

**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. 20:
§
§ To Exclude Evidence, Argument, or
§ Reference Regarding Prior Government
§ Enforcement Actions and Subsequent
§ Settlements (Doc. 186).
§
§

I. Introduction

Monsanto moves “to exclude any evidence, argument, testimony, or reference to government enforcement actions and investigations, and any subsequent settlements.”¹ Specifically, the company seeks to exclude: 1) enforcement actions by the New York Attorney General for false advertising related to Roundup; 2) an investigation and enforcement action by the French government resulting from Monsanto's illegal data collection from journalists and law makers in the interest of influencing their viewpoints on glyphosate; and 3) Monsanto's felony convictions in the District of Hawaii for environmental crimes related to pesticides.

The New York and French enforcement actions are directly relevant to Monsanto's pattern and practice of defending its product – and its “Freedom to Operate” – at all costs. The felony convictions from Hawaii are admissible for impeachment under Rule 609. Monsanto's motion should be denied.

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¹ Doc. 186 at 1.

II. The New York Attorney General's enforcement actions are relevant and admissible.

In 1996, the Consumer Frauds and Protection Bureau of the New York Attorney General executed a civil-enforcement action against Monsanto for false advertising regarding the safety of Roundup.² Specifically, the New York AG found that several of Monsanto's claims about the product (e.g., that it is safer than "table salt," its "safety margin is much greater than required," "[y]ou can feel good about using [it]," and it's "practically non-toxic") were "false and misleading advertising."³ As part of the settlement agreement, Monsanto agreed to stop making those claims. It did so only in New York, however; the company continued to make similar claims in other jurisdictions where it marketed and sold Roundup.

And the company apparently could not help itself from reverting to its illegal practices in New York, because the Attorney General brought another enforcement action against the company in 2020.⁴ That prosecution resulted in a \$6.9M fine and the following statement by the Attorney General:

Bayer and Monsanto repeatedly claimed in advertising that Roundup consumer products containing the active ingredient glyphosate were safe and non-toxic without adequate substantiation. These claims violated state laws against false and misleading advertising, and also breached a previous settlement the Office of the Attorney General (OAG) reached with Monsanto in 1996, in which Monsanto committed to stop making unsubstantiated claims regarding the safety of Roundup products that contained glyphosate. . . .

Once again, Monsanto and the company's current owner, Bayer, made false and misleading claims about the safety of their products, but we will not allow them to get away with endangering our environment. . . .

In 2020, Attorney General James began an investigation into whether Monsanto, and its current owner Bayer, were again engaging in false advertising of their roundup products, in violation of Monsanto's 1996 settlement with OAG. The investigation found that a number of claims made in advertising, including promises that Roundup products "won't harm anything but weeds," and "do not pose a threat to the health of animal wildlife," were not adequately substantiated. *The investigation also revealed that the companies made claims that implied Roundup products were safer and less toxic than dish detergent and soap, a practice that Monsanto had agreed to cease in the 1996 settlement.* Following the investigation, Attorney General James concluded that the companies' claims about these products violated New York laws against persistent business fraud

² Exhibit A (1996 settlement agreement).

³ *Id.* at 4-5.

⁴ Doc. 186 at 3.

and false and misleading advertising, and breached Monsanto's obligations under the prior settlement.⁵

The fact that the State of New York chastened Monsanto 1996 for making false and misleading claims about the safety of its product and that, almost 25 years later, it caught them doing the exact-same thing again, is obviously probative of the company's decades-long practice of promoting its product without regard for human health. This goes directly to the company's credibility and punitive damages.

It is also not unfairly prejudicial. Contrary to the company's view, Rule 403 does not proscribe evidence that the other side deems "prejudicial." The prejudice must be "unfair" and it "must substantially outweigh the evidence's probative value." *Cruz v. Cervantez*, 96 F.4th 806, 814 (5th Cir. 2024) (quotation omitted). There is nothing about this evidence that is unfair to Monsanto. It is also admissible under Rule 404(b), because it goes to the company's motive, intent, modus operandi, and absence of mistake. *United States v. Shaw*, 701 F.2d 367, 386 (5th Cir. 1983) ("Rule 404 is a rule of inclusion, which admits evidence of other acts relevant to a trial issue except where such evidence tends to prove only criminal disposition."); *see also Price v. PCS Nitrogen*, 2010 U.S. Dist. LEXIS 159689, *6 (M.D. La. 2010) (admitting 404(b) evidence relevant to prove motive against a corporation). Further, any perceived prejudice can be remedied through a limiting instruction. *United States v. Hill*, 63 F.4th 355, 351 (5th Cir. 2023) ("[J]urors are presumed to follow the court's instructions.").

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⁵ Exhibit B (Press Release from New York Attorney General) at 1-2 (emphasis added).

III. The French government’s enforcement action against Monsanto for the company’s unlawful collection of personal data from over 200 law makers, journalists, and activists is relevant and admissible.

In July 2021, France’s data protection authority levied a €400,000 fine against Monsanto for failing to inform people that it had recorded their personal information in a lobbying file.⁶ The company had gathered the personal data of more than 200 law makers, journalists, and activists for its dossier, and gave a rating of one to five for each of those people, based on their “estimated influence, credibility and level of support for Monsanto.”⁷ This evidence, like the New York Attorney General’s enforcement action, is directly relevant to the company’s decades-long practice of promoting Roundup at all costs, in order to have “Freedom to Operate.” For the same reasons, it goes to punitive damages, as well as the company’s motive, intent, and modus operandi. There is nothing “unfair” about it.

IV. Monsanto’s felony convictions in the District of Hawaii are admissible for impeachment under Rule 609.

On November 21, 2019, Monsanto was charged in an information in the District of Hawaii with two felony counts of storing acute hazardous waste (PennCap-M) and one count of knowingly spraying a restricted-use pesticide (PennCap-M).⁸ The company pleaded guilty to counts one and two under a deferred-prosecution agreement.⁹ It also pleaded guilty to count three, as a misdemeanor, and was placed on two years’ probation.¹⁰ On December 13, 2021, the U.S. Probation Office notified the court that Monsanto had violated both its deferred-prosecution agreement and its probation by violating herbicide-label requirements and permitting its field workers to “enter sprayed fields within 12 hours after applying the herbicide when the labeling prohibits reentry prior to six days” on 30 separate occasions.¹¹

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⁶ Exhibit C (Politico and France24 articles) at 1.

⁷ *Id.* at 3.

⁸ Exhibit D (excerpts from *United States v. Monsanto Co.*, 19cr0162-JMS (D. Haw. 2019)) (Doc. 1).

⁹ *Id.* (Doc. 4).

¹⁰ *Id.* (Doc. 18).

¹¹ *Id.* (Doc. 25 at 2).

On December 9, 2021, the company was charged in an information with 30 counts of using the pesticide LPI Glufosinate “in a manner inconsistent with its labeling” by spraying the product on corn fields and then directing its workers to “enter[] the fields less than six days later . . . contrary to the restricted-entry interval . . . on the label.”¹² On January 6, 2022, the company pleaded guilty to all 30 misdemeanors and received a sentence of probation.¹³ The district court also found the company in violation of its deferred-prosecution agreement to the two felonies in 19cr0162 and imposed a sentence (probation and fines) in both cases.¹⁴

The two felony convictions are admissible under Rule 609, which states that a prior felony conviction “must be admitted, subject to Rule 403, in a civil case.” Fed R. Evid. 609(a)(1)(A). Here, the corporation is undeniably a witness. Plaintiffs have subpoenaed the company’s corporate representative (Rule 30(b)(6) witness) from the MDL, William Reeves. And even if Reeves does not testify,¹⁵ Plaintiffs will play deposition excerpts from his testimony on behalf of the company. And other Monsanto witnesses (e.g., Donna Farmer) routinely provide testimony on the company’s behalf. The company’s credibility is squarely at issue, and this is proper impeachment under Rule 609. *See Hickson Corp. v. Norfolk S. Ry. Co.*, 227 F. Supp. 2d 903, 907 (E.D. Tenn. 2002) (“Because a corporation speaks through its officers, employees, and other agents . . . rule 609 allows the use of a corporation’s felony conviction to impeach the corporation’s vicarious testimony.”).

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¹² Exhibit E (excerpts from *United States v. Monsanto Co.*, 21cr0140-JMS (D. Haw. 2021)) (Doc. 1).

¹³ *Id.* (Doc. 20 (plea hearing transcript)); (Doc. 18 (judgment)).

¹⁴ Exhibit D (Doc. 36 (judgment)).

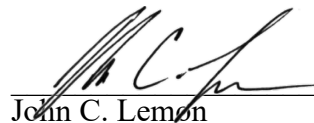
¹⁵ The company’s motion to quash his subpoena is pending.

V. Conclusion

Monsanto's motion should be denied.

Dated: June 24, 2024

Respectfully submitted,



John C. Lemon

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/s Stephen D. Demik

Pro Hac Vice
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Attorneys for Plaintiffs