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8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA

11 IN RE: ROUNDUP PRODUCTS
LIABILITY LITIGATION

Case No. 3:16-md-02741-VC
MDL No. 2741

**MONSANTO COMPANY'S APPLICATION
FOR EMERGENCY RELIEF**

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13 This document relates to:

14 ALL ACTIONS
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1 Monsanto Company (“Monsanto”) files this application for emergency relief in response
2 to plaintiffs’ counsel’s flagrant violation of this Court’s Orders and their complete disregard for
3 the procedures this Court has established to resolve confidentiality disputes. Plaintiffs’ counsel
4 recklessly and intentionally released 86 documents designated as confidential under the terms of
5 the Court’s Protective and Confidentiality Order despite Monsanto’s clear statements in meet-
6 and-confer discussions that plaintiffs did not have proper grounds to seek de-designation of the
7 documents’ confidential standing. These 86 documents include 24 documents that this Court
8 expressly refused to de-designate in response to an earlier plaintiffs’ challenge. Moreover, in
9 what now appears to have been a deliberate attempt to mislead Monsanto, plaintiffs’ counsel
10 engaged in this misconduct after telling Monsanto that it would either file a joint letter or motion
11 with the Court or elect to drop their confidentiality challenge and just four days after advising
12 Monsanto’s counsel that plaintiffs had decided *not* to submit a joint letter to the Court about the
13 confidentiality dispute. Instead of seeking Court review of the confidentiality designations or
14 clarification of the Court’s Orders, plaintiffs’ counsel willfully released these documents and
15 conducted a media campaign with the press, proclaiming in the New York Times that: “Now the
16 world gets to see these documents that would otherwise remain secret.” *See* Danny Hakim,
17 *Monsanto Emails Raise Issue of Influencing Research on Roundup Weed Killer*, N.Y. Times
18 (Aug. 1, 2017) (quoting Brent Wisner) (attached as Exhibit 7 to Declaration of Gary I. Rubin in
19 Support of Monsanto’s Emergency Request Application (“Rubin Decl.”) (attached hereto as
20 Exhibit A)). Plaintiffs’ counsel also falsely told the New York Times reporter, among others,
21 that Monsanto’s lawyers “didn’t properly take action to preserve the confidentiality of these
22 documents.” *Id.* (quoting Wisner). Then, in a post hoc attempt to justify their contumacious
23 actions, plaintiffs filed last night a motion with the Court to “clarify” or alternatively vacate the
24 very same Orders they had just so brazenly violated, claiming the Court surely did not intend its
25 prior Orders to mean what they say or, if it did, that those Orders are improper and
26 unconstitutional.

1 Such conduct is prohibited and sanctionable. Plaintiffs’ latest gambit to try their case in
2 the press is part of a longstanding pattern that has resulted in repeated and pointed admonitions
3 and instructions from the Court. In the most recent hearing with the Court addressing these
4 issues, the Court told plaintiffs’ counsel in no uncertain terms that it was improper for them to
5 use this litigation “as a vehicle to conduct a PR campaign. It’s obvious to me that that is what
6 you’ve been trying to do, and that is going to stop.” Hr’g Tr. at 20 (May 11, 2017) (cited
7 excerpts attached hereto as Exhibit B). Through PTO 15 and PTO 20, the Court also put
8 procedures in place to prevent plaintiffs from seeking to de-designate any confidential
9 documents without first making a showing of relevance and litigation need.

10 Plaintiffs’ counsel have blatantly disregarded the Court’s Orders, and once again are
11 seeking to try their case in the press through out-of-context disclosures of documents and
12 misleading spin. Because the Court’s clear Orders have proven insufficient to stop plaintiffs’
13 counsel’s improper conduct, Monsanto seeks emergency relief requiring plaintiffs’ counsel to
14 immediately remove the confidential Monsanto documents from its website, inform in writing
15 each of the media outlets who have now received these documents that plaintiffs’ counsel
16 released them in violation of this Court’s Orders, and include a public statement on their firm
17 website likewise announcing their violation of the Court’s Orders. Monsanto also requests that
18 this Court order additional sanctions and relief as it deems appropriate, including removal of the
19 responsible plaintiffs’ law firms from the Plaintiffs’ Executive Committee and discovery into the
20 nature of the plaintiffs’ counsel’s improper contact with media outlets regarding the confidential
21 documents.¹

22 BACKGROUND

23 On December 9, 2016, this Court entered a Protective and Confidentiality Order, which
24 requires, among other things, that “Confidential Material shall be treated by the Parties and their
25 counsel as being confidential and private.” Protective and Confidentiality Order ¶ 11, ECF No.

26 ¹ Pursuant to the Court’s Standing Order regarding Emergency Applications, Monsanto has
27 advised plaintiffs’ counsel of its intention to seek emergency relief and informed the Courtroom
28 Deputy, by email and phone, that it intended to file this motion. *See* Standing Order for Civil
Cases Before Judge Vince Chhabria ¶¶ 2-4.

1 64 (“Protective Order”). As this Court has explained, the Protective Order was issued in part to
2 facilitate the very rapid production by Monsanto of “a ton of documents” to meet the Court’s
3 scheduling order leading to an evidentiary *Daubert* hearing on the issue of general causation in
4 2017. Hr’g Tr. at 52-55 (Feb. 27, 2017) (cited excerpts attached as Exhibit 3C to Rubin Decl.).
5 As originally issued, the Protective Order included a provision whereby Plaintiffs’ counsel could
6 challenge the designation of discovery documents as confidential through a dispute resolution
7 process. Protective Order ¶ 16. This provision quickly became the focus of dispute, however,
8 when plaintiffs’ counsel sought to use the provision to challenge the confidentiality of nearly 200
9 documents without any showing that these documents were relevant to the general causation
10 issue currently pending before the Court. Plaintiffs’ misuse of this provision resulted in
11 protracted meet-and-confer efforts in which they sought to compel Monsanto to provide a
12 document-by-document justification for each confidentiality designation. *See* Joint Discovery
13 Letter Brief on Confidentiality Challenges at 3 n.5 (Feb. 10, 2017), ECF No. 140 (discussing
14 four hour meet-and-confer conference spread over two days not including the many additional
15 hours of attorney time spent preparing for the conferences).

16 Pursuant to this Court’s Standing Order, a joint letter was submitted on February 10,
17 2017, in which the parties presented their competing views of the proper procedure for any such
18 confidentiality challenges going forward. *See id.* Monsanto requested that all such challenges to
19 confidentiality designations be deferred until and unless plaintiffs’ counsel could show a specific
20 litigation need for de-designation of a challenged document. *See id.* Plaintiffs, in opposition,
21 argued that the dispute resolution provision of the protective order should remain as is,
22 contending that “because Monsanto desires to avoid public disclosure of embarrassing
23 documents, it seeks to shift the burden by adding an undefined ‘litigation need’ as a burden
24 Plaintiff must satisfy prior to asserting a confidentiality challenge.” *Id.* at 5.

25 The Court heard argument on the parties’ letter brief on February 27, 2017, and ruled in
26 favor of Monsanto. At this hearing, the Court expressly limited the use of the Protective Order’s
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28

1 ¶ 16 dispute resolution process to documents for which plaintiffs’ counsel first made a showing
2 of litigation need:

3 I don’t want this process and the protective order to be used to dedesignate them,
4 *unless they really are going to have – be used in the litigation. . . .* But the bottom
5 line is I think it is appropriate for Monsanto to say that if these documents – they
6 may not, you know, technically meet the definition of confidential in the
7 protective order, but there’s – they don’t – they’re not going to be used in this
8 litigation, so leave us alone. I think that is appropriate, okay.

9 ...

10 And I don’t know if the protective order needs to be modified for that purpose or
11 if we can just operate under that understanding. But I think it is appropriate – you
12 know, I think we have a problem – I have a problem with Monsanto because it’s –
13 it is insisting that stuff be filed under seal that should not be filed under seal. But
14 I have a problem with the idea of, you know, calling Monsanto on its
15 confidentiality designations and making that – you know, asking them to
16 dedesignate documents that are not reasonably likely to be used in the litigation.
17 *And I would like us all to operate under those principles.*

18 [Plaintiffs’ counsel]: Okay.

19 Feb. 27, 2017 Hr’g Tr. at 54-55 (emphasis added). The Court further explained that because of
20 the massive size of the document production and the need to produce as quickly as possible,
21 Monsanto had been required to produce documents without the normal opportunity for disputes
22 over relevancy and that it “has to err on the side of designating certain things as confidential, and
23 I don’t think Monsanto should be faulted for that.” *Id.* at 54.

24 The Court formalized its ruling in Pretrial Order No. 15, holding that the “dispute
25 [regarding the designation of confidential documents] is resolved in favor of Monsanto. As
26 explained at the [February 27] hearing, the Court will not entertain any challenge by the
27 plaintiffs to a confidentiality designation unless they can explain why the document is likely to
28 be relevant in the litigation.” Pretrial Order No. 15, at 4 (Mar. 13, 2017), ECF No. 186.
Through this ruling, the Court specifically denied plaintiffs’ motion to de-designate 24 of the 86
documents that plaintiffs now have fed to the media. *See* Rubin Decl. ¶ 5.

1 Following PTO 15, plaintiffs’ counsel sought to challenge the confidentiality of
2 documents by attaching them en masse to court filings, in an attempt to force Monsanto to file
3 motions to keep the documents under seal. The Court made clear that this attempted end-run
4 around PTO 15 was not acceptable. In Pretrial Order No. 20, the Court reiterated its prior ruling
5 that it “will not entertain any challenge by the plaintiffs to a confidentiality designation unless
6 they can explain why the document is likely to be relevant in the litigation.” Pretrial Order No.
7 20, at 1 (May 1, 2017), ECF No. 266 (quoting Pretrial Order No. 15, at 4). The Court went on to
8 recognize that plaintiffs were seeking to de-designate documents in order to litigate their case in
9 the media and chastised them for doing so: “In this phase of the MDL, the proper remedy for
10 overdesignation is to correct the discrete instances of overdesignation that require correction
11 given the needs of the litigation. *The plaintiffs will not be permitted to use this lawsuit as a*
12 *means of feeding the media documents that aren’t actually relevant to the lawsuit.*” *Id.* at 2
13 (emphasis added).

14 In a subsequent Court hearing on May 11, 2017, the Court repeatedly admonished
15 plaintiffs’ counsel for their repeated improper efforts to litigate this case in the press:

- 16 • “[Y]ou cannot use these proceedings to include as part of the court file documents
17 that you would like to see released to the public if they’re not relevant to the
18 motion that you’re filing.” May 11, 2017 Hr’g Tr. at 16.
- 19 • “[T]he order that I issued on an unrelated matter . . . made clear that I was going
20 to start sanctioning you if you continued in your effort to file documents that were
21 not related to the motions you were filing in an effort to get them released to the
22 public.” *Id.* at 17.
- 23 • “Neither of those concerns relates to the concern that I have, which is you using
24 this litigation as a vehicle to conduct a PR campaign. It’s obvious to me that that
25 is what you’ve been trying to do, and that is going to stop.” *Id.* at 20.
- 26 • “[G]iven the concern I have about the plaintiffs using this litigation as a vehicle to
27 conduct a PR campaign, I’m going to be, you know, scrutinizing this much more
28

1 closely, and you need to be much more careful about what you're submitting and
2 what you're not." *Id.* at 21.

3 Plaintiffs' counsel were undeterred. On June 30, 2017, plaintiffs' counsel Brent Wisner
4 of Baum Hedlund notified Monsanto that he had been appointed by the Plaintiffs' Leadership in
5 the MDL to challenge the confidentiality of some 86 documents pursuant to the Protective
6 Order's ¶ 16 dispute resolution process. Rubin Decl. ¶¶ 3-4. On July 13, 2017, the parties took
7 part in a nearly 40 minute meet-and-confer conference call. *Id.* ¶ 7. Monsanto's counsel
8 reminded plaintiffs' counsel of their burden of establishing a litigation need under PTO 15 and
9 PTO 20 and set forth its position that plaintiffs had failed to satisfy their burden, noting in
10 particular that not a single one of the 86 challenged documents had even been cited in any of the
11 plaintiffs' expert reports on general causation, the sole issue presently before the Court.
12 *Id.* ¶¶ 7-9. Monsanto explained that if plaintiffs disagreed with Monsanto's position regarding
13 the requirements of PTO 15 and PTO 20 and this Court's comments, the parties would need to
14 raise the issue with the Court through a joint letter, seeking clarification of the confidentiality
15 review process. *Id.* ¶ 11. Plaintiffs' counsel said they would take that approach under
16 consideration, but that they might instead file a stand-alone motion or drop the matter.
17 *Id.* ¶¶ 11-12. In light of this conversation Monsanto began preparing its half of a joint letter, but
18 on July 27, 2017, plaintiffs' counsel emailed counsel for Monsanto to state that they had decided
19 not to file a joint discovery letter with the Court concerning the confidentiality designations
20 challenged in their June 30 letter. *Id.* ¶ 13. Neither in this email nor in any communication did
21 plaintiffs' counsel state that they would simply release the confidential documents.

22 At 2:16 am PDT on August 1, 2017, Monsanto received an e-mail from Carey Gillam, a
23 blogger with U.S. Right to Know and with whom plaintiffs' counsel previously have
24 collaborated, asking if Monsanto wished to comment on an article on the 86 documents that she
25 had *already published* in Huffington Post. *See* Email from Carey Gillam to Charla Lord (Aug. 1,
26 2017) (attached as Exhibit 6 to Rubin Decl.). The timing of this contact is noteworthy. In her
27 article, Ms. Gillam quoted plaintiffs' counsel Brent Wisner of Baum Hedlund, who claimed that

1 Monsanto somehow had waived the confidentiality of the 86 documents at midnight on August
2 1, 2017, because Monsanto had not filed within 30 days of plaintiffs’ original notice letter a
3 motion with the Court to prevent the documents’ disclosure, as provided in the original
4 December 2015 Protective Order. This waiver argument was meritless following the Court’s
5 clear ruling during the February 27, 2017 hearing about how the Protective and Confidentiality
6 Order was to operate going forward, *see supra* at 4, the Court’s subsequent issuance of PTO 15
7 and PTO 20, Monsanto’s clear opposition to de-designation of these documents during the
8 parties’ meet-and-confer discussions, and plaintiffs’ counsel’s representations at and following
9 the meet-and-confer. And the article made no mention either of when the documents had been
10 provided to Ms. Gillam, although it seems apparent from the depth of discussion of the
11 documents in the article that Ms. Gillam had been provided the documents well before the
12 purported “waiver.” Carey Gillam, *New ‘Monsanto Papers’ Add to Questions of Regulatory*
13 *Collusion, Scientific Mischief*, HuffPost (Aug. 1, 2017), [http://www.huffingtonpost.com/entry/
14 newly-released-monsanto-papers-add-to-questions-of_us_597fc800e4b0d187a5968fbf?ncid=
15 engmodushpimg00000003](http://www.huffingtonpost.com/entry/newly-released-monsanto-papers-add-to-questions-of_us_597fc800e4b0d187a5968fbf?ncid=engmodushpimg00000003) (attached as Exhibit 5 to Rubin Decl.). Ms. Gillam’s article included a
16 link to each of the 86 confidential Monsanto documents.

17 Over the following 24 hours, plaintiffs’ counsel’s improper gambit has once again
18 advanced the PR campaign this Court made abundantly clear had to stop. The Gillam article and
19 perhaps subsequent disclosures of the same documents to other reporters has led to further media
20 coverage. *See* Rubin Decl. ¶ 17.

21 Remarkably, at 3:51 pm PDT on August 1, plaintiffs’ counsel filed an after-the-fact
22 motion with the Court requesting “clarification” of the very same pretrial orders (15 and 20) they
23 had so recklessly and intentionally violated earlier that morning. In fact, this is exactly the issue
24 that Monsanto suggested that the parties raise in a joint letter to the Court, a suggestion plaintiffs
25 rejected. Monsanto will respond to that motion in a separate opposition, at the appropriate time
26 under the Court’s rules. For present purposes though, plaintiffs’ motion leaves no question that
27 plaintiffs’ counsel understood Monsanto’s position, understood the Court’s Orders required

1 plaintiffs to seek relief from the Court if they wanted to modify PTO 15 and PTO 20, and
2 understood that they could not publicly release any confidential documents in this litigation
3 without the Court's say so. The plaintiffs' direct and willful violation of the Court's Orders
4 requires an immediate response from the Court.

5 ARGUMENT

6 This Court has repeatedly instructed plaintiffs' counsel against the misuse of confidential
7 discovery documents for purposes of a strategy to try their case in the media. That campaign has
8 resulted in published accounts of plaintiffs' allegations, for example, against a former EPA
9 employee, that the Court, following its own review, has noted is based upon plaintiffs' counsel's
10 "mischaracterizing the evidence." May 11, 2017 Hr'g Tr. at 11. The Court likewise has warned
11 counsel that plaintiffs' continued efforts to try their case in the media would result in sanctions.
12 *Id.* at 17. Because plaintiffs' recent efforts are the result of their flagrant violation of the Court's
13 orders and a total disregard for the procedures the Court has established, the time for sanctions is
14 now at hand.

15 Plaintiffs' counsel made the conscious decision to violate the Court's orders knowing
16 that, by the time Monsanto could object, the damage would be done. In fact, their filing of the
17 Motion to Clarify Rulings Regarding Confidentiality of Documents *after* releasing these
18 documents to the press demonstrates their awareness that their conduct was in violation of
19 various Court Orders. *See, e.g.*, Notice of Motion and Motion to Clarify Rulings Regarding
20 Confidentiality of Documents, at 1 (Aug. 1, 2017), ECF No. 415 ("[A]ccording to Monsanto,
21 PTO Nos. 15 & 20 modified the Protective Order by requiring Plaintiffs to show that any
22 challenged document was (1) relevant and (2) served a litigation need."). Indeed, plaintiffs
23 assert that "unless the Court provides clarification, Plaintiffs are hamstrung." So rather than
24 seeking appropriate relief from the Court, plaintiffs simply elected to ignore the Court's prior
25 rulings, violate the Court's Orders, and thereby achieve a result that they previously had been
26 unable to obtain from the Court. *Id.* It should go without saying that if plaintiffs disagreed with
27 the Court's Orders or somehow believed that circumstances had changed, they should have filed

1 their motion *before* violating the Orders. What plaintiffs cannot do is violate the Court's Orders
2 and then claim they are "legally invalid." *Id.*; see, e.g., *Pasadena City Bd. of Educ. v.*
3 *Spangler*, 427 U.S. 424, 439 (1976) ("[D]isobedience of such an outstanding order of a federal
4 court subjects the violator to contempt even though his constitutional claim might be later
5 upheld."); *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386 (1980) ("persons subject
6 to an injunctive order . . . are expected to obey . . . even if they have proper grounds to object to
7 the order"); *In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 725-
8 26 (9th Cir. 1989) ("The contemnor cannot ordinarily raise the invalidity of the judicial order as
9 a defense to a contempt charge.").

10 Monsanto respectfully suggests that absent a clear and strong message from the Court in
11 the form of meaningful sanctions, plaintiffs' counsel is likely to make the same decision again
12 whenever complying with the Court's Orders proves to be inconvenient or at odds with their
13 desires. Monsanto accordingly requests that the Court issue an Order imposing the following
14 sanctions, which are designed to finally put an end to this improper conduct, along with any
15 other relief the Court deems necessary and appropriate:

- 16 1. Order plaintiffs' counsel to issue a Court-approved statement to all media outlets in
17 which the documents have been or in the future are discussed that plaintiffs' counsel
18 recklessly and intentionally violated the Protective Order and PTO 15 and PTO 20 in
19 releasing the documents to the press and that Monsanto did not waive the confidentiality
20 of these documents.
 - 21 2. Order that the 86 documents be removed from the Baum Hedlund website and that Baum
22 Hedlund, in its place, post the Court's sanction order with a clear statement on its website
23 that it was found in violation of the Protective Order and PTO 15 and PTO 20 and that
24 Monsanto did not waive the confidentiality of these documents.
 - 25 3. Remove Baum Hedlund from the Plaintiffs' Executive Committee of MDL 2741.
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- 1 4. Remove Weitz & Luxenberg, Andrus Wagstaff, and the Miller Firm as co-leads for
2 plaintiffs in MDL 2741 based upon the appointment of Baum Hedlund to act on their
3 behalf in releasing the 86 documents to the media.
- 4 5. Order discovery including, but not limited to, production of all plaintiffs' counsel's
5 (including all lawyers and other individuals in plaintiffs' counsel's law firms) (1) internal
6 emails and other correspondence among and between plaintiffs' counsel concerning
7 Carey Gillam, public entities such as the Huffington Post, the U.S. Right to Know, and/or
8 any and all other media outlets, and (2) emails and other correspondence between
9 plaintiffs' counsel and Carey Gillam, public entities such as the Huffington Post, the U.S.
10 Right to Know, and/or any and all other media outlets.
- 11 6. In light of the continuing abuse by plaintiffs' counsel of confidentiality challenges,
12 modify the Protective and Confidentiality Order to:
 - 13 a. Preclude plaintiffs from any future challenges to confidentiality of discovery
14 documents;
 - 15 b. Alternatively, require plaintiffs to support any future such challenges by
16 presenting the Court with clear and convincing evidence of a litigation need
17 before any such documents may be released.
- 18 7. Order that the 86 improperly released documents here at issue may not be used by
19 plaintiffs in any future proceedings in this or any other court.
- 20 8. Impose monetary sanctions in the amount the Court deems reasonable and necessary in
21 light of the willful violation of Court orders to deter future misconduct.

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1 DATED: August 2, 2017

Respectfully submitted,

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