

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

IN RE: ROUNDUP PRODUCTS)
LIABILITY LITIGATION,) NO. M. 16-02741 VC
_____)

San Francisco, California
Thursday, August 24, 2017

TRANSCRIPT OF PROCEEDINGS

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Also Present: Individuals appeared via speaker telephone in
listen-only mode, as reflected in the Court's minutes.

1 Thursday - August 24, 2017

10:00 a.m.

2 P R O C E E D I N G S

3 ---000---

4 **THE CLERK:** Calling case number 16-MD-2741 In Re:
5 Roundup Products Liability Litigation. Counsel, please step
6 forward and state your appearances for the record.

7 **MS. WAGSTAFF:** Good morning, Your Honor. Aimee --

8 **THE CLERK:** To the podiums, please.

9 **MS. WAGSTAFF:** Oh. Good morning, Your Honor.
10 Aimee Wagstaff, for the plaintiffs.

11 **THE COURT:** Good morning.

12 **MR. MILLER:** Good morning, Your Honor.
13 Michael Miller, for the plaintiffs.

14 **THE COURT:** Good morning.

15 **MS. GREENWALD:** Good morning. Robin Greenwald, for
16 the plaintiffs.

17 **MR. BAUM:** Good morning, Your Honor. Michael Baum,
18 for plaintiffs.

19 **MR. WISNER:** Brent Wisner, Your Honor. And with me I
20 have Richard Zitrin. He's an attorney that I've hired to
21 represent me for this proceeding. He is a law professor, and
22 an expert in both legal ethics and protective orders.

23 **THE COURT:** All right.

24 **MR. ZITRIN:** Good morning, Your Honor. I'm
25 Richard Zitrin.

1 **THE COURT:** Good morning.

2 **MR. HOLLINGSWORTH:** Good morning, Your Honor. Joe
3 Hollingsworth, for Monsanto.

4 **THE COURT:** Good morning.

5 **MR. RUBIN:** Good morning, Your Honor. Gary Rubin,
6 for Monsanto.

7 **THE COURT:** All right. Okay. So I guess obviously,
8 I want to start with Mr. Wisner, or whoever is -- if you're
9 representing Mr. Wisner. I don't -- are you going to be
10 speaking on Mr. Wisner's behalf, or how is this going to go? I
11 don't care, from my standpoint.

12 **MR. ZITRIN:** May I come forward?

13 **THE COURT:** Please do.

14 **MR. ZITRIN:** Your Honor, to state my appearance
15 formally, I'm Richard Zitrin, on behalf of the firm of Baum
16 Hedlund, and in his position as member of that firm,
17 Mr. Wisner, as well.

18 Mr. Wisner is available to answer any questions that the
19 Court might want to put to him. However, I do have a
20 presentation of several minutes if the Court would indulge me
21 in making that presentation.

22 **THE COURT:** Divine "several minutes" with greater
23 specificity.

24 **MR. ZITRIN:** Maybe ten.

25 **THE COURT:** No. I don't need to hear a ten-minute

1 presentation. I want to have a discussion about this.

2 **MR. ZITRIN:** Right.

3 **THE COURT:** I've read all of the papers.

4 **MR. ZITRIN:** All right. You can ask me whatever
5 questions you want to ask me.

6 **THE COURT:** So I want to start. And again, I don't
7 particularly care who answers these questions; it's up to you
8 all. But again, you know, I think to a large extent the brief
9 filed in response to the Order to Show Cause -- Mr. Wisner's
10 brief; Baum Hedlund's brief -- misses the point.

11 The point that I tried to articulate in an Order to Show
12 Cause is that, regardless of whether self-disclosure of these
13 documents under the circumstances in which they were disclosed
14 violated the Protective Order or Pretrial Order 15 or Pretrial
15 Order 20 -- that's not the issue.

16 The issue is that there was a live dispute about all of
17 that stuff. And Mr. Wisner -- and apparently, with the
18 knowledge of at least some members of the plaintiffs'
19 leadership group -- decided to disregard the fact that there
20 was a live dispute, and go ahead and release the documents.
21 And that is the problem.

22 I will say that it seems obvious that these documents are,
23 in fact, relevant to the general causation phase of this
24 litigation. And it seems clear that the position that Monsanto
25 was taking in the meet-and-confer was unreasonable. And, you

1 know, to just state as a blanket matter that these documents
2 aren't cited in the plaintiffs' expert reports, and therefore
3 they are not relevant to the general causation phase of this
4 litigation -- I mean, it's almost laughable; but again, that's
5 not the point.

6 We had a live dispute about the relevance of the
7 documents. And we had a live dispute about the process by
8 which the relevance of the documents would be adjudicated. And
9 certainly, as a result of Pretrial Order 15 and
10 Pretrial Order 20, there was a degree of ambiguity about that.

11 By the way, that ambiguity -- that's my fault. I mean, it
12 was my mistake to not simply amend the Protective Order at the
13 outset when I first became concerned about the plaintiffs'
14 lawyers focusing excessively on public relations, potentially
15 at the expense of actually getting the litigation job done in
16 this case. I should have simply amended the Protective Order,
17 and so it was I who created the ambiguity that resulted in the
18 dispute between the parties about the appropriate process for
19 resolving the question whether these documents could be
20 released.

21 In the end, I mean, the great irony is that, had you teed
22 this up before me in a joint discovery letter or in a motion,
23 as you told the Monsanto lawyers that you would do, I would
24 have, no doubt, ruled in your favor. And I probably would have
25 ordered Monsanto to pay the costs associated with adjudicating

1 the dispute about the relevance of these documents, because,
2 like I said, it seems quite clear that all of them -- or at a
3 minimum, the vast majority of them -- are relevant to the
4 general causation phase of the litigation, and potentially
5 quite significant.

6 But you know, this is about lawyers, you know, conducting
7 themselves, you know, in good faith. And this is about my need
8 to manage this very complex litigation going forward
9 potentially for many years.

10 And I don't see how it would be acceptable to have
11 Mr. Wisner on the Executive Committee going forward, in light
12 of what has happened. I will also say that -- and maybe his
13 firm, also. And there could be a distinction between
14 Mr. Wisner not being permitted to be on the Executive
15 Committee, and the firm being not permitted to be on the
16 Executive Committee; I don't know.

17 I also will say that I think Monsanto's, you know, request
18 for discovery of communications amongst plaintiffs' counsel is
19 not unreasonable. And, you know, the blame -- there's plenty
20 of blame to go around amongst plaintiffs' counsel for how this
21 went down.

22 So, you know, I'm willing to entertain the possibility of
23 granting Monsanto's other requests, but at a minimum, it seems
24 very difficult for me to -- it's difficult for me to understand
25 how I could be comfortable, given my role in managing this

1 litigation -- how I could be comfortable retaining Mr. Wisner,
2 and perhaps his firm, on the Executive Committee.

3 So that's sort of my tentative thinking about all of this.
4 And with that, I'm happy to hear from either of you, or both of
5 you.

6 **MR. ZITRIN:** Well, I think you may want to hear from
7 both of us, but let's start out with me, Your Honor, if you
8 don't mind.

9 Let me go to the last thing you said about the e-mails,
10 and the e-mails among counsel. Mr. Miller makes reference to
11 those in his hybrid declaration in response. Those e-mails are
12 privileged. Mr. Wisner and Mr. Baum have come fully prepared
13 to share those e-mails with the Court *in camera*, but we want to
14 make sure that, since Monsanto is requesting them, that they
15 will stipulate that there is no waiver of privilege or
16 confidentiality beyond the parameters of the e-mails.

17 **THE COURT:** I would assume that that would be the
18 case.

19 **MR. ZITRIN:** Okay. Well, that's -- and we're happy
20 to show them to you, with that caveat.

21 **THE COURT:** Okay.

22 **MR. ZITRIN:** With respect to the overriding issues of
23 the Order -- following the Order -- a live matter, and good
24 faith -- it's very difficult for me to come in in front of
25 United States District Court Judge for the very first time,

1 someone I have known by reputation, and disagree with him the
2 very first thing I say, but --

3 **THE COURT:** Why?

4 **MR. ZITRIN:** -- I'd like to take you through it,
5 because there was no violation of the Order, and there was no
6 violation of good faith.

7 **THE COURT:** Okay. As I tried to say at the outset,
8 I'm not talking about a violation of the Order here.

9 **MR. ZITRIN:** Okay.

10 **THE COURT:** And it seems again that the response to
11 the Order to Show Cause missed the point. And I thought I had
12 made very clear in the Order to Show Cause that we could have a
13 long argument about whether it violates the Order -- it
14 violated the Order. And I may very well come out on your side
15 on that question --

16 **MR. ZITRIN:** Okay.

17 **THE COURT:** -- but it misses the point.

18 The point is how counsel conducted themselves when we had
19 a live dispute about the meaning of the Order, and a live
20 dispute about how to resolve the dispute about the meaning of
21 the Order.

22 **MR. ZITRIN:** Well, yeah. Then I'm afraid I'm going
23 to disagree with the Court again. Under the Protective Order
24 and under 16.2, it lays out a certain procedure that was
25 followed on June 30th, on July 14th, with respect to the

1 meet-and-confer, at least on the part of plaintiffs' lawyers.

2 Mr. Wisner's Declaration said that they did not comply with the
3 good-faith requirement of the meet-and-confer, but that's not
4 the issue here.

5 **THE COURT:** Oh, I think you're probably right about
6 that. I mean --

7 **MR. ZITRIN:** Right, right, right. And so, well, you
8 know, we --

9 **THE COURT:** Oh, I may issue an Order to Show Cause
10 why Monsanto shouldn't be sanctioned for its role in this
11 affair.

12 **MR. ZITRIN:** Right. We wouldn't have any objection,
13 but let me go forward on Mr. Wisner. On July 27th he writes an
14 e-mail, saying, *I'm not going to agree to anything*. And in
15 that letter he doesn't say anything about, *You have a deadline*;
16 but you know, these guys are smart, and they can count to 30.
17 There's no ambiguity in the Order that in Section 16.3 --

18 **THE COURT:** The ambiguity's in the conversation that
19 Mr. Wisner had with --

20 **MR. ZITRIN:** Right, right. I understand that.

21 **THE COURT:** -- Monsanto.

22 **MR. ZITRIN:** Then if you want to focus on the
23 conversation, let's focus on the conversation. There are a lot
24 of -- there's a lot of *Sturm und Drang* in the three pleadings,
25 which I read again this morning, that Monsanto has filed.

1 There's accusatory statements. There's -- an emergency stay
2 says --

3 **THE COURT:** Just get to the point.

4 **MR. ZITRIN:** All right. They're accusing Mr. Wisner
5 of acting in bad faith, and yet the only thing that he says in
6 that hearing, assuming the best case for Monsanto, is the
7 following.

8 **THE COURT:** In what hearing? Says in what hearing?

9 **MR. ZITRIN:** In the meet-and-confer conversation.

10 **THE COURT:** Oh.

11 **MR. ZITRIN:** -- is the following. This is Rubin's
12 declaration. Mr. Wisner stated at the meet-and-confer, quote,
13 *We could either anticipate a motion or a letter brief, or if*
14 *someone talks me into it, dropping it altogether.*

15 Ms. Wagstaff's declaration talks about how Mr. Wisner --
16 and now that I met her, I know this is true -- talks in a
17 jocular fashion. He has 82 documents.

18 **THE COURT:** I'll assume for the sake of argument that
19 he was talking in a jocular fashion --

20 **MR. ZITRIN:** Right. Okay. I appreciate that.

21 **THE COURT:** -- but nonetheless, none of what you've
22 said so far detracts from the point that I'm trying to convey
23 here --

24 **MR. ZITRIN:** Then maybe you'll believe me.

25 **THE COURT:** -- which is that there was a live dispute

1 about the relevance of the documents to the general causation
2 phase. And there was a live dispute about the appropriate
3 procedure for resolving that dispute about the relevance, and
4 resolving the dispute about whether the documents could be
5 released. And Mr. Wisner --

6 (Discussion off the record between counsel.)

7 **THE COURT:** -- left the impression that they were
8 going to decide -- that the plaintiffs were going to decide
9 whether to file a letter, file a motion, or just drop the
10 matter. And I'm sure he made reference to dropping the matter
11 in a jocular fashion, and it was never a particularly
12 reasonable alternative; but then he merely told Monsanto that
13 they were not filing a letter brief and they were not filing a
14 motion, and went ahead and released the documents.

15 **MR. ZITRIN:** Giving -- giving Monsanto lawyers four
16 days to reply, as required under Section 16.3 of the
17 Protective Order. Of course, they would have to file a motion.
18 Had they filed the declaration within the 30 days --

19 **THE COURT:** Well, did he say, You have four days
20 under the Protective Order --

21 **MR. ZITRIN:** That's not a requirement.

22 **THE COURT:** -- to reply to my statement that we are
23 not going to file a letter brief and we're not going to file a
24 motion?

25 **MR. ZITRIN:** In fact, Your Honor, I must say that is

1 not his job. It can be --

2 **THE COURT:** In light of the conversation that took
3 place between the plaintiffs' lawyers and Monsanto, and in
4 light of the fact that there was a live dispute about how to go
5 about resolving this, it absolutely was his obligation to do
6 that.

7 **MR. ZITRIN:** Well, Your Honor --

8 **THE COURT:** It was his obligation to get the dispute
9 resolved before going ahead and releasing the documents; but
10 the problem is that he was not focused on being a lawyer. He
11 was focused on being a PR man. He was more interested in
12 getting these documents released, and getting them released
13 fast, than he was in being a lawyer, and making sure a live
14 dispute between two parties to the litigation got resolved
15 before he moved forward.

16 That's not how you lawyer. That might be how you do
17 conduct PR --

18 **MR. ZITRIN:** Well, Your Honor --

19 **THE COURT:** -- but that's not how you lawyer.

20 **MR. ZITRIN:** Well, Your Honor --

21 **THE COURT:** Don't you agree?

22 **MR. ZITRIN:** No, I don't.

23 I've been teaching legal ethics for 40 years. I've taught
24 trial practice at USF for ten years.

25 **THE COURT:** Neither of those two things is relevant

1 to this.

2 **MR. ZITRIN:** If he --

3 **THE COURT:** Hold on a second.

4 Neither of those two things is relevant to this
5 discussion. Could you please just stick to the facts in this
6 case?

7 **MR. ZITRIN:** If he had --

8 You asked me do I agree.

9 I said no.

10 And the reason I don't agree is that if Mr. Wisner had
11 said, *Look. I said in the conversation on January 14th that I*
12 *was going to file a motion, but that motion is obviously*
13 *predicated -- excuse me -- on a declaration being done in*
14 *response.* No declaration was done in response. That ended the
15 matter.

16 **THE COURT:** What declaration being done in response?
17 What are you talking about: Declaration done in response?

18 **MR. ZITRIN:** Here's what I'll say. Let me read you
19 16.3. This is your Order, Your Honor. *Within 30 days of the*
20 *initial notice of challenge, or within 21 days of the parties*
21 *agreeing that the meet-and-confer process will not resolve*
22 *their dispute, whichever is earlier, that's the time in which*
23 *the designating party shall file and serve a motion to retain*
24 *confidentiality.*

25 **THE COURT:** Okay, but what are you talking about:

1 Declaration? They didn't file --

2 **MR. ZITRIN:** Well, they didn't file a motion. Right.

3 **THE COURT:** The story now is that he was waiting for
4 them to file a declaration?

5 **MR. WISNER:** Your Honor --

6 **MR. ZITRIN:** No, the story is --

7 **MR. WISNER:** Let -- let --

8 **MR. ZITRIN:** Wait a minute, please.

9 The story is that they did not file a declaration. They
10 did not file a motion.

11 **THE COURT:** Okay. You were reading to me from the
12 Order, and saying they were required to file a declaration?

13 **MR. ZITRIN:** No. The Order -- the Order --

14 **MR. WISNER:** Could you read it?

15 **MR. ZITRIN:** Brent, just --

16 **MR. WISNER:** Sorry.

17 **MR. ZITRIN:** The Order --

18 Each such motion must be accompanied by a competent
19 declaration affirming that the movant has complied with the --

20 **THE COURT:** Motion. Right.

21 But the dispute was about who was required to file what.

22 **MR. WISNER:** That's not correct.

23 **MR. ZITRIN:** No, no, no. Let me -- Your Honor, if I
24 may continue, I know that the Court is impatient about
25 Mr. Wisner. Please don't be too impatient with me. Let me --

1 **THE COURT:** Just answer my questions, then.

2 **MR. ZITRIN:** Well, I am answering your questions, but
3 I need to keep reading. So you've got to file a declaration
4 affirming that the movant has complied. Failure by the --

5 This is at the bottom of page 7.

6 **THE COURT:** But I don't understand. You're saying --

7 **MR. ZITRIN:** Let me just read.

8 **THE COURT:** -- he was waiting. And --

9 **MR. ZITRIN:** May I read the sentence?

10 **THE COURT:** -- you're not going to file a motion,
11 because you didn't file a declaration?

12 **MR. ZITRIN:** No, no. It's them.

13 **THE COURT:** What?

14 **MR. ZITRIN:** They had to file the motion; the
15 designating party.

16 **THE COURT:** Okay, but he said to Monsanto, *We're*
17 *either -- we're going to decide whether to file a joint letter,*
18 *or file a motion.* That was in recognition that there was a
19 live dispute, and it needed to be resolved by the Court; a
20 dispute about relevance. And there was also, apparently, a
21 dispute about how to get it resolved. And it needed to go to
22 Court.

23 **MR. WISNER:** Could I please explain?

24 **MR. ZITRIN:** Well, Your Honor, I'm going to ask you
25 to let me explain Point A that leads to Point B that leads to

1 Point C, if you could please be a little patient with me.

2 I understand the Court's question. You only have to file
3 a motion --

4 **THE COURT:** It doesn't seem like it, because you're
5 saying that he didn't file a motion, because he was waiting for
6 them to file a declaration.

7 **MR. ZITRIN:** Because if you don't -- because you only
8 have to file a motion --

9 **THE COURT:** And you also implied that he said to them
10 that he wasn't filing a motion because they hadn't filed a
11 declaration. Where is that? Where is that in the record?

12 **MR. WISNER:** Your Honor, I think there's a confusion
13 on the facts, and I think I can help answer your question
14 very --

15 **THE COURT:** You guys decide which one of you wants to
16 talk --

17 **MR. ZITRIN:** Wait, wait, wait.

18 **MR. WISNER:** I'd like to talk.

19 **MR. ZITRIN:** There is --

20 **THE COURT:** Hold on a second.

21 **MR. ZITRIN:** There is a --

22 **THE COURT:** Be quiet. Be quiet. Okay?

23 You decide amongst yourselves who wants to talk, and who
24 wants to sit down.

25 (Discussion off the record.)

1 **MR. WISNER:** I can answer his question. I can answer
2 his question.

3 **THE COURT:** Professor Zitrin, sit down. Sit down.

4 **MR. ZITRIN:** Your Honor --

5 **THE COURT:** Sit down.

6 **MR. ZITRIN:** A record needs to be made on this
7 matter.

8 **THE COURT:** I'm going to have security come to get
9 you removed from the court --

10 **MR. ZITRIN:** I don't want to be removed from the
11 court.

12 **THE COURT:** -- if you don't sit down.

13 **MR. WISNER:** Your Honor, I'll just answer a couple
14 quick questions, because I think the facts are getting lost
15 here.

16 The first question you asked, was there a -- the first
17 issue you said -- considering that you said there was a live
18 dispute, and I published them. Okay? If you read the first
19 header of my brief, I directly answer that. I state,
20 *Mr. Wisner and Baum Hedlund did not act in bad faith by making*
21 *the 86 documents public, because there was no longer a live*
22 *dispute as of August 1st, 2017.*

23 **THE COURT:** That's great that you say that in your
24 header, but it's just not true.

25 **MR. WISNER:** Well, Your Honor, by operation of this

1 Court's Order, it was. Automatically, the confidentiality of
2 documents was waived. There was no -- there was no ambiguity.

3 **THE COURT:** Monsanto said to you that it was
4 disputing the idea that those documents were relevant. And the
5 way you left it with them is that, to get the dispute resolved,
6 you would either file a letter brief, or file a joint discovery
7 letter, or file a motion. You then told them you were going to
8 do neither of those things, and you left it at that.

9 **MR. WISNER:** That's.

10 **THE COURT:** There was still a live dispute.

11 **MR. WISNER:** That's factually incorrect, Your Honor.

12 Here's the facts. So during the call --

13 **THE COURT:** So your co-counsel's declaration about
14 what happened -- you call it inaccurate?

15 **MR. WISNER:** Read it closely, Your Honor. That's not
16 what she said.

17 **THE COURT:** I read it closely five minutes ago.

18 **MR. WISNER:** She said I stated that plaintiffs'
19 options were -- I never once, for even a second, said, *You*
20 *don't have to do anything.*

21 **THE COURT:** And -- but the options were file a joint
22 letter, or file a motion, or drop the issue.

23 You then -- after saying those things, you said to
24 Monsanto, *We are not going to file a joint letter, and we're*
25 *not going to file a motion.*

1 **MR. WISNER:** Precisely, to put them on notice that
2 they had to take action, because the Protective Order's very
3 clear. It's not ambiguous, Your Honor.

4 **THE COURT:** Your position is that the Order was
5 clear. Monsanto's position was different. And there was --

6 **MR. WISNER:** They did not state that.

7 **THE COURT:** And there was a live dispute about it.

8 **MR. WISNER:** That's not true.

9 **THE COURT:** And --

10 **MR. WISNER:** They didn't dispute that. There was
11 never once a conversation about what they had to do or not do.
12 They disputed that the documents --

13 **THE COURT:** There was. There was a conversation in
14 which you said -- Monsanto made very clear that they wanted
15 this resolved by the Court, because they disagreed that these
16 documents --

17 **MR. WISNER:** That's not what --

18 **THE COURT:** -- should be released.

19 **MR. WISNER:** That's not what they said. That's all
20 not in the declarations, Your Honor.

21 What happened during the conversation was very simple. I
22 tried going through to the documents. They said, *Go away.*

23 I tried to address the relevancy of them. They said, *We*
24 *don't have to.*

25 Putting that issue aside, then at the end of it I was

1 unbelievably blown away. I've never been treated so
2 disrespectfully by anybody in any -- and I've done a lot of
3 these calendars before in many courts, Your Honor. And I said
4 to them, *Well, it looks like you're saying I have three options*
5 *here. I could either file a joint letter, which I doubt*
6 *we're going to do. We'll file a motion; or I guess if someone*
7 *talks me into it, we could withdraw. I guess those are our*
8 *options.*

9 I never once said, *Oh, by the way, Monsanto, you don't*
10 *have to follow the Protective Order, because the thing says --*
11 *and they admit this -- we reached an impasse. And the Order*
12 *says once you reach an impasse, here is what the obligations*
13 *are. This is what you're supposed to do.*

14 And I looked at it. I studied it closely. I went back
15 and read every transcript; read every Order this Court said.
16 And never at one point did you shift that onus, not even for a
17 second. It's not even ambiguous on that point.

18 And it occurred to me as it we got closer to the deadline
19 that they actually might not file something. I couldn't
20 believe that they would just let it go, because they were so
21 obstinate on the call.

22 So to make sure that they weren't waiting for me to do
23 something, which -- I didn't want to run into a situation where
24 they said, *Oh, we are waiting for Mr. Wisner to file a motion.*
25 I made it clear to them I wasn't doing anything.

1 **THE COURT:** If the Order was so clear, why did you
2 start preparing a motion to seek clarification of the
3 Protective Order?

4 **MR. WISNER:** Because I thought what I had to do --
5 the hundreds of hours that I --

6 **THE COURT:** The answer is: Because you knew there
7 was a live dispute between you and Monsanto about how to
8 resolve this issue.

9 **MR. WISNER:** That's not true, Your Honor.

10 **THE COURT:** What possibly could be the other
11 explanation for preparing a motion to clarify the
12 Protective Order?

13 **MR. WISNER:** Because I spent hundreds of hours
14 preparing a 30-page, single-spaced letter, going through each
15 document, explaining why it's relevant; doing everything this
16 Court told us to do. And I spent countless amount of time.

17 And as I did the research preparing to oppose the motion
18 that I'd just made on the file, I did all of the research,
19 anticipating a motion of the opposition. I looked into the
20 First Amendment. I looked into the Ninth Circuit's ruling on
21 this stuff, and it became abundantly clear that this Court's
22 requirement that they be relevant was actually invalid under
23 the law; that you couldn't place a burden on plaintiffs.

24 And we can -- we can -- let's not have that fight now.
25 Right? That's a different issue.

1 But it became clear to me that we have a --

2 **THE COURT:** Well, I mean, it's relevant to how we're
3 going to proceed going forward, but I did not see a single case
4 that you cited that said that we could not have a kind of rule
5 that I was contemplating, which is that documents that should
6 never have been turned over to the plaintiffs in the first
7 place that are not relevant may not be --

8 **MR. WISNER:** Sure.

9 **THE COURT:** -- disclosed.

10 **MR. WISNER:** And I don't want to get into that fight.

11 **THE COURT:** You're right that we -- particularly I
12 don't need to have that fight with you.

13 **MR. WISNER:** Okay. So putting that issue aside, I
14 did all of this research, and I had all of these really great
15 arguments I was getting ready to make. And as the deadline
16 came, I actually realized that they weren't going to file
17 anything. And that's when I decided, oh --

18 **THE COURT:** Then why did you file the motion to
19 clarify?

20 **MR. WISNER:** Because -- because moving forward, this
21 was an incredibly difficult --

22 That's why, if you look at the motion I filed, that's what
23 I say. I say I filed this because moving forward --

24 **THE COURT:** Right. Release documents first. Ask
25 questions later --

1 **MR. WISNER:** No.

2 **THE COURT:** -- because --

3 **MR. WISNER:** No.

4 **THE COURT:** -- you were too focused on being a PR
5 man, and not focused enough on being a lawyer.

6 **MR. WISNER:** Your Honor, Your Honor --

7 **THE COURT:** And what we need in this litigation is
8 lawyers.

9 **MR. WISNER:** That is a preposterous. That is
10 absolutely preposterous. The idea that I'm trying to do PR is
11 absurd. I tried to avoid the media this whole time, because I
12 don't want to become --

13 I do this because I care about public health. I do this
14 because I live in California, and I grew up here; and my father
15 worked with Cesar Chavez, and helped protect farmworkers from
16 exposures to pesticides; because I actually care about people.

17 And there's really important decisions being made right
18 now in OEHHA, in the EPA -- they're doing an investigation to
19 potential collusion -- and in Europe.

20 And the first thing I did was not give them to reporters,
21 or any of that stuff. The first thing I did was I sent them to
22 those people, because I wanted them to make informed decisions.

23 And those documents, Your Honor -- no matter how you look
24 at them, they tell a really just alarming story of corporate
25 malfeasance.

1 Now, you might not agree with that. That's fine.

2 **THE COURT:** No. I actually tend to agree with you.

3 I mean, I think --

4 **MR. WISNER:** And so that's why I did it.

5 PR? That's not even close to what my firm does. I barely
6 sleep, because I'm a brief writer. I argue stuff. I appeal
7 stuff. I try cases. The idea that I'm into PR is just
8 preposterous. Ask the person who does the PR at my firm. She
9 can barely get me on the phone. I ignore her. That's not just
10 not what this was about.

11 I actually was doing good lawyering. I was following the
12 Protective Order to a T.

13 And they made a mistake. They screwed up. And their
14 screw-up --

15 I did what a good lawyer would do, is I put them in the
16 hands of decision makers to make the right decision. That's
17 not bad faith. Bad faith is deceptive intent; and there wasn't
18 even a drop of that in my blood. All I was trying to do was
19 get this issue presented.

20 They stonewalled me, stonewalled me, stonewalled me. And
21 in that hubris, they just decided they didn't have to do
22 anything, because the Protective Order's clear. It says if
23 there's a dispute that requires Court intervention, if there is
24 a live dispute, the onus is on the party who's getting the
25 protection to do something; and if they don't, there is a

1 penalty. There is an automatic resolution of that live dispute
2 as of August 1st, when -- actually, as of August 30th, quite
3 frankly, but I waited a few extra days, just to make sure that
4 there was no calendaring issues. As of that day, there was no
5 live dispute.

6 And I honestly believe that the reason why they didn't
7 file anything was not because they forgot. I realize that now,
8 because that's what they've basically conceded to; but what I
9 thought was they couldn't have brought a good-faith motion to
10 this Court, because there's -- none of these documents require
11 it. And as part of that good-faith motion, they have to submit
12 a declaration saying, *We acted in good faith in the*
13 *meet-and-confer*, which they didn't, *and that these documents*
14 *actually weren't confidentiality* [sic], which they couldn't.

15 And this Court specifically threatened Monsanto with
16 sanctions in PTO 15 that if they proceed to file
17 unsubstantiated, nonsense-type declarations in the future, you
18 would sanction them.

19 So when I saw that, I went, *Oh, I guess they realized they*
20 *had no leg to stand on. They finally came to their senses.*
21 *It's waived. Now let me get these documents into the hands of*
22 *people that matter.* There is no bad faith here, Your Honor.

23 And taking -- and regarding the sanctions issue, please
24 don't take my firm off. I did this. This was my -- this was
25 my crusade. This was my attempt to do something. And if you

1 want to sanction me, which -- I don't think it's warranted at
2 all, because I didn't act in bad faith -- I'd like to know what
3 you think I did that was deceptive, because in that call with
4 them I was anything but. I wish we had a transcript of it. If
5 you listened to that, if you saw the transcript, you would be
6 appalled by the kind of conversations we had.

7 And then when I sent that e-mail on the 27th, there wasn't
8 intent to deceive anybody. That was specifically the opposite.

9 Now, I didn't say, *Hey, by the way, you have obligations*
10 *to file a motion within 30 days;* but that would be literally
11 violating my duty of loyalty and obedience to my clients,
12 because getting these documents into the public is in my
13 clients' best interests. And if I were to violate that oath by
14 telling them how to practice law, that would be unethical. I
15 actually spent some time thinking about that, and I even
16 researched the issue.

17 So I -- I -- I -- other than Monsanto raising their voice
18 and trying to blame me for their own mistake, I don't see how
19 sanctioning me is a good idea, or even sends the right message
20 in this litigation. I mean, I literally did everything this
21 Court asked me to do. I worked so many hours to do it. And
22 you're going to sanction me because, at the end of the day,
23 they didn't do their job. I don't think that's right,
24 Your Honor, and so I don't think you should sanction me.

25 **THE COURT:** Okay. Is there anything else you'd like

1 Professor Zitrin to say on your behalf?

2 **MR. ZITRIN:** Yeah. I should just --

3 **THE COURT:** So I'm asking Mr. Wisner, since you're
4 representing him. It's really his choice whether he'd like you
5 to say anything further.

6 **MR. WISNER:** Yes, I'd like Mr. Zitrin --

7 **THE COURT:** Okay.

8 **MR. WISNER:** -- but -- yes.

9 **MR. ZITRIN:** Just a couple of points to wrap things
10 together, Your Honor.

11 16.3 of the Protective Order says that if the designating
12 party does not do so within 30 days of the initial notice of
13 challenge, which is the outside parameters, failure by the
14 designating party to make such a motion including the required
15 declaration within 30 days shall automatically waive the
16 confidentiality designation for each challenged designation.

17 There was no live matter under the Protective Order once
18 the 30 days had expired. The *status quo ante* after the
19 meet-and-confer, which was not, as you know, very successful at
20 all, was on the designating party to move within 30 days. They
21 did not. It was on the designating party to declare under
22 penalty of perjury. They did not.

23 And I'm sure that they read Your Honor's last sentence in
24 PTO 15, in which you admonished everybody not to come up with
25 declarations based on what we might call "alternative facts."

1 You made it very clear. You cited to Rule 11(b).

2 So when Brent here says that it dawned on him that they're
3 probably not responding because they couldn't do a good-faith
4 declaration under PTO 15 and 11(b), they had to give up the
5 ghost.

6 You know, what happened in terms of the release of the
7 documents after the 30 days was over -- and this was actually
8 on the 33rd day -- was they were automatically designated
9 waived confidentially for each challenged designation. All 82
10 documents were public. He released them.

11 And I appreciate that the Court doesn't want Mr. Wisner
12 going out and calling the press and releasing them all over the
13 place.

14 **THE COURT:** No, no. You've got me -- you've got it
15 completely wrong.

16 **MR. ZITRIN:** Okay.

17 **THE COURT:** And I've said on a number of occasions
18 there is absolutely nothing wrong with calling the press and
19 communicating with the press about the case or issues related
20 to the case.

21 **MR. ZITRIN:** Right.

22 **THE COURT:** Nothing wrong with communicating with
23 government agencies about the issue. A lawyer has expertise on
24 an issue like this. And government agencies might be
25 interested in the information. There's absolutely nothing

1 wrong with communicating.

2 And again, it just --

3 **MR. ZITRIN:** I appreciate that.

4 **THE COURT:** Your comments suggest that you're just
5 again missing the point.

6 **MR. ZITRIN:** Well, no, Your Honor.

7 **THE COURT:** All you're doing is talking about what
8 the Protective Order says. And you've now made this comment
9 about how you understand that I don't want them talking to the
10 press. You're missing the point.

11 **MR. ZITRIN:** I apologize.

12 **THE COURT:** There's nothing wrong with talking to the
13 press. There's nothing wrong with doing publicity.

14 What is wrong is moving forward unilaterally when there's
15 a live dispute about how to move forward.

16 **MR. ZITRIN:** I appreciate that.

17 **THE COURT:** And, you know, you don't seem to be in a
18 position to respond to that point. And so maybe we'll hear
19 from Monsanto briefly.

20 Anything you want to say?

21 **MR. ZITRIN:** May I add one brief thing, Your Honor?

22 **THE COURT:** Sure.

23 **MR. ZITRIN:** Two brief things, if I may.

24 First of all, Your Honor twice said that Mr. Wisner was
25 more interested in being a publicist than a lawyer. You did

1 say that today. I don't think that's true. A lawyer
2 publicizes the information.

3 Second, with respect to the issue about him filing a
4 motion --

5 **THE COURT:** And a lawyer does it once the dispute has
6 been resolved about whether the --

7 **MR. ZITRIN:** Right.

8 **THE COURT:** -- information can be published --

9 **MR. ZITRIN:** Right.

10 **THE COURT:** -- or not. Beforehand.

11 **MR. ZITRIN:** Right, but the second thing --

12 **MR. WISNER:** But --

13 **MR. ZITRIN:** -- is that although he told -- he may
14 have told counsel that he would file a motion, the need to file
15 the motion was obviated by the failure of Monsanto to respond.

16 And again -- and this may be the key issue here.
17 Plaintiffs' lawyers consider this not to have been an active
18 matter. This was a done deal. I don't see how it could be
19 anything other than a done deal, by reading the
20 Protective Order. And I'll leave it at that.

21 **MR. WISNER:** Would you like me to say up here,
22 Your Honor, or sit down?

23 **THE COURT:** Your preference.

24 **MR. WISNER:** Okay. I'll stay up here.

25 **MR. HOLLINGSWORTH:** Your Honor, the issues that the

1 Court asked us to address were made clear by Your Honor
2 beginning in last week's telephonic conference, and then
3 reiterated by Your Honor in the Court's official Order to Show
4 Cause.

5 And the issues were, according to Your Honor, that there
6 was a dispute between the parties; that Mr. Wisner was aware of
7 the dispute; that Mr. Wisner knew Monsanto's position that the
8 documents could not be released without involvement of the
9 Court; and that -- two things -- notwithstanding his awareness
10 of Monsanto's position, and notwithstanding that he left the
11 impression that the documents weren't going to be released, he
12 put them out to the world. And he did so in a PR kind of way.
13 You can read about them on the next day -- next day's version
14 of *The New York Times*, if Your Honor hasn't seen that.

15 And then Your Honor raised the issue, which Your Honor
16 said was clear to him, that there was a live dispute, and that
17 everybody knew that. And the dispute was whether these
18 documents could be released without first submitting the issue
19 to the Court. And because Mr. Wisner had submitted the
20 documents to various media outlets, and actually in advance of
21 August 1st -- I think there's evidence of that -- it seemed
22 clear to Your Honor that Mr. Wisner had acted in bad faith.

23 So that leaves two or three issues that I think are live
24 or remain issues for this hearing. One is whether Baum Hedlund
25 and Mr. Wisner explicitly knew, and trumpeted to all kinds of

1 people in the world, that Monsanto wanted to maintain the
2 confidentiality of its documents; that it was not waiving or
3 giving up any rights to designation of confidentiality of the
4 documents; and it took a position opposite to the plaintiffs on
5 the de-designation issue.

6 That's not controverted. That is not controverted. That
7 is what should have been controverted, according to
8 Your Honor's Order, but it's not.

9 **THE COURT:** I was having difficulty following what
10 you were saying.

11 Can you make that point again? You're saying that --

12 I may have misheard you, but it seemed like you were
13 saying that the plaintiffs' lawyers trumpeted to people that
14 Monsanto did not want the documents released, and believed the
15 documents shouldn't be released?

16 **MR. HOLLINGSWORTH:** Correct. They said that.

17 **THE COURT:** Could you explain that a little more?

18 **MR. HOLLINGSWORTH:** Yes. For example, Your Honor,
19 they said that specifically in their three letters to the
20 various agencies: To the United States EPA, the Office of
21 Inspector General, to OEHHA, and also to the European Health
22 Safety Agency, or European Parliament. And they said that
23 Monsanto had made clear that they did not agree to de-designate
24 the documents. That's on -- that was in the first paragraph of
25 our earlier Reply Brief in connection with the main motion.

1 And that hasn't been controverted.

2 So Your Honor's statement that that was an issue that
3 Your Honor was interested in resolving, I think, is shown by
4 the papers, and by what's been said today, that there's no
5 controversy about.

6 The second thing was --

7 **THE COURT:** But I want to go back and look at that,
8 to make sure I have a clearer understanding of what you're
9 saying.

10 **MR. HOLLINGSWORTH:** Okay.

11 **THE COURT:** This was in -- you're talking -- you said
12 you referenced this in your reply to -- on the motion -- on the
13 original motion for emergency relief that you filed? Is that
14 what this is?

15 **MR. HOLLINGSWORTH:** Yes, yes.

16 **THE COURT:** And so point me to it.

17 **MR. HOLLINGSWORTH:** Yes. And that Reply Brief was
18 filed on August 7th.

19 **THE COURT:** Okay. yeah. I have it in front of me.

20 **MR. HOLLINGSWORTH:** And on the front page of that
21 brief --

22 **THE COURT:** Yeah.

23 **MR. HOLLINGSWORTH:** -- we quote from these letters
24 that Mr. Wisner's office had prepared and sent to the three
25 agencies that I mentioned. We quote the one that went to the

1 members of the European Parliament; the four members.

2 The letter -- the letter, which is also attached to -- as
3 an exhibit to that brief is before Your Honor; but my point is
4 that that letter makes a statement that Monsanto met with us,
5 and stated it would not retract claims of confidentiality over
6 documents we specifically challenged. That's clear.

7 **MR. WISNER:** Well --

8 **MR. HOLLINGSWORTH:** It says that three times, and
9 three --

10 **THE COURT:** Don't interrupt. Don't interrupt.

11 **MR. WISNER:** Actually I have the letter for you.

12 **THE COURT:** Just don't interrupt opposing counsel.

13 **MR. WISNER:** Sorry. I was giving --

14 **MR. HOLLINGSWORTH:** He says that three times in
15 separate letters. That's clear from the -- I think that's
16 clear also from the various declarations, though.

17 **THE COURT:** But my recollection is that he later said
18 that Monsanto then waived its confidentiality objection. Isn't
19 that right?

20 **MR. HOLLINGSWORTH:** He -- well, he took that -- he's
21 taken that position here in court.

22 **MR. ZITRIN:** Yes.

23 **THE COURT:** Again, I'm talking to opposing counsel
24 now, Professor Zitrin.

25 **MR. ZITRIN:** I apologize.

1 **THE COURT:** Usually the lawyers don't interject when
2 the Judge is talking to opposing counsel.

3 **MR. HOLLINGSWORTH:** Yes. He did go on and state that
4 Monsanto had made a mistake, and that its lawyers had erred,
5 and that, according to the Protective Order, Monsanto should
6 have done something; but Your Honor's question, pursuant to a
7 discussion last -- the telephonic hearing, which I think was
8 about a week ago, and then to Your Honor's Order to Show Cause
9 went to the issue of whether Monsanto had made clear that it
10 was not agreeing to the de-designate these documents, and that
11 there was a dispute about that.

12 The other thing that I think is not disputed now, clearly,
13 is that Baum Hedlund and the other members of this committee
14 knew that Monsanto had proposed a joint letter to the Court,
15 and that there was a live dispute. And Your Honor's Order
16 mentions the live dispute. And Your Honor's conversation at
17 the hearing mentions live dispute. And that's known to all.
18 That was mentioned. That's mentioned at page 9 of Mr. Wisner's
19 brief. It's mentioned in all of the declarations. There was a
20 live dispute. That's not controverted. So --

21 **THE COURT:** I mean, it also seems like it's proved by
22 the fact that they filed this brief on August 1st, seeking
23 clarification of the Protective Order. Right?

24 **MR. HOLLINGSWORTH:** Well, I thought that was --

25 **THE COURT:** Obviously, they were working on it before

1 August 1st.

2 **MR. HOLLINGSWORTH:** Yes. I think that's a very
3 powerful point that we've made in all of our briefs. And, I
4 mean, that just -- that's just a thing that really confounds a
5 lot of what Mr. Wisner has said before the Court today, in my
6 opinion; but -- so the two basic -- the things that are at the
7 crux of the issue of whether or not there was bad faith
8 committed by this committee and by Mr. Wisner here are not in
9 controversy. They haven't controverted those things.

10 And from that Your Honor, I think, was leading to the
11 conclusion that Baum Hedlund and Mr. Wisner and others had
12 actively misled Monsanto. And they had left Monsanto with the
13 impression that the documents were not going to be released
14 until this dispute could be decided, which I think were Your
15 Honor's words mostly; not mine. And I think that Your Honor is
16 heading to the right conclusion in that connection. And I
17 don't think that the factual bases that Your Honor needs to get
18 there have been controverted.

19 **THE COURT:** You know --

20 **MR. HOLLINGSWORTH:** And that's our position.

21 **THE COURT:** -- there's a lot of discussion of bad
22 faith. And, you know, it does strike me that the Record, you
23 know, supports -- based on everything I've read and everything
24 I've heard today, it strikes me that the Record does support,
25 you know, a finding of bad faith.

1 I mean, I understand that a finding of bad faith is
2 necessary to support sanctions under Rule 11, or whatever, you
3 know; but the Court has a lot of discretion to manage its
4 cases. And particularly in MDLs the Court has a lot of
5 discretion to manage these very complex, difficult-to-manage
6 cases.

7 And so I guess on the question of whether Mr. Wisner
8 and/or Baum Hedlund should be removed from the Executive
9 Committee, which is one of the things you've requested, does it
10 matter whether there was bad faith?

11 I mean, it seems to me that at an absolute minimum there
12 was misconduct. Right?

13 And you could spin out a story, I suppose, that, you know,
14 a lawyer, in his zeal to, you know, get these documents
15 released --

16 And one can understand why a lawyer might be very anxious
17 to get these documents released. And, as I've said a number of
18 times, there's absolutely nothing wrong with a lawyer wanting
19 these documents to be released, and communicating them to the
20 press, and, you know, communicating them to government
21 agencies.

22 -- but in his zeal to get the documents released, he sort
23 of decided to sort of shove aside the fact that there was a
24 live dispute between the parties about whether they could be
25 released, and about the process that needs to be undertaken to

1 get them released.

2 And at a minimum, that's misconduct, whether you describe
3 it has bad faith or, you know, extreme overzealousness and
4 disregard for, you know, someone's, you know -- neglect to
5 properly consider someone's obligations to the Court and to
6 opposing counsel.

7 It seems like either one -- given the discretion I have to
8 manage this litigation, either finding could just removal of
9 Mr. Wisner and/or Baum Hedlund from the Executive Committee in
10 this case.

11 **MR. HOLLINGSWORTH:** I agree with that, Your Honor. I
12 think that the rule may be bad faith, or conduct tantamount to
13 bad faith. It's something I've thought about, too.

14 **THE COURT:** Well, you're talking about the rule for
15 sanctions, but the question that I'm asking is --

16 You know, there's an issue of sanctions hanging out here,
17 but there's also an issue of simply managing this case, you
18 know; managing this MDL; and, you know, concern that the kind
19 of lawyering that we saw -- the kind of conduct that we saw on
20 the part of Mr. Wisner and potentially on the part of other
21 members of the plaintiffs' leadership committee is not the kind
22 of conduct that we can have in a case like this, which is
23 already very complicated and very difficult to manage.

24 So, you know, does the bad-faith/tantamount-to-bad-faith
25 standard apply to whether I can remove somebody from the

1 Executive Committee for, you know, case-management purposes?
2 For MDL-management purposes?

3 **MR. HOLLINGSWORTH:** I'm not sure what the answer to
4 that is, Your Honor. I have looked -- I've also looked at
5 that. I have seen MDL cases in which judges reported that the
6 ethical and -- ethical duties and the duty to conduct oneself
7 with good faith in connection with discussions with opposing
8 counsel is actually heightened in a case of an MDL.

9 So I think that -- I think that the actions of Mr. Wisner
10 meet the definition of bad faith that I've seen in the case
11 law, which is recklessness, and a clear improper motive. And
12 it's either bad faith, or tantamount to bad faith.

13 Black's Law Dictionary says that bad faith is very
14 difficult to define precisely because it can arise in so many
15 different circumstances.

16 And I think I agree that Your Honor has tremendous
17 discretion in operating an MDL. I've seen that in other MDLs.

18 **THE COURT:** Okay. Is there anything else you want to
19 add to respond to plaintiffs' presentation?

20 **MR. HOLLINGSWORTH:** I agree with Your Honor that
21 discovery would be in order, especially in connection with the
22 other lawyers and the other law firms. I think Ms. Wagstaff's
23 Declaration makes clear that she was complicit in this bad
24 faith or improper action. I think other counsel are, too; but
25 I think that we should -- I think that we should see e-mails

1 and phone records for that -- for that discrete period of time
2 that we've asked for, in order to pursue this. At least
3 those -- at least those two kinds of discovery are in order.

4 **THE COURT:** Anything else?

5 **MR. HOLLINGSWORTH:** No, sir.

6 **THE COURT:** Okay. How could you have taken the
7 position that these documents are not relevant to the general
8 causation phase?

9 **MR. HOLLINGSWORTH:** Well, I don't see anything -- I
10 don't see anything in any one of those documents that has --
11 has any bearing on the issue of whether reliable science is
12 present to support the conclusion that glyphosate can cause
13 non-Hodgkin's lymphoma.

14 **THE COURT:** But your --

15 **MR. HOLLINGSWORTH:** Those documents are not --

16 Excuse me.

17 **THE COURT:** I was just going to say, I mean, your
18 position is that the scientific consensus is that it doesn't
19 cause non-Hodgkin's lymphoma?

20 **MR. HOLLINGSWORTH:** No.

21 **THE COURT:** And -- I mean, you've said that in your
22 papers.

23 **MR. HOLLINGSWORTH:** Well, yes, we've taken that
24 position; but that wasn't my position in response to
25 Your Honor's inquiry.

1 **THE COURT:** You know, I'm just saying that that has
2 been your position --

3 **MR. HOLLINGSWORTH:** Well, it has.

4 **THE COURT:** -- in this litigation --

5 **MR. HOLLINGSWORTH:** Sure, it has.

6 **THE COURT:** -- with respect to the general causation.

7 **MR. HOLLINGSWORTH:** I'm talking about *Daubert* now.

8 **THE COURT:** Yeah.

9 **MR. HOLLINGSWORTH:** I'm referring to the *Daubert* when
10 I made the comments that I made.

11 **THE COURT:** Right.

12 **MR. HOLLINGSWORTH:** *Daubert* is not going to regard
13 any of those documents that I saw. And I went through most of
14 them, if not all of them. I've seen some of them before,
15 because they actually released documents that had already been
16 excluded from release by one of Your Honor's prior Orders, by
17 the way. Twenty-four documents they released were released in
18 violation of an earlier Order.

19 So I've seen those documents. I'm up to speed on those
20 documents. And I know what the case law says about documents
21 like those, and whether or not those kind of internal corporate
22 e-mails are -- are relevant to the -- to a *Daubert* issue, which
23 is whether or not reliable scientific data supports a general
24 causation opinion. Those --

25 **THE COURT:** Right, but --

1 **MR. HOLLINGSWORTH:** -- internal e-mails are not --

2 **THE COURT:** But --

3 **MR. HOLLINGSWORTH:** -- reliable scientific data.

4 **THE COURT:** But the internal e-mails reflect that
5 Monsanto has been ghostwriting reports. And those reports have
6 been portrayed as independent. And you -- I mean, your whole
7 presentation thus far has been about how all the independent
8 science supports a conclusion that glyphosate doesn't cause
9 non-Hodgkin's lymphoma.

10 So, you know, I don't understand how you could have taken
11 the position that the issue of Monsanto drafting reports for
12 allegedly independent experts on whether glyphosate causes
13 non-Hodgkin's lymphoma could be irrelevant to the question of
14 whether there's evidence that glyphosate causes non-Hodgkin's
15 lymphoma. I just don't understand how you could take that
16 position.

17 **MR. HOLLINGSWORTH:** It's because that -- the reports
18 that you're referring to, I think, are two reports in the
19 literature, Your Honor. They're not -- they are not scientific
20 studies. They're not reports on scientific studies. They're
21 reports known as "surveys"; literature surveys. That -- that's
22 the technical characterization of those reports.

23 Those aren't original science. They aren't the original
24 reports of the 14 animal studies that are at issue here. They
25 aren't the original reports by the epidemiologists who have

1 done observational studies; both case-controlled and -- and
2 prospective epidemiology. They aren't the original reports of
3 those authors. And for that reason, they're not relevant under
4 a *Daubert* -- in a *Daubert* context. That's the basis for our
5 statement.

6 **THE COURT:** So that sort of invokes another question
7 for me, which is, you know, Phase One of this case is about
8 whether there is enough to go to the jury on the question
9 whether Roundup is capable of causing non-Hodgkin's lymphoma.
10 Right? And we've --

11 **MR. HOLLINGSWORTH:** Well, that's not exactly right,
12 Your Honor, with all due respect.

13 **THE COURT:** Go ahead.

14 **MR. HOLLINGSWORTH:** Phase One of this inquiry is
15 whether or not the expert-witness testimony that the plaintiffs
16 have that Monsanto -- that glyphosate can cause cancer is
17 reliable, and based on sound, reliable, scientific evidence
18 that's relevant.

19 **THE COURT:** Right, but if there is enough reliable
20 evidence to go to the jury, then we get past Phase One. Right?

21 **MR. HOLLINGSWORTH:** Well, if there is enough reliable
22 evidence to support an expert witness' opinion --

23 **THE COURT:** Mm-hm.

24 **MR. HOLLINGSWORTH:** -- they would -- they may get by
25 the first phase, possibly.

1 **THE COURT:** Okay. And so --

2 **MR. HOLLINGSWORTH:** I don't think that's going to
3 happen, but --

4 **THE COURT:** Right, but --

5 **MR. HOLLINGSWORTH:** So --

6 **THE COURT:** And so we have to look at what everyone
7 is saying; what everyone in the scientific community is saying
8 about the question whether Roundup causes non-Hodgkin's
9 lymphoma. Right?

10 **MR. HOLLINGSWORTH:** I don't think that's the inquiry
11 specifically, Your Honor. There --

12 **THE COURT:** Well, I mean, if one of their plaintiffs'
13 experts came up and testified, and didn't mention some paper on
14 the ability of Roundup to cause non-Hodgkin's lymphoma that was
15 in your favor, no doubt you would cross-examine them on their
16 failure to consider that paper. Yes?

17 **MR. HOLLINGSWORTH:** We might if it's original
18 science.

19 If it's a review article, which is what I think you're
20 referring to from the -- from the information we've seen on
21 ghostwriting, which, by the way, I disagree with. I don't
22 think it's correct. I don't think it's a correct
23 characterization of what went on there. It's become very
24 popular in the media, thanks to these guys, but --

25 **THE COURT:** Well, Monsanto --

1 **MR. HOLLINGSWORTH:** -- and I guess your Honor's been
2 influenced by it, but --

3 **THE COURT:** Well, wait a minute. It's Monsanto that
4 used the term "ghostwriting."

5 **MR. HOLLINGSWORTH:** Well, yes.

6 **THE COURT:** So you're saying that Monsanto
7 mischaracterized what it was doing --

8 **MR. HOLLINGSWORTH:** Yes --

9 **THE COURT:** -- when it was drafting these reports?

10 **MR. HOLLINGSWORTH:** Yeah, I think that Monsanto
11 was --

12 **THE COURT:** I haven't been tricked --

13 **MR. HOLLINGSWORTH:** -- loosely using the word
14 "ghostwriting."

15 **THE COURT:** I haven't been tricked by the plaintiffs.
16 I've apparently been tricked by Monsanto when Monsanto
17 internally referred to what it was doing as "ghostwriting."

18 **MR. HOLLINGSWORTH:** Well, the ghostwriting memos,
19 Your Honor, don't refer to any original science. Okay?

20 What they refer to is review articles done by groups of --
21 of -- of --

22 **THE COURT:** Independent scientists?

23 **MR. HOLLINGSWORTH:** -- professors, and independent
24 people, and oftentimes consultants. That goes on. I'll admit
25 that. Okay?

1 But what it does not -- what none of those documents refer
2 to is any original science. The original path. reports from
3 these 14 studies; the original scientific evidence that is
4 going to have to form the basis for an expert witness' opinion.

5 That's why all of the e-mails that Your Honor looked at in
6 these -- in this 30-page, carefully drawn exhibit that
7 Mr. Wisner says he spent hundreds of hours on are irrelevant to
8 the *Daubert* inquiry. None of those things are going to go into
9 evidence; at least, they wouldn't go into evidence in the
10 Eighth Circuit or the Tenth Circuit or the Eleventh Circuit to
11 support --

12 They can go into evidence. Anything can go into a *Daubert*
13 hearing. That's what Rule 104 says.

14 But they won't be able to legitimately support an expert
15 witness' opinion. I don't think that -- I don't think that any
16 solid expert is going to rely on review papers, or what
17 Monsanto's internal folks are saying in e-mails just to come up
18 with a reliable basis for his expert opinion.

19 **THE COURT:** Monsanto has --

20 **MR. HOLLINGSWORTH:** His or her expert-witness
21 opinion.

22 **THE COURT:** Monsanto has made a number of filings in
23 this case since it began. And in a number of filings it has
24 made statements to the effect of, you know, *There's no evidence*
25 *to support the conclusion that Roundup causes non-Hodgkin's*

1 *lymphoma. The scientific consensus is that Roundup does not*
2 *cause non-Hodgkin's lymphoma.*

3 In any of those filings, did you rely on any of these
4 reports that we now know were ghostwritten by Monsanto?

5 **MR. HOLLINGSWORTH:** No. You're referring to --
6 you're referring to the 2000 article by Williams and others.
7 Williams is the only living author among three different
8 authors. That's a review-based paper.

9 And you're referring to something called "the intertech
10 panel," which is a panel of seven or eight experts and
11 consultants that Monsanto put together after the IARC came out
12 with its conclusion. It's a review article. It's a review of
13 all of the literature. Both of those papers are reviews of the
14 literature. They're not the original opinions and findings and
15 reports of the people who conducted the original, basic
16 science. And it's the original, basic science on which
17 Monsanto company has relied, in every statement that I'm aware
18 of, to say that there's no support for the notion that
19 glyphosate can cause cancer.

20 It's impossible for anybody to say that glyphosate doesn't
21 cause cancer, because you cannot prove a negative; all you can
22 say is that there's no reliable science to say that it does.
23 And that's what *Daubert* is to address to you. That's what the
24 Supreme Court was talking about when it wrote the *Daubert*
25 Opinion.

1 **THE COURT:** Okay. Anybody on the plaintiffs' side
2 want to respond?

3 One question I do want answered by somebody is, you know,
4 if there is going to be a removal from the Steering Committee
5 [sic], is there -- I mean, the Executive Committee, should it
6 be Mr. Wisner, or should it be the firm of Baum Hedlund, or
7 should it be broader than just Mr. Wisner and Baum Hedlund?

8 **MR. WISNER:** Can I just answer that question?

9 And I just want a couple just quick facts.

10 The short answer to the question you just asked is if
11 there should be any punishment, it should be at me. I don't
12 agree that there should be; but if there should be, it should
13 be at me.

14 The leadership here appointed me to take on this task
15 because I asked them to let me do it; not because that -- there
16 was some selection. I specifically petitioned the leadership
17 to be allowed to do this. And they green-lighted me because of
18 my experience in this area, in challenging documents.

19 My partner, Mr. Baum, is on the -- is on the Executive
20 Committee; I am not, Your Honor. I'm -- I'm --

21 **THE COURT:** Well, I mean, the firm is on the
22 Executive Committee.

23 **MR. WISNER:** That's correct. I believe, yeah, the
24 firm or Michael Baum specifically from the firm is on the
25 Executive Committee.

1 Our firm has provided considerable resources to this
2 project, and we are heavily involved in all aspects of *Daubert*
3 right now. I am one of the primary brief writers actually on
4 this issue. And I believe that taking us off by not letting us
5 work on this, or somehow prohibiting our -- it would just
6 prejudice the case.

7 If any order to remove us was to be issued, it should at
8 the very least not take effect until after December, when we've
9 got these things briefed, because there's too much work right
10 now. We're literally in the middle of the expert depositions.
11 We had one yesterday. And I'm playing a very intensive role in
12 helping that effort, both from a science perspective, because I
13 actually do have a pretty, pretty, pretty robust
14 science/statistical background, as well as just the -- you
15 know, if we need someone to stay up all night working on a
16 brief, I'm usually that guy. So I think it would be really
17 detrimental to these clients -- my clients, and everyone's
18 clients.

19 So I don't think that would be -- well, I don't think that
20 would effect the result of having more efficient litigation.

21 Prohibiting me from taking on further challenges or
22 negotiating these types of procedural things -- I don't think
23 you would even need to order that, because I'm pretty sure
24 they'll never let me do this again at this point; but I think
25 from purely practical perspective, I think that would be pretty

1 detrimental to the litigation.

2 At the very least, if you do remove Baum Hedlund, mixing
3 up the leadership right now at this point would literally be
4 like the day before trial, kicking the lawyers off of the --
5 you know, opening statements are ready, and kicking them off.
6 It would just be so detrimental.

7 And then generally, Your Honor, every year -- every year
8 or so, MDLs typically do a new application for leadership. And
9 you could maybe mix it up at some later point, if you want to,
10 if you're concerned that we're not doing a good-enough job; but
11 right now it would be very dangerous and really bad.

12 At the very least, I think if there's going to be any ire
13 from this Court it should be at me. I mean, I don't think I
14 acted in bad faith. I don't think I acted with misconduct. I
15 think I did what I was supposed to do ethically as an attorney.
16 And I believe in what I did. And I apologize to the Court if
17 you believe I acted with misconduct. That was never my intent.
18 I do respect this Court deeply.

19 Just a couple quick factual points, just to raise.
20 Mr. Hollingsworth referred to 24 documents that the Court
21 previously denied.

22 **THE COURT:** Yeah. I didn't follow that.

23 **MR. WISNER:** What that's referring to is we did a
24 blanket challenge for 200 documents way back when. And we
25 submitted a joint letter to the Court.

1 And the Court said, *Well, listen. I'm not going to go*
2 *through these 200 documents. This is PTO 15. You said, Moving*
3 *forward, tell me why you need those documents and why they're*
4 *relevant.* That's actually where that relevance issue comes in,
5 was in response to those 200 documents.

6 So of those 200, we actually -- I actually went through
7 them, and found the ones that were relevant. And that was
8 those 22 documents that were part of this new challenge.

9 So the Court actually never --

10 **THE COURT:** When you say "part of this new
11 challenge," you mean part of the detailed chart that you
12 presented to --

13 **MR. WISNER:** That's correct.

14 **THE COURT:** -- Monsanto.

15 **MR. WISNER:** So I actually went through them, and did
16 exactly what the Court said, is find the ones that are relevant
17 to the phase of the litigation, because rest of them I didn't
18 think particularly were; I didn't think they had a really
19 strong argument.

20 So I found the ones that were really on point.

21 So the Court actually never ruled on the merits of them,
22 at all. It was just sort of a blank -- so that's what I was
23 referring to. And I think we ought to be really --

24 Sorry I'm speaking so quickly. I am really sorry. I do
25 that in depositions all of the time.

1 And I think that that should be clear that's what happened
2 there. So there wasn't actually a ruling on the merits.

3 And then the other factual issue is there was also another
4 ghostwritten article that was --

5 And when I say "ghostwriting," it's their own employees
6 who said that it was ghostwritten; I'm not saying it.

7 It was a Grimes article which was submitted, actually.
8 It's been cited by Monsanto in past briefings; I don't know if
9 it recently has been, but it has in the past. And it was
10 submitted --

11 **THE COURT:** I seem to recall in my mind's eye seeing
12 a citation to that --

13 **MR. WISNER:** Yeah.

14 **THE COURT:** -- a number of times in Monsanto's
15 filings.

16 **MR. WISNER:** That's correct. And it was submitted to
17 the EPA. And it cited and relied on by the EPA in its CARC
18 report. And it was even considered by IARC. So --

19 And it's never been disclosed publicly really until
20 recently that that actually was, according to Monsanto's
21 employee -- and they're saying it's not the case, but -- that
22 it was ghostwritten by them, and it wasn't disclosed.

23 So, I mean, I don't want to get into the nitty-gritty of
24 how that affected anybody, but it is our position and will be
25 argued to the jury that this is conduct that manipulates

1 science. And that's really a problem, particularly since our
2 regulatory agencies are actually relying on that science.

3 That's all I had to say, Mr. Zitrin. I just wanted to
4 correct those factual points.

5 And again, Your Honor, my argument -- my legal argument is
6 I don't believe there was really a live dispute.

7 I think there's a really important distinction between
8 whether or not PTO 15 and 20's requirement for relevance was
9 appropriate, which we did dispute on the phone, and whether or
10 not these 86 documents were confidential; and as of August 1st,
11 the 86 documents were not, by operation of the Court Order.

12 **THE COURT:** I understand that argument.

13 **MR. WISNER:** This -- this legal issue was. And
14 that's why I filed that thing. And that's why I filed the
15 motion on August 1st, clarifying PTO 15 and 20 -- or August
16 2nd, clarifying 15 and 20: Because that issue about the impact
17 of this moving forward was still ripe.

18 But it didn't affect those 86 documents, because we had
19 reached an impasse. And the Order said if you don't file it
20 within 30 days, the impasse is resolved in the challenging
21 party's favor. That's what it says. And that's what happened.
22 So I believed I acted in good faith in taking that at its word.

23 **THE COURT:** Okay.

24 **MR. ZITRIN:** Your Honor, if I may, I have a very
25 brief response to what Mr. Hollingsworth said, and Mr. Wisner

1 has just articulated most of it.

2 I know that the Court has, in its PTO 28, not only this
3 issue, but the issue of going forward. And I think all of
4 plaintiffs' counsel agree that the *status quo ante* needs some
5 change, because it created this ambiguity.

6 Two of the ideas floated were that all meet-and-confer
7 conversations should be recorded, by agreement of all of the
8 parties, which would certainly help.

9 And the other one the Court suggested is maybe you need
10 motions made to the Court; but of course, the reason to do this
11 procedure was to avoid the Court having to be actively involved
12 each time around. Maybe the recording of documents, which is
13 what I suggested to Mr. Wisner and Baum when they first
14 contacted me --

15 **THE COURT:** Recording of documents?

16 **MR. ZITRIN:** The recording of conversations, I
17 mean -- the meet-and-confer conversations -- would be a first
18 step.

19 The second thing I wanted to say is that there's a great
20 deal -- there was a great deal of conversation, a great deal of
21 comments by Mr. Hollingsworth about what happened after the
22 fact. And I agree with Mr. Wisner and with the Court that the
23 issue of whether this was a live matter or a done deal seems to
24 be central to the decision that the Court has to make. I read
25 it, and it seemed like a done deal. I think the Court feels

1 that it may not have been. But everything that happened after
2 the fact, and what letters said going out to various agencies
3 are really not relevant to this issue.

4 They quoted a letter from Mr. Wisner, talking about how
5 Monsanto would not retract claims of confidentiality; and yet
6 there's another letter from Mr. Wisner or a -- further down on
7 that letter, where he says: But 30 days went by, and they
8 hadn't objected. He may not have specified 30 days, but he
9 said, *Since Monsanto did not file any motions seeking continued*
10 *protection of the documents, as required by 16.3, it waived*
11 *confidentiality of them.*

12 That was certainly my reading. I guess perhaps it may not
13 entirely --

14 **THE COURT:** Yeah, but the problem is that they filed
15 this brief on August 1st seeking clarification of the
16 Protective Order, explaining that Monsanto and the plaintiffs
17 had a live dispute about the issue of confidentiality.

18 **MR. ZITRIN:** But the issue of -- but the live dispute
19 is not about the Protective Order's self-executing 30 days.

20 The live dispute set forth on page 4 -- set forth on page
21 2 of that motion --

22 **THE COURT:** But in the motion to clarify the
23 Protective Order and to clarify Pretrial Orders 15 and 20, they
24 identified a live dispute about whether the Protective Order
25 was self-executing. So how can you say that there was no live

1 dispute about whether the Protective Order was self-executing?

2 **MR. ZITRIN:** Well, I don't think that's correct.

3 I think what they're talking about is a dispute over the
4 issue of whether they should be required to provide information
5 about --

6 **THE COURT:** It's all about whether PTO 15 and 20
7 erected new barriers to the ability of the plaintiffs to
8 disclose documents.

9 **MR. ZITRIN:** That's right, but those barriers don't
10 deal with the 30 days. Those barriers deal with the
11 requirements that the plaintiffs demonstrate relevancy; that
12 plaintiffs demonstrate litigation need; and that there are
13 blanket restrictions about documents that can be opened for
14 public disclosure.

15 And that's what's stated on page little one of their
16 brief. They very clearly set forth the three issues there.
17 Those disputes are live; but there's nothing in PTO 15 that
18 even arguably relates to the 30 days.

19 In PTO 13, Your Honor, at the end, is talking about the
20 fact that documents filed confidentially within the umbrella
21 are not necessarily confidential for purposes of being filed
22 under seal. And Your Honor says that has no bearing on whether
23 the document, if it ends up being filed in court, should be
24 filed under seal. And then the Court goes on to say whether
25 the documents -- we have to decide whether the documents

1 previously designated confidential truly need that designation.

2 When that's not practical -- when that's not practical --
3 the under-seal designation -- and when plaintiffs provisionally
4 file documents under seal, Monsanto must make a good-faith
5 review, and inform the Court. For the remainder of the general
6 causation phase, Monsanto will have ten days to file responsive
7 declarations required by Civil Local Rule 79-5(e), but that
8 doesn't relate to the 30-day confidentiality in 16.3; the
9 30-day waiver. That relates to the issue of whether
10 confidential documents can be filed under seal.

11 And then the Court continues, *If Monsanto continues to*
12 *file unreasonable or unsubstantiated declarations, it will be*
13 *sanctioned. See Federal Rules of Civil Procedure 11(b).*

14 I think that they didn't file a response within 30 days,
15 because they didn't want to be sanctioned under what Your Honor
16 said in PTO 15; but the substance of PTO 15 has nothing to do
17 with 16.3 of the Protective Order. It has to do with whether
18 documents that are confidential under the Protective Order may
19 also be filed under seal. And that's why there's not, to me,
20 even an argument that that 30-day deadline in 16.3 was changed.
21 This is about something entirely different.

22 (Discussion off the record.)

23 **MR. ZITRIN:** And our brief says that at page 7 and 8,
24 reaffirming the "automatically" language of Section 16.3.

25 **THE COURT:** Well, that's the position that -- that's

1 certainly the position that the plaintiffs were taking. And
2 this motion reflects the fact that Monsanto disagreed with
3 that.

4 **MR. ZITRIN:** Right.

5 **THE COURT:** And there was a disagreement.

6 That's the point. And that's -- look. That's why the
7 motion that's why the motion to clarify was filed.

8 Ms. Wagstaff, you seem like you want to say something.

9 **MS. WAGSTAFF:** Yeah. I just want to say a few
10 things.

11 **MR. HOLLINGSWORTH:** May I respond?

12 **THE COURT:** Sure, but why don't we give --

13 **MS. WAGSTAFF:** Okay.

14 **THE COURT:** -- Mr. Hollingsworth a chance to respond
15 to what was just said first?

16 **MR. HOLLINGSWORTH:** I don't think anything the
17 professor said was responsive to Your Honor's Order.

18 I wanted to respond specifically to the matter that is
19 before Your Honor. And it's in our briefs. And Your Honor
20 perhaps didn't understand our point. There was an Order, which
21 is PTO 20, that went to the issue of a motion to de-designate
22 and a motion to strike by Monsanto 200 documents. And if
23 Your Honor looks at the second page of PTO 20, Your Honor will
24 see that Monsanto's motions to strike were granted in full.

25 **THE COURT:** Right.

1 **MR. HOLLINGSWORTH:** And that covered 24 of the 86
2 documents that he just sent off to the *New York Times*. So I
3 think that he also has violated one of Your Honor's Orders. So
4 there's not just good faith, or bad faith, or tantamount to bad
5 faith, or Your Honor's tremendous inherent discretion that
6 empowers Your Honor; but there's also the fact that that
7 Order's been violated. And I wanted to correct the Record on
8 that so our position is clear.

9 **MS. WAGSTAFF:** Good afternoon, Your Honor.

10 With respect to what Mr. Hollingsworth was just
11 immediately referencing, I have that in my Declaration at
12 paragraph 11(a) on page 4. And I think that our position on
13 that was that Your Honor, with respect to those 24 documents in
14 PTO 20, did not actually look at the relevancy or look at the
15 confidentiality of those documents, but rather struck them, and
16 colorably added requirement that we must find that they were
17 relevant, which we believe we did in this most recent
18 challenge. So we think that there is no violation of PTO 20,
19 and that Your Honor had not actually made an Order on the
20 confidentiality of those documents.

21 Moving sort of on to what I would like to say, seems that
22 I am a target in Monsanto's sanctions motions, myself. So I
23 wanted to speak a little bit about that, and see if Your Honor
24 had any questions for me.

25 In this process I have, in my mind, put sort of the

1 conduct that I view into three buckets.

2 And I've seen the first bucket as sort of the actual
3 challenge process. Was it proper to challenge? Did we do the
4 challenge process correctly?

5 And then sort of the *mens rea* of us during the challenge
6 process. Did we act in good faith? Bad faith? Was there
7 miscommunication in actually the production of the documents at
8 the end?

9 I don't think your Honor, from comments made at the
10 telephonic hearing last week and this morning, is much
11 concerned with the production of documents or the challenge
12 process, as long as our faith was good sort of during the
13 middle of it. And so the way that I view that is there's
14 really two -- two sort of actions that I think that Your Honor
15 should be concerned with to determine our faith. And one was
16 the meet-and-confer on July 13, which -- I was on that
17 telephone conference. And then also the July 27th e-mail that
18 followed up. You know. And I was actually cc'd on that, and I
19 had internal correspondence prior to that. So I'm actually
20 involved in all of the action that Your Honor should be
21 concerned with.

22 My co-leads, Ms. Greenwald and Mr. Miller, weren't on the
23 phone call, and they weren't involved.

24 Ms. Greenwald was cc'd on the July 27th e-mail, but
25 Mr. Miller was not.

1 So I think that I can answer any questions you have with
2 respect to that.

3 I think in the -- Monsanto's response to show cause, they
4 take my statement -- my Declaration, where Mr. Wisner said that
5 there was two options, and they spin that in their favor. And
6 they forget to mention that my Declaration went on to state
7 that on 5, paragraph 12, that it no --

8 **THE COURT:** Wait. Hold on. Give me one second --

9 **MS. WAGSTAFF:** Okay.

10 **THE COURT:** -- to pull it up.

11 **MS. WAGSTAFF:** Page 5, paragraph 12 --

12 **THE COURT:** Okay. I --

13 **MS. WAGSTAFF:** -- the second little bullet point.

14 While I do state in there in the first bullet point that
15 Mr. Wisner told Monsanto he believed the plaintiffs had two
16 choices, the second bullet point goes on to say that at no
17 point --

18 And this is now on page 5.

19 -- that at no point did Mr. Wisner or anyone on the
20 meet-and-confer tell Monsanto's attorneys that Monsanto's
21 obligations under the Protective Order were dependent on
22 plaintiffs' decision. And at no point during the
23 meet-and-confer did Monsanto's attorneys state to us that they
24 believed that their obligations were dependent on ours.

25 I mean, as a practical matter, we can only control what

1 our options are, and we can only control what we do. And the
2 *mens rea* of how we were operating on there was pure, and it was
3 not in bad faith.

4 And I would suggest that if Your Honor -- I do not believe
5 that the internal correspondence between counsel should be
6 provided; but if Your Honor is inclined to do so, I would
7 request that we also look at the internal correspondence
8 between Monsanto and the Hollingsworth firm, to decide really
9 what they were thinking, and if they really thought there was a
10 live dispute.

11 And I would like to also request -- Your Honor had
12 mentioned earlier that there might be an Order to Show Cause
13 why Monsanto should not be sanctioned for acting in bad faith
14 on the meet-and-confer on July 13th. And I would request that
15 we entertain that a little bit further.

16 Mr. Rubin, who is here, was on that telephone call, as
17 well as Mr. James Sullivan. I would request an Order to Show
18 Cause why they should not be sanctioned, as well as the
19 Hollingsworth firm in general, for failing to act in good faith
20 in there; and that we also get all of their internal
21 correspondence with how they explained the process to
22 Monsanto's attorneys, the in-house counsel; who made the
23 decision not to file the motion; why they thought a motion
24 shouldn't be filed. And see if there is actually was a live
25 dispute on their end, before we just take that at face value.

1 Secondly, Mr. Hollingsworth stated earlier that the
2 Williams article was not relied on by Monsanto in this
3 litigation. I believe you asked him.

4 In fact, it was the first sentence in the statement of
5 relevant facts in the Motion to Dismiss filed in the *Hardeman*
6 case, which was the lead case that I was counsel on with
7 Your Honor, before everyone joined us. That was the first
8 statement in there; three of their expert reports. And that
9 was filed on March 1st, 2016. So they've been relying on that
10 article throughout the entirety of that litigation, contrary to
11 what Mr. Hollingsworth just said.

12 And July 31st, 2017 -- so only, like, three weeks ago --
13 their expert reports were served. And three of their experts
14 cited that article in reliance of their position. So what
15 Mr. Hollingsworth said, actually, was not completely true.

16 And so I can answer any other questions you may have for
17 me. Otherwise, I stand on my Declaration.

18 **THE COURT:** Okay. I think what we'll do right now is
19 give the court reporter a little break, particularly given how
20 fast you all have been talking. And maybe we'll return at
21 about 11:30 --

22 **MR. ZITRIN:** Thank you.

23 **THE COURT:** -- and look to wrap up.

24 (Recess taken from 11:29 a.m. until 11:50 a.m.)

25 (During recess a sidebar conference was held but not reported.)

1 **THE COURT:** Okay. So the two other things that I
2 want to talk about today are how we're going to handle the
3 documents that have been designated confidential going forward,
4 and kind of what the hearings are going to look like in
5 December.

6 But before that, does anybody else have anything else they
7 want to add on this Order to Show Cause?

8 **MS. GREENWALD:** No, Your Honor.

9 **THE COURT:** Anyone else? We see.

10 **MR. WISNER:** Nothing from me, Your Honor.

11 **THE COURT:** Okay. All right. So I have a tentative
12 proposal for how to handle documents designated confidential
13 going forward. It would be to amend the Protective Order.
14 And, like I said, you know, I should have done that a while
15 ago, to avoid any confusion; but you know, the burden would
16 remain on Monsanto to show why the documents should remain
17 designated confidential, but the procedure would be as follows.
18 And the procedure would be -- my idea is to adopt this
19 procedure out of concern regarding the overzealousness of
20 plaintiffs' counsel in wanting to release documents that are
21 not clearly allowed to be released. And so the procedure would
22 be as follows.

23 First, the parties would be required to meet and confer
24 about confidentiality designations in the same way that the
25 Protective Order requires them to do now.

1 And I will say that, for all the complaints we might have
2 about Mr. Wisner's conduct, one thing that I thought he did
3 extremely well was put together this chart identifying each of
4 the documents, and describing why they have relevance. And so
5 that part of the process, I think, is good. And that remains.
6 This meet-and-confer process remains.

7 However, following the meet-and-confer process, if the
8 plaintiffs believe that a document designated confidential
9 should have that designation removed, they must make a filing
10 with the Court. It's not putting the burden on the plaintiffs
11 to justify. It's simply that the plaintiffs will be required
12 to file a notice with the Court; notice regarding -- I'm sort
13 of making this up as I speak, but notice regarding improperly
14 designated documents; something like that. And then it would
15 say something very simple, such as, *Plaintiffs believe that the*
16 *documents with the following Bates numbers should be*
17 *de-designated*, and then just list the Bates numbers. This will
18 be after the meet-and-confer process that's already called for
19 by the Protective Order.

20 And then Monsanto has 14 days to respond, to file a motion
21 or to file a response to the plaintiffs' notice, explaining why
22 the documents are or are not confidential; why the documents
23 should or should not be de-designated. And then the documents
24 can be attached, if necessary. They can be submitted with a
25 motion to seal, if necessary.

1 And then the plaintiffs will have 7 days from Monsanto's
2 filing to file a response. And the burden, again, remains on
3 Monsanto to explain why the document should remain designated
4 confidential.

5 However, as I have said a number of times during this
6 litigation -- and I can't even really believe that I'm saying
7 it again -- the plaintiffs served exceedingly broad discovery
8 requests on Monsanto, requiring Monsanto to gather and deliver
9 an extraordinary number of documents in a very short period of
10 time. I could have been much less generous with the
11 plaintiffs' discovery requests. I could have denied or
12 narrowed a number of the discovery requests, but in the
13 interests of making sure that the plaintiffs were not denied
14 anything that they might be entitled to get, I gave the
15 plaintiffs the benefit of the doubt, and approved the bulk of
16 their very broad discovery requests.

17 The consequence of that was that Monsanto was required to
18 turn over a lot of irrelevant material that the plaintiffs
19 shouldn't have gotten their hands on in the first place if the
20 discovery requests had not been so broad, and if the time line
21 had not been so compressed.

22 And at least in Phase One of the litigation, it is not
23 appropriate for everybody to be wasting their time fighting
24 about de-designation of documents that are not relevant to
25 Phase One of the litigation. So I will deny any --

1 Let me put it another way.

2 I will sustain any objection by Monsanto to the
3 de-designation of documents that are not relevant to Phase One
4 of the litigation. Perhaps that can be revisited at a later
5 time, but this is a case-management issue. This is an
6 MDL-management issue. I do not want any of the lawyers or the
7 Court or Court staff spending any time pondering whether
8 documents not relevant to Phase One of the litigation should be
9 de-designated. And so that is how I would propose that we
10 proceed going forward.

11 If anybody would like to argue against that, or ask any
12 clarification questions, feel free to do so.

13 **MS. WAGSTAFF:** Your Honor, Aimee Wagstaff.

14 I will speak with my co-counsel on our side. It seems
15 like something we might be able to agree to. I will respond to
16 that.

17 I just wanted to bring something to your attention that
18 you probably aren't aware of that's happening in state courts
19 around the country. I appreciate the time and resources that
20 it take your Court to have to do confidentiality challenges.
21 And I just wanted to let you know that Monsanto is requesting
22 in almost every state court as of late that state court
23 plaintiffs bring their challenges to the MDL.

24 And I don't know that if that's something that Your Honor
25 is even agreeable to. I'm not even quite sure how it would

1 work, but one state court Judge has adopted something into a
2 Protective Order that, if the documents were produced in the
3 MDL, the state court plaintiff must bring the challenge to
4 Your Honor to adjudicate what is relevant to the litigation
5 need of that state court. And I just wanted to know if that
6 was even something Your Honor was aware of.

7 We have objected to that in state courts, but they are
8 continuously trying to put that in state court protective
9 orders. And the way that the document production has worked to
10 date -- and you may not know this, just because you're not
11 involved in the state court stuff -- is prior to the MDL being
12 formed, there was a state court case in Missouri that had
13 unphased discovery.

14 **THE COURT:** Mm-hm.

15 **MS. WAGSTAFF:** And a significant portion, if not the
16 majority -- I don't have the exact numbers, so I don't want to
17 speak out of turn, but at least close to 50 percent or maybe
18 over 50 percent of those documents were produced in that state
19 court litigation.

20 And when Your Honor formed the MDL, they just sort of were
21 put into this. And it's the same document depository. So we
22 just get access to the same -- you know, we have an ESI
23 depository, and everyone just gets access to that. And
24 anything that gets produced around the country just gets put in
25 that.

1 So the majority of the documents so far to date were not
2 produced in here. That's one thing -- in the MDL. That's one
3 thing I wanted to let you know. But we have access to them.

4 Does that make sense? You look like I've confused you.

5 **THE COURT:** I think so, but -- I think so.

6 What's the status of the Missouri case now? Is discovery
7 still proceeding in an unbifurcated fashion?

8 **MS. WAGSTAFF:** Yeah. So there's one -- the one --
9 what was the name of that one?

10 **MR. WISNER:** *Kennedy*.

11 **MS. WAGSTAFF:** *Kennedy*. So the *Kennedy* case is in --
12 is in St. Louis. And it's sort of a solo case, all by itself.
13 And that was the one that most of the documents were produced
14 under.

15 In fact, our ESI kiosk which has all of our documents is
16 even called *Kennedy versus Monsanto*, because that's where all
17 of the documents first came from.

18 So, yes, we got some custodial files here, through
19 Your Honor and through this MDL; but the bulk of the documents
20 were produced pursuant to an unphased discovery order.

21 **THE COURT:** Okay.

22 **MS. WAGSTAFF:** Recently I think there's, like, 2- or
23 3,000 cases now filed in St. Louis. And recently that Judge
24 has been sort of leading the way. They're not sort of
25 consolidated like they are here; but that Judge has unphased

1 discovery. So a lot of documents are being produced pursuant
2 to those.

3 But I know that in Delaware State Court, Monsanto
4 requested -- and the Judge allowed -- that if any document was
5 produced in the MDL --

6 **THE COURT:** Mm-hm.

7 **MS. WAGSTAFF:** -- that the plaintiffs' counsel and
8 the plaintiff, itself, has to come to you to challenge
9 documents, which seems -- I don't want to speak for the
10 Delaware Court, but it seems she --

11 **THE COURT:** When you say come to me to challenge
12 documents, what does that mean?

13 **MS. WAGSTAFF:** Uh-huh.

14 **THE COURT:** To challenge the confidentiality
15 designation?

16 **MS. WAGSTAFF:** Yes. Yes.

17 **THE COURT:** Well, in other words, it sounds like what
18 you're saying --

19 That's like a -- maybe a complicated way of saying that
20 what the Delaware Judge has done has said, *If the MDL Court has*
21 *concluded that these documents should be designated*
22 *confidential, then I'm going to defer to that conclusion, and*
23 *they will be confidential in the state court case.*

24 **MS. WAGSTAFF:** No, that's not --

25 And Monsanto, I believe, attached the Delaware

1 Protective Order to one of its filings, but if not, I can
2 provide it to Your Honor.

3 But what they're saying is if the document was produced in
4 the MDL pursuant to the MDL Protective Order, which in and of
5 itself is sort of --

6 I mean, I guess every document would be, even though they
7 were produced in another case -- that the --

8 Let's say I have a client in Delaware. And let's say that
9 I want to challenge a document in Delaware -- the
10 confidentiality -- because the litigation need of that Delaware
11 says that I get that document. All right?

12 I am now ordered to come to Your Honor in San Francisco
13 Federal Court, which has no jurisdiction over that state court
14 case, and request that the document be de-designated. It seems
15 very nonsensical. I think that because the lawyers --

16 **THE COURT:** I mean, if it is how you describe it --

17 **MS. WAGSTAFF:** Uh-huh.

18 **THE COURT:** -- then, you know -- and you came to me
19 and you filed a motion which says, *We need this document*
20 *de-designated. We need this document no longer to be*
21 *designated confidential because of the needs in the Delaware*
22 *case, I would deny it. I would deny the order, because I will*
23 *only de-designate documents that meet the standard that I have*
24 *articulated here, which is, number one, *Are they relevant to**
25 *the first phase in this case?, and, number two, *Is there some**

1 *privacy concern that would require maintaining the*
2 *confidentiality designation?*

3 **MS. WAGSTAFF:** Right. So I agree with you.

4 **THE COURT:** So, I mean, other than what I've just
5 said, and other than denying any motion in which you ask me to
6 adjudicate the relevance of a document to some state court
7 case, what else can I do for you on that issue?

8 **MS. WAGSTAFF:** Nothing. I just wanted to let you
9 know that was going on, because that's over our objection.
10 Obviously, we didn't think it would be appropriate for a
11 federal Judge to be adjudicating a state court. And it sounds
12 like you agree with that. So I'll just -- those were the only
13 two.

14 **THE COURT:** We have enough to handle, ourselves --

15 **MS. WAGSTAFF:** Right. Exactly.

16 **THE COURT:** -- it seems like.

17 **MS. WAGSTAFF:** All right. Thank you.

18 **MR. WISNER:** One thing, Your Honor. And you said you
19 didn't want to change the meet-and-confer process. And I think
20 that's fine, but what's happening is we create this chart.

21 And if we do this in the future -- we create a chart; we
22 go through it in detail -- I think it would be appropriate that
23 Monsanto, as part of the meet-and-confer process, is ordered to
24 actually respond to each document, or maybe it's the same
25 objection to each document, but maybe fill in a response on the

1 chart, because, you know, they wouldn't -- they wouldn't
2 engage. And --

3 **THE COURT:** I think that's an appropriate suggestion.

4 **MR. WISNER:** That was all, Your Honor. Thank you.

5 **THE COURT:** And so what I would like -- I mean, if
6 anybody wants to argue against that approach, you are free to
7 do so; but if nobody's going to argue against that approach,
8 then what I'm going to do is I'm going to order the parties to
9 submit a revised Protective Order, consistent with what I've
10 stated here. Okay?

11 **MR. HOLLINGSWORTH:** That's fine with Monsanto,
12 Your Honor.

13 **THE COURT:** Okay. And so it sounds like that's fine
14 with the plaintiffs, as well?

15 **MR. MILLER:** Yes, Your Honor.

16 **MS. GREENWALD:** Yes, Your Honor.

17 **THE COURT:** Okay. So when do you want to submit a
18 revised Protective Order?

19 My sort of -- whatever you want to call it; TRO, or
20 whatever I issued in my -- you know, the temporary rule that I
21 adopted in --

22 Was it in the Order to Show Cause?

23 **MR. HOLLINGSWORTH:** Yes.

24 **THE COURT:** That remains in place until a revised
25 Protective Order is adopted.

1 **MS. WAGSTAFF:** Your Honor, as long as the revisions
2 are limited to what Your Honor said, I think we could probably
3 have it submitted to you in a week, from plaintiffs' side. It
4 wouldn't take long.

5 **THE COURT:** Okay. Why don't the parties meet and
6 confer, and submit it by Wednesday of next week? Seems like a
7 good day. So Wednesday will be a revised Protective Order that
8 the parties will have to jointly submit, consistent with what
9 I've proposed and what we've discussed here.

10 **THE CLERK:** That's August 30th.

11 **THE COURT:** August 30th. Okay. So that's that.

12 So, you know, this whole dispute, as annoying as it's
13 been, has sort of a side benefit, which is that it's sort of
14 forced me to start wondering a little bit earlier than I might
15 otherwise have done just what the proceedings are going to look
16 like in December, and who will we be hearing testimony from,
17 and, you know, what precisely the inquiry would be. So I guess
18 I'm happy to hear, you know, any discussion about that; but my
19 initial question to you all is: Were you assuming that we
20 would be limited to hearing testimony from both sides' expert
21 witnesses, or were you assuming that there would be some other
22 testimony or documentary evidence submitted?

23 **MR. HOLLINGSWORTH:** Well, Monsanto -- for Monsanto's
24 part, if I may respond --

25 **THE COURT:** Sure.

1 **MR. HOLLINGSWORTH:** -- we're assuming that *Daubert*
2 puts the burden on the plaintiffs. So we're assuming that the
3 plaintiffs' experts would appear first, and we'd have an
4 opportunity to cross-examine.

5 We also are assuming that we would present our own experts
6 in rebuttal -- or some of them. I think we've submitted six or
7 seven expert reports. We would want to introduce the live
8 testimony of some of those witnesses, if not all.

9 **THE COURT:** Okay.

10 **MR. HOLLINGSWORTH:** And there may be collateral
11 issues that we -- factual issues that I'm not contemplating
12 currently; but I do contemplate that we would submit possibly
13 factual evidence, given Your Honor's concern about the
14 ghostwriting issue, which I think is a false concern, with all
15 due respect, on the part of the Court. So we may have to
16 introduce some sort of factual testimony on that, which would
17 be -- which would be very limited.

18 **THE COURT:** Okay. And I think that would be fine.
19 And I think that would be appropriate if you wanted to do that.

20 **MR. HOLLINGSWORTH:** Thank you.

21 **MR. MILLER:** Good morning, Your Honor.

22 We anticipate all six of our experts testifying live.

23 One procedural question we had was: How long does the
24 Court contemplate? Should we do one expert a day? Two experts
25 a day? What is the Court's wish in that regard?

1 **THE COURT:** Well, I mean, I wonder if it's too
2 difficult for me to answer that question in a vacuum, you know,
3 without -- I haven't read any expert reports yet, or --

4 When are opening briefs due, by the way?

5 **MR. MILLER:** I have that date -- or don't have that
6 date.

7 **MS. WAGSTAFF:** December.

8 **MS. GREENWALD:** It's the 11th.

9 **MS. WAGSTAFF:** Was your question when are we going to
10 be here?

11 **THE COURT:** No. The briefs.

12 **MS. GREENWALD:** October 3rd, I believe, is when
13 Monsanto has the opening *Daubert* briefs.

14 **THE COURT:** Okay.

15 **MS. GREENWALD:** I'll verify that, Your Honor. I'm
16 pretty sure it's that day.

17 **THE COURT:** So all of the experts reports will --

18 **MS. WAGSTAFF:** It's October 6th.

19 **THE COURT:** You're going to be moving to exclude all
20 of their experts, I assume?

21 **MR. HOLLINGSWORTH:** Yes.

22 **THE COURT:** And so there will be motions regarding
23 all six of the experts.

24 **MR. HOLLINGSWORTH:** Yes.

25 **THE COURT:** And do you think, by the way, that it

1 should come in one brief, or six separate briefs; or have you
2 thought about that?

3 **MR. HOLLINGSWORTH:** I think it should come in six
4 separate briefs, but we can do it in one brief.

5 **THE COURT:** I mean, I wonder if it makes --

6 I mean, I assume there will be a lot of overlap in what
7 you want to say about each. And so I wonder if --

8 **MR. HOLLINGSWORTH:** There is a lot of overlap in the
9 testimony of these experts. They're all saying the same thing,
10 basically. So could we think about that, and --

11 **THE COURT:** Yeah. I mean, it strikes me -- I mean,
12 I'm more interested in doing it -- I'm interested in doing it
13 as sort of efficiently as possible, from a written standpoint.

14 **MR. HOLLINGSWORTH:** Yes.

15 **THE COURT:** And I don't know -- you will be a better
16 judge of it than I will -- but it strikes me that having one
17 brief will avoid a lot of repetition, and will allow you to
18 organize it maybe a little bit more by subject matter than
19 by --

20 **MR. HOLLINGSWORTH:** Okay.

21 **THE COURT:** -- than by expert.

22 **MR. HOLLINGSWORTH:** All right.

23 **THE COURT:** I mean, I -- you know, again --

24 **MR. HOLLINGSWORTH:** We'll seriously consider that.

25 So I take back my statement that we would want six different

1 briefs. So we'll seriously consider that.

2 **THE COURT:** Okay. All right. So -- but in any
3 event, by that time I will have --

4 By October 3rd? Was that the date?

5 **MR. HOLLINGSWORTH:** Yes.

6 **THE COURT:** By October 3rd I will have opening briefs
7 from Monsanto --

8 **MR. HOLLINGSWORTH:** Yes.

9 **THE COURT:** -- or an opening or a brief from
10 Monsanto. I'll have all of the experts reports, and whatever
11 other supporting material you're putting in.

12 **MR. HOLLINGSWORTH:** The expert reports have already
13 been exchanged, Your Honor. We're already in the process of
14 taking expert-witness depositions.

15 **THE COURT:** Right.

16 **MR. HOLLINGSWORTH:** We've taken two
17 plaintiff-expert-witness depositions already.

18 **THE COURT:** Okay. And actually that -- I'm sorry I'm
19 jumping around a little bit, but that actually makes me wonder.
20 You know, I think it's very common in litigation for parties to
21 submit deposition excerpts. And often the Judge is wanting to
22 read more than the portions that the parties submitted. And
23 then sometimes the other side submits other portions of the
24 deposition transcript. And you're having to bounce back and
25 forth between two different documents, and sort of collate the

1 pages, or whatever.

2 I wonder if the best thing, given the importance and size
3 of these issues, would be to just require you to submit full,
4 full transcripts of every expert's deposition, so that I have
5 that at my disposal.

6 **MR. HOLLINGSWORTH:** So far, we have designated the
7 depositions as confidential. So if we did that for
8 Your Honor -- we'd be happy to do that, but we wouldn't want it
9 to be on a public docket.

10 **THE COURT:** Well, it's not at all obvious to me why
11 the entire deposition transcript of these experts should be
12 designated confidential. I understand why you'd want to
13 initially have the entire deposition transcript designated as
14 confidential, you know, in an abundance of caution; but these
15 proceedings that we are having in December are not going to be
16 confidential.

17 **MR. HOLLINGSWORTH:** Correct. And the portions of the
18 briefs that we rely on would not be confidential. I mean,
19 depositions that we would rely on would not be confidential,
20 but the entire transcript we have thus far designated
21 confidential. And I think the plaintiffs have agreed on that.
22 I'm not sure.

23 **THE COURT:** I'm sure they --

24 **MS. WAGSTAFF:** No, no, no.

25 **MS. GREENWALD:** No.

1 **THE COURT:** Well, I mean, you know, it's often the
2 case that when parties agree that stuff should be confidential,
3 that it shouldn't be confidential; but I want the full
4 transcripts of all of the depositions. And so you can, you
5 know, submit -- you can, you know, file a motion to seal
6 portions of it that legitimately should be sealed; but I'm
7 having a hard time imagining significant parts of these
8 deposition transcripts being sealed, and having a hard time
9 thinking of reasons why significant portions of these
10 deposition transcripts would be confidential. But in any
11 event, I want the entirety of -- I want the entire deposition
12 transcript of every expert witness who's being relied on in
13 this case.

14 **MR. MILLER:** Your Honor, perhaps the Court would want
15 a written copy of our expert reports now. It's up to the
16 Court. We offer that, if the Court wants it.

17 **THE COURT:** I mean, that would be fine. Yeah. Why
18 not? That would actually be good. Yeah.

19 **MR. MILLER:** We could just --

20 **THE COURT:** That reminds me of another thing I want
21 to raise with you, but I'll hold off on for a second. Yes, I
22 would like that. That would be great if you all could. I
23 mean, you can lodge them, so that -- because if you --

24 Are there aspects of the expert reports that are
25 confidential?

1 **MR. HOLLINGSWORTH:** Well, I hadn't come here prepared
2 to address that, actually.

3 **THE COURT:** Okay.

4 **MR. HOLLINGSWORTH:** But if we could deliver them
5 though chambers, if that's --

6 **THE COURT:** That's fine for now. I mean, I'm
7 assuming all of these experts reports are, again, not going to
8 be confidential, and they're going to be part of the public
9 record; but if for now you just want to lodge the expert
10 reports in chambers, that's fine. Why don't you do that by --

11 **MR. HOLLINGSWORTH:** We can do that immediately.

12 **MR. MILLER:** We can have that done in 48 hours.

13 **THE COURT:** By Friday. Close of business tomorrow,
14 or Monday, if that's best. Maybe -- I don't wanting to go
15 through a fire drill, or whatever.

16 **MR. HOLLINGSWORTH:** Okay.

17 **THE COURT:** So by Monday, everybody -- both of you
18 lodge copies of the expert reports.

19 **MR. MILLER:** Very well, Your Honor.

20 **MR. HOLLINGSWORTH:** Yes, Your Honor.

21 **MR. MILLER:** Substantively on *Daubert*, we had
22 contemplated that plaintiffs put their experts on, and then the
23 Court decide whether, under *Daubert's* standards, they meet the
24 threshold, and the case moves on to Phase Two.

25 I wasn't contemplating and requesting the Court to

1 consider that Monsanto's experts need not testify in that
2 regard. Simply, is it plaintiffs' experts are the
3 scientifically reliable under the standards that are set in
4 *Daubert* and here in the Ninth Circuit.

5 **THE COURT:** No, but their experts are going to
6 testify about the standard, and whether your experts satisfy
7 the standards. I mean, we often rely on expert testimony to
8 help us determine whether expert testimony satisfies the
9 applicable standards.

10 **MR. MILLER:** All right, Your Honor. Thank you.

11 **THE COURT:** And that brings me -- that's a good
12 lead-in to another issue that's been on my mind. I've
13 continued to have -- I raised this issue in some form with you
14 all very early in the litigation. And I don't remember the
15 details of our discussion about it, but as the hearings
16 approach, I find myself wondering again, or maybe wondering for
17 the first time -- I can't remember exactly if I should have --
18 I should hire a Court-appointed expert. It would not be for
19 the purpose of preparing a report, and it would not be for the
20 purpose of opining; you know, providing an opinion on the
21 ultimate issue that we're deciding in Phase One.

22 It would be kind of, you know, like almost a glorified law
23 clerk with expertise in the field, kind of to help, you know,
24 sort of sift through the reports, and sift through the
25 testimony, and help me understand the concepts that are being

1 discussed; the scientific concepts that are being discussed by
2 the experts.

3 Thoughts?

4 **MR. HOLLINGSWORTH:** We opposed that, Your Honor, the
5 first time you raised it. I think the plaintiffs did, too.
6 It's probably the only thing we agreed on in the entire case so
7 far.

8 **THE COURT:** Which makes me feel like I should
9 disagree with you.

10 (Laughter in the courtroom.)

11 **MR. HOLLINGSWORTH:** Sounds like you're going to.

12 **THE COURT:** Well, I'm sort of leaning -- I'm leaning
13 there, but can you remind me of the basis for your objections?

14 **MR. HOLLINGSWORTH:** I -- I don't know any Courts that
15 have done this, save one, since 1993, that I'm familiar with --

16 **THE COURT:** Mm-hm.

17 **MR. HOLLINGSWORTH:** -- in one case.

18 And that -- you talk about an annoying, painful process --

19 **THE COURT:** Uh-huh.

20 **MR. HOLLINGSWORTH:** -- of helping the Court come to a
21 decision about which --

22 **THE COURT:** Why was it annoying and painful?

23 **MR. HOLLINGSWORTH:** Well, because the Court -- the
24 Court offered the parties the right to comment about potential
25 candidates. We went down -- that was a long, drawn-out --

1 **THE COURT:** Yeah, that sounds like a painful process.

2 **MR. HOLLINGSWORTH:** That's painful. Very painful.

3 **THE COURT:** So we could just dispose of that.

4 **MR. HOLLINGSWORTH:** Yeah, you could dispose of that.

5 I don't -- that would be a stretch of Your Honor's discretion
6 that I hadn't heard before; that Your Honor could go select his
7 own expert, without any input from the parties.

8 **THE COURT:** Yeah. I don't know. I haven't looked
9 into it yet, so I don't know what the, you know, parameters of
10 my discretion are in that regard.

11 But substantively, like, what's the problem with having
12 somebody like that appointed, you know, as a Court-appointed
13 expert to help the Court, you know, sort of get a grip on the
14 scientific issues in the case?

15 **MR. HOLLINGSWORTH:** Well, I think there's a reference
16 to that in the *Daubert* Opinion, itself, that's only a footnote.
17 I think I know which judge was responsible for it. And it
18 hasn't been -- you know, it just has not been followed very
19 much, at all -- if at all, other than in one case that I'm
20 aware of.

21 And the reason is I think that the majority opinion --
22 seven-to-two opinion -- very much favored the notion that
23 federal judges should act as gate keepers. The imprimatur of
24 an expert witness' opinion is so powerful with a jury, that if
25 it's misleading or it's not based on sound science, he should

1 figure out a way to gate-keep that out, in accordance with our
2 opinion; and that the notion that federal judges weren't
3 qualified to don the white coat of a scientist is something
4 that the Court did not accept.

5 I mean, Judge Rehnquist was strong on that issue in his
6 dissent, but by the time the second case came about, which is
7 *Joiner versus General Electric*, Rehnquist wrote the majority
8 opinion. So the Court was pretty solid in its view that,
9 despite a lot of controversy about whether judges are competent
10 to understand science -- took the position that the judge has
11 to be a gatekeeper; the judge, in and of himself.

12 **THE COURT:** But I --

13 **MR. HOLLINGSWORTH:** And I don't know many judges --

14 **THE COURT:** But I don't understand. I mean, I guess
15 I'm a little confused about what you're saying. And I should
16 go back and read the footnote that you're talking about; but I
17 mean, Courts hire/appoint experts all of the time to help them
18 understand technical matters. Right? I mean, it happens all
19 of the time in patent cases, for example.

20 **MR. HOLLINGSWORTH:** I'm not familiar with patent
21 cases.

22 **THE COURT:** So I guess I'm -- you seem to be said
23 that there's, like, some prohibition on doing that.

24 **MR. HOLLINGSWORTH:** No, no. I'm not saying that. In
25 fact, I said that there is a reference within the *Daubert*

1 Opinion to the fact that this is a possibility under the
2 Federal Rules, because the Federal Rules provide --

3 **THE COURT:** Oh, oh. Oh, okay.

4 **MR. HOLLINGSWORTH:** -- for this possibility, but
5 that's been honored in the breach -- almost totally in the
6 breach -- in the course of the last 25 years or 24 years.

7 **THE COURT:** Really? I thought it was sort of fairly
8 common in these MDLs for Court-appointed experts to be hired to
9 help Courts deal with --

10 **MR. HOLLINGSWORTH:** Well, perhaps we should research
11 that.

12 **THE COURT:** Mm-hm.

13 **MR. HOLLINGSWORTH:** I'm not familiar with that
14 process --

15 **THE COURT:** Okay. Well, for now, it's --

16 **MR. HOLLINGSWORTH:** -- other than as a rare
17 exception.

18 **THE COURT:** Okay. Any reaction?

19 **MR. MILLER:** Let me agree with Mr. Hollingsworth.
20 I've been doing this for many, many years; many, many decades.
21 I've never seen one. I've never seen a Court-appointed expert.
22 *Avandia, Actos, Fen-Phen, Zyprexa*, and on and on. *Vioxx*. I
23 just haven't seen a Court-appointed expert.

24 And I think the plaintiffs and defendants, I would
25 imagine, are going to do a pretty good job of turning science

1 into not only what the Court can understand, but for Phase Two,
2 science understood by a jury. So I think we can get that done
3 without it, but -- and I think it's hard to find an expert.
4 They're -- I'd say the majority --

5 **THE COURT:** Other than it's not done commonly, is
6 there any other reason not to do it?

7 **MR. MILLER:** I think -- well, I do think, yeah,
8 because you could wind up inadvertently getting an expert
9 that's already weighed in on a scientific controversy. There
10 is a controversy out there. And we think the majority of
11 scientists are strong our way, but the scientists that -- there
12 are some that are their way, and I guess a few that haven't
13 heard about it yet; but the odds of getting one who hasn't
14 heard about it who's going to come in -- and then what's he
15 going to do? Not usurp, hopefully, an Article III Judge's
16 responsibilities. And he's going to just explain some things,
17 I guess, but that --

18 I think we -- the experts that are going to be coming in
19 can do that for both sides. And then the advocacy skills and
20 intelligence and impartiality of the Court just gets it done.
21 That's sort of the way we've both seen it go, year after year,
22 case after case.

23 **THE COURT:** Mm-hm. Okay. Well, it's something that
24 I'm going to think about a little bit more.

25 **MR. MILLER:** I understand.

1 **THE COURT:** Okay. And then -- so I took us on a bit
2 of a detour, but we were talking about the process; these
3 hearings that will be taking place in December.

4 And you've got the experts. And you may want to put on, I
5 guess, for lack of a better word, fact witnesses on this issue
6 of ghostwriting, or manipulating science, or whatever. I know
7 you object to those terms, but on that issue you want --

8 **MR. HOLLINGSWORTH:** We may bring into court one of
9 the authors of those papers that they say are ghostwritten.

10 **THE COURT:** Okay.

11 **MR. HOLLINGSWORTH:** So I think Your Honor would like
12 to talk to someone like that, based on Your Honor's statements
13 earlier that you thought that that was a disturbing thing from
14 the e-mails that you read.

15 **THE COURT:** Uh-huh.

16 **MR. MILLER:** If I could, Your Honor, if they're going
17 to bring in one of the authors, we'd like to bring in
18 Dr. William Heydens, who is at Monsanto, who we say did do the
19 ghostwriting. So I think that would be a fair --

20 **THE COURT:** Right. So I mean -- so it seems like
21 maybe what needs to happen here is there needs to be an
22 exchange of Witness Lists and, you know, a process for
23 resolving any disputes about which witnesses will be allowed to
24 testify at this phase. Does that sound right?

25 **MR. MILLER:** That's sounds right, Your Honor.

1 **MR. HOLLINGSWORTH:** With one caveat, Your Honor.
2 Dr. Heydens has already been deposed for seven and a half
3 hours. His deposition is a matter of record.

4 **THE COURT:** Well, he --

5 **MR. HOLLINGSWORTH:** So that's a lot of testimony.

6 **THE COURT:** Yeah, but I mean -- and it would be fine
7 to have, you know, the deposition testimony be put in, in lieu
8 of live testimony --

9 **MR. HOLLINGSWORTH:** Sure.

10 **THE COURT:** -- and particularly if it's not on a --
11 I mean, if it's on a central matter, I think it would be
12 preferable to have live testimony --

13 **MR. HOLLINGSWORTH:** Yes.

14 **THE COURT:** -- but it sounds like what needs to
15 happen is -- you know, we're having the experts. And we're
16 going to have some degree of fact testimony, I guess, is the
17 best way to describe it. I'm not sure, you know, if it is the
18 best way to describe it; but for lack of a better word, fact
19 testimony on these issues we've been discussing. And that will
20 come from both -- of course, come from both sides; presumably
21 come from both sides.

22 And so should we set a deadline for the exchange of
23 Witness Lists and, you know, set, I mean, a further
24 case-management conference at some point in the next couple
25 months to discuss that issue, and any further issue --

1 case-management issues that need to be discussed?

2 **MR. MILLER:** Yes, Your Honor. I would suggest that
3 after the defendant's expert reports are in and they've
4 completed deposing our experts, at some point a case-management
5 conference, to see exactly the timing of things. When should
6 we tell experts to be here? And list. And how is it going?
7 And, yes, a case-management conference.

8 **THE COURT:** Yeah. And, I mean, the upshot -- we've
9 blocked out that entire week. Right, Kristen?

10 **THE CLERK:** Yes.

11 **THE COURT:** And so we -- and if it needs to be more
12 than that entire week, you know, we'll figure out a way to make
13 that happen, too.

14 **MR. MILLER:** Very well.

15 **THE COURT:** I mean, this -- you know, obviously, this
16 is --

17 Let me look at my calendar real quick.

18 (Pause in proceedings.)

19 **THE COURT:** So -- but for me to say right now, *Okay.*
20 *I only want one expert testifying for X amount of time, or --*

21 **MR. MILLER:** I understand.

22 **THE COURT:** I mean, whatever. I mean, I want us to
23 take whatever time is necessary to give me as good an
24 understanding as I'm capable of developing on these issues.

25 **MR. MILLER:** I understand. I understand.

1 **THE COURT:** So I think, though -- so I think that
2 what you should do is you should put together a list of
3 witnesses, and you should kind of propose a schedule. And I'm
4 not going to hold you to time limits, or anything like that;
5 but propose a schedule for how long you believe each witness
6 will testify for, and on which day, and all of that kind of
7 stuff.

8 **MR. MILLER:** Very well.

9 **THE COURT:** So when do you all want do that?

10 **MR. MILLER:** We would need a couple of weeks to just
11 schedule, and see which experts are available on which date, so
12 we could --

13 **THE COURT:** Yeah. That's fine. I mean, it's only
14 you know late August. You know. So --

15 **MR. MILLER:** Yeah, we could --

16 (Discussion off the record.)

17 **THE COURT:** And when are the --

18 **MS. WAGSTAFF:** Briefing is due.

19 The depositions are done September 22nd.

20 **THE COURT:** Okay.

21 **MS. WAGSTAFF:** All of them by both sides.

22 The first briefing starts October 6th.

23 And we're going to spend October and November briefing.

24 The final reply, because we sort of have dual tracks, is
25 due right before Thanksgiving.

1 **MS. GREENWALD:** It's November 10th. I just looked.

2 **MS. WAGSTAFF:** Yeah. So I would propose that we come
3 back here in October at some point with, you know, either
4 exchanging Exhibit Lists before or after. You know. And I
5 don't know if we would need to depose someone who they have on
6 their list that we didn't know about, or whatever. I don't
7 know until we see their list, but that's what I would propose:
8 As of October, coming back, with an exchange of the Witness
9 Lists maybe right before.

10 **THE COURT:** Okay. Does that sound good to you all?

11 **MR. HOLLINGSWORTH:** Yes.

12 **MR. MILLER:** Yes.

13 **THE COURT:** Okay. So we'll have you -- what we'll do
14 is we'll have you come back in October. And we'll have you
15 file a case-management or status report or case-management
16 statement, you know, seven days before that. And that would
17 require you to exchange Witness Lists, and whatnot prior to the
18 filing of that case-management statement. So what date should
19 we set for you all to come back?

20 **MS. WAGSTAFF:** Does Your Honor like Thursdays? Is
21 that --

22 **THE COURT:** I don't particularly care. I mean, I'm
23 happy to specially set it for, like, a Wednesday.

24 **THE CLERK:** (Shakes head from side to side.)

25 **THE COURT:** Kristen is shaking her head.

1 **MR. MILLER:** Whatever the Court has available.

2 **THE CLERK:** If you want to special set it, we can do
3 Monday the 2nd. We can do -- I'm looking at Thursday
4 afternoons.

5 (Discussion off the record.)

6 **THE CLERK:** We could even do the 5th or the 12th in
7 the afternoon.

8 **MS. WAGSTAFF:** Your Honor, there's a motion currently
9 on schedule for October 5th that would necessitate Mr. Miller,
10 Ms. Greenwald, and me to be here. So we could kind of couple
11 that together, if that makes sense for you all.

12 **THE COURT:** What's the motion scheduled for
13 October 5th?

14 **MR. MILLER:** The Rowland deposition. Motion for
15 fees. There's a motion for sanctions for asking --

16 **MS. WAGSTAFF:** Their attorney has filed a motion for
17 attorneys' fees.

18 **MR. MILLER:** Attorneys' fees; not sanctions.

19 **THE COURT:** Whose attorney has asked for attorneys'
20 fees?

21 **MR. MILLER:** Mr. Rowland's attorney is asking for,
22 fees, for us asking for the motion to compel.

23 **THE COURT:** I have a feeling you're not going to need
24 to be here on that.

25 **MR. MILLER:** I was not planning on being here. I was

1 planning on doing it by phone, obviously.

2 **THE COURT:** We can certainly have a case-management
3 conference on that day.

4 **MR. HOLLINGSWORTH:** October 5th?

5 **THE COURT:** Yeah. Does that work?

6 **THE CLERK:** That's fine. Do you want to specially
7 set it to allow more time?

8 **THE COURT:** Yeah. We should set it for the
9 afternoon.

10 **THE CLERK:** Like, 2:00 o'clock?

11 **THE COURT:** Yeah.

12 **MR. MILLER:** Very well.

13 **THE COURT:** Okay. So we'll have a case-management
14 conference on October 5th at 2:00 o'clock. We will move that
15 hearing -- that Rowland hearing -- to 2:00 o'clock. I may end
16 up vacating that hearing, but deciding on the papers -- but so
17 that will be the 5th at 2:00 o'clock.

18 And then seven days prior to that, a joint case management
19 statement will be due. Or did we set up some protocol for --
20 some different protocol for filing case management statements?
21 I can't remember.

22 **MR. MILLER:** Me neither. I don't remember.

23 **MS. WAGSTAFF:** I remember talking about it. I can
24 confer with -- I think at one point we can confer and look at
25 that, and file whatever we have decided; or we can file a joint

1 one.

2 **THE COURT:** Okay. Well, as of now, I'll require you
3 to file a joint case management statement seven days prior; but
4 you can go back and look. If we have some other protocol,
5 you're free to submit a stipulation changing the schedule to
6 that other protocol.

7 But I want Witness Lists, and any discussion of
8 disagreement you have about the right of certain witnesses to
9 testify; the right of the parties to call certain witnesses.

10 I want to hear from you further on, you know, whether
11 there should be a Court-appointed expert; again, not to provide
12 a report or an opinion, but just to assist the Court in sort of
13 understanding the expert testimony.

14 What else should be in there?

15 Oh, and a proposed schedule for the week. Who's going to
16 testify when; how long -- roughly how long -- an estimate of
17 how long it's going to take, and all of that.

18 **MS. WAGSTAFF:** Your Honor, one of my colleagues just
19 pointed out to me that the *Daubert* motions that I had told you
20 the date of is October 6th.

21 **THE COURT:** Mm-hm.

22 **MS. WAGSTAFF:** And so in light of the fact that we
23 may not have to be here on October 5th, he suggested that we
24 push our next case management to the week of the 16th, so that
25 we can see their *Daubert* motions before we give our Witness

1 Lists, which sort of makes a little bit more sense
2 logistically.

3 **THE COURT:** Uh-huh.

4 **MS. WAGSTAFF:** And so if we could -- even though I
5 just requested --

6 What did you say?

7 **MS. GREENWALD:** (Indicating).

8 **MS. WAGSTAFF:** Early in the week of the 16th might --
9 October 16th might make more sense. We could come a little bit
10 more educated and informed to you.

11 **THE COURT:** That sounds fine. I mean, we have a
12 trial that is almost certainly going to go that week, starting
13 on Monday.

14 **MR. MILLER:** October 12?

15 **MS. GREENWALD:** How about the week before?

16 **THE CLERK:** That's better, I think. Yeah. I think
17 it's better. Yeah. October 12th is actually really light.

18 **THE COURT:** I was sort of thinking I was wondering
19 about the 26th, because I don't know if that's getting too
20 close to the hearings, but --

21 **THE CLERK:** You have a special-set criminal hearing
22 in the afternoon that's going to take a long time, I think.

23 **THE COURT:** On the 26th?

24 **THE CLERK:** Yeah.

25 **MS. WAGSTAFF:** The week of October 23rd would work,

1 as well.

2 **THE COURT:** Let me get back to you on this.

3 Well, maybe -- let's try and plough through figuring it
4 out. So we have trial 16th, scheduled to go a couple weeks.

5 **THE CLERK:** Mm-hm.

6 **THE COURT:** Almost certainly a civil case, but almost
7 certainly going to go.

8 **THE CLERK:** Mm-hm.

9 **MS. WAGSTAFF:** Your Honor, as mentioned on our call
10 last week, Ms. Greenwald's moving her daughter into college,
11 and she needs to go.

12 **MS. GREENWALD:** I'm sorry, Your Honor. I don't mean
13 to be rude. I appreciate it.

14 **THE COURT:** Go ahead. Yeah. It does make sense to
15 do it after the *Daubert* motions come in.

16 What about -- what if we scheduled it for October 27th, on
17 the theory that --

18 **THE CLERK:** I won't be here.

19 **THE COURT:** -- on the theory that that trial --
20 there's a fair chance that trial will be over.

21 **THE CLERK:** Yeah. That's fine. I just won't be
22 here.

23 **THE COURT:** Okay. Congratulations.

24 Kristen says she won't be here on October 27th. That's
25 why I said "Congratulations."

1 Yeah. Let's do the 27th at, like -- just to be safe,
2 2:00 o'clock on the 27th.

3 **MS. WAGSTAFF:** Your Honor, that day doesn't work for
4 me, but there's luckily three of us, so my co-leads will be
5 here.

6 **THE COURT:** The benefits of a bloated leadership
7 structure.

8 **MS. WAGSTAFF:** Oh, that word has --

9 **MR. MILLER:** We'll be here, Your Honor.

10 **MR. HOLLINGSWORTH:** Your Honor, is it possible to do
11 the 26th instead of the 27th?

12 **THE COURT:** Apparently not, Kristen tells me.

13 **MS. WAGSTAFF:** 26th would work for me.

14 **THE COURT:** What's specially set on the 27th?

15 **THE CLERK:** The afternoon is all of the pretrial
16 motions in the *Morgovsky* matter. And I just found out that
17 there's going to be at least four from one of the defendants.
18 And then there's a second defendant who's going to have more,
19 and I don't even know how many they have.

20 **THE COURT:** Okay.

21 **THE CLERK:** They had set this for 3:00. You could
22 set this for 3:00.

23 **THE COURT:** Set this for 3:00?

24 **THE CLERK:** Yeah.

25 **THE COURT:** When is the *Morgovsky* matter being heard?

1 **THE CLERK:** 2:00.

2 **THE COURT:** I don't think that's going to work. I
3 think there's a chance those will go away, but I think I'll
4 need to set it for Friday, the 27th. Would it be helpful to do
5 it in the morning, rather than the afternoon?

6 **MR. HOLLINGSWORTH:** Yes.

7 **THE COURT:** Okay. We'll do it at 10:00 o'clock on
8 Friday, the 27th.

9 **MR. HOLLINGSWORTH:** Thank you.

10 **THE COURT:** And so the case-management statement will
11 the joint case-management statement be due a week before then.
12 And the parties will be required to exchange their Exhibit
13 Lists, and proposed schedules. And sorry. Did I say Exhibit
14 Lists?

15 **MR. MILLER:** I'm sorry.

16 **MS. WAGSTAFF:** You said "Exhibit Lists."

17 **THE COURT:** So the parties will be required to
18 exchange their Witness Lists and their proposed schedules seven
19 days before the case-management statement is due.

20 Should I also require you to exchange your Exhibit Lists
21 on that date, or is that too early?

22 **MS. WAGSTAFF:** I think that's too early, Your Honor.

23 **THE COURT:** Okay. All right. When would it be
24 reasonable to have you exchange Exhibit Lists?

25 **MS. WAGSTAFF:** Your Honor, I think probably two weeks

1 before the hearing might be appropriate. Two to three weeks
2 before the hearing.

3 **THE CLERK:** Before the CMC?

4 **THE COURT:** No, before the *Daubert* hearings.

5 **MS. WAGSTAFF:** Yeah, which puts it around November.

6 If you look at a calendar, that puts it at around the 13th or
7 the 20th of November; somewhere around there.

8 **THE COURT:** Okay.

9 **MR. HOLLINGSWORTH:** We think the sooner the better on
10 that.

11 **THE COURT:** Require an exchange of Exhibit Lists on
12 the 13th of November.

13 **THE CLERK:** Witness Lists?

14 **THE COURT:** No. Exhibit Lists.

15 Yeah. Witness Lists are being exchanged two weeks before
16 our October 27th CMC.

17 **THE CLERK:** Okay.

18 **MS. WAGSTAFF:** Your Honor, do you anticipate
19 objections being entertained to the Exhibit List?

20 **THE COURT:** I mean, you know, this is not a jury
21 trial. So the guidance I can give you is that unless there's
22 anything, like, very significant, you know, I can figure out
23 what's relevant and what's not relevant in the course of the
24 proceedings in December.

25 **MS. WAGSTAFF:** Okay.

1 **THE COURT:** So it has to be something that would be
 2 really time wasting, or really problematic for some other
 3 reason.

4 **MS. WAGSTAFF:** Okay. So I would take that to mean
 5 that failure to file an objection when they serve their Exhibit
 6 List doesn't waive an objection. Is that --

7 **THE COURT:** Yeah, because you can always argue --
 8 yeah. You can always, you know, argue or establish through
 9 cross-examination that something that somebody's relying on is
 10 not relevant.

11 **MS. WAGSTAFF:** Okay.

12 **THE COURT:** Yeah. Okay. Anything else?

13 **MR. MILLER:** No, Your Honor.

14 **THE COURT:** All right. Thank you.

15 **MR. MILLER:** Thank you.

16 **THE CLERK:** Court is adjourned.

17 (At 12:40 p.m. the proceedings were adjourned.)

18 I certify that the foregoing is a correct transcript from the
 19 record of proceedings in the above-entitled matter.

20

21 

22 _____ August 25, 2017

Signature of Court Reporter/Transcriber Date

23 Lydia Zinn

24

25