

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

█████ █████ Individually and as
Independent Executrix of the Estate of
█████ █████ ██████████ Individually,
and ██████████ ██████████ Individually,
Plaintiffs,

v.

Monsanto Company,
Defendant.

§ Civil Action No. 1:22-cv-209-RP
§
§ **Plaintiffs’ Response in Opposition to**
§ **Monsanto’s Motion *in Limine* No. 5:**
§
§ **To Exclude Reference to a “Fake” or**
§ **“Magic” Tumor (Doc. 167).**
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§
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I. Introduction

Monsanto moves “to exclude references to a ‘fake’ or ‘magic’ tumor,”¹ which relates to one of the company’s early efforts to manipulate data from a mouse study in order to persuade the EPA that Roundup doesn’t cause cancer. This motion intrudes on the fundamental notion of trial advocacy, and it should be denied.

II. This Court should not preclude Plaintiffs’ counsel or witnesses from using words merely because Monsanto does not like them.

The abridged version of this chapter in the Roundup saga begins in 1984, when the EPA notified Monsanto that its Office of Pesticide Programs (OPP) considered glyphosate a possible human carcinogen because of tumors found in male mice that were part of a two-year study. Internal company documents reflect that Monsanto planned to hire Dr. Marvin Kushner² to review “kidney sections and present his evaluation of them to EPA in an effort to persuade the agency that the observed tumors are not related to glyphosate.”³ This bears repeating: the

¹ Doc. 167 at 1.

² Monsanto’s motion states that “the EPA suggested that Monsanto engage an outside consulting pathologist, Dr. Marvin Kushner.” *Id.* at 1-2. That is not accurate. Monsanto *chose* Kushner. See Exhibit A (Excerpts of William Reeves’s testimony from *Caranci v. Monsanto*, Oct. 11, 2023).

³ Exhibit B (April 3, 1985 memo from George Levinskis of Monsanto’s Dept. of Medicine & Environmental Health to T.F Evans).

company's plan was to hire Kushner for the express purpose of persuading the EPA not to classify glyphosate as a possible carcinogen, and Monsanto was confident that Kushner would produce data supporting the company's position even *before* he received the samples.

And Kushner delivered, purportedly identifying a previously undetected tumor in one of the male mice in the control group (No. 1028). The EPA scientists who reviewed the same slides remained unpersuaded, concluding that there was no tumor in Mouse 1028 or any other mouse in the control group. Undeterred, Monsanto told the EPA that it would pull the samples out of the freezer, resection them, and have Kushner evaluate them again. Right on schedule, Kushner reviewed the new slides and reported the same findings – a tumor in Mouse 1028. The EPA's senior pathologists also reviewed the new slides and again disagreed with Kushner.

The impasse resulted in the EPA convening its Scientific Advisory Panel (SAP) to resolve the stalemate. Monsanto ultimately hired at least a dozen consulting pathologists, all of whom told the SAP that they observed the same tumor in Mouse 1028, but no other tumors deviating from the original pathology report. None of the EPA pathologists who reviewed the same slides agreed with that assessment. But the SAP resolved the disagreement in Monsanto's favor and recommended that the OPP include the single tumor in Mouse 1028 in its statistical assessment, which flipped the study from positive to negative. In other words, the EPA resolved the doubt Monsanto had ginned up in its favor. This decision led to the agency reclassifying glyphosate as noncarcinogenic in 1991.

Because this tumor apparently had a cloaking device that rendered it invisible to the pathologists at the EPA, it has sometimes been referred to as “magic” or “fake.” Those terms are fair commentary on the evidence and well within the bounds of appropriate advocacy. *See, e.g., United States v. Bagaric*, 706 F.2d 42, 60 (2d Cir. 1983) (use of “rhetorical devices such as sarcasm” was “fair comment”) (citing *United States v. Modica*, 663 F.2d 1173 (2d Cir. 1981)); *see also Canales v. Davis*, 966 F.3d 409, 417 (5th Cir. 2020) (Higginbotham, J., dissenting) (noting that prosecutor's “sharp sarcasm” had “bite” because of the state of the evidence); *United States v. Serrano*, 607 F.2d 1145, 1152 (5th Cir. 1979) (sarcasm in closing argument

permissible).

III. Conclusion

Monsanto's motion is overreaching, and it should be denied.

Dated: June 24, 2024

Respectfully submitted,



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