SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

AVAAZ FOUNDATION, Petitioner, -against- MONSANTO COMPANY, Respondent.	Index No. 151653/2018 Hon. Shlomo S. Hagler Part 17

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITION TO QUASH SUBPOENA

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Statutes

Petitioner Avaaz Foundation ("Avaaz") submits this reply memorandum of law in further support of its petition to quash, or in the alternative modify, the January 26, 2018 subpoena (the "Subpoena") issued by Respondent Monsanto Company ("Monsanto") and for a protective order.

PRELIMINARY STATEMENT

Suppose that the United States Congress passed a law tomorrow banning soft drinks made with sugar. In theory, this outcome might suggest that a majority of legislators were convinced by a body of scientific evidence that excessive soda consumption causes obesity, hypertension, and other negative health outcomes. In the real world, the story would undoubtedly be more complicated. While many legislators would have been persuaded by the scientific research, others might have voted for the ban in response to vocal advocacy efforts by their constituents who cared deeply about the issue. Others might have agreed to support the measure in exchange for other legislators' support for their own unrelated priorities—a practice commonly known as "log-rolling." Still others might have jumped on the bandwagon simply to chalk up an "accomplishment" to tout to voters in the midterm elections. And, cynically enough, a few might have even voted "yes" simply to curry favor with the artificial sweetener lobby.

Almost certainly, every legislator who voted for the bill would have been motivated by a complex set of reasons—public-spirited, ideological, partisan, and self-interested—all at once. That is how democratic politics works.

But under no circumstances would the fact that Congress banned soda pop *be evidence* that soda consumption causes obesity and hypertension. Whether sugary soda does or does not have negative health consequences is a question of chemistry and human physiology, not of politics. Legislatures are free to conclude whatever they wish on questions of scientific fact, or on any matter. But their votes and even their stated conclusions about scientific truth or causation do not make those conclusions empirically true, or any more likely to be true. To

further extend the analogy, it is certainly the case that the letters that people sent their representatives urging them to ban soda, and the internal correspondence of the groups who organized anti-soda rallies on the Capitol steps, are not *evidence* of the health effects of soda. Democratic citizens are free to hold any beliefs they wish, to urge their governments to enact the policies they prefer, and to organize around common causes. Those private beliefs and actions do not tend to prove or disprove scientific facts.

So too here. Monsanto's sweeping Subpoena to Avaaz, a global civic movement that advocates on issues of importance to its 46 million members worldwide, continues to seek virtually every document relating to Avaaz's years of campaigning about glyphosate—all, Monsanto claims, for use in a Missouri products liability case brought by agricultural workers Ronald Peterson and Jim Hall. Even in its narrowed form, the Subpoena pries deeply, and unconstitutionally, into the strategic deliberations and work product of one of Monsanto's leading political adversaries, and it demands hundreds of thousands of sensitive documents spanning years from a hundred custodians around the world. Monsanto's only real argument for the relevance of the materials it seeks is that, in the course of Avaaz's campaign to encourage the European Union not to renew its license for glyphosate, Avaaz coordinated with lawyers who ostensibly represent Peterson and Hall, and brought those lawyers (but not Peterson or Hall) to Brussels to raise public awareness.

The assertion that communications among civic advocates and lawyers about efforts to persuade European political institutions are *evidence of whether a chemical compound causes cancer* boggles the mind—and it is just plain wrong. That the EU decided through its political processes to re-license glyphosate for only five years instead of the fifteen years Monsanto had hoped for does not make it more or less likely that glyphosate is a carcinogen. As the New York

Court of Appeals has held, "standards promulgated by regulatory agencies as protective measures" are irrelevant to whether a particular toxin causes a particular disease. *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 783 (2014). The words, beliefs, and conduct of private citizens who advocated for (or against) that outcome are even *less* probative of scientific fact. Nothing Avaaz's campaigners say to each other, to lawyers, or to governments tends to make it more or less likely that glyphosate causes non-Hodgkin's lymphoma.

Monsanto's baseless effort to justify the Subpoena is even more troubling in light of the profound threat it poses to Avaaz's constitutionally protected associational and petitioning activities. While Monsanto has narrowed the Subpoena to exclude sensitive *member* information, it continues to seek *all* of Avaaz's strategy deliberations, confidential communications, and sensitive internal documents concerning glyphosate—the heart and soul of Avaaz's political efforts against Monsanto and its product glyphosate. Monsanto ignores the evidence that such an intrusion into Avaaz's internal workings would undermine its political efficacy and chill its political speech, and it ignores the case law holding that compelled disclosure under the circumstances would violate the First Amendment.

Nor does the narrowing of the Subpoena change the fact that compliance still would require thousands of person-hours and cost hundreds of thousands of dollars. And, by clarifying that its main concern is Avaaz's work with certain lawyers, Monsanto admits that the burden it seeks to impose on Avaaz is especially unjustified because it could get the documents it cares most about directly from those lawyers' clients, who are plaintiffs in personal injury cases against the company. There is no basis to seek those documents from Avaaz.

Monsanto has failed to show that the materials it seeks from Avaaz have *any* utility, let alone that they meet the compelling need the law requires given the core First Amendment interests at stake. The petition should be granted and the Subpoena quashed in its entirety.

THE SUBPOENA CONTINUES TO SEEK AN EXTREMELY BROAD ARRAY OF SENSITIVE DOCUMENTS

The Subpoena served by Monsanto demanded "all documents" pertaining to certain kinds of activities undertaken by Avaaz with respect to "glyphosate . . . *or* Monsanto." Celli Aff. Ex. A at 2-3 (emphasis added); *see* Avaaz Br. (NYSCEF No. 16) at 7-9. As a result, the Subpoena swept within its scope *all* of Avaaz's Monsanto-related work on a wide range of matters—from the construction of a seed conditioning facility in Argentina, to Monsanto's merger with Bayer, to the licensing of dicamba by the Arkansas Plant Board. *See* Ruby-Sachs Aff. ¶¶ 14-21, 50-54. It also called for emails to and from individual members, Monsanto-related petitions suggested by members, and information about member donations in response to Monsanto-related appeals. *See id.* ¶ 54.

Avaaz sent Monsanto a letter objecting to the Subpoena and pointing out that it sought patently irrelevant material relating to Avaaz's campaigning on non-glyphosate issues and that it infringed upon Avaaz members' associational rights by seeking their private information. Celli Aff. Ex. D at 2, 3. Monsanto responded with a one-paragraph letter asserting that the Subpoena was lawful and saying nothing about its intended scope. *Id.* Ex. E.

Only *after* Avaaz filed its petition to quash the Subpoena did Monsanto clarify that it was not seeking documents reflecting individual Avaaz members' personal information and was not seeking material relating to Avaaz's campaigns on issues other than glyphosate. By stipulation dated March 8, 2018, the parties agreed that the Subpoena would be construed to exclude from its scope "[d]ocuments reflecting any personal identifying information for Avaaz members and

subscribers" and "[d]ocuments that do not relate to glyphosate or glyphosate-containing herbicides." Celli Reply Aff. Ex. A.

As modified by the stipulation, the Subpoena still seeks virtually every single document from Avaaz's glyphosate campaign—an astonishingly broad set of material spanning nearly three years and exposing all of Avaaz's most sensitive inner workings. The most sweeping provisions are Paragraphs 5 and 9. Paragraph 5 of the Subpoena calls for "[a]ll documents . . . created by, sent by, received by, copied to, or maintained by Avaaz relating to public relations and lobbying in the United States and Europe regarding glyphosate [or] glyphosate-containing herbicides." Celli Aff. Ex. A at 2. Paragraph 9 demands "[a]ll documents regarding any trips, visits, or *contact made* (whether in person, over the telephone, or internet) with the United States government, a foreign government, or any non-governmental agency, regarding glyphosate [or] glyphosate-containing herbicides." *Id.* at 3.

"Public relations and lobbying" and "contact" with government officials and non-governmental organizations are the essence of Avaaz's work. *See* Ruby-Sachs Aff. ¶ 52. Almost every document from the glyphosate campaign "relat[es] to" public relations, lobbying, or contact with government officials. *See id.* ¶ 53. Therefore, even as narrowed, the Subpoena calls for the production of all of Avaaz's internal staff email correspondence about glyphosate; every communication between Avaaz media professionals and journalists concerning glyphosate; notes of communications with confidential sources; notes of strategy meetings; internal drafts of every letter Avaaz sent to public officials; internal drafts of Avaaz's emails to its members; internal drafts of the material on Avaaz's website; campaign budgets, balance sheets, receipts, and other financial information; and logistical communications about calls, meetings, travel, and internal staffing. *See* Ruby-Sachs Reply Aff. ¶ 2.

The volume of responsive material is enormous. Avaaz has worked on the glyphosate issue continuously since the spring of 2015. *See* Ruby-Sachs Aff. ¶ 24. Almost everyone in the organization has participated in some form or another. *Id.* ¶¶ 41, 56. There are, at minimum, several hundred thousand documents potentially responsive to the narrowed Subpoena maintained by approximately 100 custodians scattered around the globe. Ruby-Sachs Reply Aff. ¶ 3. These custodians' email inboxes and computer hard drives would all need to be searched individually. *See* Ruby-Sachs Aff. ¶¶ 55-59; Ruby-Sachs Reply Aff. ¶ 4. Notwithstanding the narrowing of the Subpoena, searching for responsive documents and reviewing them for responsiveness and attorney-client privilege will still cost the organization hundreds of thousands of dollars. *See* Ruby-Sachs Reply Aff. ¶ 5. This represents a significant financial burden for a member-supported civic organization that does not accept corporate or government funding to ensure that it is accountable to all of its members. *See* Ruby-Sachs Aff. ¶ 12.

ARGUMENT

I. THE MATERIALS THAT MONSANTO SEEKS ARE UTTERLY IRRELEVANT TO GENERAL CAUSATION

It is well established that subpoenas "may not be used as 'fishing expeditions' to obtain evidence." *Future Tech. Assocs., LLC v. Special Comm'r of Investigation*, 31 Misc. 3d 1206(A), 2011 WL 1200778, at *4 (Sup. Ct. N.Y. Cnty. Mar. 17, 2011); *see In re Office of Att'y Gen. of State of N.Y.*, 269 A.D.2d 1, 10 (1st Dep't 2000). And it is equally well established that courts must protect the targets of subpoenas where their purpose seems to be to harass or annoy. *See* CPLR § 3013; *In re Application of Law Offices of Paul A. Lange*, 245 A.D.2d 118, 119 (1st Dep't 1997) (protective order "justified in order to prevent unnecessary harassment"); *Markowitz v. Fein*, 36 A.D.2d 707, 707 (1st Dep't 1971) (quashing subpoena to prevent "needless harassment"). Especially in the context of a civil dispute between private parties, the "broadly

stated standard" that a subpoena should be quashed if the materials sought are utterly irrelevant "should not serve as an excuse for a court to abdicate its responsibility to determine whether the materials sought are in fact relevant to a legitimate subject of inquiry or to permit the subpoena power to be used as a tool of harassment." *Reuters Ltd. v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 341-42 (1st Dep't 1997). Monsanto's Subpoena, seeking *every document* relating to *all* of Avaaz's work on glyphosate over the course of years, is the quintessential fishing expedition—given its scope and breadth, and its lack of relevance, it seems principally if not solely designed to harass or annoy a political adversary. It must be quashed.

Monsanto does not dispute any of the following: (1) Avaaz is not a medical or scientific organization, Ruby-Sachs Aff. ¶ 26, and it has no knowledge of Peterson's or Hall's medical condition beyond what is alleged in the complaint attached to Monsanto's subpoena, *see id.* ¶ 44. (2) Avaaz did not do any work on glyphosate until *after* the release of the 2015 monograph by the International Agency for Research on Cancer (the "IARC Report"). Avaaz had no role in *any* of the scientific research reflected in the IARC Report, no input into its contents, and no advance knowledge of its existence. *Id.* ¶ 24. Avaaz's advocacy concerning glyphosate has relied on the public findings of scientists and the public actions of regulators. *Id.* ¶ 26. (3) All of Avaaz's advocacy work concerning glyphosate occurred after Peterson and Hall stopped using Roundup® and after they had contracted non-Hodgkin's lymphoma. *See* Avaaz Br. 24 (citing Celli Aff. Ex. A at 8; Celli Aff. Ex. B ¶¶ 78-79). As such, none of the material that Monsanto seeks can be relevant to Monsanto's knowledge or state of mind at the time it engaged in the allegedly tortious conduct or the reasonableness of that conduct.[1] *See id.*

[1] The timing of Avaaz's campaigning in relation to Peterson's and Hall's exposure to glyphosate is important because it rules out the possibility that Avaaz's documents can be evidence of Monsanto's knowledge or state of mind. Monsanto is correct that timing is less

Monsanto offers one—and only one—justification for the relevance of the materials it seeks: "general causation." Monsanto Opp'n (NYSCEF No. 32) 2, 6, 8, 13, 14. In a toxic tort case, "general causation" is the question whether exposure to a substance is scientifically capable of causing a particular disease.[2] *See Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 448 (2006). Monsanto asserts that certain countries have "taken action regarding glyphosate-containing products" since Avaaz began campaigning about glyphosate, and that Peterson and Hall, as well as the plaintiffs in the Roundup® multi-district litigation (MDL), have "relied upon these alleged actions to support their general causation argument." Monsanto Opp'n 6. Monsanto further claims that Avaaz "***coordinated with plaintiffs' counsel***" from the firm of Baum Hedlund to affect EU regulatory decisions about glyphosate, and that Avaaz and Baum Hedlund "influenced" the "regulatory assessments" on which Peterson, Hall, and other plaintiffs rely. *Id.* at 7 (double emphasis in original).

Monsanto's claim that Avaaz's civic advocacy efforts are relevant to general causation fails for three reasons.

First, regulatory decisions by governments are irrelevant to general causation as a matter of law. The New York Court of Appeals has squarely held that precautionary measures taken by governmental bodies are "*irrelevant*" to general causation in a tort action concerning whether exposure to a particular substance caused human illness. *Cornell*, 22 N.Y.3d at 782 (emphasis added). This is settled and legally irrefutable.

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important on timeless questions of scientific causation, *see* Monsanto Opp'n 8 (citing *United Oil Co. v. Parts Assocs., Inc.*, 227 F.R.D. 404, 417 (D. Md. 2005)), but none of the material in Avaaz's possession is evidence of whether glyphosate causes cancer.

[2] "Specific causation" is the question whether the particular plaintiff got the illness from the substance in question. *See Parker*, 7 N.Y.3d at 448.

General causation must be proven through expert testimony, typically in the field of epidemiology or occupational medicine. *See, e.g.*, *Parker*, 7 N.Y.3d at 448; *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 185 (Mo. Ct. App. 1988); *In re N.Y.C. Asbestos Litig.*, 48 Misc. 3d 460 (Sup. Ct. N.Y. Cnty. 2015); *Reeps ex rel. Reeps v. BMW of N. Am., LLC*, 39 Misc. 3d 1234(A), 2013 WL 2362566 (Sup. Ct. N.Y. Cnty. May 10, 2013). In *Cornell*, a tenant claimed that she became physically ill as a result of exposure to mold in her apartment and sued her landlord. 22 N.Y.3d at 766-67. On cross-motions for summary judgment, the parties submitted dueling expert testimony from medical doctors. *See id.* at 768-73. The Court of Appeals held that the testimony of the plaintiff's expert was not sufficiently reliable to be admissible and failed to raise a triable issue of fact as to general causation. *Id.* at 781. It rejected the plaintiff's expert opinion because it was based in part on the fact that "government reports and public health initiatives treat mold in damp indoor environments as a public health concern, and public health agencies have issued guidelines and recommended precautions to safeguard against the risk of harm from indoor mold exposure." *Id.* at 782. The Court of Appeals concluded that these actions by government bodies were "*irrelevant* since 'standards promulgated by regulatory agencies as protective measures are inadequate to demonstrate legal causation.'" *Id.* (emphasis added) (quoting *Parker*, 7 N.Y.3d at 450).

Monsanto seeks to avoid this conclusion by both ignoring *Cornell* and its logic, and by propping up their claim of relevance with citations to Peterson and Hall's *allegations* in their civil complaint. Monsanto suggests that because Peterson and Hall's complaint "relies" on European governments' regulatory decisions, those government actions are somehow probative of general causation. Monsanto Opp'n 6 (citing Celli Aff. Ex. B ¶ 72); *see also id.* at 6 n.6 (citing allegations made by other plaintiffs and arguments made by MDL plaintiffs in a brief).

This is nonsense: Peterson and Hall can allege whatever they would like, but allegations are not evidence. Their reference to governmental action in their pleadings in no way suggests that they will be able to rely on governmental action to prove general causation at trial. What seems clear is that the reference to EU bans in the *Peterson* complaint was included as *background* information on Roundup®, not as evidence of general causation—because it is indubitably not that.

The *Peterson* plaintiffs' successful demand to take the deposition of Todd Rands, Monsanto's "external advocacy lead," also does not prove that advocacy equals evidence because it clearly had an alternative purpose. *See* Chernack Aff. Exs. D & E. As Peterson and Hall explained, Rands's testimony was relevant because it would shed light on Monsanto's efforts to influence, and undermine, the actual *scientific research* upon which the Peterson plaintiffs' expert witnesses would in turn rely. *Id.* Ex. D. at 3.[3] Peterson and Hall never claimed that Rands tried to affect the policy decisions of foreign *governments* concerning glyphosate, or that the decisions of such governments were in any way relevant to general causation. *See id.* They only argued—and the Missouri court agreed—that his efforts to influence the *science* were relevant. *See id.*

Second, even if regulatory precautions taken by European governments were, somehow, deemed to be evidence of general causation, the citizen advocacy surrounding those decisions is surely not. Monsanto provides no support for its apparent assumption that a court would allow testifying scientific experts to "look behind" regulatory decisions and speculate about the extent to which they were influenced by external forces. As a rule, courts do not conduct inquiries into

[3] Rands was "responsible" for "Project Spruce," Monsanto's coordinated effort to "coordinate attacks on the scientific literature, the World Health Organization [which sponsored the IARC Report], and even Plaintiffs' retained experts." *Id.*

individual legislators' motivations (as opposed to the purpose of the legislation they pass). This is true even when a plaintiff challenges the very lawfulness of government action, let alone when trying to determine the basis for a regulatory rule. *See Kenford Co. v. County of Erie*, 62 A.D.2d 1176, 1177 (4th Dep't 1978); *Humane Soc'y of N.Y. v. City of New York*, 188 Misc. 2d 735, 739 (Sup. Ct. N.Y. Cnty. 2001); *Akari House, Inc. v. Irizzary*, 81 Misc. 2d 543, 550 (Sup. Ct. N.Y. Cnty. 1975).

Monsanto claims that the materials it seeks would show the degree to which European decision-making was "influenced by Avaaz" and by Baum Hedlund. Monsanto Opp'n 7. But any attempt to answer that question would be wildly speculative; to the extent the answer exists at all, it is found in the minds of thousands of European politicians, not in Avaaz's internal campaign documents. The EU's decision to re-license glyphosate for five rather than fifteen years was the result of an extraordinarily complex political process involving a resolution passed by a majority of the European Parliament, multiple recommendations by the appointed officials of the European Commission, and a vote of the 28 EU member states. *See* Ruby-Sachs Aff. ¶¶ 32-34, 40. Each individual parliamentarian surely had a variety of motives for acting as he or she did. While it is certainly true that the Commission likely considered scientific evidence, it also all but certainly considered the views of its staff, and its sense of what was politically feasible. Each EU member state's position was decided by its national government, likely taking account of agricultural policy, environmental policy, public opinion, domestic coalition politics, and European politics. The extent to which the outcome of this multi-level, multi-year process was "influenced by Avaaz" is fundamentally unknowable without a sweeping inquiry into thousands of European officials' private thoughts, and a heavy dose of truth serum.

Third, apart from its utter lack of merit as a general matter, Monsanto's asserted basis for relevance does not even apply to the *Peterson* case. Monsanto states in its brief that Baum Hedlund is counsel to Peterson and Hall, *see* Monsanto Opp'n 1 n.2, but it provides no evidence that this is so, *cf.* CPLR § 2214(c) (requiring parties to put into evidence all facts necessary to support their position on a pending motion). In fact, the assertion is simply untrue. The Baum Hedlund law firm is *not* among counsel of record for the plaintiffs in the *Peterson* case. *See* Celli Reply Aff. Ex. B. Rather, Baum Hedlund is prominently involved in an entirely different case, the Roundup® multi-district litigation ("MDL") in California. *See* Chernack Aff. Ex. A at 3 (appointing Michael Baum of Baum Hedlund to plaintiffs' executive committee). Monsanto tips its hand by repeatedly invoking the allegations made by the plaintiffs in the MDL to support its position on the Subpoena here. *See* Monsanto Opp'n 1 n.2, 6 n.6. Monsanto should not be permitted to obtain discovery for use in the MDL, where the parties have already completed a *Daubert* hearing on general causation, through the back door of the *Peterson* litigation.

These facts prompt an obvious question: Why did Monsanto serve this Subpoena in the *Peterson* case, not the MDL? As Avaaz pointed out in its opening brief, it would make much more sense for Monsanto to seek documents in the MDL for use in dozens of actions simultaneously, rather than in a small case in Missouri involving only two individual plaintiffs. *See* Avaaz Br. 27. Monsanto offers no explanation for its curious choice. The likely answer is that the federal judge supervising the MDL has carefully circumscribed Monsanto's attempts at wide-ranging third-party discovery on relevance and burdensomeness grounds. *See infra* § III. If Monsanto wanted to engage in a third-party fishing expedition for documents relating to Baum Hedlund, it at least should have done so in the litigation in which Baum Hedlund is actually

counsel of record, and subject to the supervision of the district judge. It did not, presumably because it knew that such an effort would have been shut down. This Court should do the same.

II. THE RESPONSIVE MATERIALS ARE PRIVILEGED BECAUSE OF THE HARM THEY WOULD INFLICT ON AVAAZ'S WORK

Because Monsanto has articulated no proper basis for the Subpoena, the Subpoena should be quashed in its entirety on the basis of irrelevance alone. But the Subpoena also raises grave First Amendment concerns by threatening the full deliberation and open communication that make Avaaz's constitutionally protected political activities possible. The governing law is clear: If Avaaz satisfies its "light" burden to make a *prima facie* case that compelled disclosure would infringe its First Amendment rights, the burden shifts to Monsanto to show a "compelling interest" in obtaining the material in question. *N.Y. State Nat'l Org. for Women (NOW) v. Terry*, 886 F.2d 1339, 1355 (2d Cir. 1989); *see Evergreen Ass'n v. Schneiderman*, 153 A.D.3d 87, 100-01 (2d Dep't 2017).

Monsanto makes virtually no effort to satisfy the "compelling need" standard, choosing instead to simply summarize its (meritless) arguments for the documents' relevance. *See* Monsanto Opp'n 13-14. But a "compelling interest" is a high bar and, in the First Amendment context, has a specific meaning: if Avaaz makes a *prima facie* showing of First Amendment injury, the Subpoena must effectively survive strict constitutional scrutiny. *See Evergreen*, 153 A.D.3d at 100-01. Monsanto does not come close to making the requisite showing that the materials it seeks are *necessary* and that the Subpoena, in all of its sweep, is a narrowly-tailored means of obtaining them. *See id.*; *see also Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 954 F. Supp. 2d 127, 141-42 (E.D.N.Y. 2013) (defendant failed to show compelling interest in learning identities of material witnesses against it). Monsanto's lack of compelling need for the discovery is confirmed by its failure to take any measures to obtain them

in the MDL itself, and its apparent failure to seek any of the materials concerning Baum Hedlund directly from parties represented by Baum Hedlund. *See infra* § III.

Faced with this deficit of proof on Monsanto's side of the ledger, the company gamely employs a jujitsu argument, claiming that Avaaz has failed to meet *its* "minimal burden of proof" to establish a *prima facie* case of First Amendment harm. *Schiller v. City of New York*, No. 04-CV-7922, 2006 WL 3592547, at *6 (S.D.N.Y. Dec. 7, 2006). Monsanto is wrong. In its petition, Avaaz asserted two separate and distinct First Amendment associational injuries: chill of Avaaz's protected political advocacy efforts arising from disclosure of its internal communications and deliberations about strategy to its political opponent, *see* Avaaz Br. 11-14; and chill of Avaaz members' association with the organization based upon disclosure of their personal information, donation history, and private views, *see id.* at 14-17. Now that Monsanto has narrowed the Subpoena to exclude member information, the second category of harm, and only the second, has been somewhat diminished. The first remains powerful and profoundly damaging to Avaaz. Giving Monsanto unfettered access to the internal workings of Avaaz's glyphosate campaign would chill—and, in fact, the mere prospect of disclosure already *has* chilled—Avaaz's protected political advocacy. Monsanto's arguments to the contrary misrepresent the law.

A. The First Amendment Protects Advocacy Organizations' Internal Campaign Materials From Compelled Disclosure to Political Adversaries

Avaaz's position is clear: the First Amendment protects its *internal* communications, strategic deliberations, and campaign work product from disclosure to its political opponent. *See* Avaaz Br. 11-14. Three federal Courts of Appeals have held that such materials are subject to a First Amendment privilege against compelled disclosure under similar circumstances, and none have held otherwise. In *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003), the D.C. Circuit

concluded that compelled disclosure to the government of "an association's confidential internal materials . . . intrudes on the privacy of association and belief guaranteed by the First Amendment, as well as seriously interferes with internal group operations and effectiveness." *Id.* at 177-78 (citation and quotation marks omitted). In *Perry v. Schwarzenegger*, 591 F.3d 1126 (9th Cir. 2009), the Ninth Circuit held that disclosure of "internal campaign communications" can chill protected First Amendment activity because "[i]mplicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private." *Id.* at 1140. Finally, in *In re Motor Fuel Temperature Sales Practices Litigation*, 641 F.3d 470 (10th Cir. 2011), the Tenth Circuit concluded that the First Amendment privilege applied to the compelled disclosure of trade groups' internal communications concerning lobbying strategy to their adversaries, *id.* at 480, but found that the groups had failed to make a *prima facie* showing of chill because they introduced *no evidence* and "simply . . . argue[d] that a chill can be 'inferred,'" *id.* at 490.

Monsanto ignores the *Perry* and *AFL-CIO* cases as if they did not exist. *See generally* Monsanto Opp'n (not a single citation to either one). And it seeks to minimize the importance of the *Motor Fuel Temperature* decision by noting that disclosure was ultimately ordered in that case—without engaging with the reasons why. *See id.* at 12. Faced with clear legal authority to which it has no response, Monsanto tries to collapse the distinction between "communications between lobbying groups and public officials" and "communications . . . about internal campaign strategies." *Id.* But that distinction is critical. It is the latter that are entitled to First Amendment protection, and that Avaaz seeks to shield from compelled disclosure on constitutional grounds here. The cases cited by Monsanto in which courts concluded that *external* communications with public officials or other groups are not entitled to First Amendment protection are therefore

irrelevant. *See id.* (citing *Wal-Mart Stores, Inc. v. Tex. Alcoholic Bev. Comm'n*, No. 15-CV-134, 2016 WL 5922315, at *6-8 (W.D. Tex. Oct. 11, 2016); *Valle Del Sol v. Whiting*, No. 10-CV-1061, 2013 WL 12098752, at *3 (D. Ariz. Dec. 11, 2013); *In re Motor Fuel Temp. Sales Practices Litig.*, 707 F. Supp. 2d 1145, 1163-64 (D. Kan. 2010)).[4]

Monsanto's claim that internal campaign documents cannot be privileged unless campaigners face harassment or retaliation on par with the serious physical injury threatened in *NAACP v. Alabama*, 357 U.S. 449 (1958), is just incorrect. *See* Monsanto Opp'n 12-13. As an initial matter, the cases upon which Monsanto relies for this proposition concern alleged harm to *members* from the disclosure of their *identities*, not First Amendment chill to the *organization*'s political activities from disclosure of its inner workings to its adversaries. *See Sherwin-Williams Co. v. Spitzer*, No. 1:04-CV-185, 2005 WL 2128938, at *3-4 (N.D.N.Y. Aug. 24, 2005); *P& B Marina, Ltd. v. Logrande*, 136 F.R.D. 50, 59-60 (E.D.N.Y. 1991); *Nat'l Org. for Women v. Sperry Rand Corp.*, 88 F.R.D. 272, 274-75 (D. Conn. 1980). Here again, Monsanto confuses and conflates the two forms of First Amendment harm in an effort to prop up the Subpoena.

To be entitled to First Amendment protection, an organization claiming that its political activities will be chilled by disclosure of its internal deliberations to its political adversary does not need to show that its adversary will try to harass or physically harm it or its members. The organization need only show that the act of disclosure itself will reduce its effectiveness and deter its future advocacy efforts. In *AFL-CIO*, for instance, no one argued or suspected that the Federal Election Commission (the party seeking disclosure) was going to treat the AFL-CIO the way the Ku Klux Klan would have treated the NAACP in 1950s Alabama. The issue, instead,

[4] In fact, in *Valle Del Sol*, the court specifically explained that, under *Perry*, the First Amendment protected "internal communications" but not "communications . . . with public officials." 2013 WL 12098752, at *3.

was one of "associational autonomy." *Id.* at 177. The court recognized that certain political activities necessarily require the ability to plan strategies and execute them confidentially and without outside interference. *Id.* at 177-78. Forced disclosure would undermine the ability of labor unions and political parties to engage in such activity. *See id.*

More generally, courts have recognized that there are a wide range of reasons why compelled disclosure can deter protected activity. *See Perry*, 591 F.3d at 1164 ("The chilling effect is not as serious as that involved in cases such as *NAACP v. Alabama* . . . , but neither is it insubstantial."). The core of the inquiry is not whether the party resisting disclosure will actually be physically hurt or threatened with physical harm, but whether there is a reasonable basis to conclude that its protected activities will be *chilled*—whether the organization will do less of the speaking, associating, or petitioning that the First Amendment protects. *See id.* at 1163 ("Disclosure would have the *practical effects* of discouraging political association and inhibiting internal campaign communications that are essential to effective association and expression." (emphasis added)); *In re Motor Fuel Temp. Sales Practices Litig.*, 641 F.3d at 489 ("[T]he First Amendment privilege . . . ensures privacy in association when exposure of that association will make it *less likely* that association will occur in the future, or . . . make it *more difficult* for members of an association to foster their beliefs." (emphasis added)). The absence of violence, economic reprisal, or harassment goes, if anything, to "the strength of the First Amendment interests asserted, not [to]. . . their existence." *AFL-CIO*, 333 F.3d at 176.

Avaaz's internal campaign documents are therefore protected by the First Amendment against compelled disclosure to Monsanto as long as Avaaz makes a *prima facie* showing that disclosure will chill its protected political activities. Here, it has done so—in vivid terms, as set forth more fully below.

B. Avaaz Meets the "Light" Burden of a *Prima Facie* Showing

Avaaz's evidentiary showing easily constitutes a prima facie showing of chill. The law in the Second Circuit and in New York is clear: Avaaz's burden in this regard is "light," *NOW*, 886 F.2d at 1355, and "minimal," *Schiller*, 2006 WL 3592547, at *6. Monsanto's reliance upon on a seemingly random assortment of trial court decisions cannot change that. *See* Monsanto Opp'n 10-11.

On the facts, Avaaz has demonstrated that First Amendment chill is already happening *right now* as a result of the Subpoena, and that the impact will be compounded in the future if the organization is forced to give Monsanto access to its internal deliberations. Avaaz campaigners have been directed not to put politically-sensitive communications about glyphosate in writing, lest they be revealed to the object of their campaigning. *See* Ruby-Sachs Aff. ¶ 71. Staff members are—right now, in their daily work—hesitant to communicate candidly with each other and with sources and partners because they fear that their private reflections about Monsanto will be disclosed to Monsanto. *See id.* ¶ 73.

Avaaz shows—and it is indeed "self-evident," *Perry*, 591 F.3d at 1163—that forcing it to disclose its internal glyphosate campaign materials will impede its future advocacy efforts. If Avaaz is compelled to disclose these materials, Monsanto will know how Avaaz sees the political landscape, how it decided on its plan of attack—what it considered and rejected, as well as what it endeavored to do—and what Avaaz is considering doing next. The impact will be immediate and crippling. *See* Ruby-Sachs Aff. ¶ 67. And the knowledge that future work involving Monsanto may be subject to a complete audit by Monsanto will discourage Avaaz staff members from speaking freely, if they speak at all. It already has. As Avaaz media campaigner Daniel Boese explains, for example: "I rely heavily on the ability to communicate freely within our team to accomplish my work. Had I known that my personal work communications –

strategy notes, . . . tactical brainstorms, conversations with staff and members, etc. regarding glyphosate . . . – would be subject to disclosure to Monsanto itself, I would have been constantly looking over my shoulder and worried about talking freely." Boese Aff. ¶ 8; *see also* Greenberg Aff. ¶¶ 5-6; Kimbrell Aff. ¶ 6. The inability to collaborate openly and think freely in emails and online chats is deeply damaging to the work of a decentralized, global organization. *See* Ruby-Sachs Aff. ¶¶ 72-73.

The evidence presented by Avaaz far exceeds what the Appellate Division, Second Department, found sufficient to make a *prima facie* showing in *Evergreen Association*, 153 A.D.3d 87, in which it substantially narrowed a subpoena by the Attorney General to a pro-life pregnancy center to shield its internal documents from disclosure.[5] The pregnancy center "*alleged*" in its petition in the special proceeding that "the subpoena had caused great distress to members of its staff," that it "invaded the privacy of the staff and would dissuade others from volunteering," and that a hospital had cut off access to an ultrasound machine as a result of the subpoena. *Id.* at 94 (emphasis added).

Avaaz also offers far more substantial evidence than did the parties resisting disclosure in the cases on which Monsanto relies. In *Flynn v. Square One Dist., Inc.*, No. 6:16-MC-25, 2016 WL 2997673, at *3 (M.D. Fla. May 25, 2016), for instance, the court concluded that a *prima facie* showing had not been made because the lone affiant was merely speculating about how other people would behave in the future. Avaaz, in contrast, offers "historical facts, personal observations, . . . [and] first-hand knowledge," *id.*: Ms. Ruby-Sachs told her subordinates to limit their communications about Monsanto in writing, *see* Ruby-Sachs Aff. ¶ 71, and her colleagues have personally changed the way they communicate in light of the Subpoena, *see*

[5] Once again, Monsanto simply ignores the *Evergreen* case as though it did not exist. *See generally* Monsanto Opp'n (no citations).

Hashad Aff. ¶ 4 ("From the moment I heard about the subpoena, I stopped typing the word Monsanto."); Kimbrell Aff. ¶ 6 ("I . . . know that now when I write 'Monsanto,' or 'glyphosate,' or any other number of words, I think twice. And, with a pained self-consciousness, wonder what is safe to say."); Staats Aff. ¶ 5 ("I find myself limiting communication about anything relating to glyphosate and/or Monsanto to only the absolute essential.").

Similarly, in *United States v. Duke Energy Corp.*, 218 F.R.D. 468, 473 (M.D.N.C. 2003), which addressed only the impact on members and not on the organization itself, the subpoenaed party offered just a "conclusory" assertion that members were likely to withdraw. *Id.* Here, in contrast, Avaaz presented emails from members who are actually withdrawing from the organization, *see* Ruby-Sachs Aff. ¶¶ 80-81 & Ex. A, and specific evidence from member/staffers explaining how they have changed their practices in light of the Subpoena. For example, Nell Greenberg, an Avaaz campaign director based in California, explains: "Most of us at Avaaz are not lawyers, and we don't really know what we should or should not say—so we've been saying a lot less. In fact, other than the emails announcing the subpoena, we have not had a single campaign go out on Monsanto since the subpoena—at a time when we were supposed to be focused on getting countries to issue bans on glyphosate." Greenberg Aff. ¶ 5. This reduction in activity has happened organically: "it's a consequence of the subpoena causing myself and I think most of the campaign team at Avaaz to step back efforts to generate proposals or ideas regarding Monsanto." *Id.* Daniel Boese explains that he and some of his colleagues feel genuinely intimidated by Monsanto: "I know Monsanto has used legal tactics to intimidate farmers, and it feels like they are seeking our internal communications to silence Avaaz . . . . Feeling censored in this way has definitely stopped us from communicating as freely as we usually do. . . . We've communicated a lot less internally, and I know that moving forward it

will be a long road to shaking-off the negative impact the specter of disclosure has had on our communications culture." Boese Aff. ¶¶ 9-10. Nick Kimbrell, an Avaaz senior campaigner based in Washington, D.C., similarly observes that he is "less likely to drive forward and innovate on ideas" concerning glyphosate or Monsanto and has "noticed fewer team communications about and less collaboration on" these issues. Kimbrell Aff. ¶ 6.

The facts are clear: People who are integral to Avaaz's campaigning, and who also feel a profoundly personal connection to the organization and to their work in furtherance of its mission, are reluctant to write, plan, and collaborate political activities about Monsanto. That is the very essence of First Amendment chill. *See, e.g.*, *Perry*, 591 F.3d at 1139. Because Avaaz has made a *prima facie* showing of chill and Monsanto has no compelling interest in disclosure, the Subpoena must be quashed so as to preclude production of Avaaz's internal communications, strategy materials, and other all other non-outward-facing documents.

C. The Reporter's Privilege Protects Avaaz's Information Gathering from Confidential Sources

A smaller subset of the material responsive to the Subpoena is also protected by the qualified constitutional reporters' privilege and the absolute privilege of the New York Shield Law. Monsanto makes two principal attacks on Avaaz's invocation of these privileges. Its claim that Avaaz's newsgathering activities ceased when it stopped publishing the *Daily Briefing* in 2013 is wrong on the facts. *See* Monsanto Opp'n 14. And its view that Avaaz is not "independent" because it disseminates information on topics of concern to its members is wrong on the law. *See id.* at 14-16.

The discontinuation of the *Daily Briefing* does not change the fact that creating and disseminating original content to inform its members—all of which is a form of news reportage—is one of Avaaz's principal functions. Avaaz has sent its entire membership of tens

of millions of people an average of five emails a month for the past decade, highlighting ongoing campaigns and related news and identifying opportunities for members to take action. Ruby-Sachs Aff. ¶ 11. It also disseminates specific regional or national emails related to local campaigns. *Id.* ¶¶ 11, 62. These communications, as well as Avaaz's other work, are informed by original reporting: gathering information from sources (frequently confidential ones), including scientists, experts, and government officials. *Id.* ¶ 10.

Contrary to Monsanto's claim, there is no case law support for the assertion that, in order to be protected, a news gathering operation must offer "neutral" and "objective" news. The law is exactly the opposite. The privilege "is not foreclosed to a journalist who has been solicited to investigate an issue and presents the story supporting the point of view of the soliciting entity." *In re McCray, Richardson, Santana, Wise & Salaam Litig.*, 928 F. Supp. 2d 748, 754 (S.D.N.Y. 2013). What matters is the *independence* of the newsgathering *process*, at the time the information sought by the subpoena in question was gathered, which clearly exists here. *See id.* at 755. No one tells Avaaz which sources to talk to, what research to conduct, or what information it should include in its communication to millions of people: those decisions are its sole discretion and are not made at the behest of any other person or organization. *See* Ruby-Sachs Reply Aff. ¶ 6; *cf. Chevron Corp. v. Berlinger*, 629 F.3d 297, 308 (2d Cir. 2011) (documentary filmmaker was not entitled to privilege because his information was designed to "promote the interests" of a client who directed his activities and retained creative control).[6]

[6] Monsanto's assertion that a "paid subscriber base" is required to claim the protections of New York's Shield Law is unsupported by case law and based on a misreading of the statute. *Cf.* Monsanto Opp'n 16. The statute protects "professional journalists," who must work for "a newspaper, magazine, news agency, press association or wire service *or other professional medium* . . . which has as one of its regular functions the processing and researching of news intended for dissemination to the public." N.Y. Civ. Rts. Law § 79-h(6). While "newspaper"

The reporter's privilege therefore protects Avaaz's notes or other records of confidential newsgathering conversations with sources; information it obtained from third parties in its newsgathering capacity, such as reports, data, and studies; notes and records of the research its staff conducted to inform its dissemination of information to the public; and work product associated with its newsletters. *See* Ruby-Sachs Aff. ¶¶ 11, 49, 54. To that extent as well, the Subpoena must be quashed.

III. THE BURDEN OF PRODUCTION IS HEAVY AND UNNECESSARY

Without citing case law or engaging in any meaningful analysis, Monsanto brushes aside the question of burdensomeness as largely irrelevant in light of the narrowing of the Subpoena. *See* Monsanto Opp'n 17-18. That is wrong. The Subpoena remains exceedingly broad and unduly burdensome; the cost of compliance in time, money, distraction and frustration of mission remains high; and the burden is especially unjustified in light of Monsanto's ability to obtain materials concerning Baum Hedlund directly from litigants represented by that law firm.

As Avaaz Deputy Director Emma Ruby-Sachs explained, "[v]irtually the entire staff of Avaaz, including senior organizational leadership, operations staff, media professionals, fundraising staff, and technical staff—more than 100 people in all, in 23 countries—worked on the glyphosate campaign at different points." Ruby-Sachs Aff. ¶ 41. Because Monsanto's Subpoena continues to seek *virtually every document* relating to the years-long glyphosate campaign, *all of these staff members* are potential custodians of potentially responsive documents. *See id.* Avaaz would have to search each person's inbox separately because it does not have the technical capacity to conduct a global system-wide search. *Id.* ¶ 58. Avaaz staff frequently use the chat feature in Skype to hold running conversations about their work; because

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and "magazine" are defined to require a paid circulation, *see id.* §§ 79-h(1), (2), the "other professional medium" catch-all category has no such requirement.

these chats are stored locally on individual users' hard drives after 30 days, any responsive chats would need to be manually retrieved from staff members' computers around the world. *Id.* ¶ 59. Even in narrowed form, the Subpoena still calls for the production of at least several hundred thousand documents, which will still cost the organization hundreds of thousands of dollars to retrieve and review for responsiveness and privilege. *See* Ruby-Sachs Reply Aff. ¶¶ 3-5.

This significant burden on Avaaz—a "not-for-profit stranger" to the dispute between Peterson and Hall and Monsanto—far exceeds what New York courts have found unreasonable in other cases. *Reyniak v. Barnstead Int'l*, 27 Misc. 3d 1212(A), 2010 WL 1568424, at *3 (Sup. Ct. N.Y. Cnty. 2010) (production of papers of a single scientist in the possession of major New York hospital was unduly burdensome); *see Matter of R.J. Reynolds Tobacco Co.*, 136 Misc. 2d 282, 285 (Sup. Ct. N.Y. Cnty. 1987) (material found in 97 drawers contained in 19 file cabinets in a single location was unduly burdensome to produce, even though requesting party offered to reimburse reasonable expenses).

Monsanto's attempt to distinguish the federal court's quashing, on burdensomeness grounds, of its subpoena to Texas A&M University in the MDL is unpersuasive. *See* Monsanto Opp'n 17-18. The MDL court concluded that the documents that Monsanto sought from Texas A&M were "not central enough to the litigation to justify the burden," given the IARC Report's "secondary" importance to the issue of general causation as a monograph that reviewed the scientific literature rather than an original scientific study. Celli Aff. Ex. C at 2-3. Monsanto does not dispute (nor could it) that the IARC Report—a monograph written by experts that concludes that glyphosate is probably carcinogenic—is far *more* relevant to general causation than are citizen advocacy efforts based upon the IARC Report. *See* Avaaz Br. 26-27. Monsanto also does not dispute that Texas A&M is also far better positioned than Avaaz to bear the burden

of production. *See id.*; Celli Aff. Exs. H, I. The Subpoena should therefore be quashed because it seeks less relevant material and imposes a greater burden than Monsanto's subpoena to Texas A&M did.

Contrary to Monsanto's assertion, the MDL court's conclusion did *not* depend on the fact that Monsanto was going to depose other IARC scientists anyways. *See* Monsanto Opp'n 17. That was simply an additional factor in the court's analysis that made the documents sought by Monsanto "even less important." Celli Aff. Ex. C at 3. Nevertheless, Monsanto is correct that the Court should consider Monsanto's ability to obtain relevant material by other means in evaluating the burden that the Subpoena imposes on Avaaz. Monsanto Opp'n 18; *see, e.g.*, *Reyniak*, 2010 WL 1568424, at *3. Here, Monsanto *does* have another way to obtain some of the documents it appears to care the most about: ordinary discovery demands served on parties represented by Baum Hedlund.

Monsanto's opposition papers—taken at face value—suggest that its main reason for subpoenaing Avaaz is that Avaaz "coordinated" its advocacy efforts with Baum Hedlund. Monsanto Opp'n 1, 7. It is black-letter law that non-privileged documents in the possession of a person's attorneys are discoverable through that person because they are under the person's control. *See, e.g.*, CPLR § 3101(a)(1) (requiring disclosure by party's agents); *Matter of Belkins Record Storage Co.*, 62 N.Y.2d 324, 327 (1984). Monsanto fails to establish that Baum Hedlund is counsel to Peterson and Hall, *see* Celli Reply Aff. Ex. B, but if it were, Monsanto should be able to obtain documents relating to any "coordination" between Avaaz and Baum Hedlund from Peterson and Hall directly. And if not, Monsanto should be able to obtain such documents from the MDL plaintiffs whom Baum Hedlund indisputably represents.

Monsanto's silence about whether it has sought documents relating to Baum Hedlund directly from plaintiffs represented by Baum Hedlund is revealing. It is further evidence that this entire exercise is about something more than just obtaining emails showing "coordination" between Avaaz and some plaintiffs' lawyers. Avaaz has been highly effective in raising questions about a product, and indeed an entire system of corporate agriculture, that generates billions of dollars for Monsanto every year. The Subpoena's startling breadth, the degree to which it pries into Avaaz's confidential communications and internal strategy, and the flimsiness of the asserted justification that documents about a junket to Brussels are somehow evidence of whether glyphosate causes cancer are all suggestive of a more nefarious purpose. The Court should not countenance any effort to harass, embarrass, or intimidate Avaaz.

CONCLUSION

The Court should grant the Petition and quash the Subpoena in its entirety.

Dated: March 29, 2018
New York, New York

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