

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Jul 19, 2019**

SEAN F. MCAVOY, CLERK

1  
2  
3 UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

4 CITY OF SPOKANE, a municipal  
5 corporation located in the County of  
6 Spokane, State of Washington,

7 Plaintiff,

8 v.

9 MONSANTO COMPANY; SOLUTIA  
10 INC.; PHARMACIA CORPORATION,  
also known as Pharmacia LLC; and  
DOES 1 through 100,

11 Defendants.

No. 2:15-cv-00201-SMJ

**ORDER RULING ON DISCOVERY  
MOTIONS**

12 Before the Court, without oral argument, is Plaintiff the City of Spokane's  
13 Motion to Compel Responses to Plaintiff's Discovery Requests, ECF No. 271, and  
14 Defendant Pharmacia LLC's Motion for Protective Order Quashing Plaintiff's  
15 Fourth Amended Notice of Deposition Pursuant to F.R.C.P. 30(b)(6) of Defendants,  
16 ECF No. 281. The parties oppose each other's discovery motions. ECF Nos. 283,  
17 292. Plaintiff also moves for sanctions against Defendants. ECF No. 292 at 18-19.  
18 Having reviewed the file and relevant legal authorities, the Court is fully informed  
19 and grants in part and denies in part the discovery motions, and denies the motion  
20 for sanctions.

1 **BACKGROUND**

2 This case involves the Spokane River’s contamination by polychlorinated  
3 biphenyls (“PCBs”). *See* ECF No. 1. Plaintiff filed this action on July 31, 2015. *Id.*  
4 On April 7, 2016, the U.S. Judicial Panel on Multidistrict Litigation denied  
5 Plaintiff’s motion to transfer this case for centralized proceedings. ECF No. 50. The  
6 parties exchanged initial disclosures on June 10, 2016. ECF No. 58 at 2. On October  
7 26, 2016, the Court granted in part and denied in part Defendants’ motion to dismiss  
8 the complaint. ECF No. 74. On February 14, 2017, the Court granted Plaintiff’s  
9 motion to dismiss counterclaims. ECF No. 100. On July 10, 2017, the Court granted  
10 Plaintiff’s motion to dismiss amended counterclaims. ECF No. 167.

11 The Court has repeatedly observed this case is complex and voluminous. ECF  
12 Nos. 104, 112, 166, 172, 185, 206, 230, 244, 257, 267. The Court authorized  
13 additional discovery on July 11, 2017, July 19, 2017, May 14, 2018, and May 14,  
14 2019. ECF Nos. 172, 185, 230, 267. And the Court resolved discovery disputes on  
15 February 21, 2017, May 21, 2017, August 18, 2017, and June 21, 2018. ECF Nos.  
16 104, 158, 199, 241.

17 The parties now dispute a broad array of Plaintiff’s requests for production,  
18 interrogatories, and designated topics for examination at the deposition of  
19 Defendants’ Federal Rule of Civil Procedure 30(b)(6) witness. The Court has  
20 determined oral argument is unnecessary to resolve these disputes. ECF No. 298.

1 **LEGAL STANDARD**

2 The scope of discovery generally encompasses

3 any nonprivileged matter that is relevant to any party’s claim or defense  
4 and proportional to the needs of the case, considering the importance of  
5 the issues at stake in the action, the amount in controversy, the parties’  
6 relative access to relevant information, the parties’ resources, the  
7 importance of the discovery in resolving the issues, and whether the  
8 burden or expense of the proposed discovery outweighs its likely  
9 benefit.

10 Fed. R. Civ. P. 26(b)(1).

11 On a motion to compel discovery, “[t]he party opposing discovery bears the  
12 burden of resisting disclosure.” *Rogers v. Giurbino*, 288 F.R.D. 469, 479 (S.D. Cal.  
13 2012). The Court has “wide discretion in controlling discovery.” *Jeff D. v. Otter*,  
14 643 F.3d 278, 289 (9th Cir. 2011) (quoting *Little v. City of Seattle*, 863 F.2d 681,  
15 685 (9th Cir. 1988)).

16 For good cause, the Court may issue a protective order “to protect a party or  
17 person from annoyance, embarrassment, oppression, or undue burden or expense.”  
18 Fed. R. Civ. P. 26(c)(1). “A party asserting good cause bears the burden . . . of  
19 showing that specific prejudice or harm will result if no protective order is granted.”  
20 *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).  
“[B]road allegations of harm, unsubstantiated by specific examples or articulated  
reasoning, do not satisfy th[is] test.” *Id.* (quoting *Beckman Indus., Inc. v. Int’l Ins.  
Co.*, 966 F.2d 470, 476 (9th Cir. 1992)).

1 **DISCUSSION**

2 **A. Relevance generally**

3 Defendants repeatedly argue that Plaintiff’s discovery requests seek  
4 irrelevant information. ECF Nos. 281, 283, 296. But Defendants’ concept of  
5 relevance is too narrow. “Relevance, for discovery purposes, encompasses ‘any  
6 matter that bears on, or that reasonably could lead to other matter that could bear  
7 on, any issue that is or may be in the case.’” *Equal Emp’t Opportunity Comm’n v.*  
8 *Wal-Mart Stores, Inc.*, 276 F.R.D. 637, 641 (E.D. Wash. 2011) (quoting  
9 *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)). Having reviewed  
10 each of Defendants’ relevance objections, the Court hereby overrules them.

11 **B. Plaintiff’s motion to compel discovery**

12 **1. Documents outside the PCB archive**

13 Plaintiff argues Defendants refuse to produce documents outside their PCB  
14 archive. ECF No. 271 at 7–11. Defendants argue they have produced or will produce  
15 such documents, to the extent they exist and are relevant and responsive to  
16 Plaintiff’s discovery requests. ECF No. 283 at 11–12. Defendants emphasize they  
17 have already provided many thousands of documents. *Id.* Yet, Defendants  
18 acknowledge they have withheld some documents. *Id.*

19 Defendants have not met their burden of resisting discovery. Accordingly, the  
20 Court grants Plaintiff’s motion to compel production of documents outside the PCB

1 archive. Within thirty days of this Order, Defendants shall produce all documents  
2 responsive to requests for production 2, 3, 4, 5, 8, 10, 12, 13, 23, 26, 28, and 30 in  
3 Plaintiff's first set, and requests for production 6, 11, 12, and 19 in Plaintiff's fourth  
4 set, along with a privilege log documenting any claim of privilege.

5 **2. Documents regarding IBT fraud**

6 Plaintiff argues Defendants refuse to produce documents regarding fraud at  
7 the Industrial Bio-Test Labs of Northbrook, Illinois ("IBT"). ECF No. 271 at 11–  
8 15. Defendants argue they have provided or agreed to provide such documents as  
9 they pertain to PCB testing but the remainder of such documents, which concern  
10 IBT fraud in other areas, are irrelevant. ECF No. 283 at 12–15.

11 Considering the trial testimony in *Brown v. Monsanto Co.*, No. 862-00694  
12 (21st Cir. Ct. Mo. Oct. 28, 1991), ECF No. 272 at 11–12; ECF No. 272-1 at 153–  
13 69; ECF No. 284 at 8, it appears Plaintiff's discovery requests reasonably could lead  
14 to matters bearing on a potential issue in this case—whether IBT fraud in other  
15 areas infiltrated PCB testing. Therefore, the documents Plaintiff seeks are relevant  
16 for discovery purposes. Defendants have not met their burden of resisting discovery.  
17 Accordingly, the Court grants Plaintiff's motion to compel production of documents  
18 regarding IBT fraud. Within thirty days of this Order, Defendants shall produce all  
19 documents responsive to requests for production 16 and 18 in Plaintiff's first set,  
20 along with a privilege log documenting any claim of privilege.

1           **3.     Communications with Bayer**

2           Plaintiff argues Defendants refuse to produce communications between them  
3 and Bayer AG regarding PCBs. ECF No. 271 at 15–16. Defendants argue such  
4 communications are privileged, irrelevant, and disproportionate to the needs of this  
5 case.<sup>1</sup> ECF No. 283 at 15–18. The Court partly agrees with Defendants.

6           Citing federal law, Defendants argue the common interest doctrine shields  
7 from discovery all of their communications with Bayer during and after its 2018  
8 merger with the new Monsanto Company. *Id.* “[I]n a civil case, state law governs  
9 privilege regarding a claim or defense for which state law supplies the rule of  
10 decision.” Fed. R. Evid. 501. Where, as here, the Court exercises subject matter  
11 jurisdiction based on diversity of citizenship, and state law provides the rule of  
12 decision on various claims and defenses, state law also governs privilege. *See id.*

13           In Washington state, “the ‘common interest’ doctrine is merely a common  
14 law exception to waiver of privilege that applies when parties share a common  
15 interest in litigation.” *Sanders v. State*, 240 P.3d 120, 133–34 (Wash. 2010). “The  
16 ‘common interest’ doctrine provides that when multiple parties share confidential  
17 communications pertaining to their common claim or defense, the communications  
18 remain privileged as to those outside their group.” *Id.* at 134. “[T]he ‘common

---

19  
20 <sup>1</sup> The Court is not persuaded by Defendants’ unsubstantiated contentions regarding  
relevance and proportionality. Therefore, the Court focuses solely on Defendants’  
claim of privilege.

1 interest' doctrine is not an expansion of the [underlying] privilege at all; it is merely  
2 an exception to waiver.”<sup>2</sup> *Id.* “[D]ocuments that fall under the common interest  
3 doctrine are not discoverable in civil cases . . . .” *Id.*

4 In their briefing, Defendants do not identify the underlying privilege they  
5 believe the common interest doctrine saved from waiver. But from the context as a  
6 whole, it is apparent Defendants intend to rely on the attorney-client privilege. *See*  
7 ECF Nos. 281, 283, 296. That privilege “prohibits disclosure of communication  
8 between an attorney and a client given in the course of professional employment.”  
9 *Seattle Nw. Sec. Corp. v. SDG Holding Co.*, 812 P.2d 488, 495 (Wash. Ct. App.  
10 1991) (citing Wash. Rev. Code § 5.60.060(2)(a)). The privilege extends to written  
11 as well as oral communications between an attorney and a client. *Id.* However, “The  
12 attorney-client privilege only applies to communications that are intended by the  
13 party to be confidential. Therefore, if the communication is intended to be disclosed  
14 to others, it is not protected by the attorney-client privilege.” *Id.* at 498.

15 Defendants declare that, during the 2018 merger, “Monsanto and Bayer both  
16 signed a confidentiality agreement . . . to protect their communications, and any  
17 alleged communications were lawyer-driven and restricted to a small number of  
18 people.” ECF No. 284 at 8. Considering that Bayer was once a major PCB

---

20 <sup>2</sup> Federal law is in accord. *See Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575,  
578 (N.D. Cal. 2007).

1 manufacturer, ECF No. 272 at 13, and now owns Monsanto, ECF No. 283 at 5 n.1,  
2 16 n.6, the common interest doctrine plainly applies from the 2018 merger onward.  
3 Thus, during and after the 2018 merger, any attorney-client communications that  
4 Defendants and Bayer shared with or disclosed to each other remain privileged.  
5 However, any other communications between Defendants and Bayer—specifically,  
6 any communications made before the 2018 merger or those made, at any time,  
7 outside of an attorney-client relationship—are not privileged. It is unclear whether  
8 Defendants had this distinction in mind when they declared “[n]o non-privileged  
9 responsive documents were identified.” ECF No. 284 at 8.

10 Therefore, the Court grants in part and denies in part Plaintiff’s motion to  
11 compel production of communications between Defendants and Bayer regarding  
12 PCBs. Within thirty days of this Order, Defendants shall produce all non-privileged  
13 documents, if any, responsive to requests for production 26 and 27 in Plaintiff’s  
14 fourth set, along with a privilege log documenting any claim of privilege.

15 **4. Information about people hired or retained to be involved in the**  
16 **creation or publication of PCB-related papers, articles, or studies**

17 Plaintiff argues Defendants did not provide all requested information about  
18 any people hired or retained to be involved in the creation or publication of PCB-  
19 related papers, articles, or studies. ECF No. 271 at 17–18. Defendants argue they  
20 fully responded to Plaintiff’s discovery requests regarding so-called “ghostwriters.”  
ECF No. 283 at 18–20. The Court disagrees with Defendants.



1 Defendants' responses were somewhat evasive and misleading in that they  
2 focused excessively on one potential class of people—unnamed authors—rather  
3 than simply identifying and describing any people hired or retained to be involved  
4 in the creation or publication of PCB-related papers, articles, or studies. *See* ECF  
5 No. 284-5 at 5–7; ECF No. 284-6 at 1; ECF No. 284-7 at 1. While Defendants  
6 ultimately identified thirty-eight people, they provided an incomplete and confusing  
7 description of those peoples' roles, ECF No. 284-5 at 7, and did not “identify the  
8 dates of employment, describe the work for which th[ose people] were hired,  
9 describe the compensation provided, and identify all relevant documents including  
10 retention agreements,” *id.* at 5.

11 Defendants have not met their burden of resisting discovery. Accordingly, the  
12 Court grants Plaintiff's motion to compel disclosure of the above-described  
13 information. Within thirty days of this Order, Defendants shall fully respond to  
14 interrogatory 20 in Plaintiff's third set.

15 **5. Information about confidential alternative dispute resolutions in**  
16 **other lawsuits**

17 Plaintiff argues Defendants refuse to disclose other, purportedly confidential  
18 lawsuits. ECF No. 271 at 18–20. Defendants argue the other lawsuits, filed in  
19 Missouri and California, were ultimately resolved by mediation and all information  
20 relating to such mediation is absolutely non-discoverable under Missouri and  
California law. ECF No. 283 at 20–24. Plaintiff does not reply to this argument.

1 ECF No. 288 at 2–4. The Court agrees with Defendants. Accordingly, the Court  
2 denies Plaintiff’s motion to compel disclosure of the above-described information.

3 **C. Pharmacia’s motion for a protective order**

4 **1. Temporal restriction**

5 Pharmacia argues topics 1, 2, 3, 5, 6, 7, 12, 16, 18, 19, 20, 22, and 24 in  
6 Spokane’s fourth amended Rule 30(b)(6) deposition notice lack relevance and are  
7 overly broad and disproportionate to the needs of this case because they do not place  
8 a temporal restriction on the testimony sought. *See* ECF No. 281 at 12–16. Because  
9 the old Monsanto Company ceased manufacturing and selling PCBs in 1977, and  
10 the federal government began regulating PCBs in 1978, Pharmacia asks the Court  
11 to preclude discovery on subjects after 1980. *See id.* The Court declines to do so.

12 Contrary to Pharmacia’s assertion, the complaint is not limited to 1980 and  
13 before. The complaint, filed on July 31, 2015, alleges Defendants have created a  
14 continuing public nuisance; have continually failed to provide proper warnings or  
15 instructions; and have caused, and continue to cause, injury and damages. ECF No.  
16 1 at 27–34. In ruling on Defendants’ motion to dismiss the complaint, the Court  
17 noted that “[w]hether PCB contamination in the Spokane River is reasonably  
18 abatable [so as to establish possible liability under a continuing-tort theory] presents  
19 a factual question that cannot be resolved at this stage of the litigation.” ECF No.  
20 74 at 9.

1           Allowing discovery on subjects after 1980 reasonably could lead to matters  
2 bearing on real issues in this case—whether Defendants are liable for present-day  
3 public nuisance, failure to warn or instruct, and injury and damages; and whether  
4 the continuing-tort doctrine applies. Therefore, the discovery Spokane seeks is  
5 relevant for discovery purposes, not overly broad, and proportional to the needs of  
6 this case. Pharmacia has not met its burden of showing specific prejudice or harm  
7 will result without a temporal restriction on discovery. Accordingly, the Court  
8 denies Pharmacia’s motion to impose a temporal restriction on discovery.

9           **2.     Topic 20**

10           Considering the analysis in sections B.3 and C.1 above, the Court grants in  
11 part and denies in part Pharmacia’s motion to limit topic 20. *See* ECF No. 281 at  
12 17–20. Topic 20 in Spokane’s fourth amended Rule 30(b)(6) deposition notice is  
13 amended to read, “20. Non-privileged communications, if any, between Defendants  
14 and Bayer in regards to PCBs and PCB litigation.” *See* ECF No. 282-3 at 15.

15           **3.     Topic 30**

16           Considering the analysis in section B.5 above, the Court agrees with  
17 Pharmacia that topic 30 seeks non-discoverable information. *See* ECF No. 281 at  
18 21–24. Spokane is incorrect regarding the scope and waiver of the mediation  
19 privilege under Missouri and California law. *See* ECF No. 292 at 14–15.  
20 Accordingly, the Court grants Pharmacia’s motion to quash topic 30. Topic 30 in

1 Spokane's fourth amended Rule 30(b)(6) deposition notice is stricken.

2 **4. Topic 25**

3 Considering the analysis in section B.2 above, the Court denies Pharmacia's  
4 motion to quash topic 25. *See* ECF No. 281 at 24–27. However, in light of  
5 Spokane's agreement to reword topics 26 and 27, the Court employs its proposed  
6 language. *See* ECF No. 292 at 16. Topics 26 and 27 in Spokane's fourth amended  
7 Rule 30(b)(6) deposition notice are amended to read, "26. What Defendants did, if  
8 anything, subsequent to learning of the allegations of IBT fraud to ensure the PCBs  
9 studies were valid. 27. Defendants' knowledge of allegations of falsifying data  
10 committed by IBT with respect to the PCB studies." *Id.*

11 **5. Topic 32**

12 The Court agrees with Pharmacia that, as written, topic 32 seeks attorney  
13 work product to the extent it could reveal defense counsel's impressions,  
14 conclusions, or opinions about each topic via his or her selection of documents most  
15 relevant to each topic. *See* ECF No. 281 at 27–30. Spokane's proposed language is  
16 insufficient to protect against this concern. *See* ECF No. 292 at 17. Pharmacia's  
17 proposed language is fitting. *See* ECF No. 281 at 27. Therefore, the Court grants  
18 Pharmacia's motion to limit topic 32. Topic 32 in Spokane's fourth amended Rule  
19 30(b)(6) deposition notice is amended to read, "32. How the witness prepared for  
20 the deposition and specifically what documents the witness relies on to support his

1 testimony. Presenting a witness on this topic does not waive any privilege or work  
2 product objection. Pharmacia reserves its right during the deposition to object to  
3 and instruct the witness not to answer any questions that call for the disclosure of  
4 information or documents protected by the attorney-client privilege and the attorney  
5 work product doctrine.” *Id.*

#### 6 **6. Topic 24**

7 The Court agrees with Pharmacia that, as written, topic 24 is overly broad to  
8 the extent it could be construed as seeking information unrelated to PCBs. *See* ECF  
9 No. 281 at 30–31. But Pharmacia proposes no language to effectuate the limitation  
10 it envisions. Spokane’s proposed language is fitting. *See* ECF No. 292 at 18.  
11 Therefore, the Court grants in part and denies in part Pharmacia’s motion to quash  
12 topic 24. Topic 24 in Spokane’s fourth amended Rule 30(b)(6) deposition notice is  
13 amended to read, “24. Defendants’ product stewardship policies and statements that  
14 would apply to Monsanto’s PCBs and PCB products.” *Id.*

#### 15 **D. Spokane’s motion for sanctions**

16 While the Court overrules many of Pharmacia’s objections, it declines to  
17 impose sanctions. Pharmacia appears to have made its objections in good faith to  
18 protect itself from what it perceived as undue burden. The Court declines to penalize  
19 Pharmacia for the reasonable actions it took in its own defense. Therefore, the Court  
20 denies Spokane’s motion for sanctions. *See* ECF No. 292 at 18–19.

1 Accordingly, **IT IS HEREBY ORDERED:**


2 **1.** Plaintiff's Motion to Compel Responses to Plaintiff's Discovery  
3 Requests, **ECF No. 271**, is **GRANTED IN PART** and **DENIED IN**  
4 **PART**, as outlined above.

5 **2.** Defendant Pharmacia's Motion for Protective Order Quashing  
6 Plaintiff's Fourth Amended Notice of Deposition Pursuant to F.R.C.P.  
7 30(b)(6) of Defendants, **ECF No. 281**, is **GRANTED IN PART** and  
8 **DENIED IN PART**, as outlined above.

9 **3.** Plaintiff's Motion for Sanctions, **ECF No. 292 at 18–19**, is **DENIED**.

10 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and  
11 provide copies to all counsel.

12 **DATED** this 19th day of July 2019.

13   
14 SALVADOR MENDOCIA, JR.  
United States District Judge