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**
This Document Relates to All Cases	**MDL No. 3004**

PLAINTIFFS' MOTION AND MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL AND MOTION FOR SANCTIONS RELATING TO THE DEPOSITION OF NON-RETAINED EXPERT RICHARD CAVALLI

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Pursuant to Fed. R. Civ. P. 26, 11, and 37, as well as L.R. 7.1, and the relevant case management orders in this MDL, Plaintiffs bring this Motion to Compel and Motion for Sanctions. Plaintiffs respectfully request: (1) that the Court order Dr. Cavalli to appear for a second deposition; (2) that Chevron be compelled to produce all documents considered and/or relied upon by Dr. Cavalli and all correspondence to and from Dr. Cavalli with counsel for any party in this matter; (3) that the second deposition take place at Chevron's expense; and (4) that Chevron's attorneys be sanctioned in a manner that is proportional to the violations of the rules they intentionally committed at Dr. Cavalli's deposition, making it clear that Chevron must respect the rules of this Court, and that there are consequences for failing to do so.

Introduction

Dr. Richard Cavalli was disclosed by Chevron as a non-retained expert witness on August 18, 2022. **Ex. A**. He was subsequently deposed on August 22-23, 2022. As a non-retained expert witness, Chevron is entitled to extremely limited protections concerning its communications with Dr. Cavalli. In California, Chevron is entitled to virtually no protection at all. Nevertheless, and although Chevron retained highly sophisticated attorneys who are aware of the distinction between retained and non-retained experts, Chevron's attorneys refused to permit Dr. Cavalli to answer basic, permissible questions during his deposition.

Relevant Facts

Dr. Richard Cavalli was employed by Chevron as a toxicologist from 1969 through his retirement in 1999, though he stopped working on paraquat in 1986. **Ex. A**, pp. 1-2. During Dr. Cavalli's deposition, it became clear that Dr. Cavalli and Defendants' attorneys had met "several" times for approximately 2-5 hours each to prepare for his deposition. **Ex. B**, Cavalli Tr. 76:4-78:25. Chevron also clearly met with Dr. Cavalli in preparation for its disclosure of Dr. Cavalli as a non-

retained expert, and Chevron's disclosure contains extensive discussions concerning Dr. Cavalli's state of mind. *See generally,* **Ex. A**.

However, when Dr. Cavalli was asked during his deposition about the nature of these meetings, he was instructed not to answer:

> MS. REISMAN: Could you answer it without revealing any of the content of your meetings and conversations with counsel.

Ex. B, Cavalli Tr. 76:19-21. It also became apparent that Dr. Cavalli had met with Defendants' attorneys while on break during his trial testimony, as well as on the evening between the two days of his trial deposition. **Ex. B**, Cavalli Tr. 80:10-15.

Dr. Cavalli was also prohibited by Chevron's counsel from answering questions about what documents he was provided and/or reviewed in preparation for his deposition:

> Q (By Mr. Kennedy): And were you shown any medical literature, published articles, in any of these meetings?
>
> MS. REISMAN: I'm going to object to you asking him what he was shown until you establish that those documents refreshed his recollection.
>
> You can answer to the extent any of the documents refreshed your recollection.

Ex. B, Cavalli Tr. 79:1-8. Dr. Cavalli was asked again later in his deposition for a list of documents he reviewed in preparation for his deposition, but Ms. Reisman repeatedly instructed Dr. Cavalli not to answer on the basis of privilege:

> MS. REISMAN: And I'm going to assert an objection, and this was a discussion we've already had off the record. We're going to assert privilege over the documents and -- work product over the documents that were shown to Mr. Cavalli. We have disclosed him out of an abundance of caution as a nonretained expert, and we have disclosed within there the materials that he reviewed and the context of his work at Chevron back in the '80s. As is clear from today, he doesn't have a recollection of that he's testified, that nothing refreshed his recollection.
>
> ...
>
> I have said to the witness and to you, Mr. Kennedy, that he is free to tell you the documents that he reviewed that refreshed his recollection. But other than that, and if -- if he recalls

> specific worker exposure studies or animal studies that he reviewed or autopsy reports that he reviewed in the context of his review, he can reveal those to you. But past those specific limited materials, I'm going to instruct him not to answer.
>
> MR. KENNEDY: Okay.
>
> MS. REISMAN: And we are not waiving privilege or work product even with respect to those animal studies or autopsy reports or worker exposure data that he does recall reviewing. But I'm fine with he -- with Mr. Cavalli testifying with respect to the animal studies, the worker exposure studies, and the human autopsy reports that he reviewed.
>
> Q (By Mr. Kennedy) Okay. And so that I'm clear, I'm asking you to identify any -- any documents, written or electronic, any medical literature, or any other publication or any deposition testimony that you reviewed -- the totality of what you reviewed, whether it was provided to you by counsel or that you went and got it on your own. All right? Are you able to -- to give us that information?
>
> MS. REISMAN: Without waiving privilege or attorney work product, if you recall the animal studies or the worker exposure studies, the human autopsy reports that you reviewed in the context of your preparation, you can testify as to those. As to the other materials, we are asserting privilege under work product, and we are not waiving either of those with respect to the limited set of materials that I've described that you can testify about.
>
> A: I cannot give you a list of the documents that -- or other material that I looked at.

Ex. B, Cavalli Tr. 123:1-126:1.

The parties met and conferred regarding Ms. Reisman's objections on the record and during breaks, but Ms. Reisman refused to allow Dr. Cavalli to answer these questions, even after Plaintiffs' counsel provided case law related to non-retained experts in support of Plaintiffs' position. (Flowers Dec., ¶ 4.)

Legal Standard

A. Protections Afforded to Non-Reporting Experts

Federal Rule of Civil Procedure 26 distinguishes between reporting and non-reporting expert witnesses (sometimes called retained or non-retained expert witnesses). *See* Fed. R. Civ. P. (a)(2)(B); Fed. R. Civ. P. 26(a)(2)(C). "A witness who is not required to provide a report under Rule 26(a)(2)(B) may testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705." Committee Notes on Rules—2010 Amendment; *see also Currie v. Cundiff,*

09-cv-866, 2012 WL 2120002, at *2 (S.D. Ill. June 11, 2012) (recognizing that non-reporting witnesses can serve both expert and fact witness roles).

Federal courts, including Illinois's federal district courts, have repeatedly held that "to the extent a non-reporting witness is a hybrid fact and expert witness [their] communications with counsel are discoverable." *Trading Technologies, Int'l, Inc. v. IBG*, No. 10-c-715, 2020 WL 12309208, at *1 (N.D. Ill. Sept. 14, 2020) (*Slip Copy*) (citing *United States v. Sierra Pacific Indus.*, 09-cv-2445, 2011 WL 2119078 (E.D. Ca. May 26, 2011); *City of Wyoming, Minn. v. Procter & Gamble Co.* 15-c-2101, 2019 WL 245607 (D. Minn. Jan. 17, 2019)); *see also United States ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 1:06-cv-433, 2019 WL 692774 (S.D. Miss. Dec. 12, 2019) ("[T]he designation of a non-reporting expert generally waived applicable privileges for communications between a party's attorney and the non-reporting expert.") (granting motion to compel as to non-employee designated as non-reporting expert).

The decision in *Sierra Pacific* "has provided a particularly scholarly and well-considered opinion analyzing the minutes of the Civil Rules Advisory Committee with respect to non-reporting employee experts," *Trading Technologies* 2020 WL 12309208, at *1 (quoting *City of Wyoming*, 2019 WL 245607, at *3). For this reason, the Illinois federal court in *Trading Technologies* found "the *Sierra Pacific* framework persuasive and adopt[ed] it . . . by reference. Accordingly, whether communications between counsel and [the witness] are privileged and whether work product protections apply turns on whether [the witness] offers pure opinion testimony or whether he is instead an expert whose underlying knowledge of the facts derives from his percipient knowledge of facts at issue in the litigation." *Id.* at *2. The conclusion of the *Sierra Pacific* adopted by the federal court in Illinois relied on the statements made in the Report of the Civil Rules Advisory Committee:

> There are reasonable grounds to believe that broad discovery may be appropriate as to some 'no-report' experts. . . . Drafting an extension that applies only to expert employees of a party might be tricky, and might seem to favor parties large enough to have on the regular payroll experts qualified to give testimony. Still more troubling, employee experts often will also be "fact" witnesses by virtue of involvement in the events giving rise to the litigation. An employee expert, for example, may have participated in designing the product now claimed to embody a design defect. Discovery limited to attorney-expert communications falling within the enumerated exceptions might not be adequate to show the ways in which the expert's fact testimony may have been influenced.

Id. at *1 (quoting Report of the Civil Rules Advisory Committee, May 8, 2009, at 4–5). In fact, the Report further stated, "Both the Subcommittee and the Committee concluded that the time *has not come* to extend the protection for attorney-expert communications beyond experts required to give an (a)(2)(B) report." *Id.* at *1 (quoting Report of the Civil Rules Advisory Committee, May 8, 2009, at 4–5) (emphasis added). Thus, as federal courts—including one in Illinois—have recognized, the Federal Rules Committee and Subcommittee considered *and rejected* protections for communications between attorneys and non-reporting experts. *See id.*; Report of the Civil Rules Advisory Committee, May 8, 2009, at 4–5.

Significantly, the *Sierra Pacific* case and related case *FDIC v. Anderson*, 2:11-cv-01061, 2013 WL 14627 (E.D. Ca. Jan. 14, 2013), involved two non-reporting experts: one a current employee and one—as here—a *former employee*. *Sierra Pacific*, 2011 WL 2119078, at *3; *FDIC v. Anderson*, 2013 WL 14627, at *2. As to both current *and former* employees serving as non-reporting experts, the court reasoned that Rule 26 "does not provide protection for communications between non-reporting experts and counsel". *Id.* at *5. Moreover, in related case *FDIC*, the same court explained, "[w]hile it is desirable that any testifying expert's opinion be untainted by attorney's opinions and theories, it is even more important that a witness who is testifying regarding his own knowledge of facts be unbiased." *FDIC v. Anderson*, 2:11-cv-01061, 2013 WL 14627, at *1 (E.D. Ca. Jan. 14, 2013). For this reason, "discovery should be permitted into such

witnesses' communications with attorneys, in order to prevent, or at any rate expose, attorney-caused bias." *Id.* Thus, the court concluded that "counsel's communications with [the non-retained experts] should not be protected. [They] are hybrid fact and expert witnesses. In addition to being current *and former* employees, [they] have percipient knowledge of the facts at issue in the litigation." *Id.* at *2.

Because Dr. Cavalli's deposition was cross-noticed in the JCCP, California's treatment of non-retained expert witnesses is also relevant. Under the California Civil Code, non-reporting (percipient) experts are treated as fact witnesses, *Hurtado v. W. Med. Ctr.*, 222 Cap. Rptr. 324, 327 (Cal. Ct. App. 1990), so there are no special discovery protections applicable to communications between such an expert and counsel. *See Kalaba v. Gray*, 95 Cal. App. 4th 1416, 1422 (Cal. Ct. App. 2002) (explaining, as to non-retained experts, "because they acquire the information that forms the factual basis for their opinions independently of the litigation, they are subject to no special discovery restrictions."); *see also Schreiber v. Estate of Kiser*, 989 P.2d 720, 723 (Cal. 1999). Further, for all designated experts—retained or non-retained—privilege is deemed waived when it becomes known that the witness will actually testify. *Shooker v. Superior Ct.*, 4 Cal.Rptr. 3d 334, 338 (Cal. Ct. App. 2003). Likewise, any attorney work product transmitted to a testifying witness—whether a retained expert, non-retained expert, or general fact witness—loses that protection. *See DeLuca v. State Fish Co., Inc.*, 217 Cal. App. 4th 671, 691 (Cal. Ct. App. 2013) ("Indeed, any time an attorney speaks with a testifying witness—percipient or expert—the attorney discloses some amount of work product, in the fact of the conversation and the matters discussed.").

B. Sanctions for Inappropriate Deposition Conduct

There are only three justifications for instructing a deponent not to answer a question in a deposition: "to preserve a privilege; to enforce a limitation imposed by the court; or to present a Rule 30(d)(3) motion." *Rojas v. X Motorsport, Inc.*, 275 F. Supp. 3d 898, 902 (N.D. Ill. 2017); Fed. R. Civ. P 30(c)(2). "A violation of Rule 30(c)(2) may be remedied under Rule 30(d)(2), which states that a court may "impose an appropriate sanction ... on a person who impedes, delays, or frustrates the fair examination of [a] deponent." *Id.* This rule "explicitly authorizes the court to impose the cost resulting from obstructive tactics." Notes of Advisory Committee on Rules – 1993 Amendment.

In addition, Federal Rule of Civil Procedure 30 authorizes a motion to compel and for appropriate sanctions "if a deponent fails to answer a question asked under Rule 30 or 31" and states that "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond. Fed. R. Civ. P. 37(a)(3)(B)–(a)(4). The Seventh Circuit has "construed the sanctioning power conveyed by Rule 37 to extend to instances of a party hiding evidence and lying in his deposition" and stated that it could "think of no reason why the power would not also extend to a party soliciting" particular witness testimony at their deposition. *Ramirez v. R&H Lemont, Inc.*, 845 F.3d 772, 776 (7th Cir. 2016). In determining whether the responsible party engaged in sanctionable conduct pursuant to Rule 37, the appropriate standard is "preponderance of the evidence." *Id.* at 777.[1]

Sanctions available pursuant to the Court's inherent authority and under Rule 37 include:

> (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

[1] Previously, a more stringent standard applied, but in *Ramirez*, the Seventh Circuit overruled its prior decisions and expressly adopted "preponderance of the evidence" as the new standard, noting that it had repeatedly questioned the prior standard. *Ramirez*, 845 F.3d at 777.

> (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
>
> (iii) striking pleadings in whole or in part;
>
> (iv) staying further proceedings until the order is obeyed;
>
> (v) dismissing the action or proceeding in whole or in part;
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> (vi) rendering a default judgment against the disobedient party; or
>
> (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed. R. Civ. P. 37(b)(2).

Argument

A. Communications between Non-Retained Experts and Attorneys Are Not Protected

The Federal Rules protect communications between a party's attorney and "any witness required to provide a report under Rule 26(a)(2)(B)." Noticeably absent in this text is an express protection for communication between a party and a non-retained expert falling under Rule 26(a)(2)(C). *Sierra Pac. Indus.*, 2011 WL 2119078, at *7 ("It is clear that [Rule 26(b)(4)(C)] neither created a protection for communications between counsel and non-reporting expert witnesses, nor abrogated any existing protections for such communications."). The comments from the Rules Advisory Committee also make clear that this omission was not an oversight:

> The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. **The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C).** The rule does not exclude protection

> under other doctrines, such as privilege or independent development of the work-product doctrine.

Fed. R. Civ. P. 26 advisory committee notes for 2010 amendment (emphasis added); *see also Luminara Worldwide, LLC v. Liown Elecs. Co.*, No. CV 14-3103 (SRN/FLN), 2016 WL 6914995, at *6 (D. Minn. May 18, 2016) (same).

Chevron's expert disclosure is clear: Dr. Cavalli is a non-retained expert, who "has not been retained or specially employed to provide expert testimony." **Ex. A**, p. 2. Chevron further makes it clear that Dr. Cavalli is being put forth solely to testify concerning "his state of mind and understanding of paraquat while working as a toxicologist at Chevron who addressed toxicological issues related to paraquat until Chevron exited the paraquat business in 1986." *Id.* Chevron also notes that Dr. Cavalli will not testify to the state of the science after 1986. *Id.* In other words, there is no ambiguity as to Dr. Cavalli's status or the protections his communications were entitled to. *See City of Wyoming, Minnesota v. Procter & Gamble Co.*, No. 15-CV-2101 (JRT/TNL), 2019 WL 245607, at *4 (D. Minn. Jan. 17, 2019), *aff'd in part, modified in part sub nom. City of Mankato, Minnesota v. Kimberly-Clark Corp.*, No. CV 15-2101 (JRT/TNL), 2019 WL 4897191 (D. Minn. May 28, 2019) (citing *Sierra Pacific Industries* and *Luminara Worldwide, LLC v. Liown Elecs. Co.* and stating, "[O]ther courts have found that designating an individual who is also a percipient witness to the facts at issue as a non-reporting expert waives privilege and work-product protections."). This information is critical given that Plaintiffs previously requested a full Rule 26 disclosure and report from Dr. Cavalli; Chevron refused. **Ex. C**. Instead, Chevron informed the parties that Dr. Cavalli was not their expert, was not retained, and based upon these representations, would not be providing the requested disclosure. *Id.*

Understanding this, there is no question that Dr. Cavalli falls into the category of "hybrid" witnesses who are not entitled to protection, Chevron and Dr. Cavalli are not entitled to withhold

any communications or documents. *Ramaco Res., LLC v. Fed. Ins. Co.*, No. 2:19-CV-00703, 2020 WL 5261320, at *4 (S.D.W. Va. Sept. 3, 2020) (holding that engineers put forth to testify about their percipient observations "are afforded no special protection under Rule 26(b)(4)(C) for their communications with counsel. Accordingly, communications related to those topics, regardless of when the communications occurred, are subject to discovery, unless some other applicable privilege or protection is asserted.").

i. This Court Should Compel Chevron to Produce Improperly Withheld Documents and to Produce Dr. Cavalli for a Second Deposition

Dr. Cavalli unequivocally testified that he was provided and reviewed documents in preparation for his deposition; Ms. Reisman confirmed this during the course of her objections, where she instructed Dr. Cavalli not to disclose these documents. **Ex. B**, Cavalli Tr. 122:23-126:1. Because Dr. Cavalli is a non-retained expert, Chevron has no basis upon which to withhold any information about the documents Dr. Cavalli was provided and reviewed in preparation for his deposition. *See Luminara Worldwide, LLC v. Liown Electronics Co. Ltd.*, No. CV 14-3103, 2016 WL 6774229 (D. Minn. Nov. 15, 2016) ("[T]he waiver of privilege attached to [his] status as a non-reporting expert extends to any documents and information he considered in connection with his proposed testimony. In this jurisdiction, as well as others, courts have clearly and repeatedly recognized that the term 'considered' is to be interpreted broadly in this context. . . . the scope of waiver is not limited by subjective questions of whether the expert actually relied on or used the documents and information to which he was exposed in crafting his opinion. What matters is simply that he was exposed to those materials in the first place.").[2] *See also City of Mankato,*

[2] *See also City of Wyoming, Minn. v. Procter & Gamble Co.*, 15-cv-2101, 2019 WL 245607, at *2 (D. Minn. Jan. 17, 2019) (stating that the defendant "waived attorney-client and work product protections for documents considered" when it designated a "non-reporting" expert); *Pacificorp v. Nw. Pipeline GP*, 3:10-cv-00099, 2012 WL 13195528, at *1, 5 (D. Or., Nov. 6, 2012) (granting

Minnesota v. Kimberly-Clark Corp., No. CV 15-2101 (JRT/TNL), 2019 WL 4897191, at *11 (D. Minn. May 28, 2019) (work-product doctrine is waived where non-retained expert relies on knowledge and experience concerning the subject matter).

Dr. Cavalli and Defendants should therefore be compelled to produce all communications, materials and documents provided to or considered by Dr. Cavalli, including any used to prepare for testimony and/or form his opinions. *City of Mankato, Minnesota v. Kimberly-Clark Corp.*, No. CV 15-2101 (JRT/TNL), 2019 WL 4897191, at *9 (D. Minn. May 28, 2019) (..."'considered' is to be interpreted broadly as covering everything that the expert was exposed to and not only what the expert actually relied upon.) (citing *Luminara Worldwide, LLC v. Liown Elecs. Co.*, No. 14-CV-03103 (SRN/FLN), 2016 WL 6774229, at *3 (D. Minn. Nov. 15, 2016); *see also In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001); *Johnson v. Gmeinder*, 191 F.R.D. 638, 649 (D. Kan. 2000); *PacifiCorp v. Nw. Pipeline GP*, 879 F. Supp. 2d 1171, 1213 (D. Or. 2012)) (same).

Similarly, the conversations between Dr. Cavalli and Defendants' counsel are not privileged and therefore, not afforded any protection from discovery. Therefore, Dr. Cavalli should be compelled to answer questions addressing any such conversations, including those taking place at break during his trial testimony. *See Luminara Worldwide, LLC v. Liown Elecs. Co.*, No. CV 14-3103 (SRN/FLN), 2016 WL 6914995, at *6 (D. Minn. May 18, 2016).

ii. Dr. Cavalli should be ordered to appear for a second deposition.

A court "must allow additional time ...if the deponent, [or] another person...impedes...the deposition." Fed. R. Civ. P. 30(d)(1). Because Plaintiffs were wrongfully prevented from obtaining

motion to compel production of documents non-retained expert "considered" on the basis that privilege and work product protections were waived).

answers to questions on discoverable topics, namely Dr. Cavalli's preparation for the deposition, his review and reliance on certain materials, and his correspondence with Defendants' attorneys which includes conversations during breaks from his testimony, Dr. Cavalli should be compelled to appear for a second deposition on these topics.

iii. The Second Deposition Should Take Place at Chevron's Expense

"The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent." Fed. R. Civ. P. 30(d)(2).

Plaintiffs came prepared to take Dr. Cavalli's deposition but were prevented from completing their examination by Defense counsel's improper instructions for Dr. Cavalli not to answer appropriate questions seeking plainly discoverable information surrounding his preparation for the deposition, materials he considered, and communications and conversations that occurred between himself and Defendants' counsel, all while he had openly been disclosed as a non-retained expert. *See generally*, **Ex. A**, **Ex. B**.

Further, Chevron's tactics are consistent with its handling of other depositions, which included inappropriate conduct, such as interposing more than 300 objections in a single deposition, interposing frequent speaking objections, and unilaterally cancelling the Chevron 30(b)(6) deposition over the instruction of Special Master Ellis. Flowers Dec. ¶6. Here, the necessity of a second deposition, the expenses that will be incurred and time associated with the deposition are entirely the result of Chevron's counsel's actions.

Because this delay and need for further testimony were easily preventable and resulted from Chevron's flagrant disregard for the rules, the Court should permit Plaintiffs to submit a bill of costs after the deposition occurs for reimbursement by Chevron. This should include Plaintiffs'

time in preparing for the additional deposition, reviewing documents produced as a result of any Order this Court issues on the instant motion, travel expenses, the costs of bringing this Motion, and any other expenses incurred in preparing for or taking Dr. Cavalli's subsequent deposition. *See* Fed. R. Civ. P. 30(d); 37(a)(5).

iv. Attorneys at Jones Day Should be Separately Sanctioned for their Repeated Violations of the Rules after Multiple Reminders On and Off the Record

After it became apparent that Ms. Reisman intended to lodge improper objections to questions by Plaintiffs' counsel and that she further intended to continue to instruct Dr. Cavalli not to answer questions, Plaintiffs' counsel stated on the record that this objection was improper. **Ex. B**, Cavalli Tr. 76:10-77:20. Plaintiffs' counsel further met and conferred with Ms. Reisman during breaks from the deposition to explain that these objections were improper. Nonetheless, and despite these reminders, Ms. Reisman stood on her baseless and unfounded objections. (Flowers Dec. ¶ 5; *see also* **Ex. B**, Cavalli Tr: 76:19-21, 79:1-8, 123:1-126:1. As set forth above, these actions from Chevron's counsel show a pattern of obstruction, consistent with how prior depositions were obstructed. These actions cannot be condoned, and they must stop.

This Court is empowered with "the inherent authority to manage judicial proceedings and to regulate the conduct of those appearing before it, and pursuant to that authority may impose appropriate sanctions to penalize and discourage misconduct." *Ramirez v. T & H Lemont, Inc.*, 845 F.3d 772, 776 (7th Cir. 2016). *See also Tucker v. Williams*, 682 F.3d 654, 661–62 (7th Cir. 2012) (holding that a court has the inherent power to impose sanctions where a "party has willfully abused the judicial process or otherwise conducted litigation in bad faith"). Sanctions "'should be used to sanction attorneys 'for actions taken in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Rojas v. X Motorsport, Inc.*, 275 F. Supp. 3d 898, 910 (N.D. Ill. 2017) (quoting *Johnson v. Cherry*, 422 F.3d 540, 548–49 (7th Cir. 2005) (quoting *Chambers v. Nasco, Inc.*, 501 U.S. 32,

44-46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). Courts issuing sanctions against attorneys have adhered to the rule that the punishment must fit the crime. *See Rojas v. X Motorsport, Inc.*, 275 F. Supp. 3d 898, 910 (N.D. Ill. 2017). Ms. Reisman's conduct prevented Plaintiffs' counsel from meaningfully deposing Dr. Cavalli (and Chevron's 30(b)(6) witness for that matter). Not only did Ms. Reisman prevent Dr. Cavalli from testifying fully, she and counsel for Syngenta jointly met with Dr. Cavalli before and on every break during the deposition, yet failed to allow Dr. Cavalli to disclose the contents of those meetings and conversations. **Ex. B**, Cavalli Tr. 122:23-126:1; *LM Ins. Corp. v. ACEO, Inc., 275 F.R.D. 490, 491 (N.D. Ill. 2011)* ("Of course, overt instructions to a witness not to answer a question are improper absent a claim of privilege[.]") (*citing Redwood v. Dobson*, 476 F.3d 462, 468 (7th Cir.2007); Rule 30(c)(2)); *Philips v. Spartan Light Metals, Inc.*, 3:06-cv-864, 2008 WL 11508988, at *4 (S.D. Ill. Jan. 2008) (imposing sanctions, specifically costs, pursuant to Fed. R. Civ. P. 30(d)(2) on the basis that "Defendant delayed the examination of Deponents" where the defendant instructed deponents not to answer due to privilege, *even though* it was not clear whether or not privilege applied).

Setting aside counsel for Chevron's prohibition against Plaintiffs obtaining the information about the communications and correspondence between Dr. Cavalli and Defense counsel, the improper communications between Defendants' counsel and the witness at break during his trial testimony also merits the imposition of sanctions. As the Court is no doubt aware, counsel is not to confer with witnesses (experts or otherwise) while on breaks during trial testimony. *Hunt v. DaVita, Inc.*, 680 F.3d 775, 780 (7th Cir. 2012) ("Coaching and private conferences (on issues other than privilege) that would be inappropriate during trial testimony are not excused during a deposition merely because the judge is not in the room."). Had Dr. Cavalli's testimony been given live, at trial, the Court no doubt would have instructed the parties as such. Trial deposition

testimony is no different, yet Defendants' counsel and the witness admittedly conferred regarding his testimony, opinions, and the subject matter of his testimony repeatedly on breaks throughout the time he was under oath and giving trial testimony. **Ex. B**, Cavalli Tr. 80:10-21. These actions taken by Defendants' counsel are a clear violation of the Rule, justifying an appropriate sanction to ensure similar actions do not take place in the future.

Plaintiffs, therefore, ask that the Court issue an order prohibiting Ms. Reisman from defending any subsequent depositions of Dr. Cavalli or any subsequent depositions of any retained or non-retained experts in any paraquat case before this Court. Plaintiffs also ask that counsel for Defendants be prohibited from engaging in this conduct in any subsequent depositions, and for the Court to order a monetary sanction against Jones Day for these actions.

Conclusion

Chevron and its attorney's conduct at Dr. Cavalli's deposition was wholly improper. Therefore, Plaintiffs respectfully request: (1) that the Court order Dr. Cavalli to appear for a second deposition; (2) that Chevron be compelled to produce all documents considered and/or relied upon by Dr. Cavalli, all correspondence to and from Dr. Cavalli with counsel for any party in this matter; (3) that the second deposition take place at Chevron's expense; and (4) that Chevron's counsel be sanctioned in a manner that is proportional to the violations of the rules she intentionally committed at Dr. Cavalli's deposition.

Dated: September 20, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send electronic notification of such filing to counsel of record.

/s/ Peter J. Flowers