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 MOTION *IN LIMINE* NO. 11 TO EXCLUDE TESTIMONY FROM *DAUBERT* HEARING

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

I. INTRODUCTION

Defendant Monsanto Company ("Monsanto") respectfully requests that this Court exclude former testimony of two expert witnesses from a federal multi-district litigation ("MDL") *Daubert* hearing ("the *Daubert* hearing") as inadmissible hearsay under Cal. Evid. Code § 1291(a)(2). In March 2018, Judge Vince Chhabria of the U.S. District Court for the Northern District of California held a week-long evidentiary *Daubert* hearing in that MDL proceeding aimed at assessing the admissibility of the parties' general causation expert opinions. *See In re Roundup Prod. Liab. Litig.*, Case No. 3:16-md-02741-VC (N.D. Cal.). Dewayne Johnson, the plaintiff in this lawsuit ("Plaintiff"), submitted, along with his deposition designations for use at trial, portions of the *Daubert* hearing testimony from two of his designated general causation experts in this case, Drs. Beate Ritz and Charles Jameson. Allowing the introduction of testimony from those hearings rather than live testimony precludes Monsanto from cross-examining these experts in front of this jury, and thus precludes Monsanto from conducting a *trial* examination at all, since Monsanto's motives in conducting its cross-examination during a *Daubert* hearing were materially different than they would be at trial. In ruling on objections to the deposition designations, Judge Curtis E. Karnow of this Court asked the parties to submit motions *in limine* to address whether the designations from the *Daubert* hearing testimony are admissible. Accordingly, Monsanto requests that the Court exclude such designated testimony as inadmissible hearsay.

II. ARGUMENT

"Former testimony" – any testimony given under oath "in another action or in a former hearing or trial of the same action" – is not inadmissible hearsay if the declarant is unavailable and "[t]he party against whom the former testimony is offered was a party to the action in which the testimony was given and had the right and opportunity to cross-examine the declarant *with an interest and motive similar to that which the party has at the hearing.*" *See* Cal. Evid. Code §§ 1290, 1291(a)(2) (emphasis added). Monsanto's interest and motive at trial here is meaningfully different than at the *Daubert* hearing, and the testimony from the *Daubert* hearing should therefore be excluded.

At the *Daubert* hearing, the sole issue for the Court's consideration was whether the

proffered testimony was sufficiently scientifically reliable to go to a jury under Rule 702 of the Federal Rules of Evidence. The Court had extensive briefing on the applicable science and had the benefit of a week-long evidentiary hearing involving live testimony from multiple witnesses. The parties were operating under a strict time clock. Given all of this, Monsanto's cross-examination was narrowly tailored to addressing multiple technical issues of scientific admissibility, and *not*, for example, to educate the jury about the background for various lines of questioning, inquiring into crucial areas for juror comprehension that did not present technical admissibility issues, and challenging motives and background.

In a *Daubert* hearing, the court performs only "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993). In the case of scientific testimony, as proffered by Drs. Ritz and Jameson, the Court's inquiry is often focused on the *Daubert* factors of (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community. *See id.* at 593-95. Once the court makes a threshold determination that the expert testimony is admissible at trial, it is "[v]igorous cross-examination [that is] the traditional and appropriate means of attacking shaky but admissible evidence" – which is an entirely different goal for Monsanto than arguing under *Daubert* for the wholesale exclusion of the testimony. *Id.* at 596.

Plaintiff will likely attempt to argue that, because the *Daubert* hearing involved the same defendant and some of the same law firms, and Roundup and general causation, Monsanto's motives in cross-examination at trial would be the same as they were during that hearing. But "[t]he determination of similarity of interest and motive in cross-examination should be based on *practical considerations and not merely on the similarity of the party's position in the two cases.*"

Cal. Evid. Code § 1291, Assembly Committee on Judiciary cmt. (emphasis added).[1] And in practice, the scope of cross-examination is considerably broader at trial than at a *Daubert* hearing, where (in the case of scientific testimony) the witness examination is largely focused on the *Daubert* factors described above. For example, at trial, counsel may attempt to demonstrate an expert's bias through compensation paid to that expert for his or her testimony, or that he or she always testified for the same side – matters that bear little weight on the *Daubert* standard.

Further, practically, Monsanto will take a substantially varied approach to cross-examination in front of a jury than a judge. For subjects that are common both at a *Daubert* hearing and at trial – such as an expert's qualifications or methodology – a party's questions (and the witness' answer) at a *Daubert* hearing are often highly technical and not necessarily intended for consumption by laypeople. Given that the jury will not have had the benefit of the parties' extensive briefing or the numerous days of testimony that were present at the *Daubert* hearing, Monsanto's approach to cross-examination here – both its choice of questions and how those questions are asked – will be substantially altered at trial.

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[1] The comment to Section 1291 continues: "For example, testimony contained in a deposition that was taken, but not offered in evidence at the trial, in a different action should be excluded if the judge determines that the deposition was taken for discovery purposes and that the party did not subject the witness to a thorough cross-examination because he sought to avoid a premature revelation of the weakness in the testimony of the witness or in the adverse party's case. In such a situation, the party's interest and motive for cross-examination on the previous occasion would have been substantially different from his present interest and motive." Cal. Evid. Code § 1291, Assembly Committee on Judiciary cmt.

III. CONCLUSION

For the foregoing reasons, the Court should exclude testimony from the *Daubert* hearing from this matter.

Dated: May 24, 2018

Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By: 

Sandra A. Edwards

Attorneys for Defendant
MONSANTO COMPANY