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17 MONSANTO COMPANY

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
19 **COUNTY OF SAN FRANCISCO**

21 DEWAYNE JOHNSON,  
22 Plaintiff,  
23 vs.  
24 MONSANTO COMPANY,  
25 Defendant.

Case No. CGC-16-550128  
**DEFENDANT MONSANTO COMPANY'S  
MOTION *IN LIMINE* NO. 23 TO  
EXCLUDE EVIDENCE, ARGUMENT,  
AND REFERENCE TO LOBBYING  
ACTIVITY AND GENERATION OF  
SUPPORT FOR REGISTRATION OF  
GLYPHOSATE**

Trial Date: June 18, 2018  
Time: 9:30 a.m.  
Department: TBD

ELECTRONICALLY  
**FILED**  
*Superior Court of California,  
County of San Francisco*  
**05/24/2018**  
Clerk of the Court  
BY: VANESSA WU  
Deputy Clerk

1 **I. INTRODUCTION**

2 Defendant Monsanto Company (“Monsanto”) respectfully submits this motion *in limine* to  
3 exclude any evidence, argument, or reference to Monsanto’s lobbying activity and generation of  
4 support for the registration of glyphosate, including meetings with regulators and other public  
5 relations activities, and any argument that such activities are evidence of allegedly nefarious  
6 conduct. Evidence related to these constitutionally protected activities is irrelevant, prejudicial,  
7 and would confuse the issues and waste time.

8 **II. BACKGROUND**

9 Like many companies, Monsanto has contact with regulatory agencies, including the U.S.  
10 Environmental Protection Agency (“EPA”), which is responsible for registration of herbicides in  
11 the United States. Monsanto meets with regulators, petitions the government pursuant to its rights  
12 under the First Amendment of the U.S. Constitution, and engages in public relations activities. As  
13 Plaintiff Dewayne Johnson’s (“Plaintiff”) expert Dr. Benbrook explains, these “practices are not  
14 unique to Monsanto.” Declaration of Sandra A. Edwards (“Edwards Decl.”) at ¶ 14, Ex. 13  
15 (Expert Report of Charles Benbrook (“Benbrook Rpt.”) at ¶ 940 (Dec. 21, 2017)). Documents  
16 produced by Monsanto reflect many of these common activities.

17 Plaintiff seems poised to introduce numerous Monsanto documents evidencing these  
18 lobbying, petitioning, and public relations activities. For example, Plaintiff submitted a lengthy  
19 report from Dr. Benbrook asserting that Monsanto engaged in “Efforts to Influence Scientific  
20 Community and Regulatory Assessments of Glyphosate Risks,” before this Court excluded Dr.  
21 Benbrook from interpreting Monsanto’s emails. Edwards Decl. at ¶ 14, Ex. 13 (Benbrook Rpt. at  
22 ¶¶ 362–95, 601–30, 921–70); *see* 05/17/2018 Order on *Sargon* Motion and Summary Judgment at  
23 30–31. Monsanto expects that Plaintiff may try to introduce other evidence consistent with Dr.  
24 Benbrook’s opinion that he is “not aware of another company in the pesticide industry that invests  
25 so heavily, creatively, and aggressively” to “lobby the U.S. Congress and federal agencies, and  
26 conduct a wide array of media and [public relations] activities.” Edwards Decl. at ¶ 14, Ex. 13  
27 (Benbrook Rpt. at ¶¶ 935, 940). Likewise, Monsanto expects Plaintiff to argue that “the scope and  
28 nature of the activities pursued by Monsanto via [public relations and communications] firms

1 stands out as uniquely broad and aggressive” regarding a “proposal focused on triggering  
2 expressions of support for the EPA’s re-registration of glyphosate in the political, farm, academic,  
3 and gardening communities.” *Id.* at ¶¶ 950, 952.

4 **III. ARGUMENT**

5 Evidence regarding Monsanto’s lobbying activities and generation of support for  
6 glyphosate should be excluded at trial. First, such evidence is irrelevant. *See* Cal. Evid. Code  
7 §§ 210, 350. This case involves whether glyphosate caused Plaintiff’s mycosis fungoides.  
8 Monsanto’s lobbying and public relations efforts are not relevant to that question in any way. *See*  
9 *Empress Casino Joliet Corp. v. Johnston*, No. 09-C-3585, 2014 WL 6735529, at \*10 (N.D. Ill.  
10 Nov. 28, 2014) (“evidence regarding contributions to and lobbying of legislators is likewise  
11 irrelevant and inadmissible”).<sup>1</sup>

12 Second, the First Amendment’s protection of the right “to petition the Government for a  
13 redress of grievances” includes the right to petition administrative agencies. *California Motor*  
14 *Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (“Certainly the right to petition  
15 extends to all departments of the Government,” including “administrative agencies (which are  
16 both creatures of the legislature, and arms of the executive)”) (commonly known and referred to  
17 herein as the “*Noerr-Pennington* doctrine”). Under the *Noerr-Pennington* doctrine, Plaintiff’s  
18 efforts to paint Monsanto in a negative light based on its lobbying activities or public relationship  
19 campaigns unlawfully attempts to ascribe liability for these constitutionally protected activities.  
20 *See e.g., Ludwig v. Superior Court* 37 Cal. App. 4th 8, 21 (1996) (“Those who petition the  
21 government are generally immune from . . . liability.”) (alteration in original); *see People ex rel.*  
22 *Gallegos v. Pac. Lumber Co.* 158 Cal. App. 4th 950, 964 (2008), as modified (Feb. 1, 2008) (“The  
23 *Noerr-Pennington* doctrine has been extended to preclude virtually all civil liability for a  
24 defendant’s petitioning activities before not just courts, but also before administrative and other

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26 <sup>1</sup> This evidence is also preempted because it suggests Monsanto was engaged in improper regulatory  
27 activity. The regulators, including the EPA, are the proper entities to determine the correctness of  
28 Monsanto’s regulatory actions—not the jury in this case. *Accord* Defendant Monsanto Company’s  
Motion *in Limine* No. 26 to Exclude Evidence or Argument Alleging that Monsanto Deceived the  
EPA.

1 governmental agencies.”). As the Seventh Circuit has explained in similar circumstances:

2 The evidence of defendants’ lobbying activity poses a serious problem of confusion  
3 of issues. The likely confusion is that the jury will consider this evidence as  
4 probative of an [improper] agreement to influence public officials .... An  
5 appropriate cautionary instruction could be fashioned .... [y]et, the more likely  
6 result is that the jury ... would conclude that the passage of a favorable consumer  
7 credit limit was the product of an unlawful conspiracy. We believe that confusion  
8 of issues is the probable result of admission of this evidence.... [T]he threat of  
9 prejudice from admission of this evidence is considerable[ and ] would serve to  
10 focus the jury’s attention on the lobbying evidence. This could easily result in a  
11 finding of antitrust liability for engaging in the First Amendment right to petition  
12 which Noerr-Pennington protects. We believe the District Court correctly excluded  
13 this evidence from consideration....

14 *Weit v. Cont’l Illinois Nat. Bank & Tr. Co. of Chicago*, 641 F.2d 457, 467 (7th Cir. 1981).

15 Ascribing liability based on evidence of protected First Amendment activity is “presumptively  
16 prejudicial,” and thus, courts regularly exclude such evidence or argument. *U.S. Football League  
17 v. Nat’l Football League*, 634 F. Supp. 1155, 1181 (S.D.N.Y. 1986) (noting that such evidence was  
18 “clearly designed to place defendants in the harshest light” and that the “evidence which by its  
19 very nature chills the exercise of First Amendment rights, is properly viewed as presumptively  
20 prejudicial”) (citation omitted); *see also Senart v. Mobay Chem. Corp.*, 597 F. Supp. 502, 506 (D.  
21 Minn. 1984) (“[P]laintiffs assail defendants for taking a particular view in a scientific debate and  
22 for trying to retain a regulatory standard which defendants preferred. Not only do these actions not  
23 constitute torts, they are protected by the first amendment.”); *see* Cal. Evid. Code § 352.

24 Finally, this evidence should be excluded to avoid a “trial within a trial.” *Notrica v. State  
25 Comp. Ins. Fund*, 70 Cal. App. 4th 911, 928 (1999). Monsanto would be forced to contest the  
26 prejudicial inferences from admission of this evidence, which would require, at a minimum, the  
27 offering of the following: (1) details about the particular regulatory proceedings at issue; (2)  
28 explanations of the governing agency rules in effect at the time; and (3) evidence of the prior  
course of dealings between Monsanto, the industry, and the regulators. This sideshow should be  
avoided under Section 352 of the Evidence Code.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court should exclude all evidence, argument, or reference to  
3 Monsanto's lobbying activity and generation of support for the registration of glyphosate, and any  
4 argument that such activities are evidence of allegedly nefarious conduct.

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6 Dated: May 24, 2018

Respectfully submitted.

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By: 

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Sandra A. Edwards

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Attorneys for Defendant  
MONSANTO COMPANY

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