**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| **THE PEOPLE OF THE STATE OF ILLINOIS, EX REL. KWAME RAOUL, ATTORNEY GENERAL, Plaintiff,** | ) | |
| **v.** | ) | **No. 1:22-cv-05339** |
| | ) | **Magistrate Judge M. David Weisman** |
| **MONSANTO COMPANY, SOLUTIA INC., and PHARMACIA LLC, Defendants.** | ) | |

# ORDER

## Background

The State sues Defendants for the alleged contamination of the environment based on its discharge of polychlorinated biphenyls (PCBs) from the W.G. Krummrich Plant in Sauget, Illinois. Discovery is proceeding, and the State issued requests for production relating to Defendant's knowledge, representations, and omissions concerning the hazards of PCBs. Defendants objected to certain requests and the parties' have conferred pursuant to LR 37.2. The State now moves to compel production of certain documents. For the reasons stated below, the State's motion [92] is granted in part and denied in part.

## Analysis

Parties may "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issue at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). "However, this permission is not boundless; courts 'must limit the frequency or extent of discovery otherwise allowed by [the] rules' if … 'the proposed discovery is outside the scope permitted by Rule 26(b)(1).'" *Bouto v. Guevara*, No. 19-CV-2441, 2020 WL 4437671, at *1 (N.D. Ill. Aug. 3, 2020) (quoting Fed. R. Civ. P. 26(b)(2)(C)).

1. Materials pursuant to ADR Proceedings[1]

[1] There are two categories of what the parties call "ADR proceedings": (1) four insurance-coverage ADR proceedings, two of which took place in London and are purportedly subject to the English implied obligation of confidentiality and two that are subject to protective orders, and (2) civil lawsuits that were resolved through ADR processes supervised by a neutral mediator that are, according to Defendants, governed by Missouri and California law.

The State moves to compel the production of dispute resolution materials in response to its Request for Production Nos. 48-52. Specifically, the State seeks materials generated during the ADR proceedings,[2] including all transcripts and/or copies of any sworn statements, deposition testimony, or trial testimony; all exhibits produced by any party at depositions, trial, or as part of dispositive motions; and any responses by Defendants to interrogatories and requests for admission. According to the State, the records developed in the ADR proceedings are highly relevant to this case in that they address Defendants' knowledge concerning PCBs' hazards and efforts to conceal such knowledge from the public.

Defendants object to producing the materials relating to both the insurance coverage arbitrations and the mediations on the grounds that they are confidential and protected from discovery and, to the extent relevant to the State's claims, available through other means. Specifically, Defendants assert the materials are protected by English law, protective orders, and relevant state-law mediation privileges.

a. Relevance

While Defendants assert that the documents requested are irrelevant, they do not expound on this contention in any detail or support it with any citations to the record or authority. "The term 'relevant' for the purposes of discovery is 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.'" *Daniels v. Jeffreys*, No. 07 C 1298, 2023 WL 4733474, at *2 (C.D. Ill. July 25, 2023) (citation omitted). The Court lacks specific information about the contents of the requested documents or the cases at issue; nevertheless because the arbitrations and mediations between Monsanto and third parties regarding alleged PCB contamination could contain relevant information under the Federal Rules of Civil Procedure and defendants fail to meaningfully develop their relevance objection, the Court overrules this objection.

b. Implied obligation of confidentiality under English law (*Swiss re International and XL Insurance (Bermuda) Ltd.)*

Defendants contend that two of the insurance coverage arbitrations between Monsanto and its insurers took place in London and were governed by English law, under which the parties are required to maintain the confidentiality of the arbitration. According to Defendants, the parties to

[2] "ADR proceedings" mean any of the following proceedings in any of the follow actions: (1) *Monsanto Company v. Swiss re International Se f/k/a Zurich Re (UK) Limited, et al*., commencing on March 13, 2017; (2) *Monsanto Company v. XL Insurance (Bermuda) Ltd*. commencing on July 1, 2014; (3) *In re: One Market Plaza* – ADR, commencing in approximately 1985; (4) *Birmingham Fire Insurance Company, et al., v. Pacific Gas & Electric Company, et al*., commencing in approximately 1984; (5) *Williams, et al. v. Monsanto Company, et al*., commencing on March 2, 2015; (6) *Hampton, et al. v. Monsanto Company, et al*., commencing on March 9, 2015; (7) *Colella, et al. v. Monsanto Company, et al*., commencing on April 6, 2015; (8) *Guenther, et al. v. Monsanto Company, et al.,* commencing on April 6, 2015; and (9) *Hearon, et al. v. Monsanto Company, et al*., commencing on May 11, 2015.

those arbitrations had an expectation that their confidentiality would be upheld, see 1st Miller Decl., Def.'s Ex. 1, Dkt. # 96-1, ¶ 9, and if Defendants are forced to produce those materials in this matter, they could be liable for damages for violating the confidentiality mandates imposed in those other proceedings. *Id*. The English law to which Defendants refer states:

> [there is] an implied obligation (arising out of the nature of arbitration itself) on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court . . . The obligation is not limited to documents which contain material which is confidential, such as trade secrets.

*Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184, [2008] Bus LR 1361, per Lawrence Collins LJ at [¶ 81].

Several courts have concluded that the implied obligation under English law does not preclude production of ADR materials in a case in U.S. court. *Veleron Holding, B.V. v. Stanley*, 12 CIV. 5966 CM, 2014 WL 1569610, at *4, 8 (S.D.N.Y. Apr. 16, 2014) (stating that "[n]o American court of which I am aware would ever accept that a party to an arbitration was shielded by rules like those of the [London Court of International Arbitration] from producing documents or evidence in an American lawsuit pursuant to discovery demand or subpoena," litigants "are not free to immunize materials that are relevant to some other dispute from disclosure in connection with a wholly separate dispute resolution proceeding—particularly where, as here, that proceeding is conducted in a court of law in a country dedicated to open proceedings," and concluding that "[a]ny and all documents that fall within the broad definition of 'relevance' in the Federal Rules of Civil Procedure are subject to discovery here and are presumptively not confidential"); *Contship Containerlines, Ltd. v. PPG Indus., Inc.*, No. 00 CIV. 0194 RCCHBP, 2003 WL 1948807, at *1 (S.D.N.Y. Apr. 23, 2003) ("Even if [the court] assume[s] that plaintiffs' contention as to the state of English law is correct, it does not preclude the disclosure sought here.")

In addition, as the State notes, a New Mexico court (albeit without written citation to authority) overruled Monsanto's objection to production of ADR materials based on the implied obligation of confidentiality under English law, (Pl.'s Ex. G, Dkt. # 92-7, *Frank v. Monsanto, et al.*, No. D-101-CV-2021-00481 (N.M. 1st Jud. Dist. Ct.) (granting plaintiff's motion to compel and directing Monsanto to "fully and completely respond" to the ADR production requests), and Monsanto ultimately produced over 22,000 pages of ADR materials.[3] (Pl.'s Ex. J., Filippazzo Decl., Dkt. # 92-10 (noting court's denial of Monsanto's request to redact insurance-company information and attesting that Monsanto produced 22,939 pages of "London Arbitration Documents"); Pl.'s Ex. H, Dkt. # 92-8, Def.'s Expedited Mot. Limited Modification Ct. Order

[3] Although Monsanto asked to redact certain information on behalf of the insurance company that was involved in the ADR proceeding, the New Mexico court apparently denied that request.

Requiring Disclosure, *Frank,* No. D-101-CV-2021-00481, filed 6/14/22, at 9) (Monsanto stating that "while [it] is fully prepared to produce information from the English Arbitration, it submits that it should do so in a manner that does not violate [the insurance company's] interests.").

The Court agrees that Defendants have no basis on which to rely on an implied obligation of confidentiality under English law to refuse to produce relevant documents in a lawsuit pending in a U.S. court. Otherwise, large multinational companies could mandate England as the required location for all arbitrations, produce a plethora of documents as part of those arbitrations and thus preclude the subsequent disclosure of relevant documents in any related U.S. litigation. This is simply not a tenable or logical result. To the extent Defendants are concerned about disclosing confidential information of third parties, the parties are directed to continue discussions and implement a procedure by which narrow redactions by third parties can be accommodated. Such procedures may include attorneys'-eyes-only designations or privilege logs.

b. Protective Orders

According to Defendants, "[t]he other two insurance ADR proceedings are subject to protective orders," but Defendants do not elaborate on the contents of the protective orders or provide authority for their application to this case. Accordingly, this objection is overruled.

c. Mediation Privilege

According to Defendants, the private civil ADR proceedings are subject to the mediation privileges under California and Missouri law, which Defendants assert are more robust than the Illinois mediation privilege.[4] Under Federal Rule of Evidence 501, "in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."

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[4] Defendants note that a U.S. District Court in Washington has sided with Defendants on the issue, noting that the

> United States District Court for the Eastern District of Washington, in a decision the State ironically relies upon in its Motion, likewise ruled: "Defendants argue the other lawsuits, filed in Missouri and California, were ultimately resolved by mediation and all information relating to such mediation is absolutely non-discoverable under Missouri and California law. … [T]he Court agrees with Defendants." See Order Ruling on Discovery Motions, *City of Spokane v. Monsanto Company, et al.*, No. 2:15-cv-00201-SMJ (E.D. Wash. July 19, 2019).

(Defs.' Resp., Dkt. # 96, at 8.) Defendants fail to mention that the District Court in Washington noted that the plaintiff did not respond to defendants' contention that the Missouri and California mediation privileges applied, and the Court offered no authority or support for its statement that it agreed with defendants that these privileges protected the requested materials.

[5] According to Plaintiff, because Illinois law governs the claims or defenses in this action, Illinois law also governs the Court's determinations concerning the application of any privilege. (Pl.'s Sur-Reply, Dkt. # 101, at 2-3) (citing *Doe v. Archdiocese of Milwaukee*, 772 F.3d 437, 440 (7th Cir. 2014) ("Wisconsin law provides the rule of decision governing Doe's fraudulent inducement contention, and because it does, Wisconsin mediation privilege law applies."); *Gibbons v. Mony Life Ins. Co*., No. 15 C 5352, 2017 WL 3421475, *4 (N.D. Ill. Aug. 9, 2017) ("Gibbons only asserted claims under Illinois law. Therefore Illinois law regarding privilege applies to these emails."); *Mustafa v. Mac's Convenience Stores, LLC*, No. No. 13 CV 2951, 2014 WL 1088991, *2 (N.D. Ill. Mar. 18, 2014) ("Because Illinois law supplies the rule of decision for Mustafa's claims under the Illinois Human Rights Act, Illinois privilege law [under the Illinois Mediation Act] applies to the current dispute.").

However, "[i]ssues of privilege are substantive." *U.S. Sur. Co. v. Stevens Family Ltd. P'ship*, No. 11 C 7480, 2014 WL 902893, at *1 (N.D. Ill. Mar. 7, 2014). "Where, as here, jurisdiction is based on the federal officer removal statute, 28 U.S.C. § 1442(a)(1), a federal court adheres to the forum state's choice of law rules to determine the applicable substantive law." *Burleigh v. Alfa Laval, Inc.*, 313 F. Supp. 3d 343, 351 (D. Mass. 2018) (citing *Baird v. Fed. Home Loan Mortg. Corp*., No. 3:15CV00041, 2016 WL 6583732, at *2 (W.D. Va. Nov. 4, 2016) ("'federal court's role under § 1442 is similar to that of a federal court sitting in diversity'" with court applying "choice of law rule of the forum state") (citations omitted), *aff'd*, 706 Fed. Appx. 123 (4th Cir. 2017) (unpublished); *Baldonado v. Avrinmeritor, Inc*., No. 13-833-SLR-CJB, 2014 WL 2116112, at *3 (D. Del. May 20, 2014) (applying "choice of law rule of the forum state" in action removed under section 1442(a)). Under Illinois law, a choice-of-law determination is required "when a difference in law will make a difference in the outcome." *Townsend v. Sears, Roebuck & Co*., 227 Ill.2d 147, 155 (Ill. 2007). The Court, therefore, analyzes whether a difference in outcome between the relevant states' laws exists.

#### i. Missouri arbitrations (*Hampton*, *Colella*, and *Hearon*)

Under the Missouri mediation privilege:

> Arbitration, conciliation and mediation proceedings shall be regarded as settlement negotiations. Any communications relating to the subject matter of such disputes made during the resolution process by any participant, mediator, conciliator, arbitrator or any other person present at the dispute resolution shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or attainable shall be admissible as evidence or subject to discovery.

Mo. Rev. Stat. § 435.014.2. The language of the statute is precise and provides that no representation or statement made in conducting arbitration or mediation proceedings shall be

[5] "Rule 501 applies at all stages of all actions, cases, and proceedings, including discovery proceedings." 3 Weinstein's Fed. Evid. § 501.02 (2023).

admissible. Thus, the Missouri statute does not allow for discovery of the sworn statements, deposition testimony, arbitration testimony, responses to interrogatories or requests to admit served on Defendants "in the proceedings" unless they are otherwise discoverable or attainable, which the State does not demonstrate. Moreover, the Missouri statute expressly covers arbitrations; thus, the State's attempt to preclude application of a privilege on the ground that the proceedings at issue were not mediations, but rather arbitrations, is unavailing.[6]

For its part, the Illinois Mediation Act provides as follows:

> (a) . . . a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.
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> (b) In a proceeding, the following privileges apply:
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> > (1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
> > (2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
> > (3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.
> > (c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

710 ILCS 35/4. The Illinois Mediation Act protects "[c]ommunications" that occur "during a mediation" or that are "made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." 710 ILCS 35/2(2), 35/4(a), 35/5, 35/6. Such communications are generally "not subject to discovery or admissible in evidence in a proceeding." *Id*. § 35/4(a). The State emphasizes, however, that "[e]vidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation." 710 ILCS 35/4(c). Moreover, to the extent that the Missouri proceedings were arbitrations, the Illinois Mediation Act would not apply, as it only applies to mediations. Thus, because it appears that the mediation privilege would

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[6] The parties at times appear to use the terms mediation and arbitration interchangeably, or at least imprecisely; thus, it is not clear to the Court whether the proceedings at issue were arbitrations or mediations. The Court notes that the documents and information sought by the State (including testimony and exhibits generated or filed in the proceedings and discovery responses served in the proceedings) are the types of documents generally associated with arbitrations rather than mediations.

apply under Missouri law, but not under Illinois law, a determination of which state's law applies affects the outcome; thus, the Court proceeds to the choice-of-law analysis.

When a conflict exists, Illinois courts use Section 139 of the Second Restatement of Conflict of Laws ("Restatement") in matters involving discovery of confidential materials. *See Allianz Ins. Co. v. Guidant Corp*., 373 Ill. App. 3d 652 (2d Dist. 2007). Under Restatement § 139:

> (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect. … Among the factors that the forum will consider in determining whether or not to admit the evidence are (1) the number and nature of the contacts that the state of the forum has with the parties and with the transaction involved, (2) the relative materiality of the evidence that is sought to be excluded, (3) the kind of privilege involved and (4) fairness to the parties.

The State fails to engage in this analysis, but, as Defendants note, Missouri has the most significant relationship to the proceedings given that the arbitrations took place there. Based on the current record, no contacts exist between Illinois and the Missouri arbitrations, nor does the State demonstrate that the documents it seeks contain information that is material to the claims and defenses in this case and that the documents are not otherwise available elsewhere or in Defendants' prior productions. Further, law and public policy generally favor the use of alternative dispute resolution and provide protection to communications relating to resolving claims outside of litigation. Finally, comment d to the Restatement § 139 provides that fairness to the parties requires a determination of whether parties relied "on the fact that [materials] involved are treated in strict confidence in the state of most significant relationship" and assessing "whether the privilege belongs to a person who is not a party to the action." Here, the parties to the Missouri arbitrations apparently relied on the confidentiality of the proceedings. (1st Miller Decl., Dkt. # 96-1, ¶ 10) (in referring to the Missouri proceedings, attesting that "Defendants are contractually bound to keep the terms of these matters and all materials generated relating to the mediation process confidential"); *see Gibson v. Chubb Nat'l Ins. Co.*, No. 20 C 1069, 2021 WL 4401434, at *3 (N.D. Ill. Sept. 27, 2021) ("Regarding the final factor, fairness to the parties, 'the Restatement advises that the forum will be more inclined to give effect to a privilege if it was probably relied upon by the parties.'"); *Equity Residential v. Kendall Risk Mgmt*., 246 F.R.D. 557 (N.D. Ill. 2007) (following Restatement factors and determining Connecticut law applied to privileged materials because "the individuals making the[] communications likely relied on the privilege as it applie[d] in Connecticut").[7]

[7] Again, while the State failed to conduct a choice-of-law analysis and Defendants fail to identify contrary case law, the Court notes that at least one court in Illinois applying the factors in the Restatement § 139 concluded that "[w]here, as here, *some factors favor the application of Illinois law* and some favor the application of foreign law, Illinois courts have repeatedly found that there is no 'special reason' for overriding Illinois's policy favoring the admission of evidence that would

Thus, because a consideration of the factors favors application of Missouri law, and as already noted, the Missouri statute regarding arbitration and mediation proceedings dictates that the documents related to the Missouri arbitrations remain confidential, the Court denies the State's motion to compel as it relates to the Missouri ADR Proceedings.

ii. California ADR proceedings (mediations in *Williams* and *Guenther* and arbitrations in *Birmingham Fire* and *One Market Plaza*)[8]

California law regarding materials related to mediations provides as follows:

> Except as otherwise provided in this chapter:
>
> (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
> (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

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be precluded by the foreign law." *Gibson,* 2021 WL 4401434, at *4 (emphasis added). Because the State does not identify any factors favoring application of Illinois law over Missouri law, *Gibson* is unpersuasive in this instance. Further, we note that undermining confidentiality protections of arbitration processes provided by the various states cuts against the strong public policy supporting resolution of civil actions. Sophisticated parties engaged in litigation in one state, which provides for broad protections of the mediation process, may very well be hesitant to engage in mediation in that forum, for fear that another state's law could nullify those protections.

[8] With respect to the proceedings that occurred in California, Defendants differentiate between "mediations" and "arbitrations" in their supplemental choice-of-law brief. (Defs.' Mem. Opp'n, Dkt. # 104 at 4.) Nevertheless, the declaration of Adam Miller, attorney and counsel of record for Defendants, states that other than two insurance-coverage disputes that occurred in London (discussed above), "[t]he remaining proceedings listed in [footnote 2, supra], were confidential *mediations* of civil lawsuits alleging personal injuries, which were supervised by a neutral mediator." (Miller Decl., Defs' Ex. 1, Dkt. # 96-1, ¶ 10) (emphasis added). Because of the different language used, it is not clear to the Court what the nature of the California proceedings was, but because Defendants differentiate between arbitrations and mediations in their supplemental brief, the Court follows this distinction.

> (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

Cal. Evid. Code § 1119.

Assuming the same choice-of-law analysis applies to the California mediations as the Missouri ones, California law governs the assertion of privilege with respect to the mediations that occurred there. Defendants point out that in California, "the mediation . . . privilege[] ha[s] a broad sweep and [is] designed to promote frank exchange of information in an effort to encourage parties to resolve their differences through methods of dispute resolution other than civil litigation." *Saeta v. Superior Ct*., 117 Cal. App. 4th 261, 271 (2004)[9]; *see also Foxgate Homeowners' Ass'n, Inc. v. Bramalea Cal., Inc.*, 25 P.3d 1117, 1126 (Cal. 2001) ("[T]he purpose of confidentiality is to promote 'a candid and informal exchange regarding events in the past . . . . This frank exchange is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.'") (citation omitted). While the State contends that "if parties use facts in mediation, mediation confidentiality does not necessarily preclude disclosure of those facts," *Wimsatt v. Superior Ct*., 152 Cal. App. 4th 137, 157, 160 (2007), the Supreme Court of California has held that "under section 1119, because both photographs and written witness statements qualify as 'writing[s], as defined in [s]ection 250,' if they are 'prepared for the purpose of, in the course of, or pursuant to, a mediation,' then they are not 'admissible or subject to discovery, and [their] disclosure . . . shall not be compelled.'" *Rojas v. Superior Ct*., 93 P.3d 260, 265 (Cal. 2004).

Contrary to the States's unsupported assertion that "[t]here is no indication that the documents the State has requested were generated for the 'purposes' of mediation," (Pl.'s Supp. Br., Dkt. # 101, at 3), the State's requests expressly include documents, testimony, and discovery responses that were "generated during," "filed," or "served" in the relevant ADR Proceedings. Because such documents were prepared for the purpose of, in the course of, or pursuant to a mediation, they are protected under the California mediation privilege. However, to the extent that any of the proceedings in California were arbitrations[10] and not mediations, they are not protected by § 1119.

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[9] The quotation from *Saeta* also includes a reference to the breadth of the California "arbitration privilege"; that reference, however, was to Section 703.5 of the California Evidence Code, which provides in part: "No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding. . . ." Because the State's motion to compel does not involve compelling testimony of an arbitrator and Section 703.5 of the California Evidence Code is not at issue, the Court excluded that portion of the quotation and disregards any purported California arbitration privilege for purposes of this motion.

[10] Defendants also assert in their supplemental briefing, Dkt. # 104 at 5, that the *One Market Plaza* arbitration was governed by a "strict" confidentiality agreement between the parties, and the *Birmingham Fire* arbitration was governed by a 1986 protective order entered by the presiding

For these reasons, the State's motion to compel is granted in part and denied in part with respect to the California ADR Proceedings.

2. Public Record Requests

Plaintiff's request No. 54 seeks production of:

> Documents sufficient to identify any public record request, open record request, or other request for information, issued by You or at Your direction, [to] any Illinois government agency relating to PCBs, including Documents and Communications received by You through any such request.

(Pl.'s Ex. A, Dkt. # 92-1, ¶ 54.) While Defendants originally objected on the ground that "'producing documents responsive to this Request would require [Defendants'] counsel to reveal their attorney work product, including mental impressions, conclusions, opinions, and/or legal theories,'" (Pl.'s Ex. B, Dkt. # 92-1, at 69-70), Defendants state in their response brief that they will produce public records received in response to public records requests submitted to Illinois agencies. The motion to compel these documents is therefore denied as moot.

3. Documents Created by and Communications with Third-Party Consultants

The State's Request No. 60 seeks production of:

> All Documents regarding, and Communications with, any consultant retained or employed by, on behalf of, or at the direction of any Defendant (other than for purposes of this litigation) regarding PCBs.

While the State appeared in its briefing to narrow the request to a specific company, FTI Consulting,[11] and a particular project, "Project Chrome," (Pl.'s Mot., Dkt. # 92, at 11), at oral argument, Plaintiff clarified that it continues to seek the broader universe of documents originally identified in Request No. 60. In response, Defendants assert both attorney-client privilege and work-product doctrine. (Defs.' Resp., Dkt. # 96, at 11) (asserting that "[n]on-testifying consultants engaged for purposes of litigation are not subject to discovery under Rule 26(b)(4)(D) and are protected by attorney-client privilege and the work-product doctrine"). According to Defendants:

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court in that case, "protecting from disclosure '[a]ll documents and communications which are or were generated for, received by, or exchanged, for or as a result solely of participation in the ADR or negotiations leading to it.'" (2d Miller Decl., Dkt. # 103, ¶ 6.) Defendants, however, do not point to authority demonstrating that the confidentiality agreement or protective order preclude disclosure of documents in subsequent litigation, and more specifically, the types of documents sought by the State in this case.

[11] Defendants contend that the State's representation of FTI's work for Defendants was "completely inaccurate and wholly misplaced."

> The State's flimsy and unsupported misrepresentations and untruths about alleged corruption and undue influence cannot serve as a basis for requiring Defendants to affirmatively prove that "every consultant retained by Monsanto in connection with PCBs has been retained as a litigation consultant"—regardless of the time period of retention, location of the consultant's work, or relevance to this litigation. Neither Rule 26 nor any of the cases cited by the State, all of which involved consultants who worked on the specific matter at issue in the litigation, impose such a duty.

(*Id*. at 14.) Defendants further note that "[a]ny non-litigation consultants engaged to assist or consult on remediation activities relating to the Krummrich Plant in Sauget, Illinois, will be identified in documents that will be produced by Defendants." (*Id*. at 11.)

The Court concludes that the State's Request No. 60 is overbroad, unduly burdensome and likely requests irrelevant information. Not only does the State fail to define "consultant," but it also does not provide a timeframe for its request (just based on facts elicited pursuant to this motion, PCB litigation involving Monsanto has been ongoing for at least over three decades). According to the State, it will be "prejudiced in the absence of this discovery in its ability to fully develop the facts as they pertain to [Defendants' alleged] historic and recent, intentional campaigns to avoid accountability for its creation of widespread PCB contamination in Illinois and beyond." (Pl.'s Mot. Compel, Dkt. # 92, at 15.) The State asserts that the "jury is entitled to know the full scope of Monsanto's efforts to prevent regulation, legislation, and enforcement activities that would benefit the public health but cost Monsanto money." (*Id*.) Notably lacking in the State's explanation for the request, however, is its identification of any connection to proving the claims in this case, rather than simply attempting to blemish Defendants' reputation.

For these reasons, the motion to compel as it relates to Request No. 60 is denied.

**SO ORDERED.**

**ENTERED:** October 24, 2023

**M. David Weisman**
**United States Magistrate Judge**