



IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

In re: PARAQUAT PRODUCTS
LIABILITY LITIGATION

Case No. 3:21-md-3004-NJR

MDL No. 3004

This Document Relates to All Cases

CASE MANAGEMENT ORDER NO. 13
RULE 502(d) AND PRIVILEGED MATERIALS ORDER

ROSENSTENGEL, Chief Judge:

The Plaintiffs and Defendants to this multi-district litigation (MDL), by and through their respective counsel, have jointly stipulated to the terms of this Order. The Court now **ORDERS** as follows:

I. APPLICABILITY

This Order shall be applicable to any potentially privileged or otherwise protected or exempted information contained in deposition transcripts and/or videotapes, and documents produced in response to requests for production of documents, answers to interrogatories, responses to requests for admissions, affidavits, declarations and all other information or material produced, made available for inspection, or otherwise submitted by any of the parties in this litigation pursuant to the Federal Rules of Civil Procedure, as well as testimony adduced at trial or during any hearing (collectively "Information"). Nothing in this Order shall be construed as a determination as to the admissibility of any such Information at trial.

II. PRODUCTION OF *HOFFMANN* DISCOVERY MATERIALS PURSUANT TO RULE 502(D)

1. All documents produced by Syngenta pursuant to Rule 502(d) in the *Hoffmann, et al. v. Syngenta Crop Protection, LLC, et al.* (“*Hoffmann*”) litigation shall either be produced in this litigation pursuant to a Rule 502(d) designation, or to the extent they are not produced pursuant to Rule 502(d), they shall be included on a privilege log as set forth in the ESI Protocol. Any document produced pursuant to Rule 502(d) shall include, both in the metadata and on the image of the document, a unique number as well as the following designation on the face of the document: “SYNG MDL 3044—Pursuant to Rule 502(d).” To the extent Syngenta produces the document pursuant to Rule 502(d), that production shall be made no later than three business days of the entry of this Order. To the extent Syngenta claims privilege over a document previously produced in *Hoffmann* pursuant to Rule 502(d), Syngenta shall identify such documents on a privilege log as set forth in the ESI protocol, with such privilege log to be provided on a rolling basis and complete no later than **January 18, 2022**.

2. Any documents produced by Chevron in the *Hoffmann* litigation pursuant to Rule 502(d), to the extent they have not been produced to the MDL Plaintiffs, were (1) documents that the *Hoffmann* Plaintiffs and Chevron agreed were irrelevant (*i.e.*, not related to paraquat or relevant in the litigation) or (2) privileged documents that were logged as privileged in *Hoffmann*. Chevron shall produce to the MDL Plaintiffs its privilege logs from the *Hoffmann* litigation no later than January 18, 2022.

3. Pursuant to Rule 502(d), the production of any privileged or otherwise protected or exempted information in this case shall not be deemed a waiver or impairment of any claim of privilege or protection in this case or in any other federal or state proceeding, including, but not limited to, the attorney-client privilege, the protection afforded to work product materials, statutory privileges and protections, or the subject matter thereof, as to the produced document and any related material. The parties agree that any production of 502(d) documents by parties in this matter is not for the purpose of gaining tactical advantage, but in the interest of efficiency; therefore, the purpose of enforcement of subject matter waiver principles when a party uses attorney-client privilege protection as both a sword and a shield is not applicable. Moreover, the disclosure of the Syngenta MDL 502(d) documents (or any Chevron 502(d) documents disclosed in the future) shall not constitute or be deemed a waiver, forfeiture, or impairment of any claim of privilege or work product protection that Defendants would otherwise be entitled to assert with respect to any subject matter, including for any undisclosed documents and information. Each of these provisions applies equally to any 502(d) documents subsequently produced by any party in the MDL.

4. Plaintiffs may utilize documents produced with the legend "SYNG MDL 3044 - Pursuant to Rule 502(d)" as though they have been designated "CONFIDENTIAL" pursuant to the Protective Order entered in this litigation. Plaintiffs may use such documents at depositions, in hearings, and in filings in the same manner as a document marked "CONFIDENTIAL" under the Protective Order. In addition, to the extent Plaintiffs believe that a document bearing the legend the legend "SYNG MDL 3044 -

Pursuant to Rule 502(d)" is not entitled to attorney-client privilege or work product protection, Plaintiffs may request that such a document be re-produced without the legend "SYNG MDL 3044 - Pursuant to Rule 502(d)" with a Bates number. To the extent Plaintiffs make such a request, Syngenta shall advise Plaintiffs within seven (7) days, or as otherwise agreed by the Parties based on the volume of implicated documents, as to whether they disagree with Plaintiffs' belief that the document is not entitled to attorney-client privilege or work product protection.

5. If the parties are unable to resolve by agreement any issue raised by another party with respect to a 502(d) document's privilege, protection, and/or exemption from production, either party may by motion filed under seal ask the Court to decide the issue and grant appropriate relief. Regardless of which party files any such motion, the party claiming privilege shall have the burden of establishing that the document is privileged, protected, or otherwise exempt from production.

6. If the parties agree or the Court finds that a 502(d) document is not protected, the document shall be produced without a 502(d) designation within three (3) business days, and the parties' obligations regarding the use and disclosure of the document in this case shall be governed by the same provisions of the Protective Order in this case that apply to documents produced by the parties in this case.

7. Unless and until the producing party has agreed or the Court has found that a 502(d) document is not protected, if the receiving party receives a discovery request, subpoena, or other lawful process in other litigation seeking the production of such a document, the receiving party shall promptly notify the producing party and shall

take reasonable steps to resist production of the document until such time as the producing party has either consented to its production or intervened, appeared, or otherwise asserted its privilege claim, which the producing party shall do within a reasonable time given any deadlines imposed on the MDL plaintiffs for production.

A. Clawback of Produced Documents

8. With respect to all documents produced in this litigation (including the 502(d) documents), the producing party must notify the receiving party promptly, in writing, upon discovery that a document has been produced for which the producing party asserts privilege and/or other protection and intends to withhold from production either in whole or in part. This “Clawback Notice” shall include (i) the Bates range of the produced materials, (ii) a privilege log listing the item(s) produced, and (iii) a new copy of the material (utilizing the same Bates number as the original material) with the privileged or protected material redacted (if the producing party claims that only a portion of the document contains privilege or other protected information). If the producing party claims that the entire document is privileged or protected, then the producing party shall provide a slip sheet noting that the document has been withheld.

9. When the producing party has asserted a Clawback Notice regarding privilege in a document, the producing party shall use best efforts to identify substantively duplicative privileged evidence in other produced documents and notify all other parties of those documents within 14 days.

10. Upon receipt of a Clawback Notice, all such information, and all copies thereof, shall be sequestered and the receiving party shall not use such information for

any purpose, except as provided in paragraph 11 until further Order of the Court. The receiving party shall also attempt, in good faith, to retrieve and sequester all copies of the documents in electronic format.

11. The receiving party may contest the producing party's assertion of privilege or other protection. In that instance, within seven (7) business days from receipt of the Clawback Notice, the receiving party shall give the producing party written "Notice of Clawback Challenge" providing the reason for said disagreement. The producing party will have seven (7) business days to respond to the Notice of Clawback Challenge, in writing, by either: (i) agreeing to withdraw the claim of privilege or other protection; or (ii) stating the reasons for such claim. If the producing party's response to the Notice of Clawback Challenge does not resolve the issue, the parties shall meet and confer within five (5) business days of the response. If the conference does not resolve the dispute, within five (5) business days of the conference, the parties shall submit the dispute to the Court for resolution. The producing party retains the burden of establishing the applicability of the privilege or other protection as to any produced materials. If the receiving party does not serve a Notice of Clawback Challenge, then, upon expiration of the seven (7) business day period, all copies of the disputed material shall be returned or destroyed.

12. Any analyses, memoranda or notes or portions thereof which were internally generated and contain or were based upon the item(s) listed in the Clawback Notice shall immediately be sequestered and destroyed in the event that (a) the receiving party does not contest that the information is privileged or subject to other protection

pursuant to paragraph 11, or (b) the Court rules that the information is privileged or otherwise protected. Such analyses, memoranda or notes or portions thereof may only be removed from sequestration and returned to its intended purpose in the event that (a) the producing party agrees in writing that the information is not privileged or otherwise protected, or (b) the Court rules that the information is not privileged or otherwise protected.

13. If, during a deposition, a producing party claims that a document being used in the deposition (*e.g.*, marked as an exhibit, shown to the witness, or made the subject of examination) contains material that is subject to the attorney-client privilege, the attorney work product doctrine, or other protection, the producing party may (a) allow the document to be used during the deposition without waiver of any claim of privilege or other protection; (b) instruct the witness not to answer questions concerning the parts of the document containing privileged or protected material; or (c) object to the use of the document at the deposition to the extent the entire document is privileged or protected, in which case no testimony may be taken relating to the document during the deposition until the matter is resolved by agreement or by the Court. If the producing party instructs the witness not to answer or provide testimony in accordance with 13(b) or (c), which is later determined to not be privileged, the producing party shall make the witness available for a deposition regarding that document and its contents within 14 days of that determination or as otherwise agreed or ordered.

14. If the producing party allows the examination concerning the document to proceed consistent with this paragraph, all parties shall sequester all copies of the

produced document. As to any testimony subject to a claim of privilege or other protection, the producing party shall serve a Clawback Notice within five (5) business days of the deposition's conclusion, after which the parties shall follow the procedures set forth in paragraphs 10 and 11. With respect to any document or testimony that is the subject of a Clawback Notice that is sent more than twenty (20) days after the conclusion of the deposition, the asserted privilege or protection will be deemed as waived absent extraordinary circumstances. Pending determination of the clawback dispute, all parties with access to the deposition transcript shall treat the relevant testimony in accordance with paragraph 10.

15. If a receiving party uses produced material in a brief or at a hearing, and the producing party has not served a Clawback Notice in advance of the briefing event or hearing, the producing party shall serve a Clawback Notice within five (5) business days of the briefing event or hearing. Thereafter, the procedures set forth in paragraphs 10 and 11 shall apply. With respect to any produced material used in a brief or at a hearing that is the subject of a Clawback Notice that is sent more than twenty (20) days after the filing of the brief or conclusion of the hearing, the asserted privilege or protection will be deemed as waived absent extraordinary circumstances.

16. Nothing contained herein is intended to or shall serve to limit a party's right to conduct a review of documents, ESI or information (including metadata) for responsiveness and/or segregation of privileged and/or protected information before production.

17. This Order does not preclude a party from voluntarily waiving any claims of privilege or protection. The provisions of Federal Rule of Evidence 502(a) apply when a party uses privileged or other protected information to support a claim or defense.

IT IS SO ORDERED.

DATED: December 15, 2021

Handwritten signature of Nancy J. Rosenstengel in black ink, written over a circular seal of the U.S. District Court for the District of New Jersey.

NANCY J. ROSENSTENGEL
Chief U.S. District Judge