Sandra A. Edwards (State Bar No. 154578)
Joshua W. Malone (State Bar No. 301836)
Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
Telephone: (415) 954-4400; Fax: (415) 954-4480
sedwards@fbm.com
jmalone@fbm.com

Joe G. Hollingsworth (appearance *pro hac vice*)
Martin C. Calhoun (appearance *pro hac vice*)
Kirby T. Griffis (appearance *pro hac vice*)
William J. Cople (appearance *pro hac vice*)
Hollingsworth LLP
1350 I Street, N.W.
Washington, DC 20005
Telephone: (202) 898-5800; Fax: (202) 682-1639
jhollingsworth@hollingsworthllp.com
mcalhoun@hollingsworthllp.com
kgriffis@hollingsworthllp.com
wcople@hollingsworthllp.com

George C. Lombardi (appearance *pro hac vice*)
James M. Hilmert (appearance *pro hac vice*)
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
Telephone: (312) 558-5969; Fax: (312) 558-5700
glombard@winston.com
jhilmert@winston.com

Attorneys for Defendant
MONSANTO COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

vs.

MONSANTO COMPANY,

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

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

I. INTRODUCTION

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

II. ARGUMENT

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

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

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

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

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

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

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

III. CONCLUSION

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

Dated: June 12, 2018

Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By: 

Sandra A. Edwards

Attorneys for Defendant
MONSANTO COMPANY