IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

IN RE: ROUNDUP PRODUCTS LIABILITY LITIGATION, MDL 2741	)	
	)	Case No. 1:17-mc-01273-TSC
This Document Relates To:	)	
Hardeman v. Monsanto Company et al., Case No. 3:16-cv-00525-VC	)	

DR. JANET E. COLLINS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL and TO TRANSFER

Dr. Janet E. Collins (hereinafter "Dr. Collins"), a non-party in *Hardeman v. Monsanto Company* (the "*Hardeman* litigation"), provides the following Response in Objection to Plaintiff Edwin Hardeman's ("Plaintiff's") Motion to Compel and to Transfer.

I. INTRODUCTION AND FACTUAL BACKGROUND

Fact discovery closed in the *Hardeman* litigation on April 17, 2017.[1] Six months earlier, on November 17, 2016, Plaintiff served a broad Notice of Subpoena *Duces Tecum* to Third Party Dr. Janet E. Collins[2] ("Notice of Subpoena"), requesting, among other things, documents

[1] At the March 8, 2017 CMC, the Court confirmed that the April 17th deadline was the close of general causation fact discovery. *See* Transcript of Proceedings at 6:12-15, *In re Roundup Prods. Liab. Litig.*, No. 3:16-md-02741-VC (N.D. Cal. Mar. 8, 2017) (the Court discussing scheduling of next CMC relative to "the cutoff" on April 17, 2017); *id*. at 4:18-19 (ordering that a deposition take place "before the discovery cutoff"). Counsel for Plaintiffs also referred to April 17 as the "close of discovery" in discussing the case schedule. *Id.* at 5:25-6:3 (an unidentified speaker for plaintiffs proposing that the next CMC be scheduled for "right at the end of the close of discovery," noting that "[w]e have a lot to do between now and April 17th, so it might make sense to do it right after that").

[2] Dr. Collins is the Executive Vice President of Science & Regulatory Affairs of CropLife America ("CLA"). CLA is a trade association that represents the nation's developers, manufacturers, and distributors of crop protection chemicals and plant science solutions for agriculture in the United States. It advocates for and promotes the responsible use of safe and environmentally sound crop protection products, including herbicides, fungicides and insecticides.

previously requested from Monsanto in the *Hardeman* litigation, publicly available documents, and other materials unrelated to the *Hardeman* litigation. Immediately following service of this initial set of requests, Dr. Collins filed her first set of Responses and Objections to the Third Party Notice of Subpoena *Duces Tucem* on December 5, 2016. Dr. Collins objected to Plaintiff's requests to the extent they were irrelevant, overbroad, and unduly burdensome. She also objected to Plaintiff's requests for her personal communications, as an unwarranted intrusion into her privacy, as well as Plaintiff's requests for information outside of her custody or control.[3] After serving the objections, Dr. Collins did not hear anything from Plaintiff for nearly two months until late January 2017. The parties then proceeded to meet and confer several times to refine the scope of Plaintiff's requests.

On January 31, 2017, Plaintiff served a new set of document requests that narrowed the scope of the prior requests, but which still included overbroad and irrelevant requests for information. In particular, Plaintiff continued to request communications between Dr. Collins and third parties uninvolved in the *Hardeman* litigation (i.e. not Monsanto).[4] Dr. Collins agreed to produce communications with Monsanto regarding the same topics,[5] but objected to requests

[3] *See* Dr. Janet E. Collins' Responses and Objections to Plaintiff's Third Party Notice of Subpoena *Duces Tucem*, December 5, 2016 (Exhibit 1).

[4] *See* Plaintiff's Amended Third Party Notice of Subpoena *Duces Tucem*, January 31, 2017 (Exhibit 2). For example, Request No. 2 states, without condition: "Please provide all emails, including attachments, and other documents sent by, created by, maintained by, copied to, or received by Dr. Collins' relating to or referring to: a) The 2015 IARC Monograth [sic] 112; b) The October 1, 2015 Memorandum, Glyphosate: Report of the Cancer Assessment Review Committee (hereinafter, the "October 2015 CARC Memo"); c) The September 12, 2016 Glyphosate Issue Paper: Evaluation of Carcinogenic Potential from the Office of Pesticide Programs (hereinafter, the "September 2016 OPP Paper"); d) the FIFRA SAP meeting; and/or e) the FIFRA SAP members."

[5] *See id.*, Request No. 3. "Please provide all communications, including but not limited to, correspondence, memoranda, emails (including attachments), and any other documentation reflecting communications (including written, electronic and/or oral) **between Dr. Collins and**

seeking the disclosure of communications between CropLife and other members of its organization and other third parties. Plaintiff continued to meet and confer, and, on February 2, reached a tentative agreement that Plaintiff would eliminate the document request seeking communications between Dr. Collins and other non-parties in the *Hardeman* litigation. On February 6, 2013, in response to a follow-up email from counsel for Dr. Collins, counsel for Plaintiff withdrew her verbal agreement to narrow the scope of the subpoena.

On February 13, 2017, Dr. Collins served a second set of Responses and Objections to the Third Party Notice of Subpoena *Duces Tucem*.[6] On February 16, Ms. Wagstaff (counsel for Plaintiff) sent a series of questions to Mr. Thurlow (counsel for Dr. Collins) regarding the second set of Responses and Objections. Ms. Wagstaff explained that she required timely answers to the requests, "as we will be filing a Motion to Compel in the next few days and I want to make sure I understand Dr. Collins' objections."[7] Mr. Thurlow stood on the previously stated objections and replied that "Dr. Collins is open to further meet and confer in the event you decide not to pursue your motion to compel."[8] In return, Ms. Wagstaff again requested that Dr. Collins "state her objections with specificity" and indicated that she would file a motion to compel production shortly. *Id.*

Mr. Thurlow advised Ms. Wagstaff that Dr. Collins was "comfortable with the objections and responses… [i]f you reconsider the motion and want to further meet and confer regarding

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Monsanto Company relating to or referring to: a) The 2015 IARC Monograth [sic] 112; b) The October 2015 CARC Memo; c) The September 2016 OPP Paper; d) the FIFRA SAP meeting; and/or e) the FIFRA SAP members." (emphasis added).

[6] *See* Dr. Janet E. Collins' Responses and Objections to Plaintiff's Third Party Notice of Subpoena *Duces Tucem*, February 13, 2017 (Exhibit 3).

[7] *See* E-mail from A. Wagstaff to M. Thurlow, February 16, 2017 (Exhibit 4).

[8] *See* Email Exchanges Between A. Wagstaff and M. Thurlow, February 13-23, 2017 (Exhibit 5).

how you can narrow the scope of your current document requests and cure the deficiencies in your subpoena, we are happy to do so."[9] On February 23, 2017, Ms. Wagstaff informed Mr. Thurlow that "yes we will be filing a Motion with the Court."[10]

Relying on Ms. Wagstaff's statements that she would file a motion to compel in the immediate future, Dr. Collins decided to wait for the Motion to Compel prior to offering any additional responses or objections to the Notice of Subpoena, or attempting to make a potentially objectionable production of documents. As a non-party to the *Hardeman* litigation, Dr. Collins did not want to bear the burden and expense of having to collect, review, and produce documents multiple times. In particular, Dr. Collins awaited a determination as to whether she would be required to produce communications between Dr. Collins and other non-parties in the *Hardeman* litigation and whether Plaintiff would provide additional responses or arguments to the objections raised by Dr. Collins.

Contrary to her assertions, Ms. Wagstaff did not file a motion to compel. On May 30, 2017—a month and a half after fact discovery closed, and three months after Plaintiff's counsel ended discussion regarding Dr. Collins' discovery objections, Plaintiff served Dr. Collins with the instant motion to compel a so-called "agreed upon" production – and a simultaneous motion to transfer adjudication of the motion to the MDL court where the *Hardeman* claim is pending. Dr. Collins was very surprised to hear of an "agreed upon" production, as Plaintiff's counsel had ended the parties' communications by asserting her intention (repeatedly) to serve a motion to compel. Following the close of discovery in the *Hardeman* litigation, Plaintiff now appears to be restyling the motion to compel as a motion seeking production of documents Dr. Collins had

[9] *Id.*

[10] *See* Email Exchanges between A. Wagstaff to M. Thurlow, February 13-23, 2017 (Exhibit 5).

already promised to produce. The motion to compel – filed seven weeks after the discovery cut-off in the underlying litigation – should be denied as untimely, and the motion to transfer denied for failure to demonstrate the "exceptional circumstances" required by Fed. R. Civ. P. 45(f).

II. THE COURT SHOULD DENY PLAINTIFF'S MOTION TO TRANSFER

Plaintiff seeks to transfer his Motion to Compel to the Northern District of California, where the *Hardeman* litigation is pending. No circumstances exist here to justify transfer of the motion from this Court: the issue before the Court is simple and discrete, and this Court has all the necessary information before it to make a determination. Plaintiff has not presented and cannot present the "exceptional circumstances" Rule 45 requires for such a transfer, and his Motion to Transfer should therefore be denied. *See* Fed. R. Civ. P. 45(f).

Rule 45(d)(2)(B)(i) of the Federal Rules of Civil Procedure provides that once a Rule 45 subpoena recipient serves objections on the serving party, "the serving party may move the court for the district where compliance is required for an order compelling production or inspection." *Id.* Rule 45(f) provides further that, "[w]hen the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances." *Id.*

The "proponent of transfer bears the burden of showing that such [exceptional] circumstances are present." Fed. R. Civ. P. 45, Advisory Comm. Notes, 2013 Amendment, Subdivision (f). Importantly, "it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions." *Id.* Instead, transfer is appropriate "only if such interests outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion." *Id.* Factors courts are to consider include "the complexity, procedural posture, duration of pendency, and the nature of the issues pending before, or already resolved

by, the issuing court in the underlying litigation." *Judicial Watch, Inc. v. Valle Del Sol, Inc.*, 307 F.R.D. 30, 34 (D.D.C. 2014). The "prime concern" in such an analysis is "avoiding burdens on local nonparties subject to subpoenas." Fed. R. Civ. P. 45 Advisory Comm. Notes, 2013 Amendment, Subdivision (f); *see also* Fed. R. Civ. P. 45(d)(1) (requiring party issuing subpoena to avoid undue burden or expense to persons subject to subpoena).

Plaintiff's assertions in support of transfer – that the Northern District of California understands the underlying factual circumstances and discovery schedule of the *Hardeman* action, and that transfer is the best "use of judicial resources" – fail to show that exceptional circumstances exist here that warrant transfer and outweigh the burden that transfer would place on Dr. Collins. As one District Court has observed, the "exceptional circumstances" requirement of the rule necessitates that the circumstances under consideration are actually "unusual." *Woods v. Southerncare, Inc.*, 303 F.R.D. 405, 408-09 (N.D. Ala. 2014). Here, the issues raised by Plaintiff's Motion to Compel are standard discovery disputes regarding the proper scope of discovery issued to a non-party in light of claims made in the underlying litigation. Moreover, they involve a non-party who has not been before the Northern District of California in the *Hardeman* litigation, so that Court is no better situated than is this Court to address the issues. *See FDIC v. Galan-Alvarez*, No. 1:15-mc-00752 (CRC), 2015 WL 5602342, at *3 (D.D.C. Sept. 4, 2015) (denying motion to transfer where the discovery motion "present[ed], at bottom, a legal question severable from the merits of the underlying litigation"). Questions regarding the permissible scope of discovery occur in nearly every civil litigation; by definition they cannot constitute "exceptional circumstances."

Moreover, the Advisory Committee Notes do not list Plaintiff's purported justification of "best use of judicial resources" as a basis for transfer. Not only is judicial economy not a proper

basis for transfer, but Plaintiff has not explained how familiarity with the discovery schedule here or the underlying action would be needed to rule upon his current demands on Dr. Collins. It is not evident that transfer would, in fact, tend to conserve judicial resources.

Plaintiff has failed to demonstrate any cause for transfer of this motion, and should not be permitted to drag Dr. Collins across the country for a discovery dispute that would force her to incur unnecessary additional expense.

III. THE COURT SHOULD DENY PLAINTIFF'S MOTION TO COMPEL AS TIME-BARRED

Courts have routinely denied motions to compel discovery requests served after the close of discovery. *See Klugel v. Clough*, 252 F.R.D. 53, 55-56 (D.D.C. 2008) (motion to compel denied as untimely); *see also Gluck v. Ansett Australia, Ltd*., 204 F.R.D. 217-18 (D.D.C. 2001) (request for discovery denied as untimely); *Toone v. Federal Express, Corp*., No. Civ. A. 96-2450 (RCL), 1997 WL 446257 at *8 (D.D.C. July 30, 1997) ("The plaintiff waited until the eleventh hour to serve discovery . . . his motion to compel must be denied."); *Allergan Inc. v. Pharmacia Corp*., No. Civ. A. 01-141-SLR, 2002 WL 1268047, at *2 (D. Del. May 17, 2002) ("Motions that relate to fact discovery must be filed during fact discovery, especially where, as here, the underlying facts relating to the motion were known to plaintiffs [three months earlier]"); *Lillbask ex rel. Mauclaire v. Sergi*, 193 F. Supp. 2d 503, 516 (D. Conn. 2002) ("A motion to compel received after the expiration of the deadline for the *completion* of all discovery is untimely." (Emphasis in original)).[11]

[11] *See also Rossetto v. Pabst Brewing Co*., 217 F.3d 539, 542 (7th Cir. 2000) (denial of discovery motion not error where motion was filed two months after court-ordered date for completion of discovery); *Ayala-Gerena v. Bristol Myers-Squibb Co*., 95 F.3d 86, 94 (1st Cir. 1996) (no abuse of discretion in denying discovery motion where appellants waited more than one month after the discovery deadline had elapsed to properly request an order from the district court); *James v. United States*, No. 99 Civ-4238 (BSJ) (HBP), 2003 WL 22149524, at *6 (S.D.N.Y. Sept. 17,

Courts are even more likely to deny a motion to compel discovery when a party unreasonably delays discovery *despite* knowing the other party's position. 8A Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure: Civil 2d § 2285 (Supp. 2008). In *United States v. Philip Morris USA, Inc*., for example, the court held that the government was not entitled to production of documents where the government knew defendants were not going to search and produce third–party documents, and abandoned efforts to serve subpoenas. 219 F.R.D. 203, 204 (D.D.C. 2004); s*ee also, e.g.*, *Audi AG v. D'Amato,* 469 F.3d 534 (6th Cir. 2006) (upholding decision to deny untimely motion to compel discovery where the moving party knew about the issue involved a full two and a half months before the discovery deadline); *In re Sulfuric Acid Antitrust Litig*., 231 F.R.D. 331, 337 (N.D. Ill. 2005) (finding "no legitimate excuse for the plaintiffs having waited until the last day . . . to have filed their motion" because "plaintiffs knew from the outset what [defendant's] position was, and had the option to do something about it").

Most courts do not permit litigants to file discovery requests at any time they choose – especially where, as in the underlying multi-district litigation, discovery is often lengthy and complex. This allows parties and the Court to resolve discovery disputes in a timely manner that maximizes the efficient administration of the case. Absent such a rule, parties could wait and file motions to compel late in a case for a host of improper strategic reasons – to delay trial or extend discovery, for example, or to harass their adversary. This is particularly significant when addressing discovery obligations imposed on non-parties to a litigation: "'[T]he word 'non-party' serves as a constant reminder of the reasons for the limitations that characterize 'third party'

2003) (motion to compel untimely where fact discovery closed six months before motion was filed); *McCambridge v. Bishop*, C.A. No. 09C-02-030 FSS, 2010 WL 3511265, at *1 (Del. Super. Ct. Aug. 24, 2010) (motion to compel untimely after discovery ended).

discovery.'" *Beinin v. Ctr. for Study of Popular Culture*, No. C 06-2298 JW (RS), 2007 WL 832962, at *2 (N.D. Cal. Mar. 16, 2007) (citation omitted). Discovery should be "limited to protect third parties from harassment, inconvenience, or disclosure of confidential documents." *Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980).

Here, it was clear from the communications between Mr. Thurlow and Ms. Wagstaff that the parties had not resolved Dr. Collins' objections to the Notice of Subpoena and Plaintiff intended to compel production of her materials. It is apparent from Plaintiff's motion that notwithstanding Dr. Collins' agreement to produce certain documents, Plaintiff sought—and still seeks—to make numerous follow-up discovery requests to Dr. Collins, completely disregarding the potential burden and cost associated with such an interminable discovery process for a non-party in the *Hardeman* litigation.[12] Plaintiff could have filed his Motion to Compel at any time between February 23, 2017 and April 17, 2017. Instead, Plaintiff waited for discovery to close in the MDL, allowed several weeks to pass, and on May 22, 2017, finally filed the motion in this court. For this reason and others, Plaintiff's Motion to Compel should be denied as untimely.

IV. THE COURT SHOULD DENY PLAINTIFFS' MOTION TO COMPEL BASED ON PLAINTIFF'S ATTEMPTED GAMESMANSHIP OF THE DISCOVERY PROCESS

The dilatory filing of the Motion to Compel undercuts Plaintiff's alleged need for the documents, and suggests that Plaintiff is engaged in gamesmanship. The current fact discovery schedule has been in place since November 23, 2016. If the Plaintiff truly considered Dr. Collin's documents to be important for his case, as Ms. Wagstaff repeatedly averred in

[12] As Plaintiffs described in their Motion to Compel, "While Plaintiffs disagree with Dr. Collin's objections to Request No. 2 – the only request in the second subpoena to her to which she refused production– Plaintiffs have made a decision to reserve motion practice to compel these documents in this MDL proceeding ***until the second phase of the case***." Motion to Compel Dr. Collins Subpoena pg. 5 n. 3 (emphasis added).

communications promising a Motion to Compel, Plaintiff would have filed a timely motion. *See Philip Morris USA, Inc.*, 219 F.R.D. at 205 (recognizing that "if the [requested documents were] such a critical factor. . . one must question why the filing of the Motion was delayed, ***particularly where*** the positions of the Defendants were long-standing and well-known" (emphasis added)).

Instead, Plaintiff's months-long silence regarding the documents demonstrates that either (i) Plaintiff in fact determined Dr. Collins' materials to be a low priority and so postponed (or forgot) the discovery request in lieu of other discovery; or (ii) Plaintiff's counsel intended to see what documents she could collect on the first pass and then harass Dr. Collins with a motion to compel and additional document requests.

Plaintiff has sought to undermine the discovery process, much like the plaintiff in *Foreman v. Am. Rs. Lines, Inc.*, 623 F. Supp. 2d 1327, 1330–31 (S.D. Ala. 2008). In *Foreman*, the defendant had not complied with the expert disclosure obligations under Rule 26. The plaintiff was aware of the deficiencies with defendant's expert's report but did not file a motion to compel or take any other action to resolve the deficiencies. Instead, the plaintiff remained silent for months, then abruptly filed his objection in the hope of "parlaying …an omission" into "disallowance of [the expert's] testimony in its totality." *Id.* This type of "gamesmanship," the court ruled, undermined the "spirit of cooperation and fair play that animates Rule 26." *Id.*

Determining that the prejudice to the moving party was self-inflicted, the court refused to grant plaintiff's motion. Such gamesmanship should also be rejected here, especially considering that Dr. Collins, as a non-party, is "powerless to control the scope of litigation and discovery", and should not be the subject to never-ending discovery and "costs of litigation to which [she is] not a party." *United States v. Columbia Broad. Sys., Inc.*, 666 F.2d 364, 371 (9th

Cir. 1982).

V. CONCLUSION

For the foregoing reasons, Dr. Collins respectfully requests that Plaintiff's Motion to Compel and to Transfer be denied. Notwithstanding the dilatory Motion to Compel, Dr. Collins will produce certain documents responsive to the Notice of Subpoena, subject to the objections stated in her Responses and Objections filed in February 2017.

Dated: June 13, 2017

Respectfully submitted,

/s/Matthew D. Thurlow
Matthew D. Thurlow (D.C. Bar No. 1008014)
Matthew.thurlow@lw.com
555 Eleventh Street, N.W.,
Suite 1000
Washington, D.C. 20004-1304
Telephone: 202-637-2200
Facsimile: (202) 637-2201