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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10 IN RE: ROUNDUP PRODUCTS  
LIABILITY LITIGATION

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

11  
12  
13 This document relates to:  
14 ALL ACTIONS

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

15  
16 Mr. R. Brent Wisner and Baum Hedlund's (collectively "Baum Hedlund") Post-  
17 Hearing Supplemental Brief (1) re-argues the underlying briefs in response to the Show  
18 Cause Order, seeking to re-frame the issue, (2) asks the Court to expunge the public  
19 record regarding its misconduct and leaving only plaintiffs' briefing, which is replete with  
20 unsubstantiated accusations against Monsanto and its counsel, and (3) offers a  
21 "conditional withdrawal" from the Executive Committee only *after* the *Daubert* hearing,  
22 which does not satisfy the Court's concern that led to the Show Cause Order in the first  
23 place: While acting as the agent of the Executive Committee, Baum Hedlund dealt in bad  
24 faith with Monsanto's counsel and disregarded this Court's role in resolving live disputes  
25 between the parties.

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

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

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

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

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

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

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

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

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

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

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

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26 <sup>3</sup> 8/24/17 Hr’g Tr. at 13.

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

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

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

7 So determined to re-frame the issue away from its bad faith and misconduct in  
 8 dealing with the Court and Monsanto's counsel, Baum Hedlund asks the Court to strike  
 9 the prior filings relating to its misconduct, leaving only its own spin and unfettered  
 10 accusations against Monsanto. R. Brent Wisner's & Baum Hedlund's Post-Hearing  
 11 Supplemental Brief at 5 (Aug. 28, 2017), ECF No. 474.<sup>5</sup> Baum Hedlund's proposal  
 12 would concoct a record that reflects its contorted position only – indeed it seeks to strike  
 13 the Court's Show Cause Order, but not its current brief, and none of its own earlier related  
 14 papers. The request, absurd on its face, should be denied.

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

17 As the Court noted at the August 24, 2017 hearing, it has complete discretion to  
 18 manage the MDL. 8/24/17 Hr'g Tr. at 39. Indeed, this is the exact issue now before the  
 19 Court, i.e., how will the MDL operate going forward. The prior briefings collectively –  
 20 both plaintiffs' and Monsanto's – and two conferences with the Court (one telephonic and  
 21 one in-person) lead to but one conclusion: sanctions are appropriate. Baum Hedlund's  
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23 plaintiffs' leadership remains after the Court's Orders. *See* Pretrial Order No. 4: Plaintiffs'  
 24 Leadership Structure at 1-2 (Dec. 7, 2016), ECF No. 62 (Plaintiffs' "co-lead counsel have the  
 25 authority and the duty to . . . [r]etain the services of any attorney not part of the Executive  
 Committee to perform any common benefit work, provided the attorney so consents and is bound  
 by the compensation structure established in this MDL").

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

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

3 **Conclusion**

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

7  
8 DATED: August 29, 2017  
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10 Respectfully submitted,

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