

1 Sandra A. Edwards (State Bar No. 154578)
Joshua W. Malone (State Bar No. 301836)
2 Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
3 San Francisco, CA 94104
Telephone: (415) 954-4400; Fax: (415) 954-4480
4 sedwards@fbm.com
jmalone@fbm.com

5 Joe G. Hollingsworth (appearance *pro hac vice*)
6 Kirby T. Griffis (appearance *pro hac vice*)
Eric G. Lasker (appearance *pro hac vice*)
7 William J. Cople (appearance *pro hac vice*)
Hollingsworth LLP
8 1350 I Street, N.W.
Washington, DC 20005
9 Telephone: (202) 898-5800; Fax: (202) 682-1639
jhollingsworth@hollingsworthllp.com
10 kgriffis@hollingsworthllp.com
elasker@hollingsworthllp.com
11 wcople@hollingsworthllp.com

12 George C. Lombardi (appearance *pro hac vice*)
James M. Hilmert (appearance *pro hac vice*)
13 Winston & Strawn LLP
35 West Wacker Drive
14 Chicago, IL 60601
Telephone: (312) 558-5969; Fax: (312) 558-5700
15 glombard@winston.com
jhilmert@winston.com

16 *Attorneys for Defendant*
17 MONSANTO COMPANY

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **COUNTY OF SAN FRANCISCO**

21 DEWAYNE JOHNSON,
22 Plaintiff,

23 vs.

24 MONSANTO COMPANY,
25 Defendant.

Case No. CGC-16-550128

**DEFENDANT MONSANTO COMPANY'S
OPPOSITION TO PLAINTIFF'S
MOTION TO ALLOW LIVE VIDEO
TESTIMONY AT TRIAL**

Honorable Judge Suzanne R. Bolanos

Department: 504

1 **I. INTRODUCTION**

2 Plaintiff Dewayne Johnson’s counsel ambushed Monsanto and the Court on June 20, 2018
3 with a secret plan to compel trial testimony from an out-of-state witness in violation of California
4 law and Judge Karnow’s Case Management Order (“CMO”) #7. CMO #7 explicitly provided that
5 witnesses must be disclosed by May 25. Neither of Plaintiff’s witness lists – either the initial list
6 served on May 25 or its untimely amended list served on June 8 – stated that Dr. Donna Farmer
7 would be called live. Plaintiff then served his Separate Statement Regarding Trial Times on June
8 13, 2018, which affirmatively stated that Plaintiff would present Dr. Farmer’s video deposition.
9 On June 18, 2018, Plaintiff then assured the Court and Monsanto again that he would present only
10 the video testimony of Dr. Farmer.

11 Only at the end of the June 20 hearing did Plaintiff reveal that he had hatched an
12 alternative plan to compel livestream testimony from Dr. Farmer in Missouri to this Court.
13 Monsanto did not know of the real details of Plaintiff’s counsel’s plan until later in the evening on
14 June 20, 2018, when Dr. Farmer was served with a Missouri State Court subpoena. *See*
15 Declaration of Sandra A. Edwards (“Edwards Decl.”) at ¶ 2, Ex. 1 (Dr. Donna Farmer Subpoena).
16 This subpoena ordered Dr. Farmer to appear at Plaintiff-affiliate offices of O’Leary, Shelton,
17 Corrigan in St. Louis Missouri on July 2, 2018 for testimony via video conference at this trial.

18 On June 22, 2018, the Missouri State Court denied Monsanto’s Motion to Quash the
19 subpoena to Dr. Farmer. Monsanto plans to appeal this ruling, which would effectively allow an
20 out-of-state court to force a California court to hear trial testimony from a non-resident. This
21 would effectively undermine California state law, which prohibits this maneuver. But in any
22 event, this Court should deny Plaintiff’s untimely and improper motion to livestream Dr. Farmer’s
23 out-of-state testimony at trial.

24 **II. ARGUMENT**

25 **A. Plaintiff’s Request to Compel Dr. Farmer’s Testimony By Live Feed Violates**
26 **California Law**

27 Plaintiff attempts to circumvent California law by serving the witness with a subpoena to
28 appear in this trial by live broadcast under the guise of Missouri State Law. Yet, the Missouri

1 State Court has no authority over the jurisdiction of this Court. Plaintiff misrepresented to the
2 Court that compelling a witness to appear at trial in San Francisco by livestream through invoking
3 the subpoena power of a Missouri Circuit Court “will be 100 percent within the four corners of
4 what’s allowed.” See Edwards Decl. at ¶ 3, Ex. 2 (Transcript 62:22-23 (June 20, 2018)).
5 Plaintiff’s assertion is wrong and contradicts well-established law.

6 California law provides two methods to compel witness testimony at trial: by subpoena, if
7 the witness is a California resident, or by offering deposition designations. See Cal. Civ. Proc.
8 Code §§ 1985(a), 2025.620(b). Further, “[a] witness, including a witness specified in subdivision
9 (b) of Section 1987 [party witness], is not obliged to attend as a witness before any court, judge,
10 justice or any other officer, unless the witness is a resident within the state at the time of service.”
11 Cal. Civ. Proc. Code § 1989 (emphasis added); see *Amoco Chem. Co. v. Certain Underwriters at*
12 *Lloyd's of London*, 34 Cal. App. 4th 554, 559 (1995) (“the geographical reach of the notice to
13 attend is explicitly limited by section 1989”). In *Amoco Chem. Co.*, the Second District Court of
14 Appeal reversed the trial court’s order compelling the attendance of an out-of-state witness at trial,
15 production of documents, and subsequent sanctions order for the witness’ failure to produce those
16 documents because “the trial court had no jurisdiction to compel the attendance of an out-of-state
17 witness and, therefore, no jurisdiction to compel the production of documents.” *Id.* at 559.
18 Moreover, the defendant need not formally object to the notice to appear at trial, finding “the
19 notice to attend was void on its face [and] no objection was required.” *Id.* (citing *Twin Lock, Inc.*
20 *v. Superior Court* 52 Cal.2d 754, 761–762 (1959) (no form of compulsion, including sanctions,
21 may be used by the court to compel a party who is an out-of-state resident to come to California);
22 see also *Prisch v. Superior Court*, 52 Cal.2d 889 (1959); *Liberty Bank v. Superior Court*, 195 Cal.
23 766, 773–774 (1925) (an order compelling a party's agent to appear beyond the court's
24 jurisdictional limits under section 1989 is void).

25 Plaintiff relies on two federal cases to argue that “th[e] contemporaneous transmission [of]
26 live testimony” is proper and preferable to a video deposition, but Plaintiff’s argument misses the
27 point. See Pl.’s Mot. at 3 (citing *In re De Puy Orthopaedics, Inc. Pinnacle Hip Implant Products*
28 *Liab. Litig.*, No. 3:11-MD-2244-K, 2016 WL 9776572 (N.D. Tex. Sept. 20, 2016); *In re Vioxx*

1 *Products Liab. Litig.*, 439 F. Supp. 2d 640 (E.D. La. 2006)). Plaintiff’s argument misses the point.
2 The issue is not whether this Court will allow video transmission of testimony – use of the specific
3 technology is irrelevant to the larger jurisdictional issue before the Court . Plaintiff’s actions are
4 improper because neither this Court or the Missouri Circuit Court can compel a Missouri resident
5 (who is currently present in the state of Missouri) to testify in a California trial. Plaintiff simply
6 has no legal authority to force Dr. Farmer to testify live in this case.

7 **B. Plaintiff’s Request is Untimely and Demonstrates Clear Gamesmanship**

8 This complex litigation has benefited from Judge Karnow’s extensive case management
9 orders designed to ensure orderly administration of the case so that it is ready for trial. CMO #7
10 required parties to disclose their witnesses by May 25, 2018. Plaintiff’s request is untimely and
11 less than candid.

12 This Court possesses an “inherent power to control litigation” before it and “to exercise
13 reasonable control over all proceedings connected with pending litigation.” *Elkins v. Superior*
14 *Court*, 41 Cal. 4th 1337, 1351 (2007). A court may use this inherent authority to prevent
15 testimony from an eleventh-hour witness, *see Castaline v. City of Los Angeles*, 47 Cal. App. 3d
16 580, 592 (1975), or to prevent “trial by ambush” and other “unfair results” stemming from
17 “abus[ive] litigation tactics.” *People v. Bell*, 118 Cal. App. 4th 249, 256 (2004).

18 Plaintiff’s counsel misrepresented to the Court and Monsanto on multiple occasions, as
19 recently as the afternoon on June 18, that he intended to play 2 hours and 49 minutes of Dr.
20 Farmer’s video testimony at trial. For example, on June 13, Plaintiff’s counsel served its Separate
21 Statement Re Trial Times identifying Dr. Farmer’s testimony by video deposition. Again on
22 Monday, June 18, Plaintiff’s counsel represented in open court that he intended to call his
23 remaining witnesses (not otherwise specifically discussed during the hearing) by deposition. *See*
24 *Edwards Dec.* at ¶ 4, Ex. 3 (6/18/2018 p.m. Transcript of Hearing at 47:11-13) (“THE COURT: So
25 the remaining witnesses that you list are all by deposition, is that right? MR. WISNER: That’s
26 correct, Your Honor.”). Yet, while making these representations, Plaintiff’s counsel knew that he
27 filed (or would soon file) a subpoena that same day for Dr. Farmer to appear by live broadcast
28 from Missouri. *See Edwards Dec.* at ¶ 5, Ex. 4 (Missouri Court Docket Image). Plaintiff’s

1 counsel failed to alert the Court or Monsanto of his improper plan until the end of the day on June
2 20, 2018.

3 Further, Plaintiff's Motion provides absolutely no cause for this tactic, let alone the good
4 cause required to effectively add another witness at this late stage. He asserts that "significant
5 time has passed since Dr. Farmer's recorded deposition," and that subsequent discovery, as well as
6 her MDL deposition being restricted to general causation, justifies Dr. Farmer's live examination.
7 *See Pl.'s Mot.* at 3-4. But this does not excuse Plaintiff's behavior – Plaintiff could have sought to
8 depose Dr. Farmer again in *this* case. He fails to explain why he chose not to do so.
9 Alternatively, while procedurally improper, Plaintiff could have announced weeks ago that he
10 would seek to livestream her testimony. On both counts, Plaintiff failed to do so, choosing instead
11 to hide his intentions from the Court and Monsanto.

12 **C. Plaintiff's Tactics Substantially Prejudice Monsanto**

13 Plaintiff's unjustifiable gamesmanship substantially prejudices Monsanto. Until Monsanto
14 received word Wednesday evening that Dr. Farmer had been served with a subpoena, her
15 testimony was set in stone as required by CMO #7: Plaintiff designated portions of her deposition
16 testimony on April 2, 2018, Monsanto served its counter-designations and objections a week later,
17 and on May 17, 2018, Judge Karnow issued his Order on those objections. All that remained was
18 for Plaintiff to play the videotape of Dr. Farmer's testimony. Now, with the parties set to deliver
19 their opening arguments and Plaintiff's first witness to testify in mere days, Plaintiff's tactics
20 would force Monsanto to prepare for an additional witness with trial already underway.

21 But for Monsanto, it is extremely burdensome to meet with and prepare Dr. Farmer
22 effectively at this late stage. Monsanto would have little opportunity to meet in person with Dr.
23 Farmer in Missouri to prepare her for her examination. Monsanto's trial attorneys in this case are,
24 obviously, in trial and almost 2,000 miles away from Dr. Farmer. And this preparation would be
25 crucial – as Plaintiff admits, a "significant time has passed since Dr. Farmer's recorded
26 deposition" in January 2017, and Monsanto would need to adequately refresh her recollection on
27 many marked exhibits, numerous other potential exhibits, and key topics of which Plaintiff would
28 likely inquire. *See Pl.'s Mot.* at 3.

1 Further, Plaintiff's livestreaming Dr. Farmer's testimony at trial would inaccurately and
2 improperly suggest to the jury that Dr. Farmer's testimony is comparatively more important than
3 any of the other witnesses who are not appearing live. The jury will rightly wonder why a special
4 emphasis has been placed upon Dr. Farmer and not, for example, Drs. Goldstein or William
5 Heydens, also current Monsanto employees who are testifying by videotape. The jury may also be
6 left wondering why Monsanto and why Dr. Farmer didn't "care enough" about the case for her to
7 come to San Francisco for a couple of days, while they are giving up 5 or more weeks of their
8 time. That is completely unfair and prejudicial. There is also no basis in law for requiring Dr.
9 Farmer to be summoned to a hostile plaintiff's law office, without the usual oversight of the Court,
10 and no assurance that the quality of the video/audio will not put her in an unfavorable light. She
11 should be treated like every other witness in the case.

12 Finally, Plaintiff has no legitimate claim of need or prejudice should the Court maintain
13 Dr. Farmer's testimony by video deposition, as planned and as represented. Plaintiff has already
14 designated his desired portions of Dr. Farmer's testimony, and he thus has no argument that a key
15 witness would somehow be missing from the presentation of his case. Comparatively, for the
16 reasons discussed, virtually all of the prejudice that would result from livestreaming Dr. Farmer's
17 testimony would be heaped upon Monsanto. Plaintiff has no justification for his gamesmanship
18 and has presented no cause for effectively adding another witness at this time, contrary to the
19 Court's scheduling order.

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1 **III. CONCLUSION**

2 For the foregoing reasons, this Court should deny Plaintiff's motion to livestream the
3 testimony of Dr. Donna Farmer.

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5 Dated: June 22, 2018

Respectfully submitted,

6 FARELLA BRAUN + MARTEL LLP

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8 By: 

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10 Sandra A. Edwards

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12 Attorneys for Defendant
13 MONSANTO COMPANY
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2018, I electronically filed the foregoing

- **MONSANTO COMPANY'S OPPOSITION TO PLAINTIFF'S REQUEST TO ALLOW LIVE VIDEO TESTIMONY AT TRIAL**
- **DECLARATION OF SANDRA EDWARDS IN SUPPORT OF MONSANTO COMPANY'S OPPOSITION TO PLAINTIFF'S REQUEST TO ALLOW LIVE VIDEO TESTIMONY AT TRIAL**
- **[PROPOSED] ORDER DENYING PLAINTIFF'S REQUEST TO ALLOW LIVE VIDEO TESTIMONY AT TRIAL**

with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Curtis G. Hoke, Esq.
The Miller Firm, LLC
108 Railroad Avenue
Orange, VA 22960


Susan C. Hunt