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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10 IN RE: ROUNDUP PRODUCTS
LIABILITY LITIGATION

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

11
12
13 This document relates to:
14 ALL ACTIONS
15

**MONSANTO COMPANY'S
RESPONSE TO R. BRENT WISNER'S
AND BAUM HEDLUND'S POST-
HEARING SUPPLEMENTAL BRIEF**

16 Mr. R. Brent Wisner and Baum Hedlund's (collectively "Baum Hedlund") Post-
17 Hearing Supplemental Brief (1) re-argues the underlying briefs in response to the Show
18 Cause Order, seeking to re-frame the issue, (2) asks the Court to expunge the public
19 record regarding its misconduct and leaving only plaintiffs' briefing, which is replete with
20 unsubstantiated accusations against Monsanto and its counsel, and (3) offers a
21 "conditional withdrawal" from the Executive Committee only *after* the *Daubert* hearing,
22 which does not satisfy the Court's concern that led to the Show Cause Order in the first
23 place: While acting as the agent of the Executive Committee, Baum Hedlund dealt in bad
24 faith with Monsanto's counsel and disregarded this Court's role in resolving live disputes
25 between the parties.

26 The Court should reject Baum Hedlund's post-hearing brief, refuse Baum
27 Hedlund's request to strike documents 416, 435, 457, and 442 in this case, reconstitute the

1 Executive Committee, and order sanctions necessary to deter further misconduct and
 2 preserve the Court’s ability to manage this litigation, as Monsanto requested in its initial
 3 motion and as the Court suggested in its Show Cause Order.

4 **1. Baum Hedlund’s Brief Re-Argues Its Previous Briefing and Seeks to**
 5 **Re-Frame the Principal Issue that Led to the Show Cause Order.**

6 Baum Hedlund’s brief adds nothing to the record that isn’t already in its previous
 7 filings (ECF Nos. 430, 452) and its arguments at the August 24, 2017 hearing before the
 8 Court.¹ The brief simply and inappropriately seeks to re-frame the underling dispute and
 9 to put Baum Hedlund’s bad faith and misconduct aside. This is so despite the Court
 10 having framed Baum Hedlund’s bad faith three separate times: at the telephonic
 11 conference [Hearing Transcript at 4-5 (Aug. 9, 2017) (“8/9/17 Hr’g Tr.”)]; in the Show
 12 Cause Order [Pretrial Order No. 28: Order to Show Cause; Order re De-Designation at 1
 13 (Aug. 9, 2017), (“PTO 28”), ECF No. 442]; and at the August 24, 2017 hearing [Hearing
 14 Transcript at 5, 9, 56, 59 (Aug. 24, 2017) (“8/24/17 Hr’g Tr.”)].

15 The principal issue in this matter was, has been, and is the course of conduct of the
 16 Executive Committee, acting through Baum Hedlund and with the Committee’s
 17 knowledge,² in (1) misleading Monsanto’s counsel into believing that the dispute between
 18 the parties would be presented to and resolved by the Court – as it should have been – or
 19 abandoned by plaintiffs; and (2) then unilaterally releasing documents to the press and
 20 public despite explicit knowledge that Monsanto did not intend to withdraw its
 21 confidentiality positions. This Court already has found that these actions, at an absolute
 22 minimum, constitute misconduct. *See* 8/24/17 Hr’g Tr. at 38-39 (“[I]t seems to me that at
 23 an absolute minimum there was misconduct”; “And at a minimum, that’s misconduct . . .

24
 25 ¹ Its one addition is its attempted re-direct via *ad hominem* attacks on Monsanto and its counsel.

26 ² The briefing and declarations in response to the Show Cause Order was revelatory: Two of the
 27 four members of the Executive Committee disclaimed knowledge that Mr. Wisner was going to
 28 release the documents, despite what appears to be communication from Mr. Wisner on that very
 matter; the other member, with an apparent understanding of Mr. Wisner’s intention to release the
 documents, claims only that she did not direct him to do so.

1 whether you describe it has [sic] bad faith or . . . extreme overzealousness and disregard
 2 for . . . - neglect to properly consider someone’s obligations to the Court and to opposing
 3 counsel.”). Baum Hedlund’s latest brief again dodges the only issue.

4 Instead, Baum Hedlund once again seeks to distract attention away from its
 5 misconduct through *ad hominem* attacks on Monsanto and unfounded allegations of
 6 “ghostwriting”. Unlike plaintiffs, Monsanto looks forward to completing and setting the
 7 record straight on this issue, as plaintiffs’ claims of “ghostwriting” focus on three review
 8 articles (not underlying scientific studies), one of which is identified specifically as
 9 having a Monsanto co-author (the second-named author, in fact) and the other of which
 10 expressly acknowledge Monsanto’s assistance or sponsorship. Such publicly disclosed
 11 involvement by Monsanto is inconsistent with “ghostwriting,” under any definition of that
 12 term. But Plaintiffs’ unfounded accusations are irrelevant to the issue before the Court,
 13 which is plaintiffs’ counsel’s clear misconduct by publicly releasing documents that it
 14 knew were the subject of a live dispute between the parties that needed to be raised before
 15 the Court. Baum Hedlund’s continued refusal to acknowledge this fact and continued
 16 desperate effort to focus attention elsewhere demonstrates the need for sanctions.

17 **2. Baum Hedlund’s “Conditional Withdrawal Offer” Should Be Rejected.**

18 The Court should reject Baum Hedlund’s “offer” to withdraw only after the close
 19 of the General Causation Phase because the phases of the case have nothing to do with the
 20 central issue that led to the Show Cause Order in the first place. As the Court explained at
 21 the August 24 hearing, Mr. Wisner acted on behalf of the Executive Committee not as a
 22 litigator but as a PR man: “[i]t was [Mr. Wisner’s] obligation to get the dispute resolved
 23 before going ahead and releasing the documents; but the problem is that he was not
 24 focused on being a lawyer” and he was instead “focused on being a PR man.”³ A partial
 25 withdrawal from the Executive Committee made on Baum Hedlund’s terms,⁴ which

26 _____
 27 ³ 8/24/17 Hr’g Tr. at 13.

28 ⁴ Contrary to the Supplemental Brief, removal of Baum Hedlund does not preclude Mr. Wisner or other members of his Firm from preparing drafts of briefs or continuing to assist whatever

1 allows the Firm to continue to participate in the plaintiffs' management of the litigation
 2 through the centrally important *Daubert* proceedings, will not accomplish what the Court
 3 properly requires: an Executive Committee with members the Court can expect will fulfill
 4 their obligations fully and fairly.

5 **3. Baum Hedlund Improperly Seeks to Expunge the Public Record,**
 6 **Except for Its Briefs.**

7 So determined to re-frame the issue away from its bad faith and misconduct in
 8 dealing with the Court and Monsanto's counsel, Baum Hedlund asks the Court to strike
 9 the prior filings relating to its misconduct, leaving only its own spin and unfettered
 10 accusations against Monsanto. R. Brent Wisner's & Baum Hedlund's Post-Hearing
 11 Supplemental Brief at 5 (Aug. 28, 2017), ECF No. 474.⁵ Baum Hedlund's proposal
 12 would concoct a record that reflects its contorted position only – indeed it seeks to strike
 13 the Court's Show Cause Order, but not its current brief, and none of its own earlier related
 14 papers. The request, absurd on its face, should be denied.

15 **4. The Court Has Complete Discretion in Its Management of this MDL to**
 16 **Award Sanctions and Reconstitute the Executive Committee.**

17 As the Court noted at the August 24, 2017 hearing, it has complete discretion to
 18 manage the MDL. 8/24/17 Hr'g Tr. at 39. Indeed, this is the exact issue now before the
 19 Court, i.e., how will the MDL operate going forward. The prior briefings collectively –
 20 both plaintiffs' and Monsanto's – and two conferences with the Court (one telephonic and
 21 one in-person) lead to but one conclusion: sanctions are appropriate. Baum Hedlund's

22
 23 plaintiffs' leadership remains after the Court's Orders. *See* Pretrial Order No. 4: Plaintiffs'
 24 Leadership Structure at 1-2 (Dec. 7, 2016), ECF No. 62 (Plaintiffs' "co-lead counsel have the
 25 authority and the duty to . . . [r]etain the services of any attorney not part of the Executive
 Committee to perform any common benefit work, provided the attorney so consents and is bound
 by the compensation structure established in this MDL").

26 ⁵ Baum Hedlund seeks to strike Monsanto's filings and this Court's Show Cause Order, but none
 27 of their filings: Monsanto Co.'s Application for Emergency Relief (Aug. 2, 2017), ECF No. 416;
 28 Monsanto Co.'s Reply in Support of Application for Emergency Relief (Aug. 7, 2017), ECF No.
 435; PTO 28, ECF No. 442; Monsanto Co.'s Response to Plaintiffs' Counsel's Responses to
 Order to Show Cause (Aug. 17, 2017), EFC No. 457.

1 latest attempt to re-direct and re-frame the issue and its attempt to re-write the history of
2 this matter should be rejected. Monsanto's initial motion should be granted in full.

3 **Conclusion**

4 For all the above reasons, Baum Hedlund's conditional proposal should be
5 rejected and the Court should instead issue an order granting the relief requested in
6 Monsanto's original motion, its Application for Emergency Relief (ECF No. 416).

7
8 DATED: August 29, 2017
9

10 Respectfully submitted,

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