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. 11 TO EXCLUDE TESTIMONY FROM DAUBERT HEARING

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

I. INTRODUCTION

The former testimony of one of Plaintiff Dewayne Johnson's ("Plaintiff") designated general causation experts, Dr. Beate Ritz, is inadmissible hearsay because Defendant Monsanto Company's ("Monsanto") motives in conducting its cross-examination during a *Daubert* hearing were materially different than they would be at trial.[1] Monsanto's cross-examination was crafted to address the narrow issue of whether the expert's testimony satisfied the standards set forth in *Daubert* – an issue that has not yet been resolved – and Monsanto's questions (and Dr. Ritz's answers) were intended for a judge who had the benefit of extensive briefing and a week-long evidentiary hearing. If Plaintiff is allowed to introduce Dr. Ritz's *Daubert* testimony, Monsanto will be precluded from conducting a trial examination at all in front of this jury. Meanwhile, Plaintiff's opposition never adequately addresses why Monsanto's motives should be considered sufficiently similar. The testimony should be excluded.

II. ARGUMENT

"The 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 positions in the two cases." Cal. Evid. Code § 1291, Assembly Committee on Judiciary cmt. In his opposition, Plaintiff mostly sidesteps the central issue before the Court – i.e., *why* he believes Monsanto's motives at the *Daubert* hearing were similar to what they would be trial. To the extent Plaintiff attempts to address the issue, his reasons fail.

First, Plaintiff notes that "[b]oth Monsanto's counsel and Plaintiff's counsel are involved in the Roundup MDL proceeding" and that "Monsanto's counsel fully cross-examined Dr. Ritz on both days." Plaintiff's Opp'n to MIL No. 11 (Pl.'s Opp.) at 2-3. Monsanto does not dispute that it cross-examined Dr. Ritz during the *Daubert* hearing. However, whether a party technically had the ability to cross-examine a witness is irrelevant for deciding whether the requirements of Section 1291 of the Evidence Code were met; instead, the determination hinges on whether Monsanto's motives were sufficiently similar in the *Daubert* hearing. For the reasons stated in

---

[1] Plaintiff states in his opposition that he no longer intends to introduce Dr. Charles Jameson's *Daubert* testimony at trial in this case.

Monsanto's opening motion *in limine* and emphasized again here, they were not.

Second, Plaintiff suggests that because Monsanto's cross-examination at the *Daubert* "covered the substantive territory" of her expected testimony at trial – i.e., "the association between Roundup and Non-Hodgkin Lymphoma" – that Monsanto's motives are sufficiently similar. Monsanto does not dispute that Dr. Ritz will testify generally at trial about her opinion regarding whether Roundup does or does not cause non-Hodgkin lymphoma – but again, this is irrelevant for a Section 1291 analysis. At issue is whether, "based on practical considerations," Monsanto would have a similar motive at trial on cross-examination as it did in that proceeding. At the *Daubert* hearing, Monsanto's cross-examination was focused on addressing narrow issues of scientific admissibility under the *Daubert* standard. *See* Monsanto's MIL No. 11 at 2. The very purpose of a cross-examination during a *Daubert* hearing is to challenge the expert's reasoning or methodology – a narrowly focused topic. Cross-examination during trial is for a different purpose and before a very different audience: Monsanto will take a substantially different approach to its questioning in front of a jury in order to educate them about the science and all the bases for Dr. Ritz's opinions. Monsanto may pursue other lines of questioning that bear little weight on the *Daubert* factors, such as demonstrating the expert's potential bias. Plaintiff neglects to address any of these points.

Third, Plaintiff argues that Monsanto's motives in conducting cross-examination at the prior hearing "need not be identical." Pl.'s Opp. at 3 (citing *People v. Carter*, 117 P.3d 476 (2005)). But Monsanto does not contend that its motives must be "identical", rather that its motives are sufficiently dissimilar. Plaintiff cites a Third Circuit federal case as an example of a Court finding a party's motives to be similar at a *Daubert* hearing as it would have been at trial. Pl.'s Mot. at 3-4 (citing *U.S. v. Mitchell*, 365 F.3d 215 (3d Cir. 2004)). But *Mitchell* held only that it was appropriate for a court to take judicial notice of a certain scientific conclusion that would have been the subject of testimony at trial, and thus, the Confrontation Clause was not implicated. *Id.* at 253. The holding was limited to the facts of that case, and it does not stand for the proposition a party's motives are always the same at a *Daubert* hearing as at trial.

Finally, allowing Plaintiff to introduce Dr. Ritz's testimony during the *Daubert* hearing

would be unduly prejudicial under Evidence Code section 352. By playing for the jury the videotaped testimony of Dr. Ritz, sitting in the witness box, being questioned by a lawyer and in some instanced the judge, there is a substantial risk that jury will inaccurately assume that Monsanto has been a defendant in another trial involving Roundup® during which Dr. Ritz testified as an expert witness. This assumption risks the jury concluding that Monsanto is more likely to be at fault in this case. The videotaped testimony of Dr. Ritz from the *Daubert* hearing should be excluded.

III. CONCLUSION

For the foregoing reasons, the Court should exclude Plaintiff from introducing *Daubert* hearing testimony in this case.

Dated: June 12, 2018

Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By: 

Sandra A. Edwards

Attorneys for Defendant
MONSANTO COMPANY