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17 MONSANTO COMPANY

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

20
21 DEWAYNE JOHNSON,
22 Plaintiff,
23 vs.
24 MONSANTO COMPANY,
25 Defendant.

Case No. CGC-16-550128

**DEFENDANT MONSANTO COMPANY'S
REPLY IN SUPPORT OF MOTION *IN*
LIMINE NO. 23 TO EXCLUDE EVIDENCE
AND ARGUMENT REGARDING ITS
LOBBYING ACTIVITY AND
GENERATION OF SUPPORT FOR
REGISTRATION OF GLYPHOSATE**

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

1 **I. INTRODUCTION**

2 Plaintiff Dewayne Johnson’s (“Plaintiff”) opposition to Defendant Monsanto Company’s
3 (“Monsanto”) motion *in limine* misstates the law, makes little sense, and provides no justification
4 for its efforts to assign liability to Monsanto for engaging in First Amendment activities. Under
5 *Noerr-Pennington* and its progeny, evidence relating to Monsanto’s lobbying activities is
6 inadmissible to prove liability and presumptively prejudicial when used for that purpose. Such
7 evidence or argument should be excluded entirely.

8 **II. ARGUMENT**

9 Plaintiff does not dispute that Monsanto’s lobbying activity is protected by the First
10 Amendment, nor that *Noerr-Pennington* precludes liability for these First Amendment protected
11 activities. Indeed, as Monsanto pointed out in its opening brief, California and federal law make it
12 perfectly clear that *Noerr-Pennington* immunity “has been extended to preclude virtually all civil
13 liability for a defendant’s petitioning activities before not just courts, but also before
14 administrative and other governmental agencies.” *People ex rel. Gallegos v. Pac. Lumber Co.* 158
15 Cal. App. 4th 950, 964 (2008), as modified (Feb. 1, 2008); *U.S. Football League v. Nat’l Football*
16 *League*, 634 F. Supp. 1155, 1181 (S.D.N.Y. 1986) (“evidence which by its very nature chills the
17 exercise of First Amendment rights, is properly viewed as presumptively prejudicial.”).

18 Despite admitting that the *Noerr-Pennington* doctrine “precludes liability for lobbying
19 activity,” Plaintiff’s Opp’n to MIL No. 23 (“Pl. Opp’n”) at 1 n.1, Plaintiff nevertheless insists that
20 he should be allowed to seek punitive damages from Monsanto based on these First Amendment
21 protected activities. *See* Pl. Opp’n. at 4. Plaintiff’s argument makes no sense. Relying on
22 Monsanto’s protected lobbying activities in order to secure a punitive damages award is the very
23 definition of an attempt to ascribe liability for First Amendment activities. If awarding punitive
24 damages based on the exercise of First Amendment rights does not “chill[] the exercise of First
25 Amendment rights,” *Nat’l Football League*, 634 F. Supp. at 1181, it is difficult to imagine what
26 would.

27 While Plaintiff fails to muster a single case supporting his punitive damages argument, he
28 cites various cases in an attempt to argue that lobbying activities can be relevant in certain

1 circumstances. Plaintiff posits that *Noerr-Pennington* is not an *evidentiary* rule, and therefore
2 does not exclude his attempts to demean Monsanto via its lobbying activities. Pl. Opp’n. at 1. But
3 Plaintiff fails to perceive the obvious problem with his argument: because Monsanto cannot
4 lawfully be held liable based on its lobbying efforts, Plaintiff’s presentation of evidence of these
5 efforts in an attempt to prove liability necessarily prejudices Monsanto unfairly. That was
6 precisely the point that the Seventh Circuit made in *Weit v. Cont’l Illinois Nat. Bank & Tr. Co. of*
7 *Chicago*, 641 F.2d 457, 467 (7th Cir. 1981), when it rejected the admissibility of such evidence,
8 and in other such cases. *See also Senart v. Mobay Chem. Corp.*, 597 F. Supp. 502, 506 (D. Minn.
9 1984) (excluding evidence of lobbying activity where “plaintiffs assail[ed] defendants for taking a
10 particular view in a scientific debate and for trying to retain a regulatory standard which
11 defendants preferred,” because “[n]ot only do these actions not constitute torts, they are protected
12 by the first amendment.”).

13 Contrary to Plaintiff’s assertions, “the overwhelming majority of courts” do not allow
14 evidence of lobbying activity and petitioning of government officials, and Plaintiff’s citations do
15 not support its position. While Plaintiff trumpets the California Court of Appeals decision in
16 *Hernandez v. Amcord, Inc.*, 215 Cal. App. 4th 659 (2013), as “the seminal” case approving the
17 exclusion of “evidence of lobbying activity,” Pl. Opp’n at 2, in fact, the court made “no
18 assessment of the relevance, probative value, or prejudicial nature of the evidence at issue.”
19 *Hernandez*, 215 Cal. App. 4th at 680. And the cases that do allow for lobbying evidence do so
20 under narrow sets of circumstances where the potential for unfair prejudice is minimal.

21 Here, apart from his punitive damages argument, Plaintiff does not clearly explain the
22 purposes to which he is intending to introduce evidence of Monsanto’s lobbying activities, and
23 further confuses the issue by making a variety of straw-man arguments for the admissibility of
24 evidence that has nothing to do with lobbying. *See* Pl. Opp’n at 3 (discussing Monsanto’s alleged
25 “ghostwriting”). At a minimum, however, it appears that Plaintiff intends to prejudice Monsanto
26 by casting it in a negative light based on First Amendment protected activities, and use that
27 evidence in a variety of ways to argue that Monsanto should be liable for causing Plaintiff’s cancer
28 or to punish Monsanto via punitive damages. Any such attempts are presumptively prejudicial

1 under the First Amendment, and evidence of Monsanto's lobby activities for these purposes
2 should be excluded.

3 **III. CONCLUSION**

4 Monsanto's motion *in limine* should be granted.

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6 Dated: June 12, 2018

Respectfully submitted,

7 FARELLA BRAUN + MARTEL LLP

8 By: 

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Sandra A. Edwards

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11 Attorneys for Defendant
MONSANTO COMPANY

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