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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF SAN FRANCISCO**

16 DEWAYNE JOHNSON,
17
18 Plaintiff,
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20 vs.
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22 MONSANTO COMPANY,
23
24 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

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

1
2 **I. INTRODUCTION**

3 Plaintiff Dewayne Johnson (hereinafter, “Mr. Johnson” or “Plaintiff”) hereby opposes the
4 entirety of Defendant Monsanto Company’s (hereinafter, “Monsanto” or “Defendant”) Motion *in*
5 *limine* No. 11 to Exclude Testimony From Daubert Hearing (the “Motion”).

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

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

17 Plaintiff therefore respectfully requests that the Court deny Monsanto’s motion to
18 exclude the prior *Daubert* testimony under Cal. Evid. Code § 1291(a)(2). Monsanto was a party
19 to the prior proceeding and fully cross-examined both witnesses with the similar motive and
20 intent it would have at trial. Its argument that the scope and style of cross-examination in the
21 MDL proceedings is different from its expected cross-examination at trial does not mandate the
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1 exclusion of reliable prior testimony. Monsanto cannot expect its motives during the prior cross-
2 examination to have been identical to what they would be at trial.

3 **II. ARGUMENT**

4 The California Evidence Code § 1291 provides that “(a) Evidence of former testimony is
5 not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: . . . (2)
6 The party against whom the former testimony is offered was a party to the action or proceeding
7 in which the testimony was given and had the right and opportunity to cross-examine the
8 declarant with an interest and motive similar to that which he has at the hearing.”
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10 First, § 1291(a)’s requirement that the declarant be unavailable is not at issue here as Dr.
11 Ritz will be unavailable for Plaintiff’s trial. Dr. Ritz is currently out of the country and will not
12 be available until after the close of Plaintiff’s case. Dr. Ritz will be in Europe in association with
13 her role as President of the International Society for Environmental Epidemiology. *See*
14 Declaration of Beate Ritz, MD, Ph.D.¹
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16 Further, the requirement of prior opportunity to cross-examine the declarant is fully
17 satisfied here. Both Monsanto’s counsel and Plaintiff’s counsel are involved in the Roundup
18 MDL proceeding and therefore fully participated in the week-long *Daubert* hearings, as well as
19 the additional testimony of certain of the expert witnesses, including Dr. Ritz. Dr. Jameson
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24 ¹ Dr. Jameson’s *Daubert* testimony would be admissible upon the proper showing
25 that he was an unavailable witness. At this time, however, Plaintiff does not intend to call
26 Charles Jameson as an expert witness but, rather, as a fact witness to testify regarding his role
27 with the International Agency for Research on Cancer (IARC). Accordingly, Plaintiff has no
28 present intention of introducing Dr. Jameson’s testimony from the *Daubert* hearing.

1 testified on March 7, 2018; Monsanto's counsel had the opportunity to cross-examine Dr.
2 Jameson on this day. Dr. Ritz testified on March 5, 2018, and again on April 4, 2018;
3 Monsanto's counsel fully cross-examined Dr. Ritz on both days. As a practical matter,
4 Monsanto does not and cannot deny that it had the right to full and meaningful cross-
5 examination of both Drs. Ritz and Jameson within the meaning of Cal. Evid. Code § 1291 and,
6 further, that it was able to cross-examine Dr. Ritz on two separate days of her testimony.
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8 Nonetheless, Monsanto insists that its motives and interests are materially different at
9 trial, that the scope of permissible cross-examination at trial would be broader, and that its
10 approach to cross-examination, as in the form and style of questioning, would be different in
11 front of a jury. This is an inadequate and untenable basis upon which to exclude reliable *Daubert*
12 testimony. As in the MDL *Daubert* proceedings, Dr. Ritz will be introduced here for her views
13 on the association between Roundup and Non-Hodgkin Lymphoma. (Neither Dr. Ritz nor Dr.
14 Jameson will be offered to testify on specific causation or Plaintiff's medical records). Thus,
15 Monsanto's prior questioning of Dr. Ritz sufficiently covered the substantive territory of her
16 testimony.
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19 Monsanto seems to require that its motives and intent at the prior hearing, as well as the
20 actual cross-examination, have been identical to what they would be at trial. But this is not the
21 standard under § 1291. The rule merely requires that Monsanto's prior motives and intent have
22 been "similar." As numerous California courts have held, the motives at the prior hearing "need
23 not be identical." *People v. Carter*, 117 P.3d 476, 516 (Cal. 2005). Here, Monsanto's interest in
24 probing the strengths and weaknesses of the prior expert testimony is similar to its interests at
25 testing the expert evidence at trial. *Cf. U.S. v. Mitchell*, 365 F.3d 215, 253 (3d Cir. 2004) (district
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1 court's judicial notice of Daubert testimony was only harmless error; "This would not present an
2 obstacle here, however, because the putative substitute testimony was actually given at the
3 Daubert hearing and was subject there to cross-examination by Mitchell, who had the same
4 motive to attack the government's experts as he would have had at trial.").

5
6 **III. CONCLUSION**

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

9 DATED: June 7, 2018

Respectfully submitted,

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