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Attorneys for Plaintiffs

7 UNITED STATES DISTRICT COURT
8
9 NORTHERN DISTRICT OF CALIFORNIA

10 IN RE: ROUNDUP PRODUCTS
11 LIABILITY LITIGATION

MDL No. 2741

Case No. 16-md-02741-VC

12 HEARING: August 24, 2017
13 TIME: 10:00 A.M.
14 Courtroom 4, 17th Floor, N.D.Cal.
15 San Francisco, California

16 This document relates to:

17 ALL ACTIONS

18 **ANDRUS WAGSTAFF, PC'S RESPONSE TO PTO 28**

19 On August 9, 2017, the Court entered PTO 28, which ordered co-lead counsel to "show
20 cause why they should not be replaced as a result of their involvement in Baum Hedland's
21 conduct." PTO 28 at 1. Andrus Wagstaff responds as follows:

22 **I. Introduction**

23 Monsanto's message is clear - stay out of its way. Having already gone after the
24 scientists, researchers, academics, reporters, and everyone else who questions the safety of
25 Roundup, now it's the lawyers turn. Here, with no evidence to support any claim that Andrus
26 Wagstaff acted in bad faith, Monsanto is requesting extreme sanctions against Andrus Wagstaff
27 by claiming its own lawyers were somehow lulled into inaction by another law firm.
28 Shockingly, during the August 1, 2017 meet and confer for Monsanto's Application for

1 Emergency Relief, wherein Monsanto would request the Court remove Andrus Wagstaff and
2 three other law firms from MDL leadership, Monsanto did not even bother to ask what role each
3 law firm played in the publication of the 86 documents at issues. Monsanto didn't ask, because
4 Monsanto doesn't care. Instead, with no evidentiary support, Monsanto shot off a canon and
5 requested the Court remove the entire leadership. Of course, this timing of Monsanto's request
6 cannot be ignored – expert discovery has just commenced. In fact, one expert deposition has
7 occurred and twelve (12) more are scheduled in the next 5 weeks. The four law firms Monsanto
8 seeks to remove are the most familiar with the documents, the experts, the science, and the
9 liability. Removing any one of these four firms, much less all of them, at this critical point in the
10 litigation will unfairly prejudice MDL 2741 Plaintiffs and would require a re-analysis of the
11 expert discovery schedule. All of this, with no evidence of bad faith against Andrus Wagstaff¹.

12 To impose the sanctions requested by Monsanto, “counsel's conduct must ‘constitute[] or
13 [be] tantamount to bad faith.’” *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, 100 S.Ct.
14 2455, 2465, 65 L.Ed.2d 488 (1980); *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F.3d 431, 436 (9th
15 Cir. 1996). In sanctioning counsel, “[c]ourts may not invoke [inherent] powers without a ‘specific
16 finding of bad faith.’” *Yagman v. Republic Ins.*, 987 F.2d 622, 628 (9th Cir.1993) (quoting *United*
17 *States v. Stoneberger*, 805 F.2d 1391, 1393 (9th Cir.1986)); *accord Zambrano v. City of*
18 *Tustin*, 885 F.2d 1473, 1478 (9th Cir.1989) (“To insure that restraint is properly exercised, we
19 have routinely insisted upon a finding of bad faith before sanctions may be imposed under the

21
22 ¹ The Protective Order, in connection with PTOs 15 and 20, was not violated. However, because
23 the court's PTO 28 requested that we put that issue aside for the moment, Andrus Wagstaff
24 merely incorporates Plaintiffs' Response to Monsanto's Motion for Emergency Relief herein as
25 support of why the Protective Order was not violated. In response to the Court's concerns that the
26 pace of MDL document production has resulted in an over-production of documents that the
27 MDL Plaintiffs would not otherwise have access to, it is worth noting that almost half of the
documents in this litigation were produced to Plaintiffs **prior** to the formation of this MDL in a
state court matter. Further, the documents are being produced for all state court cases too, several
of which are not bifurcated. Monsanto does not – and cannot – argue that Plaintiffs are not
entitled to these 86 documents.

1 court's inherent power.”) As set forth in Aimee H. Wagstaff, Esq.’s Declaration, attached as
2 **Exhibit A**, Andrus Wagstaff did not act in bad faith².

3 Andrus Wagstaff is not opposed to involving a special master to facilitate de-designation
4 requests. However, Andrus Wagstaff believes the process should begin with recorded voice-to-
5 voice meet and confers between counsel. If the meet and confers are not successful, the dispute
6 can be elevated to a special master with the non-prevailing party to pay the special master
7 expenses. It would be unfair to, on the one hand acknowledge that the documents are over-
8 designated, and then, on the other hand, order that the MDL Plaintiffs pay for the entirety of the
9 special master expenses to challenges those over-designations. The non-prevailing party should
10 be required to pay for the special master’s expenses associated with each challenge.

11
12 Dated: August 14, 2017

Respectfully Submitted,

13
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18 *Co-Lead Plaintiffs’ Counsel*
19 *For MDL 2741*

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27 ² Although undersigned counsel does not believe sanctions are warranted against any member of
the Executive Committee because none acted in bad faith, this Response is written solely on
28 behalf of Andrus Wagstaff, PC and Co-Lead counsel Aimee Wagstaff.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed with the Court and electronically served through the CM-ECF system which will send a notification of such filing to all counsel of record.

DATED: August 14, 2017

/s/ Aimee Wagstaff
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