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MONSANTO COMPANY

9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 IN RE: ROUNDUP PRODUCTS
12 LIABILITY LITIGATION

Case No. 16-md-02741-VC

MDL No. 2741

**MONSANTO COMPANY'S RESPONSE IN
SUPPORT OF PLAINTIFFS'
ADMINISTRATIVE MOTION TO FILE
UNDER SEAL AND MONSANTO'S
RELATED MOTION TO MAINTAIN
CONFIDENTIALITY**

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15 This document relates to:

16 ALL ACTIONS
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20 **I. INTRODUCTION**

21 On January 9, 2017, Plaintiffs served Defendant Monsanto Company ("Monsanto") with
22 Plaintiffs' Administrative Motion to File Under Seal, which sought a ruling on whether
23 Plaintiffs' Motion to Compel the Deposition of Jess Rowland ("Motion to Compel") and four
24 exhibits filed in support of that motion should be filed under seal. On January 10, 2017,
25 Plaintiffs filed a Corrected Administrative Motion to Seal ("Motion to Seal") noting that
26 Plaintiffs had conditionally filed under seal the four documents, which Monsanto designated as
27 Confidential pursuant to the Protective and Confidentiality Order issued by this Court on
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1 December 9, 2016 (ECF No. 64), and the related Motion to Compel, which references and quotes
2 from those confidential documents. Plaintiffs also request that the documents remain
3 conditionally under seal for only four days. Plaintiffs' Motion to Seal was filed under Civil
4 Local Rule 79-5, which requires Monsanto to file "a declaration ... establishing that all of the
5 designated material is sealable," Civil L.R. 79-5(e)(1), and Civil Local Rule 7-11, which allows
6 Monsanto to file a response in support of a Motion for Administrative Relief, Civil L.R. 7-11(b).

7 Pursuant to Civil Local Rules 79-5 and 7-11 and Protective and Confidentiality Order ¶¶
8 16.3, 18, Monsanto hereby files its response to Plaintiffs' motion together with a motion to
9 maintain confidentiality, along with the supporting Declaration of Robyn D. Buck, requesting
10 that the Court maintain the confidentiality of the documents at issue and direct that the
11 documents continue to be maintained in the docket under seal.¹ Monsanto also submits a
12 proposed order that supplements Plaintiffs' submissions by directing, without time limitation,
13 that the four exhibits and the unredacted discovery motion that quotes and characterizes them, be
14 maintained on the docket under seal.

15 **II. GOOD CAUSE EXISTS FOR THE CONFIDENTIAL DOCUMENTS**
16 **MADE EXHIBITS TO PLAINTIFFS' MOTION TO COMPEL TO BE**
17 **FILED UNDER SEAL AND REMAIN CONFIDENTIAL.**

18 Plaintiffs seek to compel the public disclosure of internal Monsanto documents produced
19 during discovery in this MDL. Those documents have not been admitted into evidence in a trial
20 or other proceeding by this Court and Monsanto has not had an opportunity to be heard on any
21 objections to doing so, including relevance and potential prejudice. Therefore, release of these
22 documents to the public is both premature and improper. The "restraints placed on discovered,
23 but not yet admitted, information are not a restriction on a traditionally public source of
24 information." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). Discovery documents
25 "are not public components of a civil trial" because "[s]uch proceedings were not open to the

26 ¹ Pursuant to Protective and Confidentiality Order ¶ 16, Monsanto conferred directly with Plaintiffs by phone on
27 January 13, 2017 and the parties were unable to resolve plaintiffs' challenge to the confidentiality of these
28 documents. See Decl. of Rosemary Stewart, Att. A.

1 public at common law.” *Id.* This is true despite the openness of other aspects of the judicial
2 process. As the United States Supreme Court has confirmed, “the right to inspect and copy
3 judicial records is not absolute,” and remains subject to every court’s “supervisory power over its
4 own records and files.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). For
5 example, “courts have refused to permit their files to serve as reservoirs of libelous statements
6 for press consumption, or as sources of business information that might harm a litigant’s
7 competitive standing.” *Id.* (internal citations omitted). Ultimately, “the decision as to access is
8 one best left to the sound discretion of the trial court.” *Id.* at 599.

9 When, as here, discovery documents are attached to a non-dispositive motion, “the usual
10 presumption of the public’s right of access is rebutted.” *Foltz v. State Farm Mut. Auto. Ins. Co.*,
11 331 F. 3d 1122, 1135 (9th Cir. 2003). Therefore, “a particularized showing under the ‘good
12 cause’ standard of Rule 26(c) will suffice to warrant preserving the secrecy of sealed discovery
13 material attached to non-dispositive motions.” *Kamakana v. City & Cnty. of Honolulu*, 447 F. 3d
14 1172, 1180 (9th Cir. 2006). Because plaintiffs’ Motion to Compel is a non-dispositive discovery
15 motion, the good cause standard applies. *3B Med., Inc. v. Resmed Corp.*, No. 16-CV-2050-AJB-
16 JMA, 2016 WL 6818953, at *2 (S.D. Cal. Oct. 11, 2016) (noting that “the protected portions of
17 the motion to compel and accompanying exhibits are only ‘tangentially related’ to the merits of
18 the underlying case given that the motion is aimed at obtaining discovery from a nonparty”).

19 Under the “good cause” standard, district courts have “broad latitude to grant protective
20 orders to prevent disclosure of materials for many types of information, including, *but not limited*
21 *to*, trade secrets or other confidential research, development, or commercial information.”
22 *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F. 3d 1206, 1211 (9th Cir. 2002)
23 (citing Fed. R. Civ. P. 26(c)(7)). Courts in this Circuit have found good cause for sealing
24 documents based on business interests in protecting confidential information. *See, e.g., Clearly*
25 *Food & Beverage Co. v. Top Shelf Beverages, Inc.*, 102 F. Supp. 3d 1154, 1178 (W.D. Wash.
26 2015) (good cause to seal exhibits containing confidential strategies and business plans); *Barnes*
27

1 *v. Hershey Co.*, No. 3:12-CV-01334-CRB, 2015 WL 1814293, at *3 (N.D. Cal. Apr. 21, 2015)
2 (good cause to seal a series of internal emails); *Bohannon v. Facebook, Inc.*, No. 12-CV-01894-
3 BLF, 2014 WL 5598222, at *3-4 (N.D. Cal. Nov. 3, 2014) (good cause to seal internal corporate
4 discussions); *Sun Microsystems, Inc. v. Network Appliance*, No. C-08-01641 EDL, 2009 WL
5 5125817, at *9 (N.D. Cal. Dec. 21, 2009) (good cause to seal documents containing “confidential
6 business information which could cause harm to the parties if publicly disclosed”); *G & C Auto
7 Body Inc. v. Geico Gen. Ins. Co.*, No. C06-04898 MJJ, 2008 WL 687372, at *3 (N.D. Cal. Mar.
8 11, 2008) (good cause to seal document with “proprietary information concerning business
9 practices”).

10 The four documents at issue are properly sealable under the “good cause” standard
11 because, as detailed below, they contain sensitive, non-public commercial information, relate to a
12 motion seeking to obtain discovery from a nonparty, and bear only a tangential, at best,
13 connection to the questions at issue in this litigation; hence, any public interest “is minimal.”
14 *Barnes*, 2015 WL 1814293, at *3; *see also G & C Auto Body Inc.*, 2008 WL 687372, at *3
15 (finding “good cause” to seal a non-public document “not directly relevant to the legal issues”
16 because “there is presently no reason related to this litigation to place the document in the public
17 record”). Maintaining the confidentiality of these documents does not affect Plaintiffs’ ability to
18 use them in the course of this litigation, for example, by questioning Monsanto’s witnesses about
19 them, but there is good cause to maintain their confidentiality at least during the discovery
20 process. Allowing the public dissemination of a few select internal corporate documents taken
21 out of context – out of the well over six million pages of documents Monsanto has produced to
22 Plaintiffs in a very limited time – would be prejudicial to Monsanto and could cause reputational
23 harm. As another MDL court has noted, the potential harm of public disclosure of discovery
24 documents is “amplified” when the protected documents “are segments of a large body of
25 information, whose selective and out-of-context disclosure may lead to confusion in the ...
26 community and undeserved reputational harm—‘what appears damning may, in context after
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1 difficult proof, be shown to be neutral or even favorable to the defendant.” *In re Zyprexa*
 2 *Injunction*, 474 F. Supp. 2d 385, 425 (E.D.N.Y. 2007) (quoting Note, *Secrecy in Civil Trials:*
 3 *Some Tentative Views*, 9 J.L. & Pol’y 53, 58 (2000)), *aff’d sub nom. Eli Lilly & Co. v. Gottstein*,
 4 617 F.3d 186 (2d Cir. 2010).

5 Good cause exists for each of the below exhibits to Plaintiffs’ Motion to Compel to be
 6 filed under seal and remain confidential, as set out here (with more detail provided in the
 7 accompanying Declaration):

8 **Exhibit E (MONGLY01665907-09):** This internal memorandum on glyphosate (and on
 9 dicamba, an unrelated Monsanto product not relevant to this litigation) is marked “Monsanto
 10 Company Confidential” and contains confidential business strategies regarding regulatory
 11 “goals.” The memorandum discusses in significant detail Monsanto’s planned strategic
 12 approach. Public disclosure of this document would harm Monsanto both in that it reveals its
 13 business strategy, proprietary information, Buck Decl. ¶ 3, and would give Plaintiffs the
 14 opportunity to use the information in a prejudicial manner prior to trial. The public interest in
 15 obtaining this information is minimal, and good cause exists to seal this document.

16 **Exhibit D (MONGLY00987755-58):** In this internal email chain, Monsanto employees
 17 strategize on communicating with the U.S. Environmental Protection Agency (“EPA”), which is
 18 Monsanto’s primary federal regulator, regarding the sufficiency and status of the scientific,
 19 regulatory record. The earliest email in the chain also contains confidential discussion of
 20 proposed business strategies that is irrelevant to Plaintiffs’ Motion to Compel. Monsanto’s
 21 strategic approach to this issue is part of its general business strategy and public disclosure of
 22 this document would harm Monsanto in that it reveals its internal strategies and processes and
 23 proprietary information. Buck Decl. ¶ 4. This would also give Plaintiffs the opportunity to use
 24 the information in a prejudicial manner prior to trial. The public interest in obtaining this
 25 information is minimal, and good cause exists to seal this document.

26 **Exhibit F (MONGLY03351983):** This is an internal email chain with two parts. In one part,
 27 Monsanto employees discuss the company’s approach to communications with EPA and
 28 Monsanto’s potential strategy and business planning. The earlier part of the chain contains an
 internal analysis of particular scientific studies and evaluation to assist with strategic planning.
 Public disclosure of this document would harm Monsanto by revealing its business planning,
 practices, proprietary information, and proposed strategies. Buck Decl. ¶ 5. This would also
 give Plaintiffs the opportunity to use the information in a prejudicial manner prior to trial. The
 public interest in obtaining this information is minimal; in fact, there are publicly available
 documents in which Monsanto discusses its views on the glyphosate science, absent the sensitive
 internal analysis and advice contained in Exhibit F. Good cause exists to seal this document.

Exhibit G (MONGLY00986901): In this internal email, one Monsanto employee discusses his
 perceptions regarding certain EPA employees’ involvement at particular meetings. Public
 disclosure of this document would harm Monsanto because the document was not intended for
 public disclosure and conveys one employee’s thoughts at a particular time, but would be

1 mischaracterized as company statements. Buck Decl. ¶ 6. Disclosure would give Plaintiffs the
2 opportunity to use the information in a prejudicial manner prior to trial. Given the minimal
public interest in obtaining this information, good cause exists to seal this document.

3 For the reasons detailed above and in the accompanying Declaration, Monsanto requests
4 that the Court order that these four documents and the portions of the Motion to Compel that
5 refer to and quote from them be sealed from the public record and remain confidential.

6 DATED: January 13, 2017

Respectfully submitted,

7 /s/ Rosemary Stewart
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