

**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 FTI CONSULTING (SC), INC.**

Monsanto respectfully appeals the September 6, 2019 and September 10, 2019 Orders of Special Master Norton denying its privilege claims as to certain documents and portions of certain documents involving FTI Consulting (SC), Inc. (“FTI”) (“FTI Rulings”) (collectively, Exhibit 1). On October 3, 2019, Monsanto met with the Special Master *ex parte* to discuss certain documents from his FTI 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 that he would amend at least some of his decisions 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This appeal is limited – Monsanto has withdrawn its challenge as to many of the documents included in the Special Master’s Orders – but it continues to maintain that a select number of materials are well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 FTI to provide consulting and communication services and litigation support. The inclusion of FTI 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. FTI Consulting**

FTI is an independent consulting firm that specializes in, among other subjects, public relations consulting and media messaging; government relations; and litigation support. In June 2016, Monsanto contracted with FTI to provide consulting and communication services, effective January 1, 2016. Declaration of Robyn D. Buck in Support of Monsanto Company's Privileged Communications with FTI Consulting (SC) Inc. (07/22/19) (hereinafter "Buck FTI Decl.") (attached as Exhibit 4). With respect to the Roundup<sup>®</sup> litigation, Monsanto hired FTI to provide litigation support as detailed in the attached exhibit. *See* Statement of Work (attached as Exhibit 5). The litigation work was performed at the direction of Monsanto's in-house and outside counsel. *See* Buck FTI Decl. ¶¶ 3, 8-9. Monsanto also retained FTI to assist on a number of other projects, including supporting its legal strategy regarding potential mergers and acquisitions. *Id.* ¶ 4.

FTI's legal and litigation support work required that it coordinate closely with Monsanto's legal team for all of the projects it performed. For example, FTI was in regular (and

often daily) contact with Monsanto and performed its work at the direction of Monsanto employees – or its outside counsel. *See id.* ¶¶ 5-6, 8-9. In short, attorneys were heavily involved in nearly every aspect of the work that FTI performed for Monsanto. *Id.* ¶¶ 3, 6, 8-9. Privileged communications involving FTI were exchanged pursuant to confidentiality agreements and maintained as confidential with a limited distribution. *Id.* ¶¶ 3, 7.

## **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 FTI. Plaintiffs argued both that any communications involving FTI could not be privileged because they concerned “public relations or dealing with the media” and that, in any case, the involvement of FTI in a document or communication waived privilege under any circumstance. Monsanto explained how the context of a highly regulated industry, ongoing and anticipated litigation, and antitrust concerns necessitated legal advice and review for certain projects handled by FTI, and maintained that the presence of FTI on privileged communications did not result in waiver because FTI 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 6, 2019, the Special Master issued a ruling regarding documents involving FTI that were only partially redacted for privilege, in which certain specific redactions were sustained and certain specific redactions were overruled. On September 10, 2019, the Special Master issued a ruling overruling Monsanto’s privilege claims as to all documents involving FTI that it had withheld in full. *See FTI Rulings.*

After receiving the Special Master's FTI Rulings, Monsanto conducted a re-review of the documents in light of the Special Master's rulings. As a result of that additional review, Monsanto is no longer asserting privilege before this Court as to a substantial portion of the materials where the Special Master overruled Monsanto's privilege.<sup>1</sup> But Monsanto identified some documents that easily satisfy the elements for privileged communications involving a confidential contractor/consultant who is the functional 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 3, 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 that 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 FTI 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 FTI 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.<sup>2</sup> Because the FTI Rulings do not include any legal discussion or reasoning, Monsanto's Argument below largely restates its reasoning for why the documents and

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<sup>1</sup> 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.

<sup>2</sup> 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.

document portions at issue are privileged, and why privilege was not waived by including FTI: namely, because FTI 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 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 FTI 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 FTI 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).<sup>3</sup> 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, as well as antitrust concerns, necessitated legal advice and review concerning various matters handled by FTI. In addition, FTI 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

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<sup>3</sup> “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).

transmitted. The presence of FTI on privileged communications therefore did not result in waiver.

**A. The Documents At Issue Are Privileged.**

The nature of the work FTI did for Monsanto required privileged communications between FTI, 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 FTI prepared to ensure it was compliant and consistent with laws or litigation. *See* Buck FTI Decl. ¶ 5. In addition, Monsanto's counsel (both in-house and outside counsel) provided legal advice regarding various litigation or antitrust issues related to projects that FTI worked on for Monsanto outside the spheres of public relations or government affairs. For example, Monsanto's counsel provided legal advice regarding antitrust issues, which necessarily informed FTI's efforts in that area. FTI's work assisting Monsanto's counsel on the fact investigation for the Roundup<sup>®</sup> litigation also necessarily involved the provision of legal advice regarding the litigation. FTI needed to understand Monsanto's counsel's assessment of the litigation to guide FTI's further efforts in assisting Monsanto and to enable FTI to provide privileged work product regarding the fact investigation.

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 FTI 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. FTI 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 FTI, 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”).

FTI’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*, FTI 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; Buck FTI Decl. FTI 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.* FTI’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 work regarding the Roundup<sup>®</sup> litigation – and other projects – would not have been possible without the addition of FTI employees to the team who brought specific skills

and experience Monsanto needed for such projects. Monsanto communicated with FTI with an expectation of confidentiality. *See id.*

In short, FTI “can fairly be equated with [Monsanto] for purposes of analyzing the availability of the attorney-client privilege to protect communications to which [FTI] 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 FTI.

**ii. FTI 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).<sup>4</sup>

For the privileged documents at issue here, the presence of FTI was reasonably necessary because FTI had specialized expertise that was assisting Monsanto in certain tasks. It is the function of FTI – 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; Buck FTI Decl.

For example, FTI employees’ roles drafting media related messaging for Monsanto made it necessary for them to be included in legal conversations concerning what FTI 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 FTI to be on privileged communications with Monsanto’s counsel so FTI could ensure its statements about the litigation did not take positions contrary to it and also to assist Monsanto’s counsel in guiding the corporation through the media attention given the nature of the Roundup<sup>®</sup> litigation. *See id.* In addition, FTI provided specialized knowledge and expertise to assist Monsanto with respect to certain mergers and acquisitions it was pursuing, as well as certain litigation, including the Roundup<sup>®</sup> litigation. FTI’s presence on legal communications about such matters, within the scope of its duties, therefore was necessary to further Monsanto’s legal interests. Accordingly, the reasonably necessary doctrine protects certain of Monsanto’s privileged communications involving FTI. *See Cromeans*, 2014 WL 7338830, at \*2; *Adolf*, 700 S.W.2d at 888–89.

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<sup>4</sup> 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.

## II. A Number of Documents Involving FTI 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, FTI was not Monsanto's adversary. Indeed, its interests were aligned with the Roundup<sup>®</sup> litigation as well as the other projects FTI worked on with Monsanto, and thus any disclosure of work product to FTI was "not inconsistent with maintaining secrecy." *Edwards*, 85 S.W. 3d at 27. Nor does disclosure of work product between FTI 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").

Contrary to plaintiffs' prior characterizations, FTI's work involving Roundup<sup>®</sup> was broader than just media or public relations consulting. FTI's Statement of Work included the word litigation *because* FTI was in fact involved with Monsanto's counsel's facilitation of legal advice and to create work product. *See supra* Background Section; Buck FTI Decl. Monsanto, at times, commissioned FTI to create materials based upon its ongoing fact investigation regarding the ongoing Roundup<sup>®</sup> litigation. *See id.* These materials were created at the direction of Monsanto and its attorneys (both in-house and outside counsel) to be used for or in anticipation of the litigation. *See id.* Monsanto and its counsel used the information provided by FTI in the litigation, whether it was for a court filing or for some other purpose. *See id.* FTI's assistance with litigation work product also helped Monsanto and its counsel shape strategy and form certain positions that it took in litigation. *Id.* The primary purpose of FTI's fact investigation and the related documents it created was to assist Monsanto's counsel with the litigation.

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 19 groups of documents:<sup>5</sup>

1. **Privilege Entire Tabs 8 – 9, 88 – 89, 120, 215, 220 – 221, 226 – 229, 232 – 234, 276, 279, 288, 292, 307 – 316, 321 – 332, 342, 351, 353, 376 – 377, 429, 475, 478 – 479 and Partial Privilege Tabs 131 and 138.** These documents are privileged communications between Monsanto and outside counsel such as Wilmer Hale, Caldwell, Paul Weiss, Latham & Watkins, Wachtell Lipton, Arnold & Porter, and Hollingsworth LLP. Monsanto personnel, including its in-house attorneys (such as Todd Rands and Myles Hansen) discussed several legal issues with outside counsel as part of seeking legal advice and/or defending against lawsuits. 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

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<sup>5</sup> 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*.



necessary confidential consultant to assist Monsanto and its counsel (in-house and outside) in providing legal advice on the various issues mentioned above. Documents created and/or edited by FTI are also 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. As to a few of the documents, Monsanto proposes to narrow the privilege claims as follows:

- Tab 292: Monsanto proposes to redact the first email from the top of the chain.
- Tab 475: Monsanto proposes to redact the first email from the top of the chain.

2. **Privilege Entire Tabs 12 – 45, 54 – 57, 60, 62 – 63, 77, 122 – 123, 133 – 135, 148, 173 – 174, 289, 343, 373 – 374, 399 – 406, and 465 – 466.** These documents are privileged because they are (1) requests for legal advice directed to Robyn Buck (Monsanto in-house litigation counsel), Todd Rands (Monsanto in-house counsel), and outside counsel Husch Blackwell, (2) provisions of legal advice from Ms. Buck and/or outside counsel concerning draft slide decks, and messaging statements, to ensure they will not undermine positions taken in pending litigation, and/or are work product, and/or (3) materials prepared by FTI at the request of counsel in support of litigation strategy. The presence of FTI does not break privilege because FTI was working at the direction of counsel to assist with pending litigation; FTI, acting as a litigation vendor/consultant for Monsanto, was the functional equivalent of a Monsanto employee; and/or FTI was a reasonably necessary confidential consultant assisting Monsanto and its counsel (in-house and outside) in preparing privileged materials concerning the glyphosate cancer litigation. Documents created and/or edited by FTI are also 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.

3. **Privilege Entire Tab 157.** This document is privileged because it is a communication between Monsanto in-house counsel Robyn Buck and Todd Rands concerning a lawsuit. The presence of FTI does not break privilege because FTI, acting as a litigation vendor/consultant for Monsanto, was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant to assist Monsanto and its counsel (in-house and outside) in advising on issues related to the lawsuit.

4. **Privilege Entire Tab 46.** This document is privileged because it reflects work product by Monsanto employees in preparation of defense of glyphosate cancer lawsuits. The presence of FTI does not waive privilege because FTI, acting as a litigation vendor/consultant for Monsanto was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant to assist Monsanto and its counsel (in-house and outside) in advising on issues related to the glyphosate cancer litigation.

5. **Privilege Entire Tabs 383 – 385.** These documents are privileged because they reflect requests for legal advice from Monsanto employees to Robyn Buck (Monsanto in-house litigation counsel) and the discussion of legal advice from Ms. Buck concerning a slide deck regarding the glyphosate cancer 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 assist Monsanto and its counsel (in-house and outside) in advising on issues related to the glyphosate cancer litigation. Documents created and/or edited by FTI are also 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.

6. **Privilege Entire Tabs 346 – 347.** These documents are privileged because they reflect the provision of legal advice from Todd Rands (Monsanto in-house counsel) regarding research performed by FTI for the glyphosate cancer litigation. The presence of FTI does not break privilege because FTI, acting as a litigation vendor/consultant for Monsanto, was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant to assist Monsanto and its counsel (in-house and outside) in advising on issues related to the glyphosate cancer litigation.

7. **Privilege Entire Tabs 58 – 59, and 169.** These documents are privileged because they are requests for legal advice from Monsanto to Robyn Buck (Monsanto in-house litigation counsel) and are also privileged work product. The presence of FTI does not break privilege because FTI, acting as a litigation vendor/consultant for Monsanto, was the functional equivalent of a Monsanto employee and/or a reasonably necessary confidential consultant to assist Monsanto and its counsel (in-house and outside) in advising on issues related to the glyphosate cancer litigation. Documents created and/or edited by FTI are also 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.

8. **Privilege Entire Tabs 387, 389.** These documents are privileged because they reflect a request from Robyn Buck (Monsanto in-house litigation counsel) to FTI to perform fact research for the Prop 65 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 for the Prop 65 litigation.

9. **Privilege Entire Tab 90.** This document is privileged because it is a communication from Molly Jones (Monsanto in-house litigation counsel) to Todd Rands (Monsanto in-house counsel) and Tilden Katz (FTI Consulting) regarding expert consultants in the 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 to assist Monsanto and its counsel (in-house and outside) in advising on issues related to the PCB litigation.

10. **Privilege Entire Tabs 48 – 52 and Partial Privilege Tab 2.** These documents are privileged because they reflect requests for legal advice from Monsanto employees to Robyn Buck (Monsanto in-house litigation counsel), John Rebman (Monsanto in-house counsel), and Todd Rands (Monsanto in-house counsel), and provisions of legal advice from Ms. Buck, Mr. Rebman, and Mr. Rands regarding a draft messaging statement related to an issue in the glyphosate cancer litigation in an effort to coordinate the company's position so as to not undermine positions taken in the 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 assist Monsanto and its counsel (in-house and outside) in advising on issues related to the glyphosate cancer litigation. Monsanto proposes to redact privilege entire tabs 48 – 52 consistent with partial privilege tab 2.

11. **Privilege Entire Tabs 170 – 171.** These documents are privileged because they reflect work product by FTI, acting as a litigation vendor/consultant for Monsanto, that was performed at the direction of in-house and outside counsel to assist the glyphosate cancer litigation.

12. **Privilege Entire Tabs 144 – 145.** These documents are privileged because they reflect a request for legal advice from Monsanto employee Sam Murphey and FTI to Robyn Buck (Monsanto in-house litigation counsel) regarding draft messaging statement regarding Prop 65. 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 to assist Monsanto and its counsel (in-house and outside) in advising on issues related to Prop 65. Documents created and/or edited by FTI are also 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.

13. **Privilege Entire Tabs 64 – 67, and 375.** These documents are privileged because they reflect work product performed by Monsanto and FTI at the direction of Monsanto in-house and outside counsel regarding FTI's fact investigation into IARC and its processes for the glyphosate cancer litigation. Documents created and/or edited by FTI 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.

14. **Partial Privilege Tabs 51 – 57.** The redacted portions of these documents are privileged because they reflect requests for legal advice from Monsanto to Natalia Voruz

(Monsanto in-house counsel) and John Rebman (Monsanto in-house counsel) regarding a draft messaging statement. The portions of the document that are redacted are internal to Monsanto. Monsanto proposes to narrow the redactions to just the Voruz, Mitchener, and Murphey emails.

15. **Partial Privilege Tabs 198 – 201.** The redacted portions of these documents are privileged because they reflect requests for legal advice from Monsanto employees Sam Murphey and Charla Maria Lord to Todd Rands (Monsanto in-house counsel) and Robyn Buck (Monsanto in-house litigation counsel) regarding the glyphosate cancer 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 glyphosate cancer litigation.

16. **Partial Privilege Tab 1.** This document is privileged because it reflects a request for legal advice from FTI to Robyn Buck (Monsanto in-house litigation counsel) regarding the glyphosate cancer 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 to assist Monsanto and its counsel in advising on issues related to the glyphosate cancer litigation.

17. **Privilege Entire Tabs 413 – 414 and Partial Privilege Tab 154.** These documents are privileged because they reflect a request for legal advice from FTI to Molly Jones (Monsanto in-house litigation counsel) and the provision of legal advice from Robyn Buck (Monsanto in-house litigation counsel) concerning Prop 65. 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 to assist Monsanto and its counsel in advising on issues related to Prop 65. Monsanto proposes to redact privilege entire tabs 413 and 414 consistent with partial privilege tab 154.

18. **Partial Privilege Tabs 162 – 163.** The redacted portions of these documents are privileged because they reflect the provisions of legal advice from outside counsel Molly Boast (Wilmer Hale) and Todd Rands (Monsanto in-house counsel) regarding potential antitrust issues. 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 consultant to allow Monsanto and its counsel (in-house and outside) to assist Monsanto and its counsel in advising on antitrust issues.

19. **Privilege Entire Tabs 61, 455 – 457 and Partial Privilege Tabs 175 – 183.** These documents are privileged because they reflect requests for legal advice from Monsanto employee Sam Murphey and FTI to Robyn Buck (Monsanto in-house litigation counsel) regarding research and investigation regarding IARC to support pending lawsuits alleging cancer from alleged glyphosate exposure. 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 allow Monsanto and its counsel (in-house and outside) to assist Monsanto and its counsel in advising on issues related to the glyphosate cancer litigation.

### **CONCLUSION**

For the reasons stated above, Monsanto respectfully requests that the Court set aside the Special Master's FTI 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 6, 2019 and September 10, 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 7, 2019

Respectfully submitted,

By: /s/ Gregory J. Minana  
Gregory J. Minana, #38004  
Christine F. Miller, #34430  
Erik L. Hansell, #51288  
HUSCH BLACKWELL LLP  
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 7, 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: /s/ Gregory J. Minana  
Gregory J. Minana, #38004  
HUSCH BLACKWELL