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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

REARDEN LLC, et al.,  
Plaintiffs,  
v.  
THE WALT DISNEY COMPANY, et al.,  
Defendants.

Case No. 17-cv-04006-JST

**ORDER RE: PLAINTIFFS’  
DESIGNATIONS OF SHST TRIAL  
TESTIMONY**

The Parties dispute whether Plaintiffs Rearden LLC and MOVA LLC (collectively, “Rearden”) may affirmatively designate witness testimony from the *SHST* trial to be read to the jury. *See* ECF No. 550 at 35–47; ECF No. 593 at 20. The Court rules that Rearden’s designations of SHST trial testimony are inadmissible hearsay and outside the scope of Rule 804(b)(1).<sup>1</sup>

Rule 804(b)(1) provides that former testimony given by an unavailable witness “at a trial, hearing, or lawful deposition” is not hearsay where it “is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.” Fed. R. Evid. 804(b)(1). Here, the Parties dispute whether SHST/VGH meets the definition of “predecessor in interest” with respect to Disney. Rearden argues that a party is a predecessor in interest to a present party “if it had like motive to develop the testimony about the same material facts.” ECF No. 550 at 34. Disney argues that one party is only the “predecessor in interest” of another if there is legal privity between the parties. *Id.* at 37–38.

The Ninth Circuit has not explicitly ruled on this issue, and district courts are split. *Compare Contrast Trulove v. D’Amico*, No. 16-CV-00050-YGR, 2018 WL 1248095, at \*2 (N.D.

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<sup>1</sup> All references are to the Federal Rules of Evidence unless otherwise stated.

1 Cal. Mar. 11, 2018) (“parties who are found to have opportunity and similar motive like that of the  
2 current party are deemed to be predecessors in interest” (internal quotes omitted)) *with Edwards v.*  
3 *Techtronic Indus. N. Am., Inc.*, No. 13-CV-01362-SI, 2015 WL 3616558, at \*10 (D. Or. June 9,  
4 2015) (interpreting Rule 804(b)(1) as “equat[ing] ‘predecessor in interest’ with a concept closer to  
5 ‘privity,’ which is a well-known concept in the law of property, contracts, and civil property.”).

6 The Court finds the reasoning in *Edwards* more persuasive. Under Rearden’s  
7 interpretation, former testimony would be admissible against *any* party who had a similar motive  
8 and opportunity to develop the testimony in the prior proceeding, effectively reading out the  
9 “predecessor in interest” provision of Rule 804(b)(1). Such an interpretation would run contrary  
10 to both the text and the legislative intent of the rule. “The original Advisory Committee draft of  
11 Rule 804(b)(1) would have admitted former testimony as long as the party against whom it was  
12 offered, or a party ‘with motive and interest similar’ to his, had an opportunity to develop the  
13 witness’s testimony at the former proceeding.” Clifford S. Fishman and Anne Toomey McKenna,  
14 *5 Jones on Evidence* § 36:25 (7th ed. 2023). The House Judiciary Committee then explicitly  
15 amended Rule 804(b)(1) to include the “predecessor in interest” provision:

16 The Committee considered that it is generally unfair to impose upon  
17 the party against whom the hearsay evidence is being offered  
18 responsibility for the manner in which the witness was previously  
19 handled by another party. The sole exception to this, in the  
20 Committee’s view, is when a party’s predecessor in interest in a  
21 civil action or proceeding had an opportunity and similar motive to  
22 examine the witness. The Committee amended the Rule to reflect  
23 these policy determinations.

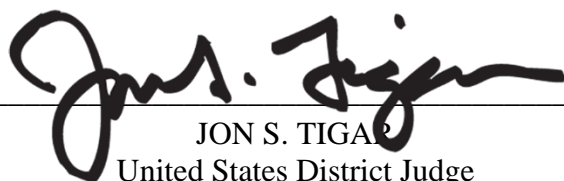
24 Fed. R. Evid. 804 advisory committee’s notes to 1974 enactment. This note suggests that the  
25 House Judiciary Committee intended to narrow the scope of the former testimony exception,  
26 finding insufficient the singular requirement that *someone* in the prior proceeding had similar  
27 motive and opportunity to develop the testimony. Thus, “the exception could only be invoked  
28 against a party that did not have such opportunity and motive before if a ‘predecessor in interest’  
of that party, meaning something less than *just anyone*, had similar motive and interest to cross-  
examine before.” 5 Mueller & Kirkpatrick, *Federal Evidence* § 8:122 (4th ed.) (emphasis in  
original). For these reasons, the Court agrees with the *Edwards* court that, for purposes of Rule  
804(b)(1), “predecessor in interest” means something more akin to legal privity.

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Because there is no dispute that legal privity did not exist between SHST/VGH and Disney, Rearden cannot satisfy the “predecessor in interest” requirement of Rule 804(b)(1), and the testimony is inadmissible as hearsay.

**IT IS SO ORDERED.**

Dated: December 4, 2023

  
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JON S. TIGAR  
United States District Judge