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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
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

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*Superior Court of California,
County of San Francisco*
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1 **I. INTRODUCTION**

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

13 **II. ARGUMENT**

14 “The determination of similarity of interest and motive in cross-examination should be
15 based on practical considerations and not merely on the similarity of the party’s positions in the
16 two cases.” Cal. Evid. Code § 1291, Assembly Committee on Judiciary cmt. In his opposition,
17 Plaintiff mostly sidesteps the central issue before the Court – i.e., *why* he believes Monsanto’s
18 motives at the *Daubert* hearing were similar to what they would be trial. To the extent Plaintiff
19 attempts to address the issue, his reasons fail.

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

27 _____
28 ¹ Plaintiff states in his opposition that he no longer intends to introduce Dr. Charles Jameson’s
Daubert testimony at trial in this case.

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

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

18 Third, Plaintiff argues that Monsanto's motives in conducting cross-examination at the
19 prior hearing "need not be identical." Pl.'s Opp. at 3 (citing *People v. Carter*, 117 P.3d 476
20 (2005)). But Monsanto does not contend that its motives must be "identical", rather that its
21 motives are sufficiently dissimilar. Plaintiff cites a Third Circuit federal case as an example of a
22 Court finding a party's motives to be similar at a *Daubert* hearing as it would have been at trial.
23 Pl.'s Mot. at 3-4 (citing *U.S. v. Mitchell*, 365 F.3d 215 (3d Cir. 2004)). But *Mitchell* held only that
24 it was appropriate for a court to take judicial notice of a certain scientific conclusion that would
25 have been the subject of testimony at trial, and thus, the Confrontation Clause was not implicated.
26 *Id.* at 253. The holding was limited to the facts of that case, and it does not stand for the
27 proposition a party's motives are always the same at a *Daubert* hearing as at trial.

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

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

8 **III. CONCLUSION**

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

11
12 Dated: June 12, 2018

Respectfully submitted,

13 FARELLA BRAUN + MARTEL LLP

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15 By: 

16 Sandra A. Edwards

17 Attorneys for Defendant
MONSANTO COMPANY

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