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DEWAYNE JOHNSON

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiffs,

vs.

MONSANTO COMPANY,

Defendant.

Case No.: CGC-16-550128

PLAINTIFF'S OPPOSITION TO MONSANTO'S MOTION IN LIMINE NO. 11 TO EXCLUDE TESTIMONY FROM DAUBERT HEARING

Trial Judge: TBD

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

I. INTRODUCTION

Plaintiff Dewayne Johnson (hereinafter, "Mr. Johnson" or "Plaintiff") hereby opposes the entirety of Defendant Monsanto Company's (hereinafter, "Monsanto" or "Defendant") Motion *in limine* No. 11 to Exclude Testimony From Daubert Hearing (the "Motion").

In March and April 2018, the Honorable Vince Chhabria of the U.S. District Court for the Northern District of California held *Daubert* hearings on the admissibility of the parties' general causation experts' testimony in the related Roundup MDL proceeding. Plaintiffs' experts at the *Daubert* hearing included Drs. Beate Ritz and Charles Jameson.

Monsanto now moves to exclude the *Daubert* testimony of Drs. Ritz and Jameson as "inadmissible hearsay" under Cal. Evid. Code 1291(a)(2), claiming that introducing testimony rather than allowing the live testimony of these witnesses precludes Monsanto from cross-examining the witnesses at trial. Despite the fact that Monsanto had adequate opportunity to and did, in fact, cross-examine both witnesses during the MDL proceeding, Monsanto asserts that its interest and motive at trial is "meaningfully different than at the Daubert hearing." Motion, at 1. This is contrary to the facts of that proceeding.

Plaintiff therefore respectfully requests that the Court deny Monsanto's motion to exclude the prior *Daubert* testimony under Cal. Evid. Code § 1291(a)(2). Monsanto was a party to the prior proceeding and fully cross-examined both witnesses with the similar motive and intent it would have at trial. Its argument that the scope and style of cross-examination in the MDL proceedings is different from its expected cross-examination at trial does not mandate the

exclusion of reliable prior testimony. Monsanto cannot expect its motives during the prior cross-examination to have been identical to what they would be at trial.

II. ARGUMENT

The California Evidence Code § 1291 provides that "(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: . . . (2) The party against whom the former testimony is offered was a party to the action or proceeding 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 he has at the hearing."

First, § 1291(a)'s requirement that the declarant be unavailable is not at issue here as Dr. Ritz will be unavailable for Plaintiff's trial. Dr. Ritz is currently out of the country and will not be available until after the close of Plaintiff's case. Dr. Ritz will be in Europe in association with her role as President of the International Society for Environmental Epidemiology. *See* Declaration of Beate Ritz, MD, Ph.D.[1]

Further, the requirement of prior opportunity to cross-examine the declarant is fully satisfied here. Both Monsanto's counsel and Plaintiff's counsel are involved in the Roundup MDL proceeding and therefore fully participated in the week-long *Daubert* hearings, as well as the additional testimony of certain of the expert witnesses, including Dr. Ritz. Dr. Jameson

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[1] Dr. Jameson's *Daubert* testimony would be admissible upon the proper showing that he was an unavailable witness. At this time, however, Plaintiff does not intend to call Charles Jameson as an expert witness but, rather, as a fact witness to testify regarding his role with the International Agency for Research on Cancer (IARC). Accordingly, Plaintiff has no present intention of introducing Dr. Jameson's testimony from the *Daubert* hearing.

testified on March 7, 2018; Monsanto's counsel had the opportunity to cross-examine Dr. Jameson on this day. Dr. Ritz testified on March 5, 2018, and again on April 4, 2018; Monsanto's counsel fully cross-examined Dr. Ritz on both days. As a practical matter, Monsanto does not and cannot deny that it had the right to full and meaningful cross-examination of both Drs. Ritz and Jameson within the meaning of Cal. Evid. Code § 1291 and, further, that it was able to cross-examine Dr. Ritz on two separate days of her testimony.

Nonetheless, Monsanto insists that its motives and interests are materially different at trial, that the scope of permissible cross-examination at trial would be broader, and that its approach to cross-examination, as in the form and style of questioning, would be different in front of a jury. This is an inadequate and untenable basis upon which to exclude reliable *Daubert* testimony. As in the MDL *Daubert* proceedings, Dr. Ritz will be introduced here for her views on the association between Roundup and Non-Hodgkin Lymphoma. (Neither Dr. Ritz nor Dr. Jameson will be offered to testify on specific causation or Plaintiff's medical records). Thus, Monsanto's prior questioning of Dr. Ritz sufficiently covered the substantive territory of her testimony.

Monsanto seems to require that its motives and intent at the prior hearing, as well as the actual cross-examination, have been identical to what they would be at trial. But this is not the standard under § 1291. The rule merely requires that Monsanto's prior motives and intent have been "similar." As numerous California courts have held, the motives at the prior hearing 'need not be identical." *People v. Carter*, 117 P.3d 476, 516 (Cal. 2005). Here, Monsanto's interest in probing the strengths and weaknesses of the prior expert testimony is similar to its interests at testing the expert evidence at trial. *Cf. U.S. v. Mitchell*, 365 F.3d 215, 253 (3d Cir. 2004) (district

court's judicial notice of Daubert testimony was only harmless error; "This would not present an obstacle here, however, because the putative substitute testimony was actually given at the Daubert hearing and was subject there to cross-examination by Mitchell, who had the same motive to attack the government's experts as he would have had at trial.").

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this honorable Court **DENY** Monsanto's MIL 11.

DATED: June 7, 2018

Respectfully submitted,

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