 Fletcher Trust Building
Indianapolis, Indiana 46204



JWBL147