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Deputy Clerk

19 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
20 **FOR THE COUNTY OF SAN FRANCISCO**

21 DEWAYNE JOHNSON,
22 Plaintiff,
23 v.
24 MONSANTO COMPANY
25 Defendants.

26 Case No. CGC-16-550128
27 **PLAINTIFF'S MOTION TO ALLOW LIVE**
28 **VIDEO TESTIMONY AT TRIAL**

Hon. Suzanne R. Bolanos

Department: 504

INTRODUCTION

Plaintiff hereby moves this Court to allow live video testimony of a witness during trial. On Wednesday, June 20, 2018, Plaintiff served the attached SUBP-001 subpoena and a valid Missouri

1 subpoena on Monsanto employee, Dr. Donna Farmer, for personal appearance at trial via video
2 transmission. Exh. 2 to Esfandiary Decl; Exh. 3 to Esfandiary Decl.; Exh. 4 to Esfandiary Decl. Dr.
3 Farmer is one of the key witnesses in this litigation with intimate knowledge of Monsanto’s herbicide,
4 Roundup, the product that caused Plaintiff’s cancer. Dr. Farmer will testify as to Monsanto’s knowledge
5 of the health risks of glyphosate-based herbicides (“GBHs”) and Monsanto’s actions or inactions in
6 responding to that risk and informing the public. Although Plaintiff has access to Dr. Farmer’s recorded
7 video deposition that may be used in lieu of her personal appearance, the trier of fact will be able to more
8 accurately assess the truthfulness of Dr. Farmer’s testimony if she is presented via contemporaneous
9 transmission. Importantly, significant discovery has occurred since Dr. Farmer was deposed, with new
10 facts of import warranting Dr. Farmer’s examination before the trier of fact. In fact, Dr. Farmer’s
11 deposition was taken during the “general causation stage” stage of the pending Multi-District Litigation,¹
12 thereby limiting the scope of the recorded deposition examination available for trial. Dr. Farmer attempted
13 to evade service but was validly served with the subpoena on June 20, 2018. Exh. 4 to Esfandiary Decl.
14 For the below reasons, the Court should allow the live video appearance of Dr. Farmer during trial.

15 **LEGAL STANDARD**

16 “Trial courts have fundamental inherent equity, supervisory, and administrative powers, as well
17 as inherent power to control the litigation before them.” *Chambers v. NASCO, Inc.* (1991) 501 U.S. 32,
18 34-35); *Rutherford v. Owens-Illinois. Inc.* (1997) 16 Cal.4th 953, 967; *In re Jeanette H.* (1990) 225
19 Cal.App.3d 25, 34; *see also*, Code Civ. Proc, §§ 128, 177, 575.1.). Importantly, “[t]rial courts are
20 afforded discretion to work within existing guidelines to determine the admissibility of evidence.” *In*
21 *re Nada R.* (2001) 89 Cal.App.4th 1166, 1176. A reviewing court will not disturb the trial court’s
22 determination in this regard unless it is arbitrary, capricious, or patently absurd. *Id.* Standard
23 2.20(b)(5) of the California Judicial Administrative Standards provides that the trial judge should “[b]e
24 receptive to using technology in managing the trial and the presentation of evidence.”

25 **ARGUMENT**

26 Evidence Code section 780 directs the trier of fact to evaluate witness credibility by, among
27 other methods, observing the witness's demeanor as she testifies, as well as her “attitude toward the

28 ¹ *In Re Roundup Products Liability Litigation*, MDL-2741 (N.D. Cal).

1 action in which (s)he testifies or toward the giving of testimony.” Evid. Code, § 780, subs. (a) and (j).
2 To that end in-person testimony is optimal. “The very ceremony of trial and the presence of the fact-
3 finder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness
4 face-to-face is accorded great value in our tradition,” *Gulf Oil Corp. v. Gilbert* (1947) 330 U.S. 501,
5 511) (locating a trial where litigants may be forced to try their cases on deposition “is to create a
6 condition not satisfactory to court, jury or most litigants”). “Oral testimony of witnesses given in the
7 presence of the trier of fact is valued for its probative worth on the issue of credibility, because such
8 testimony affords the trier of fact an opportunity to observe the demeanor of witnesses.” (*Elkins v.*
9 *Superior Court* (2007) 41 Cal.4th 1337, 1358.). “A witness's demeanor is ‘part of the evidence’ and is
10 ‘of considerable legal consequence.” *Id.*

11 Here, Plaintiff seeks to examine a key witness in this litigation, Dr. Donna Farmer, via live
12 video transmission. Dr. Farmer, a Monsanto toxicologist, has played a pivotal role in defending
13 Monsanto’s product, with knowledge of the chemical’s adverse health effects and Monsanto’s failure
14 to warn the public thereof. *See, e.g.,* Exh. 1 to Esfandiary Decl., Email Exchanges at *1(“you cannot
15 say that Roundup does not cause cancer. We have not done carcinogenicity studies with ‘Roundup.’”);
16 <https://gmoanswers.com/experts/donna-farmer-phd> (identifies Dr. Farmer role within Monsanto as
17 “Production Protection.”).

18 Importantly, significant time has passed since Dr. Farmer’s recorded deposition, with extensive
19 discovery revealing critical facts which warrant Dr. Farmer’s live examination before the jury.² *See In*
20 *re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prod. Liab. Litig.*, No. 3:11-MD-2244-K, 2016 WL
21 9776572, at *2 (N.D. Tex. Sept. 20, 2016) (“...[p]laintiffs seek to compel contemporaneous
22 transmission of live testimony where a witness under Defendants’ control is unable to appear live in
23 court. Without this contemporaneous transmission to provide live testimony, the **jury would be left**
24 **with less reliable deposition transcripts and video...**”) (emphasis added); *In re Vioxx Products*
25 *Liability Litigation* (E.D.La. 2006) 439 F.Supp.2d 640, 643 (finding live video transmission “satisfies
26 the goals of live, in-person testimony and avoids the short-comings of deposition testimony”). In fact,

27 _____
28 ² Dr. Farmer’s deposition was previously taken in *In Re Roundup Liability Litigation*, MD-2741 (N.D. Cal) on January 11, 2017.

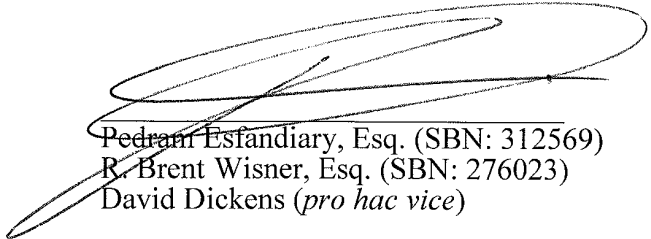
1 the MDL deposition was restricted to testimony relevant to “general causation”, which is not as
2 reliable as the live appearance of Dr. Farmer at trial where Plaintiff can examine her regarding all
3 material aspects of the case.

4 Dr. Farmer is under Monsanto’s control and possesses a wealth of information that should be
5 examined in open court. On June 18, 2018, Plaintiff issued a valid SUBP-001 subpoena for Dr.
6 Farmer’s appearance and it was served with a valid Missouri subpoena on June 20, 2018. Exh. 2 to
7 Esfandiary Decl.; Exh. 3 to Esfandiary Decl; Exh. 4 to Esfandiary Decl. *Beltran-Tirado v. INS*, 213
8 F.3d 1179 (9th Cir. 2000) (permitting the use of telephonic testimony for a hearing in California where
9 witness resided in Missouri); *Adam v. Carvalho* (9th Cir. 2005) 138 Fed. Appx. 7 (“Because [the
10 witness] was a sworn, out-of-state witness, and his testimony was subject to cross-examination, the
11 videoconference complied with the requirements of Federal Rule of Civil Procedure 43(a).”). The jury
12 will only benefit from the live testimony with no prejudice to Monsanto.³

13 **CONCLUSION**

14 For the foregoing reasons, Plaintiff respectfully requests that the Court allow the live video of
15 testimony of Dr. Donna Farmer during trial.

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18 Dated: June 21, 2018

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28 ³ It is worth noting that Plaintiff reserved the right to call any corporate representative of Monsanto for trial.