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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”).¹

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

25 _____
26 ¹ 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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Dated: May 24, 2018

Respectfully submitted.

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By: 

Sandra A. Edwards

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MONSANTO COMPANY