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

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

1 **I. INTRODUCTION**

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

19 **II. ARGUMENT**

20 “Former testimony” – any testimony given under oath “in another action or in a former
21 hearing or trial of the same action” – is not inadmissible hearsay if the declarant is unavailable and
22 “[t]he party against whom the former testimony is offered was a party to the action in which the
23 testimony was given and had the right and opportunity to cross-examine the declarant *with an*
24 *interest and motive similar to that which the party has at the hearing.*” *See* Cal. Evid. Code §§
25 1290, 1291(a)(2) (emphasis added). Monsanto’s interest and motive at trial here is meaningfully
26 different than at the *Daubert* hearing, and the testimony from the *Daubert* hearing should therefore
27 be excluded.

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

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

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

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

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

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

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24 ¹ The comment to Section 1291 continues: “For example, testimony contained in a deposition that
25 was taken, but not offered in evidence at the trial, in a different action should be excluded if the
26 judge determines that the deposition was taken for discovery purposes and that the party did not
27 subject the witness to a thorough cross-examination because he sought to avoid a premature
28 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.

1 **III. CONCLUSION**

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

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5 Dated: May 24, 2018

Respectfully submitted,

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8 By: 

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