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 9/4/19 PRIVILEGE RULINGS REGARDING DOCUMENTS INVOLVING SCOTTS COMPANY

Monsanto respectfully appeals the September 4, 2019 Order of Special Master Norton denying its privilege claims as to certain documents involving the Scotts Company ("Scotts") ("9/4/2019 Ruling") (Exhibit 1).

On September 26, 2019, Monsanto met with the Special Master e*x parte* to discuss certain documents from his 9/4/2019 Ruling 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 some of his decisions overruling Monsanto's privilege claims were likely to change, but that he would not change all of his decisions overruling Monsanto's privilege claims. Because the Special Master has indicated that he intends to change some of his rulings and 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This appeal is limited – Monsanto has withdrawn its challenge as to many of the documents included in the Special Master's Order – but it continues to maintain that a select

number of materials are well within the bounds of privileged communications between parties including based on common legal interest, contractual joint defense, or work product bases for protecting their communications. Scotts is Monsanto's longstanding agent for marketing and distribution in Monsanto's retail channel. The parties have a deep and ongoing common legal interest in the labeling, advertising, and regulatory issues as well as managing potential liability from consumer or governmental complaints. The inclusion of Scotts in Monsanto's communications as to those topics 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 portions of certain documents detailed below and on the attached chart (Exhibit 2) are privileged and that Monsanto need not produce unredacted versions of these documents.

BACKGROUND

I. The Monsanto/Scotts Relationship

Scotts has been marketing and selling Monsanto's Roundup® Lawn and Garden products as Monsanto's agent since 1998. Scotts acts as Monsanto's marketing and distribution agent as it relates to Monsanto's retailer customers. Scotts also operates call centers where consumers can call in with concerns or issues with Monsanto's products. The relationship between Monsanto and Scotts, including related joint defense agreements, litigation, and common legal interests, are discussed in detail in the accompanying supporting declarations/affidavits of in-house counsel Robyn D. Buck and Mark Sedor. *See* Declaration of Robyn D. Buck in Support of Monsanto Company's Privileged Communications with The Scotts Company (hereinafter "Buck Decl.")

(attached as Exhibit 4); *see also* Affidavit of Mark Sedor (hereinafter "Sedor Decl.") (attached as Exhibit 5).[1]

As a result of the contractual division of responsibilities between the companies, Monsanto and Scotts are often confronted in the operation of the Lawn and Garden business with legal questions and issues in which they share a common interest. *Id.* This requires the companies to request or provide legal advice and share certain privileged material. *Id.* These communications occur with an expectation of both privilege and confidentiality. *See id.* In addition, Monsanto and Scotts have entered into both written and oral joint defense agreements regarding ongoing or threatened litigation. *See id.*

II. Procedural Background

On January 5, 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 Scotts. Plaintiffs argued that the involvement of Scotts in a document or communication waived privilege under any circumstance. Monsanto maintained – and the Special Master agreed – that there were circumstances in which the presence of Scotts would not waive privilege protections.[2] Specifically, the Special Master left open the possibility that the joint defense doctrine, a common legal interest, and/or the work product doctrine could apply to protect certain documents shared between Monsanto and Scotts. The Special Master therefore ordered

[1] Scotts' roles in the Roundup® Lawn and Garden business are also detailed in the affidavits attached to Monsanto's previous briefing. *See, e.g.*, Affidavit of James Guard and Affidavit of Liz Ayers (previously filed).

[2] Monsanto understands the Special Master rejected the argument that Scotts is Monsanto's agent for purposes of privilege, and that this Court affirmed that ruling. However, to the extent that the Court does not uphold Monsanto's privilege claims based on the grounds discussed herein, Monsanto asks the Court to reconsider its April 15, 2019 Order based on the prior briefing, in the context of the particular documents at issue here. Monsanto continues to preserve its agency argument and the alternative arguments it addressed before the Special Master, this Court, and/or to the Missouri appellate courts in connection with its writ petitions on the agency issue and in the alternative independent contractor arguments addressed in those filings.

Monsanto to submit a revised privilege log detailing how these doctrines may apply to protect specific documents from production.

In response, Monsanto submitted a revised privilege log. Subsequently, however, plaintiffs filed a second motion to compel with the Special Master, claiming that Monsanto had somehow waived any privilege claims as to all documents in the revised privilege log. The Special Master rejected this argument and instead 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, with the first group consisting of documents involving Scotts that were only partially redacted for privilege, and the second group consisting of documents involving Scotts that were withheld in full based on privilege. On September 4, 2019, the Special Master issued a ruling as to the second group of documents involving Scotts 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* 9/4/2019 Ruling.

After receiving the Special Master's 9/4/2019 Ruling, 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.[3] But Monsanto identified some documents that easily satisfy the elements for privileged communications between parties with a common legal interest or contractual agreements for joint defense, or for protection under the work product doctrine.

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

As to that limited set of materials, Monsanto met with the Special Master in an *ex parte* hearing on September 26, 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 some of his decisions overruling Monsanto's privilege claims were likely to change, but that he would not change all of his decisions overruling Monsanto's privilege claims. Monsanto has not yet received word from the Special Master detailing any changed decisions for his 9/4/2019 Ruling and therefore bases its objections on the 9/4/2019 Ruling. Monsanto will notify the Court if some of the categories and documents discussed below are no longer at issue as a result of updated decisions from the Special Master.

Monsanto objects to the 9/4/2019 Ruling insofar as it incorrectly overruled Monsanto's privilege claims as to certain documents and certain portions of documents, as detailed below and in Exhibit 2. Because the 9/4/2019 Ruling does not include any legal discussion or reasoning, Monsanto's Argument below largely restates its reasoning for why the documents at issue are privileged, and why privilege was not waived by including Scotts: namely, because of the existence of a joint defense or a common legal interest, 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 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*.

Under Missouri law, the attorney-client privilege is not waived when documents are shared with a third party pursuant to a joint defense agreement or when both parties share a common interest in the legal matter at issue. *See State ex rel. Winkler v. Goldman*, 485 S.W.3d 783, 790 (Mo. Ct. App. 2016); *Lipton Realty, Inc. v. St. Louis Housing Auth.*, 705 S.W.2d 565, 570 (Mo. Ct. App. 1986). 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 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 9/4/2019 Ruling's 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 Scotts 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).[4] Since that time, the Missouri Supreme Court has

[4] "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

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 nature of the longstanding relationship between Monsanto and Scotts, and specifically Scotts' exclusive role in marketing and distributing Monsanto's Lawn & Garden products in a highly regulated environment, necessitates the sharing of certain privileged information. Although the presence of a third party may in some circumstances result in a privilege waiver, there is no waiver when Monsanto and Scotts share privileged information in the context of a joint defense or a common legal interest.

A. Communications Withheld From Production Under A Joint Defense Agreement Preserve Privilege.

When parties "join[ ] forces" in order to obtain more effective legal assistance, privilege is preserved. *State ex rel. Winkler v. Goldman*, 485 S.W.3d 783, 790 (Mo. Ct. App. 2016); *see also, e.g., Fred Weber, Inc. v. Shell Oil Co.*, 432 F. Supp. 694, 697 (E.D. Mo. 1977) (confidences which are shared in the context "of a joint defense … remain privileged"). This joint defense privilege (as well as the closely related, broader common interest privilege, discussed separately below) expands the protections of the attorney-client privilege by allowing counsel for co-defendants in pending or potential litigation to share privileged information without waiving privilege. *United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012) (joint defense privilege is an "extension of [the] attorney client privilege" which protects communications passing "from

---

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).

one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.") (internal quotation marks omitted).

A company "need not be a litigant to be a party to a joint defense agreement." *U.S. v. LeCroy*, 348 F. Supp. 2d 375, 381 (E.D. Pa. 2004). Instead, "the joint defense privilege applies to parties or potential parties sharing a common interest in the outcome of a particular claim." *Id.* (citing *Russell v. Gen. Elec.*, 149 F.R.D. 578 (N.D. Ill. 1993).[5] As long as the individual requirements for the attorney-client privilege are satisfied, the privilege protects communications between parties engaged in an "effort to set up a common defense strategy in connection with actual *or prospective* litigation." *Minebea Co. Ltd. v. Papst*, 228 F.R.D. 13, 18 (D.D.C. 2005) (emphasis added).

Although written joint defense agreements are appropriate and valid, "[i]t is clear that no written agreement is required" for a joint defense privilege to exist. *Gonzalez*, 669 F.3d at 979, 981. A joint defense agreement may be formed via "an express verbal agreement" or be "implied from conduct." *Id.*[6] If "parties invoking the privilege" establish they shared a "joint defense with the third-party," then "the privilege is extended to all." *Navigators Mgt. Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 2009 WL 465584, at *4 (E.D. Mo. Feb. 24, 2009).

---

[5] *See also Lugosch v. Congel*, 219 F.R.D. 220, 238 (N.D.N.Y. 2003) ("A key issue in this case is whether a non-party to the litigation can join a joint defense agreement, receive all of the benefit inured under such agreement, and be obligated to the same degree as the co-parties. The answer is an unreserved affirmative."); *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 106 F.R.D. 187, 191 (N.D. Ill. 1985) ("Although originally limited to cases of actual co-defendants, courts have applied the joint defense privilege to cases of 'potential' litigation as well.").

[6] *See also John Morrell & Co. v. Local Union 304A of United Food and Commercial Workers, AFL-CIO*, 913 F.2d 544, 555–56 (8th Cir. 1990) (parties "shared a joint defense privilege by virtue of being aligned on the same side" of a legal dispute); *United Food and Commercials Workers Local 1776 Participating Emp'rs Health & Welfare Fund, et al. v. Teikoku Pharma USA, et al.,* 2016 WL 5906590, at *5 (N.D. Cal. Oct. 11, 2016) (finding a joint defense agreement "need not be in writing"); *Avocent Redmon Corp. v. Rose Elec., Inc.*, 516 F.Supp.2d 1199, 1203 (W.D. Wash. 2007) ("A written agreement is not required" to invoke the joint defense privilege).

There are at least five oral or written joint defense agreements under which Monsanto and Scotts operate, including but not limited to the following, which serve to protect certain documents and document portions at issue in this set:

- **Joint Defense Agreement regarding personal injury cases, including those alleging cancer from alleged exposure to glyphosate:** Monsanto and Scotts entered into a written Joint Defense and Confidentiality Agreement on August 8, 2016 concerning personal injury/cancer claims (filed or unfiled) related to glyphosate-containing products. Buck Decl. ¶ 5.

- **Joint Defense Agreement regarding California Proposition 65:** Monsanto and Scotts entered into a written Joint Defense Agreement on or about December 4, 2015, after the California Office of Environmental Health Hazard Assessment issued a notice of intent to list glyphosate under California Proposition 65. *Id.*

- **Joint Defense Agreement regarding exposure to di(2-ethylhexyl)phthalate ("DEHP") in certain sprayers:** Monsanto and Scotts entered into a written Joint Defense Agreement on October 28, 2015 to cover the investigation and defense of claims asserted in a notice of intent to sue regarding alleged exposures to a certain chemical in certain sprayers, as well as any resulting litigation. *Id*.

- **Joint Defense Agreement regarding false advertising litigation:** Monsanto and Scotts operated under an oral joint defense agreement regarding certain false advertising litigation. *Id*.

Monsanto has withheld from production certain documents and document portions that were communicated between Monsanto and Scotts pursuant to the terms of one or more of the above joint defense agreements.[7] The documents at issue include legal advice or the request for legal advice. Although the documents were shared between Monsanto and Scotts, Monsanto and Scotts maintained the confidentiality of those documents. Since these documents "were made in the course of" the joint defense efforts contemplated by these agreements, they are appropriately

[7] The specific documents falling under each category of privilege discussed herein are detailed below in Part III, as well as in Exhibit 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.

withheld as privileged even though they were shared among Monsanto and Scotts. *United States v. Philip Morris USA, Inc.*, 2004 WL 5355972, at *6-7 (D.D.C. Feb. 23, 2004).

B. Scotts and Monsanto Have Common Legal Interests That Prevent Waiver of Attorney-Client Privilege.

Expanding the joint defense privilege so as to apply to a broader array of third-party relationships (not just potential co-defendants), the common interest (or "community-of-interest") privilege protects from waiver disclosures of privileged information between separately represented third parties who share common legal interests. The common legal interest doctrine prevents waiver where, as here, "the third party shares a common interest" in the legal matter at issue "and where the communication in question was made in confidence." *Lipton Realty, Inc.*, 705 S.W.2d at 570. The doctrine "expands the coverage of the attorney-client privilege in certain situations" where "two or more clients with a common interest in a litigated or non-litigated matter . . . agree to exchange information concerning the matter." *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997); *see also* Restatement (Third) of the Law Governing Lawyers § 76(1) (2000). "[A] communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons." *In re Grand Jury*, 112 F. 3d at 922. "[T]he common interest does not require or imply that an actual suit is or ever will be pending." *Broessel v. Triad Guar. Ins. Corp.*, No. 1:04CV-00004-JHM, 238 F.R.D. 215, 220 (W.D. Ky. Aug. 2, 2006) (citation omitted). Under this doctrine, privilege protects documents and communications where Monsanto and Scotts "share[ed] a common interest" in the legal matter at issue. *Lipton Realty*, 705 S.W.2d at 570.

Federal courts applying Missouri law have honored *Lipton Realty*'s "common interest" privilege. For example, the Western District of Missouri held that a communication of legal theories between two organizations with separate counsel "does not waive either entity's

privilege" because they "had a common interest" in litigation involving an ordinance. *In re Bisphenol-A (BPA) Polycarbonate Plastic Prod. Liab. Litig.*, 2011 WL 1136440, at *4 (W.D. Mo. Mar. 25, 2011) (citing *Lipton Realty*, 705 S.W.2d at 570–71); *Commerce Bank v. U.S. Bank Nat. Ass'n*, 2015 WL 9488395, at *2 (W.D. Mo. Aug. 18, 2015) (finding "common" interest doctrine applies to parties with a "community of interests").

The very nature of the relationship between Monsanto and Scotts demonstrates a common legal interest that forms the basis of the extension of the attorney-client privilege, as described further below and in the accompanying declarations. *See* Buck Decl.; Sedor Aff. Accordingly, Monsanto and Scotts have asserted common legal interests across a number of specific areas that allow Monsanto to withhold the production of documents (or portions of documents) under a claim of privilege:

i. Monsanto and Scotts have a Common Legal Interest in Actual and/or Anticipated Litigation.

Missouri courts recognize that a common legal interest in actual or anticipated litigation is sufficient to maintain privilege for documents shared with third parties. For example, in *Lipton Realty,* the court found an attorney's letter sent from the St. Louis Housing Authority to the Department of Housing and Urban Development ("HUD") regarding litigation focused on a joint project remained privileged despite the inclusion of a third party unrepresented by counsel. 705 S.W.2d at 570. Other courts also regularly recognize an exception to waiver when two entities "share a sufficiently common interest in defending against plaintiffs' claims…that any communications disclosed by [one] to attorneys for the [other] d[id] not lose their privileged or protected status by such disclosure." *B.E. Meyers & Co., Inc. v. United States*, 41 Fed. Cl. 729, 734 (Ct. Cl. 1998) (finding contract provisions such as an indemnity clause and a "Notice and Assistance Clause" requiring one entity to provide "all evidence and information" pertaining to

any suit related to its product supply evidence that the company had a "vested interest" in the litigation's outcome).[8]

Because Monsanto and its agent/business partner Scotts have worked together to market and sell Roundup® Lawn and Garden products, they have a common legal interest in defending pending or potential litigation related to those products. Buck Decl. ¶¶ 8-9. Similarly, both companies have provided records to the other to support the defense of litigation. *Id.* Indeed, consumer threats of litigation are often addressed to Scotts, which must then work with Monsanto and its counsel to formulate a response to protect both companies' interests in avoiding litigation. *Id.*

This common legal interest in pending or potential litigation related to Roundup® Lawn and Garden products preserves privilege for certain documents at issue.[9] Like the document at issue in *Lipton Realty*, these shared documents discuss ongoing and potential litigation focused on a joint project between Monsanto and Scotts (Scotts' sale of Monsanto's products in its role as Monsanto's agent). These communications were "sent in confidence" from one party to the other "for the limited and restricted purpose of safeguarding their shared interests." *Lipton Realty*, 705 S.W.2d at 570-71. Given the nature of their relationship, Monsanto and Scotts each have an interest in the outcome of litigation concerning the Roundup® Lawn and Garden

[8] S*ee also, e.g.*, *Margulis v. Hertz Corp.*, 2017 WL 772336, at *1 (D.N.J. Feb. 28, 2017) (holding common interest doctrine protected communications between Hertz and its vendor, a separate corporation, as Hertz was aware that it may be sued for conduct associated with services that the vendor provided); *BASF Aktiengesellschaft v. Reilly Indus., Inc.*, 224 F.R.D. 438, 442-43 (S.D. Ind. 2004) (protecting letter explaining an ongoing lawsuit and the possibility of the third-party providing records to support the defense of the lawsuit in part because there was a confidentiality agreement between defendant company and third party).

[9] Note that a document may be subject to more than one "category" of common legal interest. For example, a concern about the labeling of a product could raise legal concerns about *both* regulatory compliance of the product and the potential for litigation related to the product. Scotts and Monsanto would have common legal interests in both issues—both companies wish to ensure that Roundup® products are compliant with applicable regulations (so that they may be legally sold) and that litigation related to the products is avoided (since both companies are potential defendants in such lawsuits).

products. Because of this common interest in the outcome of litigation, Monsanto "[cannot] be compelled to produce" any particular document within this category. *Id.*

ii. Monsanto and Scotts have a Common Legal Interest in Ensuring Regulatory Compliance.

Monsanto and Scotts share a common legal interest in ensuring regulatory compliance. For the documents where this protection applies, Monsanto and Scotts sought, shared, and discussed legal advice in order to ensure that labeling, marketing, and advertising for the Lawn and Garden products, as well as any related tax concerns, complied with applicable regulations and to ensure each company could defend Monsanto's products against potential regulatory enforcement actions. These documents and document portions are therefore "clearly within the scope of the common interest doctrine," and not subject to production. *See BDO Seidman*, 492 F.3d at 816. In addition to preserving privilege for shared documents and communications, the companies' joint work to ensure regulatory compliance "serves the public interest by advancing compliance with the law, facilitating the administration of justice and averting litigation." *Id.* (affirming privilege based on a common legal interest in "ensuring compliance" and "making sure [the corporate defendant and third party] could defend their products" against potential IRS regulatory enforcement actions).[10]

When examining a common legal interest based in regulatory compliance, "the fact that there may be an overlap of a commercial and legal interest does not destroy the common legal interest, and privilege." *FSP Stallion 1, LLC v. Luce*, 2010 WL 3895914, at *6 (D. Nev. Sept. 30, 2010) (finding defendants shared a "common legal interest" in ensuring "compliance with all

[10] *See also Ryskamp ex rel. Boulder Growth & Income Fund v. Looney*, 2011 WL 3861437, at *8 (D. Colo. Sep. 1, 2011) (finding communications between corporate board and "Independent and Interested" third parties "are privileged due to the common interest of all parties to formulate a common legal strategy regarding regulatory compliance issues"); *Broessel*, 238 F.R.D. at 220 (preventing disclosure of communications between defendant and the six other companies that together comprised a trade group because the communications related to common issues of regulatory compliance).

securities laws"). Indeed, "[c]ommunications do not cease to be for the purpose of receiving legal services just because the recipient intended to use the fruits of the legal services to guide its relations with customers." *BDO Seidman*, 492 F.3d at 816.

Here, Monsanto and Scotts are both deeply interested in avoiding potential violations of governing regulations of Roundup® Lawn and Garden products, and the marketing and advertising thereof, because both companies have a direct financial interest in the sale of such products and an interest in complying with applicable regulations. Buck Decl. ¶¶ 12-13. In order to ensure such compliance, Monsanto and Scotts necessarily must communicate regarding the government regulations pertaining to Monsanto's products, including EPA governing regulations and California's Proposition 65. Scotts is thus required to work closely with Monsanto to develop packaging, advertising, and marketing materials that comply with legal and regulatory requirements. *See* Buck Decl. ¶¶ 12-13. Monsanto and Scotts exchange these documents for the purpose of "ensuring compliance" with regulations. *BDO Seidman*, 492 F.3d at 816; *see also In the Matter of Jenny Craig, Inc.*, 1994 WL 16774903 (F.T.C. May 16, 1994) (protecting documents discussing legal strategy between respondent and respondent's advertising agency because "both have a common interest in the use of legal advice").

In addition, Monsanto and Scotts share a common interest in regulatory compliance regarding adverse incident reporting. *See* Buck Decl. ¶¶ 12-13.

iii. Monsanto and Scotts have a Common Legal Interest in Joint Contracts and Joint Ventures.

As "collaborators, legally committed to a cooperative venture and seeking to make that venture maximally profitable," Monsanto and Scotts have a common legal interest that protects certain documents shared between them from waiver. *United States v. United Techs. Corp.*, 979

F. Supp. 108, 112 (D. Conn. 1997); *see also, e.g.*, *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 415-16 (N.D. Ill. 2006) (finding common legal interest doctrine prevented waiver of documents shared between corporation and third party appointed "to act as its sales agent"). Documents shared to "further an ongoing enterprise" maintain privilege because "[r]eason and experience demonstrate that joint venturers, no less than individuals, benefit from planning their activities based on sound legal advice predicated upon open communication." *United Techs. Corp.*, 979 F. Supp. at 112 (quoting *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815-16 (7th Cir. 2007)).

Likewise, companies share a common legal interest when they are parties to a joint venture and each has a "direct and coterminous financial interest" with the other in that joint venture. *Trans-W. Petroleum, Inc. v. Wolverine Gas & Oil Corp.*, 2011 WL 6318528, at *4 (D. Utah Dec. 15, 2011); *see HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 72 (S.D.N.Y. 2009) (finding plaintiff and non-party lenders, as co-lenders of a loan, shared a common legal interest in enforcing the right under the loan guaranties). This rule plainly applies here, where both Monsanto and Scotts have a direct financial interest in the sales and profitability of the Roundup® Lawn and Garden products and, indeed, share a common reconciliation statement (prepared by Scotts) that is used to determine the profits of their shared business and the amounts to be remitted to Monsanto and retained by Scotts. Buck Decl. *See Schaeffler v. United States*, 806 F.3d 34, 37 (2d Cir. 2015) (holding that "the attorney-client privilege was not waived by appellants' provision of documents to a consortium of banks … sharing a common legal interest in the tax treatment of a refinancing and corporate restructuring"). Because Monsanto and Scotts share a "direct and coterminous financial interest" that grounds their common legal interest in joint ventures and joint agreements, disclosure of

these documents "did not operate as a waiver of either the attorney-client privilege or the work-product doctrine." *Trans-W. Petroleum*, 2011 WL 6318528, at *4.

iv. Monsanto and Scotts have a Common Legal Interest in Protecting Intellectual Property.

Monsanto and Scotts also have a common legal interest in protecting intellectual property. *See* Buck Decl. ¶¶ 14-15. There is no privilege waiver when documents are shared between parties with a "common legal interest in enforcement of [] trademark rights, and the communications at issue [are] directly related to that interest." *Major League Baseball Prop., Inc. v. Salvino, Inc.*, 2003 WL 21983801, at *1 (S.D.N.Y. Aug. 20, 2003); *see Perrey v. Televisa, S.A. DE C.V. et al.*, 2009 WL 3876198, at *2 (C.D. Cal. Nov. 18, 2009) (finding common legal interest when defendant and non-party third party both financially benefit from copyright use).

Several documents at issue involve exchanges between Monsanto and Scotts regarding various trademarks used by the Roundup® brand. The parties' shared interests in enforcing these rights, and their financial benefit from doing so, underscore their common legal interest to protect the enforceability of this intellectual property and operate to prevent waiver. *See* Buck Decl. ¶¶ 14-15.

II. A Number of Documents Involving Scotts Are Also Protected Work Product.

The Special Master's Ruling makes no mention of the fact that certain documents 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, Scotts is not Monsanto's adversary – indeed, their interests are aligned in this and similar litigation – and sharing work product between these two entities does not waive work product protections. *See* Buck Decl. ¶ 17. Nor does disclosure of work product between Scotts 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").

The Special Master's Ruling as to the documents at issue would obliterate these work product protections.

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

Monsanto appeals Special Master Norton's rulings as to the following 19 groups of documents:[11]

1. **Tabs 4, 8, 10 – 11, 53, 102 – 103, 461, 532 – 539, 542, 587 – 589, 1290, and 1292 – 1296.** These documents are privileged because they reflect requests for legal advice or discussions / provisions of legal advice regarding advertising scripts and labeling. The presence of Scotts does not break privilege because Monsanto and Scotts have a common legal interest in ensuring regulatory compliance in advertising and in managing the risk of actual or anticipated litigation regarding false advertising liability. Monsanto proposes to narrow its privilege claims on certain of the documents in this group as follows:

- Tab 4: Monsanto proposes to redact this document as Monsanto agreed to modified tabs 186 – 194 in its brief filed September 25, 2019 as tab 4 is the same email thread as tabs 186 – 194 in that prior set of documents. *See* Def. Monsanto Co.'s Br. in Support of Its Objection to Certain of Special Master Norton's Privilege Rulings Regarding Partially Redacted Documents Involving Scotts Co., at 19, *Walter Winston*

[11] 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. If the Court requires more information about these documents, Monsanto is willing to meet *ex parte* to discuss the documents *in camera*.

et al. v. Monsanto Co., No. 1822-CC0051 (Mo. Cir. Ct., St. Louis City) ("Monsanto's 9/25/2019 Brief").

- Tabs 8 and 11: Monsanto proposes to redact the extracted text and produce the flat image.
- Tab 53: Monsanto proposes to redact the first two paragraphs.
- Tabs 102 – 103: Monsanto proposes to redact these documents identical to tabs 58 and 68 in Monsanto's 9/25/2019 Brief as tabs 102 and 103 in this set of documents are the same email thread as tabs 58 and 68 in the prior set of documents. *See id.* at 16-17.
- Tab 461: Monsanto proposes to redact the first 8 emails from the top of the chain.
- Tab 532 – 539, 542: Monsanto proposes to redact all communications after the Mason Bradley email sent on Tuesday, March 18, 2014 at 4:00PM.
- Tab 587 and 588: Monsanto proposes to redact the first two sentences of the email from Elizabeth Brand sent on August 7, 2012 at 5:22:18PM.
- Tabs 589: Monsanto proposes to redact the same two sentences in tabs 587 and 588 and the top email of the chain.
- Tabs 1290, 1292 – 1296: Monsanto proposes to redact the John Rebman email dated September 26, 2016 sent at 4:27PM and the email from Ona Maune dated September 27, 2016 at 9:57AM.

2. **Tabs 52, 125, 126, 127, 171, 269 – 270, 287 – 288, 489 – 490, 505 – 507, 811 – 819, 825 – 831, 833 – 846, 860 – 862, 876 – 880, 968 – 969, 1025, 1093, and 1299 – 1310.** These documents are privileged because they are communications between attorneys for Monsanto and Scotts where there is one of the Joint Defense Agreements ("JDAs") in effect as

outlined in the Buck Declaration and Sedor affidavit. *See* Exs. 4 and 5. Specifically, these documents are all related to the Proposition 65 JDA and the glyphosate cancer litigation JDA. These documents specify the existence of a JDA in the communications. The presence of Scotts does not break privilege because Monsanto and Scotts have a JDA in place for each of these documents. As to a few of the documents, Monsanto proposes to narrow the privilege redactions as follows:

- Tab 52: Monsanto proposes to redact the first four emails from the top of the chain.
- Tab 125: Monsanto proposes to redact the first two emails from the top of the chain.
- Tab 126: Monsanto proposes to redact the first email from the top of the chain.

3. **Tabs 58 – 61, 156 – 161, 174 – 183, 230 – 234, 289 – 296, 330, 337 – 340, 395 – 440, 444 – 450, 769, 882 – 888, 947 – 948, 1241, and 1381.** These documents are privileged because they are requests for legal advice, discussions of legal advice, or provisions of legal advice about how the parties should resolve a potential dispute with the USDA regarding glyphosate tolerant creeping bentgrass ("GTCB"). The presence of Scotts does not waive privilege because Monsanto and Scotts have a common legal interest in regulatory compliance regarding management of GTCB. Tabs 177, 181, and 183 are the same email thread as tab 81 in the documents at issue in Monsanto's 9/25/2019 Brief and Monsanto proposes to redact these documents in the same manner. *See* Monsanto's 9/25/2019 Brief at 17.

4. **Tabs 62 – 69, 213 – 218, 250 – 252, 805, 1056, and 1059.** These documents are privileged because they involve work product, a request for, or the provision of legal advice regarding alleged consumer injuries. The presence of Scotts does not waive privilege because Monsanto and Scotts have a common legal interest in managing the risk of actual or anticipated litigation regarding alleged injuries by consumers of their products. Tabs 805 and 1056 are the

same email threads as tabs 89, 90, 95, 96, and 99 in the documents at issue in Monsanto's 9/25/2019 Brief and Monsanto proposes to redact these documents in the same manner as Monsanto proposed to modify tabs 89, 90, 95, 96, and 99 in its 9/25/2019 brief. *See* Monsanto's 9/25/2019 Brief at 17. Tab 1059 is the same email thread as tabs 266, 349 – 350, and 386 – 389 in Monsanto's 9/25/2019 Brief and Monsanto proposes to redact Tab 1059 in the same manner as it proposed redactions to tabs 266, 349-350, and 386-389 in the 9/25/2019 Brief. *Id.* at 21.

5. **Tabs 168 – 170, 245 – 246, 331, 513, 590 – 598, and 1318 – 1321.** These documents are privileged because they are communications between attorneys for Monsanto and Scotts where there is one of the JDAs in effect as outlined in the Buck Declaration and Sedor affidavit. *See* Exs. 4 and 5. Specifically, these documents involve the glyphosate cancer litigation JDA, the DEHP JDA, the Proposition 65 JDA and/or the oral false advertising JDA. Although these documents do not explicitly mention the existence of a JDA in the communication, the substance of the communications are all regarding one or more of the JDAs. The presence of Scotts does not break privilege because Monsanto and Scotts have a JDA in place for each of these documents. Tab 513 is the same email thread as tab 482 in the documents at issue in Monsanto's 9/25/2019 Brief and Monsanto proposes to redact tab 513 in the same manner. *See* Monsanto's 9/25/2019 Brief at 23.

6. **Tabs 193 – 212.** These documents are privileged because they reflect requests for legal advice from Scotts to Cristina Spicer (Monsanto in-house counsel) and the provision of legal advice from Ms. Spicer regarding a consumer complaint involving lack of child resistant packaging on certain Roundup® products. The presence of Scotts does not break privilege because Monsanto and Scotts have a common legal interest in managing the risk of actual or anticipated litigation regarding product design defect claims.

7. **Tabs 265 – 267, 737 – 739, 847 – 848, 923 – 931, 1021 – 1022, 1098 – 1102, and 1105.** These documents are privileged because they involve discussions of legal advice regarding a competitor's possible violation of Monsanto's and Scotts' trade dress of their Roundup® products. The presence of Scotts does not break privilege because Monsanto and Scotts have a common legal interest in protecting their intellectual property and trademarks. Monsanto proposes to narrow the privilege claims on certain of these documents as follows:

- Tab 737: Monsanto proposes to redact the first email from the top of the chain.
- Tab 738: Monsanto proposes to redact the first two emails from the top of the chain.
- Tab 739: Monsanto proposes to redact the first three emails from the top of the chain.
- Tab 1098: Monsanto proposes to redact the last two sentences in the first paragraph in the email from Elizabeth Brand sent on May 4, 2012 at 10:46:05AM.
- Tab 1099: Monsanto proposes the same redactions as in tab 1098 and the top email of the chain.
- Tab 1100: Monsanto proposes the same redactions as in tab 1099 as well as the second email from the top from Elizabeth Brand sent on May 7, 2012 at 2:55PM.
- Tab 1101: Monsanto proposes the same redactions as in tab 1099 as well as the top email of the chain.
- Tab 1102: Monsanto proposes the same redactions as in tab 1101.

8. **Tabs 320, 322 – 325, 327 – 329, and 741.** These documents are privileged because they constitute legal advice from Beveridge & Diamond P.C., outside counsel representing three different task forces regarding EU data submission compliance. The fact that many companies are part of the task force does not waive privilege because the task forces are limited liability corporations and can have privileged communications with outside counsel just

like any other corporation. The members of the task force all have a common legal interest in regulatory compliance with EPA requirements.

9. **Tabs 393 – 394.** These documents are privileged because they reflect a request for legal advice from Monsanto to outside counsel Brandon Neuschafer (Bryan Cave) and the provision of legal advice from Mr. Neuschafer and Barbara Bunning-Stevens (Monsanto in-house counsel) regarding Scotts' messaging around glyphosate. Monsanto proposes to redact the top 3 emails of tab 393 and the top 4 emails of 394, which are internal to Monsanto.

10. **Tab 694.** This document is privileged because it is a request for legal advice from a Scotts employee to Dimiter Todorov (Scotts in-house counsel) regarding a possible antitrust issue affecting both Scotts and Monsanto that gets forwarded to Monsanto for Monsanto's input. The presence of Scotts does not break privilege because Monsanto and Scotts have a common legal interest in regulatory compliance regarding antitrust issues and in actual or anticipated litigation regarding alleged antitrust violations.

11. **Tabs 781 – 783.** These documents are privileged because they are a request for legal advice regarding possible litigation regarding an alleged DEHP violation that is sent to Monsanto in-house counsel Doug Wilner and Christina Spicer. The presence of Scotts does not break privilege because Monsanto and Scotts have a common legal interest in managing the risk of actual or anticipated litigation regarding their products.

12. **Tabs 852 – 858 and 1311 – 1317.** These documents are privileged because they concern a potential tax liability issue in France that would affect both parties under French law. The presence of Scotts does not waive privilege because Monsanto and Scotts have a common legal interest in regulatory enforcement of tax issues and in managing the risk of actual or anticipated litigation regarding tax liability. Tabs 1314 and 1317 are duplicates of tab 269 in the

documents at issue in Monsanto's 9/25/2019 Brief and Monsanto proposes to redact these documents in the same manner. *See* Monsanto's 9/25/2019 Brief at 21.

13. **Tab 984.** This document is privileged because it reflects a request for legal advice from Monsanto employee Dawn Fee-White and the provision of legal advice from outside counsel Brandon Neuschafer (Bryan Cave) regarding logos and an advertising script for television. Monsanto proposes to redact the first 6 emails from the top of the chain. The portions that Monsanto is maintaining as privileged are internal to Monsanto.

14. **Tabs 986 – 987, 998 – 999, and 1037.** These documents are privileged because they involve requests for legal advice from Monsanto to John Rebman (Monsanto in-house counsel), Sandra Schol (Monsanto in-house counsel), Lydie Ancel (Monsanto in-house counsel), Cristina Spicer (Monsanto in-house counsel), Robyn Buck (Monsanto in-house counsel) and outside counsel Brandon Neuschafer (Bryan Cave) and the provision of legal advice from Mr. Rebman, Ms. Spicer, and Ms. Buck regarding a brand extension for Roundup® in Europe, and advertising/marketing materials. As specified below, for the portions of the document Monsanto is maintaining as privileged, the documents are all internal communications within Monsanto with the exception of Tab 1037. The presence of Scotts on Tab 1037 does not break privilege because Monsanto and Scotts have a common legal interest in ensuring regulatory compliance in advertising and in managing the risk of actual or anticipated litigation regarding false advertising liability. Monsanto proposes to narrow the privilege claims on certain of these documents as follows:

- Tab 986: Monsanto proposes to redact the first three emails from the top of the chain.
- Tab 987: Monsanto proposes to redact the first two emails from the top of the chain.
- Tab 998: Monsanto proposes to redact the first email from the top of the chain.

- Tab 999: Monsanto proposes to redact the first two emails from the top of the chain.
- Tab 1037: Monsanto proposes to redact the first two emails from the top of the chain.

15. **Tabs 1000 – 1012.** At the *ex parte* conference, Special Master Norton provided handwritten rulings as to each of these documents, sustaining privilege as to some, and overruling others. Monsanto does not challenge the rulings as laid out in Special Master Norton's handwritten order. However, Monsanto addresses them here because they were not addressed in the Sept. 4, 2019 Ruling and Special Master Norton has not yet issued his revised ruling regarding those documents to both parties.

16. **Tabs 1039 and 1040.** These documents are privileged because they reflect the provision of legal advice from outside counsel Brandon Neuschafer (Bryan Cave) and the discussion of legal advice regarding a labeling and advertising issue for the Roundup website between Monsanto and Scotts. The presence of Scotts does not break privilege because Scotts and Monsanto have a common legal interest in ensuring regulatory compliance in advertising and in managing the risk of actual or anticipated litigation regarding false advertising liability.

17. **Tabs 1341 – 1342.** These documents are privileged because they reflect requests for legal advice to outside counsel Brandon Neuschafer (Bryan Cave) and Nancy Marshall Avioli (Monsanto in-house counsel) and the provision of legal advice from Mr. Neuschafer and Stacey Stater (Monsanto in-house counsel) regarding responses to a non-profit organization email and phone call campaign against Home Depot concerning Roundup®. The presence of Scotts does not break privilege because Monsanto and Scotts have a common legal interest in managing the risk of actual or anticipated litigation regarding allegations concerning the safety of Roundup® products.

18. **Tab 1373.** The presence of Scotts does not break privilege because this document reflects a request for legal advice from Monsanto employee Donna Farmer to outside counsel Brandon Neuschafer (Bryan Cave) and the provision of legal advice from Mr. Neuschafer regarding what Scotts can or cannot say about Roundup® on their website. Monsanto and Scotts have a common legal interest in regulatory compliance with EPA labeling requirements and in ensuring regulatory compliance in advertising and in managing the risk of actual or anticipated litigation regarding false advertising liability.

19. **Tabs 1383 – 1385.** These documents come from the files of Monsanto employee Jim Guard. Tab 1383 is privileged because it reflects the provision of legal advice from Nancy Marshall (Monsanto in-house counsel) regarding a Formulation Agreement. Tab 1383 is internal to Monsanto. Tab 1384 is privileged because it reflects a request for legal advice from Scotts to Ms. Marshall and the conveyance of legal advice by Ms. Marshall regarding a jury verdict in a case involving Scotts. The presence of Scotts does not break privilege because Monsanto and Scotts have a common legal interest in managing the risk of actual or anticipated litigation. Tab 1385 is privileged because it reflects the provision of legal advice from Aimee Zaleski (a Scotts trademark attorney) and Will Franken (a Scotts staff attorney) regarding HomeDepot's proposed changes to an agreement for a certain product. The presence of Scotts does not break privilege because Monsanto and Scotts have a common legal interest in joint ventures and contracts.

CONCLUSION

For the reasons stated above, Monsanto respectfully requests that the Court set aside the Special Master's September 4, 2019 Ruling 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 4, 2019 order 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 4, 2019

Respectfully submitted,

By: /s/ *Gregory J. Minana*
Gregory J. Minana, #38004
Christine F. Miller, #34430
Erik L. Hansell, #51288
HUSCH BLACKWELL LLP
The Plaza in Clayton
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105
Telephone: (314) 480-1500
Facsimile: (314) 480-1505
greg.minana@huschblackwell.com
chris.miller@huschblackwell.com
erik.hansell@huschblackwell.com

Booker T. Shaw
THOMPSON COBURN LLP
One US Bank Plaza
St. Louis. MO 63101
Telephone: (314) 552-6000
bshaw@thompsoncoburn.com

Edward L. Dowd, Jr., #28785
Robert F. Epperson, Jr., #46430
DOWD BENNETT LLP
7733 Forsyth Boulevard, Suite 1900
St. Louis, MO 63105
Telephone: (314) 889-7300
Facsimile: (314) 863-2111
edowd@dowdbennett.com
repperson@dowdbennett.com

Gregory S. Chernack (*pro hac vice*)
HOLLINGSWORTH LLP
1350 I Street, N.W.
Washington, DC 20005
Telephone: (202) 898-5800
Facsimile: (202) 682-1639
gchernack@hollingsworthllp.com

Attorneys for Defendant Monsanto Company

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 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.

By: By: /s/ *Gregory J. Minana*
Gregory J. Minana, #38004
HUSCH BLACKWELL