

**IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI**

WALTER WINSTON, et al.,

Plaintiffs,

v.

MONSANTO COMPANY,

Defendant.

Cause No. 1822-CC00515

**DEFENDANT MONSANTO COMPANY’S BRIEF IN SUPPORT
OF ITS OBJECTION TO CERTAIN OF SPECIAL MASTER
NORTON’S PRIVILEGE RULINGS REGARDING
DOCUMENTS INVOLVING FLEISHMANHILLARD INC.**

Monsanto respectfully appeals the September 16, 2019 and September 19, 2019 Orders of Special Master Norton denying its privilege claims as to certain documents and portions of certain documents involving FleishmanHillard Inc. (“F-H”) (“F-H Rulings”) (collectively, Exhibit 1). On October 16, 2019, Monsanto met with the Special Master *ex parte* to discuss certain documents from his F-H Rulings in order to provide additional background and information as to why those documents are privileged. At the *ex parte* hearing, the Special Master indicated that it was likely he would amend at least some of his rulings overruling Monsanto’s privilege claims. Because the Special Master is intending to change some of his rulings to sustain Monsanto’s privilege claims, in the interest of judicial economy, Monsanto respectfully suggests that the Court refrain from ruling on the documents discussed herein until the Special Master confirms which rulings will be modified.

This appeal is limited – Monsanto has withdrawn its challenge as to many of the documents included in the Special Master’s Orders – but it continues to maintain that a select number of materials are well within the bounds of privileged communications between parties

including based on the functional equivalent doctrine, the reasonably necessary confidential consultant doctrine, and/or the work product doctrine. Monsanto hired F-H to provide essential and unique work related to strategic communications and public relations. The inclusion of F-H in Monsanto's communications as to these areas does not waive privilege.

For these reasons and as discussed in more detail below, Monsanto respectfully requests that this Court hold that the documents and document portions detailed below and in the attached chart (Exhibit 2) are privileged and that Monsanto need not produce unredacted versions of these documents.

BACKGROUND

I. FleishmanHillard

F-H provides public relations and other related services to businesses and individuals throughout the world. Effective July 18, 2013, Monsanto retained F-H to be its agency of record for its corporate reputation work. Declaration of Samuel Murphey in Support of Monsanto Company's Privileged Communications with FleishmanHillard ¶ 2 (07/22/19) (hereinafter "Murphey Decl.") (attached as Exhibit 4). Monsanto retained F-H to perform work related to strategic communications and public relations for which it would have otherwise had to hire additional employees in order to be able to accomplish the same objectives. *See id.* ¶¶ 13-20. Prior to becoming the agency of record for Monsanto in 2013, F-H worked with Monsanto on a project-by-project basis. *Id.* ¶ 2; *see also id.* ¶¶ 3-12.

As the agency of record for Monsanto's strategic communications and corporate reputation work, F-H employees became integral to certain parts of Monsanto teams. Every team within Monsanto's Corporate Engagement team was assigned one or more F-H employees to be part of its team. *Id.* ¶ 16. The F-H employees had to report to Monsanto employees. *Id.* ¶¶

17-18. F-H employees were at Monsanto's offices nearly every day. *Id.* ¶ 16. They were routinely issued contract badges to be able to access Monsanto's workspaces, had Monsanto email addresses, and worked in the same office spaces as Monsanto employees. *Id.* In addition, they had access to online repositories of non-public confidential information. *Id.* F-H employees were expected to – and did – participate in Monsanto team meetings. *Id.* ¶¶ 16, 18.

F-H also worked on two projects for Monsanto in Europe regarding re-registration of glyphosate. *See id.* ¶ 18. F-H would have regular meetings and phone calls, including a weekly phone call with the team who was overseeing these two projects. *Id.* F-H also was involved in the strategy for Monsanto in Europe. *Id.* F-H's work was performed under the direction of Monsanto employees. *Id.*

F-H also was retained by Monsanto's Legal Department in 2018 for a specific project for jury research in preparation of the defense of pending lawsuits concerning Monsanto's glyphosate-containing herbicides, which occurred at the direction of attorneys of Monsanto's legal department for purposes of litigation. Declaration of Robyn D. Buck in Support of Monsanto Company's Privileged Communications with FleishmanHillard ¶ 2 (07/22/19) (hereinafter "Buck F-H Decl.") (attached as Exhibit 5).

All privileged communications involving F-H were exchanged pursuant to confidentiality agreements and maintained as confidential. *Id.*; Murphey Decl. ¶¶ 14, 21.

II. Procedural Background

On July 12, 2019, plaintiffs filed a motion to compel with Special Master Norton seeking the blanket release of all documents on Monsanto's privilege logs that involved F-H. Plaintiffs argued both that any communications involving F-H could not be privileged because they concerned "public relations or dealing with the media" and that, in any case, the involvement of

F-H in a document or communication waived privilege under any circumstance. Monsanto explained how the context of a highly regulated industry and ongoing and anticipated litigation necessitated legal advice and review for certain projects handled by F-H, and maintained that the presence of F-H on privileged communications did not result in waiver because F-H served as the functional equivalent of a Monsanto employee and/or was a reasonably necessary confidential contractor, and/or the document was protected work product.

At a hearing on July 24, 2019, the Special Master agreed to review the documents at issue to ascertain, on a document-by-document basis, whether privilege in fact applied. That review took place in waves. On September 16, 2019, the Special Master issued a ruling regarding documents involving F-H that were only partially redacted for privilege, in which certain specific redactions were sustained and certain specific redactions were overruled. On September 19, 2019, the Special Master issued a ruling as to documents involving F-H that were withheld in full for privilege, sustaining certain privilege objections in full, overruling others, and, for some, sustaining privilege objections over only certain parts of the withheld documents. *See F-H Rulings.*

After receiving the Special Master's F-H Rulings, Monsanto conducted a re-review of the documents. As a result of that additional review, Monsanto is no longer pursuing privilege before this Court as to a substantial portion of the materials where the Special Master overruled Monsanto's privilege.¹ But Monsanto identified some documents that easily satisfy the elements for privileged communications involving a confidential contractor who is the functional

¹ These materials are being processed for production and will be produced in a manner consistent with the redactions sustained by the Special Master. Monsanto is not waiving its right to claim privilege as to these documents in other jurisdictions.

equivalent of an employee and/or reasonably necessary to the communication or accomplishment of the purposes for which it was transmitted, or for protection under the work product doctrine.

As to that limited set of materials, Monsanto met with the Special Master in an *ex parte* hearing on October 16, 2019, in order to provide further evidence and argument supporting its privilege claims as to those materials. At the hearing, the Special Master indicated that it was likely he would amend at least some of his rulings overruling Monsanto's privilege claims. Monsanto has not yet received word from the Special Master detailing any changed decisions and therefore bases its objections on the F-H Rulings. Monsanto will notify the Court if some of the categories or documents discussed below are no longer at issue as a result of updated decisions from the Special Master.

Monsanto objects to the F-H Rulings insofar as they incorrectly overruled Monsanto's privilege claims as to certain documents or specific portions of certain documents, as detailed below and in Exhibit 2.² Because the F-H Rulings do not include any legal discussion or reasoning, Monsanto's Argument below largely restates its reasoning for why the documents and document portions at issue are privileged, and why privilege was not waived by including F-H: namely, because F-H was acting as the functional equivalent of a Monsanto employee and/or was reasonably necessary to the communication or the accomplishment of the purpose of the communication, and/or because the documents involved are protected under the work product doctrine.

ARGUMENT

Pursuant to Rule 68.01(g)(3), this Court "may adopt the [Special Master's] report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it

² Monsanto also submits the entries from the previously served privilege log for the specific documents discussed in Part III (i.e., the documents identified in Exhibit 2). *See* Exhibit 3.

with instructions.” Because the Court “cannot delegate or abdicate, in whole or in part, its judicial power,” this Court is in no way bound by the Ruling, *D’Agostino v. D’Agostino*, 54 S.W.3d 191, 200 (Mo. App. W.D. 2001), and it is within this Court’s “discretion” as to whether “to adopt, modify, or reject” it. *Country Club of the Ozarks, LLC v. CCO Investments, LLC*, 338 S.W.3d 325, 329 (Mo. App. S.D. 2011) (quotation marks omitted). Thus, review is *de novo*.

The attorney-client privilege is not waived when documents are shared with a third party who is the functional equivalent of a company’s employees or who is reasonably necessary for the transmission or accomplishment of the purpose of the consultation. *See In re Bieter Co.*, 16 F.3d 929, 938 (8th Cir. 1994); *Cromeans v. Morgan Keegan & Co., Inc.*, 2014 WL 7338830, at *2 (E.D. Mo. Nov. 21, 2014). The presence of a third party also does not waive work product protections unless the inclusion of that third party is inconsistent with maintaining secrecy against opponents. *See Edwards v. Mo. State Bd. of Chiropractic Examiners*, 85 S.W.3d 10, 27 (Mo. Ct. App. 2002). The documents and redacted document portions at issue are protected under one – or sometimes several – of these permissible rubrics, as detailed for each specific document in Part III below. The F-H Rulings’ failure to recognize these bases for withholding from production these documents and document portions is an error of law and Monsanto respectfully requests that this Court sustain its privilege assertions.

I. The Documents And Document Portions At Issue Are Privileged And The Presence Of F-H Did Not Result In A Privilege Waiver.

Missouri courts have broadly interpreted the attorney-client privilege for more than four decades. In *State ex rel. Great American Insurance Co. v. Smith*, the Missouri Supreme Court rejected a more narrow view of the privilege adopted by federal courts and held that the “fundamental policy” of the privilege is the protection of confidentiality “to which disclosure is the exception.” 574 S.W.2d 379, 383 (Mo. banc 1978); *see also State ex rel. Behrendt v. Neill*,

337 S.W.3d 727, 729 (Mo. App. 2011).³ Since that time, the Missouri Supreme Court has consistently recognized the “sanctity of the attorney-client privilege.” *State ex rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604, 607 (Mo. banc 1993). Because that privilege is essential to ensure that attorney-client relationships are “fostered and effective,” *Neill*, 337 S.W.3d at 729, Missouri courts do not find waiver lightly.

The regulated nature of Monsanto’s industry and the context of ongoing and anticipated litigation necessitated legal advice and review concerning various matters handled by F-H. In addition, F-H acted as the functional equivalent of a Monsanto employee for the work it did for Monsanto, and its presence on privileged communications was reasonably necessary to the communication or accomplishment of the purposes for which it was transmitted. The presence of F-H on privileged communications therefore did not result in waiver.

A. The Documents At Issue Are Privileged.

The nature of the work F-H did for Monsanto required privileged communications between F-H, Monsanto, and Monsanto’s counsel for various reasons. For example, Monsanto’s counsel (both in-house and outside counsel) often needed to provide legal advice regarding draft messaging F-H prepared to ensure it was compliant and consistent with laws or litigation. *See* Murphey Decl. ¶¶ 19-20. For instance, Monsanto’s counsel provided legal advice concerning what Monsanto and F-H could or could not say under European Union marketing laws and regulations. Monsanto’s counsel also provided legal advice on draft media messaging statements F-H was preparing regarding various litigations to ensure that the messaging would be consistent

³ “The attorney-client privilege protects confidential communications [] between an attorney and [] client concerning representation of the client.” *State ex rel. Polytech, Inc. v. Voorhees*, 895 S.W.2d 13, 14 (Mo. 1995). The presence of an attorney on the communication or document is not necessary for the privilege to apply, as long as the communication or document is prepared in order to seek or transmit legal advice. *See, e.g., Ratcliff v. Spring Missouri, Inc.*, 261 S.W.3d 534, 547 (Mo. Ct. App. 2008) (an incident report prepared by a non-attorney safety manager for purposes of providing information to the company’s insurer was protected by the attorney-client privilege).

with positions taken in those litigations. Further, Monsanto's counsel provided legal advice regarding legal disclaimers for videos F-H prepared on behalf of Monsanto.

The fact that some of these communications involve the creation of public messaging does not strip them of privilege. Courts recognize that the nature of modern business practices often requires privileged communications between a company and a firm hired to develop messaging on its behalf. *See, e.g., In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 219-220 (S.D.N.Y. 2001) (communications between public relations firm hired by commodities trading company to handle media relations during government investigation and anticipated litigation arising from trading scandal were privileged); *In the matter of Jenny Craig*, 1994 WL 16774903, at *2-3 (F.T.C. May 16, 1994) (communications between an advertising agency and its corporate client were privileged where the entities worked cooperatively to develop the client's advertising program and legal counsel reviewed prepared material); *see also In re Grand Jury Subpoenas Dated March 24, 2003*, 265 F. Supp. 2d 321 (D. Co. 2012) (finding that communications between Martha Stewart's outside attorneys and retained public relations firm were privileged).

The absence of an attorney on a privileged document also does not automatically render that document susceptible to a privilege challenge. It is well-settled in Missouri that "[t]he attorney-client privilege encompasses documents prepared by an employee at the direction of the employer for the purpose of obtaining the advice of an attorney or for use in prospective or pending litigation." *Ratcliff v. Spring Missouri, Inc.*, 261 S.W.3d 534, 547 (Mo. Ct. App. 2008) (finding an incident report prepared by a non-attorney safety manager for purposes of providing information to the company's insurer was protected by the attorney-client privilege); *Crow v. Crawford & Co.*, 259 S.W.3d 104, 122 (Mo. Ct. App. 2008) (finding notes prepared by a third-party claims administrator regarding an employee's workers' compensation claim were protected

from discovery on the basis of the attorney-client privilege, even though she was not an attorney and did not directly work for an attorney, because her job required her to investigate such claims and make reports on them).

B. The Inclusion of F-H on Communications Does Not Result in Privilege Waiver Because It Acted as the Functional Equivalent of a Monsanto Employee and/or Was Reasonably Necessary to Further Monsanto’s Legal Interests.

i. F-H was functionally equivalent to a Monsanto employee in the scope of the work it did for Monsanto.

The functional equivalent doctrine protects communications between third parties and companies where the third party has become the functional equivalent of that company’s employees. *See In re Bieter Co.*, 16 F.3d 929, 938 (8th Cir. 1994); *see also Sentis Group Inc. et al. v. Shell Oil Co.*, 559 F.3d 888, 902 (8th Cir. 2009) (citing *In re Bieter*, 16 F.3d 929, 939–40 (8th Cir. 1994)). This is because, “at times there will be potential information-givers who are not employees of the corporation but who are nonetheless meaningfully associated with the corporation in a way that makes it appropriate to consider them insiders for purposes of the privilege.” *In re Bieter Co.*, 16 F.3d at 938 (holding that a corporation’s attorney-client privilege extends to regularly-retained independent contractors); *see also Good Co. v. Honeywell Int’l, Inc.*, 2015 WL 12852954 (W.D. Mo. Sept. 1, 2015) (finding third party consultant was a *de facto* employee of the company for purposes of the attorney client privilege, and to the extent the other requirements for the assertion of the privilege were present, the company was justified in resisting the discovery).

The fact that the third party may be considered an independent contractor bears no weight. “As long as the independent contractor has a role similar to that of an employee...communications between the contractor and attorneys for the purpose of seeking legal advice are privileged.” *U.S. ex rel. Fry v. Health Alliance of Greater Cincinnati*, 2009 WL

5033940, at *4 (S.D. Ohio Dec 11, 2009). Indeed, “the majority of case law recognizes that an independent contractor serves as a representative of the client to the degree necessary to establish the attorney-client privilege.” *Id.* (internal quotation marks omitted); *see also In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. at 219 (“RLM’s independent contractor status provides no basis for excluding RLM’s communications with Sumitomo’s counsel from the protection of the attorney-client privilege” (citing “the principles set out in *Upjohn [Co. v. United States, 449 U.S. 383 (1981)]*”)).

The functional equivalent doctrine applies to firms that are hired for public relations purposes. For example, in *In re Copper Market Antitrust Litigation*, a public relations firm that “was, essentially, incorporated into [a company’s] staff to perform a corporate function” in order to help the company “deal with public relations problems following the exposure of the copper trading scandal” was found to be the functional equivalent of the company’s employee for purposes of privilege. 200 F.R.D. at 219. Similar to the reasons Monsanto hired F-H, that company’s “internal resources were insufficient to cover the task.” *Id.* Also as with many of the documents at issue here, “[t]he legal ramifications and potential adverse use of [the communications developed by the PR firm] were material factors in the development of the communications,” requiring the PR firm to seek and be privy to legal advice concerning those communications and the greater context in which they were made. *Id.*; *see also, e.g., Fed. Trade Comm’n v. Glaxosmithkline*, 294 F.3d 141, 147 (D.C. Cir. 2002) (holding that communications distributed to a drug company’s public relations consultants were privileged because the company worked with its public relations consultants “in the same manner as they did with fulltime employees”).

F-H's work for Monsanto made it the functional equivalent of a Monsanto employee for the work it did for Monsanto. Just like the PR company in *In re Copper Market*, F-H had specialized knowledge and was hired by Monsanto for specific purposes, filling roles that Monsanto's own staff could not cover. *See supra* Background Section; Murphey Decl.; Buck F-H Decl. F-H worked under the direction of Monsanto employees and, to the extent work was for litigation purposes, under the direction of Monsanto's counsel (both in-house and outside counsel). *See id.* F-H's work for Monsanto was extensive and varied, and it worked with Monsanto employees on a daily or almost daily basis. *See id.*

Monsanto's expanded public relations efforts would not have been possible without the addition of F-H employees to the team and the specific skills and experience they contributed. Monsanto communicated with F-H with an expectation of confidentiality. *See id.*

In short, F-H "can fairly be equated with [Monsanto] for purposes of analyzing the availability of the attorney-client privilege to protect communications to which [F-H] was a party concerning" those duties. *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. at 219; *see also In re Bieter*, 16 F.3d at 938. The functional equivalent doctrine therefore protects privileged communications between Monsanto, its counsel, and F-H.

ii. F-H was a reasonably necessary confidential consultant.

Privileged communications also do not lose their privileged status when shared confidentially with individuals whose presence is reasonably necessary to further the client's legal interests. Missouri courts have extended the attorney-client privilege "to communications made in the presence of, or otherwise disclosed to clerks, secretaries, interpreters, physicians, spouses, parents, business associates, or joint clients, so long as those communications were made to further the interest of the client or are otherwise reasonably necessary for transmission

or accomplishment of the purpose of the consultation.” *Cromeans v. Morgan Keegan & Co., Inc.*, 2014 WL 7338830, at *2 (E.D. Mo. Nov. 21, 2014) (quoting *State ex rel. Syntex Agri-Business, Inc. v. Adolf*, 700 S.W.2d 886, 888–89 (Mo. Ct. App. 1985) (emphasis added)). For example, in *Adolf*, the court found that communications distributed to separate corporate entities comprising a single family of corporations were protected. In doing so, the court recognized that this exception is broad and is meant to “recognize[] the practicalities of modern business practices.” 700 S.W.2d at 889; see also *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 384 (Mo. 1978) (stating privilege applies to communications with third party for “accomplishment of the purpose for which it was transmitted”).

Other courts have also recognized this exception. For example, the D.C. Circuit found that the attorney-client privilege applied to protect a redacted report prepared for the Washington Metropolitan Area Transit Authority (WMATA) by a non-party because the redacted section contained the views of WMATA’s legal counsel and the consultant needed the information to complete the project. *FiberLight, LLC v. Wash. Metro. Area Transit Auth. (WMATA)*, 288 F. Supp. 3d 133, 136 (D.C. Cir. 2018). Indeed, “when a corporation provides a confidential document to certain specified employees or contractors with the admonition not to disseminate further its contents and the contents of the documents are related generally to the employees’ corporate duties,” courts “may reasonably infer that the information was deemed necessary for the employees’ or contractors’ work.” *T.C. v. GlaxoSmithKline*, 294 F.3d 141, 148 (D.C. Cir. 2002).

Courts also have held that communications with a public relations firm are protected by the attorney-client privilege if the consultant was necessary to the attorney’s ability to defend the case. For example, in *In re Grand Jury Subpoenas*, a case involving Martha Stewart, the court

held that confidential communications between lawyers and public relations consultants hired by lawyers to assist them with the media in a high profile case were protected by the attorney client privilege. 265 F. Supp. 2d 321, 331 (S.D.N.Y. 2003). The court concluded that Martha Stewart’s attorney would be “undermined seriously” if he could not guide her through the frenzy of media attention attendant to her case. *Id.*

For this doctrine to apply, the third party need not possess special knowledge; instead, the analysis is solely whether communications made in the presence of or disclosed to a third party – including “business associates” – were “made to further the interest of the client” or were “reasonably necessary for transmission or accomplishment of the purpose of the consultation.” *Adolf*, 700 S.W.2d at 888-89; *see Cromeans*, 2014 WL 7338830 at *2 (same).⁴

For the privileged documents at issue here, the presence of F-H was reasonably necessary because F-H had specialized expertise that was assisting Monsanto in certain tasks. It is the function of F-H – the role it played – that grounds the privilege of the documents and communications at issue, each of which were exchanged pursuant to confidentiality agreements and maintained as confidential with a limited distribution. *See supra* Background Section; Murphey Decl; Buck F-H Decl.

For example, F-H employees’ roles drafting media related messaging for Monsanto made it necessary for them to be included in legal conversations concerning what F-H and Monsanto could or could not say because of the highly regulated environment in which Monsanto operates. *See id.* The litigation environment also made it necessary for F-H to be on privileged communications with Monsanto’s counsel so F-H could ensure its statements about the litigation did not take positions contrary to it and also to assist Monsanto’s counsel in guiding the

⁴ The cases also make clear that documents are protected even when knowledge flows from the *attorney* to the consultant (and not vice versa). *See, e.g., FiberLight*, 288 F. Supp. 3d. at 136.

corporation through the media attention given the nature of the Roundup[®] litigation. *See id.* Accordingly, the reasonably necessary doctrine protects certain of Monsanto's privileged communications involving F-H. *See Cromeans*, 2014 WL 7338830, at *2; *Adolf*, 700 S.W.2d at 888–89.

II. A Number of Documents Involving F-H Are Also Protected Work Product.

The Special Master's Rulings make no mention of the fact that certain documents and document portions at issue are protected by the work product doctrine. "The work product privilege precludes discovery of materials created or commissioned by counsel in preparation for possible litigation and the 'thoughts' and 'mental processes' of the attorney preparing the case." *Ratcliff v. Spring Missouri, Inc.*, 261 S.W.3d 534, 547-48 (Mo. Ct. App. 2008). Thus, the privilege protects both (a) "opinion" work product of an attorney and (b) documents or tangible things prepared in anticipation of litigation or for trial by a party or a representative of that party. *See id.* at 548; *State ex rel. Ford Motor Co.*, 151 S.W.3d 364, 367 (Mo. 2004) (en banc). Protected work product thus need not contain a request for or provision of legal advice; what matters is that the document is prepared in anticipation of litigation. *See, e.g., E.E.O.C. v. Pasta House Co.*, 1996 WL 120648, at *3 (E.D. Mo. Jan. 29, 1996) (protecting interviews conducted by paralegal assistants under work-product doctrine).

The inclusion of a third party also does not automatically waive work product protections. Under Missouri law, "[a] disclosure made in the pursuit of trial preparation and not inconsistent with maintaining secrecy against opponents should ... be allowed without waiver of the work product immunity." *Edwards v. Mo. State Bd. of Chiropractic Examiners*, 85 S.W.3d 10, 27 (Mo. Ct. App. 2002). Federal courts concur that disclosure of work product "to nonadversary third parties" does not in itself result in waiver. *Ayers Oil Co. v. Am. Bus. Brokers, Inc.*, 2009 WL 4725297, at *3 (E.D. Mo. Dec. 2, 2009) (citing cases). Courts only find waiver

when “disclosure is inconsistent with maintaining secrecy from possible adversaries.” *Monarch Fire Prot. Dist. of St. Louis Cty., MO v. Freedom Consulting & Auditing Servs., Inc.*, 2009 WL 2155158, at *2 (E.D. Mo. 2009) (citation omitted).

Here, F-H was not Monsanto’s adversary. Indeed, its interests were aligned with the Roundup[®] litigation as well as the other projects F-H worked on with Monsanto, and thus any disclosure of work product to F-H was “not inconsistent with maintaining secrecy.” *Edwards*, 85 S.W. 3d at 27. Nor does disclosure of work product between F-H and Monsanto “substantially increase[] the likelihood that adversaries will come into possession of the information ... [g]iven the commercial relationship” between the two entities, *Ayers*, 2009 WL 4725297, at *3 n.1, and the confidentiality expected in their relationship. *See Reilly Ind.* 224 F.R.D. at 443 (the purpose of the work-product rule is “not to protect the evidence from disclosure to the outside world but rather to protect it only from the knowledge of opposing counsel and his client, thereby preventing its use against the lawyer gathering the materials”).

F-H was retained by Monsanto’s Legal Department in 2018 for a specific project for jury research in preparation of the defense of pending lawsuits concerning Monsanto’s glyphosate-containing herbicides. *See supra* Background; Buck F-H Decl. This occurred at the direction of attorneys of Monsanto’s legal department for purposes of litigation, and with an expectation of confidentiality. *See id.*

These materials are the definition of work product and must be protected. *See, e.g., Ebert v. C.R. Bard, Inc.*, No. 12-01253, 2014 WL 1632155, at *3 (E.D. Pa. Apr. 24, 2014) (work product “protection extends to non-lawyers working on behalf of lawyers to prepare for litigation”); *Philip Morris USA, Inc.*, 2004 WL 5355972, at *8 (D.D.C. Feb. 23, 2004) (“The protection applies not only to tangibles created by an attorney, but also to materials prepared by

agents of the attorney acting at the attorney's request.”). The Special Master's Rulings as to the documents at issue would obliterate these work product protections.

III. The Above Doctrines Protect the Specific Documents And Document Portions At Issue.

Monsanto appeals Special Master Norton's rulings as to the following 27 groups of documents:⁵

1. Privilege Entire Tabs 1-5 and Partial Privilege Tabs 120 – 121. These documents are privileged because they reflect legal advice from Robyn Buck (Monsanto in-house litigation counsel) and/or are work product by F-H regarding the jury research project they were retained by Monsanto's Legal Department to perform. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests. Documents created and/or edited by F-H are work product because they were materials created in anticipation of litigation at the direction of counsel in order to assist Monsanto and its counsel (in-house and outside) in facilitating legal advice and litigation strategy for Monsanto.

2. Privilege Entire Tabs 76 – 80. These documents are privileged because they reflect a request for legal advice from Monsanto employee Brian Carroll to Lydie Ancel (Monsanto in-house counsel) and the provision of legal advice from Ms. Ancel regarding a draft document regarding glyphosate. The presence of F-H does not break privilege because F-H was

⁵ Each group of documents contains documents of the same email thread or topic and are addressed together as the bases for the privilege claim are the same with respect to that batch of documents. We have identified the documents by tab number in the same manner they were submitted for *in camera* review. Those documents include red boxes around the material that Monsanto redacted as privileged to assist with the *in camera* review. If the Court requires more information about these documents, Monsanto is willing to meet *ex parte* to discuss the documents *in camera*.

the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests. Monsanto proposes to redact only the Lydie Ancel emails in this group of documents.

3. **Partial Privilege Tabs 86, 89 – 95, 100 – 104.** The redacted portions of these documents are privileged because they reflect a request for legal advice from Monsanto employee Sam Murphey to Robyn Buck (Monsanto in-house litigation counsel) regarding a draft document involving the Roundup[®] litigation. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests.

Monsanto proposes to narrow its privilege claims as follows:

- Tabs 86 and 93: Monsanto proposes to redact just the Robyn Buck email.
- Tabs 89 – 92, and 94 – 95: Monsanto proposes to redact the Robyn Buck email and Sam Murphey's response to Robyn Buck's email.
- Tab 100: Monsanto proposes to redact the first, fourth and fifth emails from the top of the chain.
- Tab 101: Monsanto proposes to redact the third and fourth emails from the top of the chain.
- Tab 102: Monsanto proposes to redact the second and third emails from the top of the chain.
- Tab 103: Monsanto proposes to redact the second email from the top of the chain.

- Tab 104: Monsanto proposes to redact the first and second email from the top of the chain.

4. Privilege Entire Tabs 93, and 95 – 97. These documents are privileged because they reflect a request for legal advice from Monsanto employees to John Rebman (Monsanto in-house counsel) and the provision of legal advice from Mr. Rebman regarding trademark issues with glyphosate advertisements. The parts Monsanto is maintaining as privileged are internal to Monsanto. Monsanto proposes to redact the John Rebman emails from this group of documents.

5. Partial Privilege Tabs 106 – 113. The redacted portions of these documents are privileged because they reflect the provision of legal advice from Lydie Ancel (Monsanto in-house counsel) and the discussion of Ms. Ancel's legal advice regarding a draft document regarding Roundup[®]. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests.

6. Privilege Entire Tabs 114 – 115. These documents are privileged because they reflect a request for legal advice from Monsanto employee Melissa Duncan to John Rebman (Monsanto in-house counsel) and the provision of legal advice from Mr. Rebman regarding a draft document regarding glyphosate. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests. Monsanto proposes to redact the John Rebman emails.

7. **Privilege Entire Tabs 117 – 127.** These documents are privileged because they reflect requests for legal advice from Monsanto employee Brian Carroll to Scott Partridge (Monsanto in-house counsel and Bayer General Counsel for the US), the provision of legal advice from Mr. Partridge and William Dodero (Assistant General Counsel, Bayer), and the discussion of Mr. Dodero’s legal advice regarding Roundup[®] litigation. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto’s attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto’s legal interests. Monsanto proposes to redact every email in this group of documents except for the last email in the chain.

8. **Privilege Entire Tabs 129, 133 – 144, 151 – 155, 164 – 165, 167 – 172, 243 and Partial Privilege Tabs 174 – 177.** The documents and redacted portions of these documents are privileged because they reflect requests for legal advice from F-H employees to Lydie Ancel (Monsanto in-house counsel) and Anastasia Rubleva (Monsanto in-house counsel), provisions of legal advice from Ms. Ancel and Ms. Rubleva, and the discussion of legal advice regarding draft videos regarding glyphosate. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto’s attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto’s legal interests. Monsanto proposes to narrow its privilege claims as follows:

- Tab 129: Monsanto proposes to redact the Lydie Ancel email only.
- Tab 133: Monsanto proposes to redact the first two emails from the top of the chain.
- Tabs 151 - 155: Monsanto proposes to redact the Lydie Ancel emails.

- Tab 164: Monsanto proposes to redact the first and third emails from the top of the chain.
- Tab 165: Monsanto proposes to redact the first, second, and fourth emails from the top of the chain.
- Tabs 167 - 168: Monsanto proposes to redact the first email from the top of the chain.
- Tab 169: Monsanto proposes to redact the first and second emails from the top of the chain.
- Tab 170: Monsanto proposes to redact the first, third, fourth, and sixth emails from the top of the chain.
- Tab 171: Monsanto proposes to redact the first three emails from the top of the chain.
- Tab 172: Monsanto proposes to redact the Lydie Ancel and Anastasia Rubleva emails.
- Partial Privilege Tabs 174 - 177: Monsanto proposes to redact just the Lydie Ancel emails.

9. Privilege Entire Tabs 187 – 191 and Partial Privilege Tabs 232 – 233. The documents and redacted portions of these documents are privileged because they reflect a request for legal advice from Monsanto employee Sam Murphey to John Rebman (Monsanto in-house counsel), the provision of legal advice from Mr. Rebman, and the discussion of Mr. Rebman’s legal advice regarding a draft document regarding IARC. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto’s attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto’s legal interests. Monsanto proposes to redact privilege entire tabs 187 – 191 consistent with partial privilege tabs 232 – 233.

10. Privilege Entire Tabs 208 – 217, 222 – 227, and 266. These documents are privileged because they reflect a request for legal advice from Mathilde Bordron to Lydie Ancel (Monsanto in-house counsel) and the provision of legal advice from Ms. Ancel regarding a draft document regarding Roundup[®] litigation. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests. Monsanto proposes to narrow its privilege claims as follows:

- Tabs 208, 211, and 266: Monsanto proposes to redact just the Lydie Ancel email.
- Tabs 209 – 210, 212 – 217, and 225 – 227: Monsanto proposes to redact the Lydie Ancel emails.
- Tabs 222 – 223: Monsanto proposes to redact the Lydie Ancel emails and the Sam Murphey email on October 4, 2017 at 16:08.
- Tab 224: Monsanto proposes to redact the Lydie Ancel emails and the Sam Murphey email on October 4, 2017 at 2:07PM.

11. Privilege Entire Tabs 238 – 239, 268 – 280, and 440 - 441. These documents are privileged because they reflect requests for legal advice from Monsanto employee Melissa Duncan to Dave Snively (Monsanto in-house counsel), legal advice from Todd Rands (Monsanto in-house counsel), and Scott Partridge (Monsanto in-house counsel), and the discussion of Mr. Rands and Mr. Partridge's legal advice regarding PCB litigation. The presence of FTI, acting as a litigation vendor/consultant for Monsanto, does not break privilege because FTI was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant to Monsanto and its counsel (in-house and outside) to assist Monsanto and its counsel

in advising on issues related to the PCB litigation. Monsanto proposes to narrow its privilege claims on these documents as follows:

- Tabs 238 and 239: Monsanto proposes to redact the top email of the chain.
- Tabs 269, 440 and 441: Monsanto proposes to redact the top two emails of the chain.
- Tabs 270 – 272, 274, and 279: Monsanto proposes to redact the top three emails of the chain.
- Tabs 273, 276 and 277: Monsanto proposes to redact the top six emails of the chain.
- Tabs 275 and 278: Monsanto proposes to redact the top four emails of the chain.
- Tab 280: Monsanto proposes to redact the top five emails of the chain.

12. Privilege Entire Tabs 246 – 247, 249 – 252, 257, and 261. These documents are privileged because they reflect requests for legal advice from Monsanto employee Sam Murphey to Lydie Ancel (Monsanto in-house counsel) and the provision of legal advice from Ms. Ancel regarding a draft document regarding Roundup[®] litigation. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests. Monsanto proposes to narrow its privilege claims on these documents as follows: Monsanto proposes to redact just the Lydie Ancel email in this group of documents.

13. Partial Privilege Tabs 281. The redacted portions of these documents are privileged because they reflect a request for legal advice from Monsanto employee Cole Waggoner to Lydie Ancel (Monsanto in-house counsel), provisions of legal advice from Ms. Ancel, and the discussion of legal advice regarding a draft document regarding glyphosate. The presence of F-H does not break privilege because F-H was the functional equivalent of a

Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests. Monsanto proposes to redact the third, sixth, and seventh emails from the top of the chain.

14. Privilege Entire Tabs 284 – 289 and Partial Privilege Tabs 413, 415 – 425.

The redacted portions of these documents are privileged because they reflect requests for legal advice from Monsanto employee Sam Murphey to Lydie Ancel (Monsanto in-house counsel) and John Rebman (Monsanto in-house counsel) regarding a draft document regarding glyphosate. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests. Monsanto proposes to redact the Lydie Ancel emails and Sam Murphey's response to Lydie Ancel's email sent on June 7, 2017 at 2:11PM.

15. Privilege Entire Tabs 296 – 304. These documents are privileged because they reflect requests for legal advice from F-H and Monsanto employee Cole Waggoner to Lydie Ancel (Monsanto in-house counsel) and John Rebman (Monsanto in-house counsel), and provisions of legal advice from Ms. Ancel regarding a draft document regarding a conference. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests.

16. Privilege Entire Tabs 335 – 353, 355 – 358, 364 – 375 and Partial Privilege Tabs 441 – 466. The documents and redacted portions of these documents are privileged

because they reflect requests for legal advice from F-H, provisions of legal advice from Lydie Ancel (Monsanto in-house counsel), and the discussion of Ms. Ancel's legal advice regarding legal disclaimers and draft website content. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests. Monsanto proposes to redact privilege entire tabs 335 – 353, 355 – 358, and 364 – 375 consistent with partial privilege tabs 441 – 466.

17. Partial Privilege Tabs 343 – 350, 352 – 354. The redacted portions of these documents are privileged because they reflect a request for legal advice from Monsanto employee Sam Murphey to Robyn Buck (Monsanto in-house litigation counsel) and John Rebman (Monsanto in-house counsel) and the provision of legal advice from Ms. Buck and Mr. Rebman regarding a draft document regarding Roundup[®] litigation. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests.

- Tab 343: Monsanto proposes to redact the first email from the top of the chain.
- Tabs 344 and 354: Monsanto proposes to redact the first two emails from the top of chain.
- Tab 345: Monsanto proposes to redact the first three emails from the top of the chain.
- Tabs 346 and 353: Monsanto proposes to redact the first four emails from the top of the chain.

- Tab 347: Monsanto proposes to redact the second, third, fourth, and fifth emails from the top of the chain.
- Tab 348: Monsanto proposes to redact the first five emails from the top of the chain.
- Tabs 349 and 352: Monsanto proposes to redact the second, third, fourth, fifth, and sixth emails from the top of the chain.
- Tab 350: Monsanto proposes to redact the first eight emails from the top of the chain.

18. Partial Privilege Tabs 390 and 393. The redacted portions of these documents are privileged because they reflect the provision of legal advice from Krishna Ramaraju (Monsanto in-house counsel) regarding a Freedom of Information Act (“FOIA”) request regarding glyphosate. The portions of the documents that are redacted are internal to Monsanto.

19. Partial Privilege Tab 397. The redacted portions of this document are privileged because they reflect the legal advice of Natalia Voruz (Monsanto in-house counsel) regarding a proceeding concerning Monsanto. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto’s attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto’s legal interests. Monsanto proposes to redact just the Natalia Voruz email.

20. Partial Privilege Tabs 398 – 403. The redacted portions of these documents are privileged because they reflect a request for legal advice from Monsanto employees to Natalia Voruz (Monsanto in-house counsel) and provisions of legal advice from Ms. Voruz regarding an article concerning Monsanto. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto’s attorneys (in-house and outside counsel) to

share legal advice with F-H to protect Monsanto's legal interests. For tabs 398 – 402, Monsanto proposes to narrow its redactions to the Natalia Voruz email sent on November 7, 2017 at 22:31, and everything later in time for tabs 398 - 402. For tab 403, Monsanto proposes to redact the top email from the chain.

21. Partial Privilege Tabs 405 – 407. The redacted portions of these documents are privileged because they reflect requests for legal advice from Monsanto employees to Thomas McBride (Monsanto in-house counsel), Brian Lowry (Monsanto in-house counsel), Alissa Eagle (Monsanto in-house counsel), Nancy Marshall Avioli (Monsanto in-house counsel), and Matthew L. Madsen (Monsanto in-house counsel) and provisions of legal advice from Mr. Lowry regarding draft document regarding intellectual property issues. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests. Monsanto proposes to redact tab 405 consistent with tabs 406 and 407.

22. Privilege Entire Tabs 423 - 428. This document is privileged because it reflects a request for legal advice from F-H to Lydie Ancel (Monsanto in-house counsel) and the provision of legal advice from Ms. Ancel regarding a draft document regarding Roundup[®] litigation. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests. Monsanto proposes to narrow its redactions on tab 427 to everything but the top email of the chain.

23. Privilege Entire Tab 432. This document is privileged because it reflects the legal advice of John Winski (Monsanto in-house counsel) regarding a draft document regarding dicamba litigation. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests. Documents created and/or edited by F-H are work product because they were materials created in anticipation of litigation at the direction of counsel in order to assist Monsanto and its counsel (in-house and outside) in facilitating legal advice and litigation strategy for Monsanto.

24. Partial Privilege Tabs 438 – 439. The redacted portions of these documents are privileged because they reflect a request for legal advice from Monsanto employee Sam Murphey to John Rebman (Monsanto in-house counsel), the provision of legal advice from Mr. Rebman, and the discussion of legal advice regarding draft documents regarding Roundup[®]. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto's attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto's legal interests.

25. Partial Privilege Tab 440. The redacted portions of this document are privileged because they reflect a request for legal advice from Monsanto employee Kelly Clauss to John Rebman (Monsanto in-house counsel) and the provision of legal advice from Mr. Rebman regarding a draft document regarding IARC. The redacted portions of this document are internal to Monsanto. Monsanto proposes to redact just the John Rebman email.

26. Privilege Entire Tabs 433 – 439 and Partial Privilege Tabs 482 – 486. The redacted portions of these documents are privileged because they reflect a request for legal advice from F-H employees to Lydie Ancel (Monsanto in-house counsel), the provision of legal advice from Ms. Ancel and the discussion of Ms. Ancel’s legal advice regarding a draft document regarding glyphosate. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto’s attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto’s legal interests. Monsanto proposes to narrow its redactions for privilege entire tabs 433 – 439 to be consistent with partial privilege tabs 482 – 486.

27. Privilege Entire Tabs 473 – 476. These documents are privileged because they reflect requests for legal advice from Monsanto employees to Lydie Ancel (Monsanto in-house counsel) and provisions of legal advice from Ms. Ancel regarding a draft document regarding glyphosate. The presence of F-H does not break privilege because F-H was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant and it was often necessary for Monsanto’s attorneys (in-house and outside counsel) to share legal advice with F-H to protect Monsanto’s legal interests.

CONCLUSION

For the reasons stated above, Monsanto respectfully requests that the Court set aside the Special Master’s F-H Rulings as to the documents and document portions detailed above and instead hold that privilege exists and was not waived as to those documents. As noted previously, because the Special Master is intending to change some of his rulings to sustain Monsanto’s privilege claims, Monsanto suggests that the Court wait for confirmation by the

Special Master as to which rulings within the September 16, 2019 and September 19, 2019 orders will be modified. To the extent the Court disagrees with Monsanto's positions, before disclosure to plaintiffs of any documents or information that Monsanto has withheld as privileged, Monsanto requests an opportunity to appeal.

DATED: October 16, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2019, the foregoing was electronically filed with the Clerk of the Court of St. Louis City, Missouri using Missouri Case.Net which sent notification of such filing to all persons listed in the Court's electronic notification system.

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