

ATTORNEY GENERAL OF THE STATE OF NEW YORK
CONSUMER FRAUDS AND PROTECTION BUREAU
ENVIRONMENTAL PROTECTION BUREAU

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In the Matter of :
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MONSANTO COMPANY, :
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Respondent. :
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**ASSURANCE OF DISCONTINUANCE
PURSUANT TO EXECUTIVE LAW § 63(15)**

Pursuant to the provisions of Executive Law § 63(12), DENNIS C. VACCO, Attorney General of the State of New York, has investigated certain advertising practices of Monsanto Company ("Monsanto"), and based upon such inquiry, the Attorney General finds:

A. Monsanto is a foreign corporation engaged, *inter alia*, in the manufacture, formulation, distribution and sale of pesticide products. Monsanto's principal place of business is 800 N. Lindbergh Boulevard, St. Louis, Missouri 63167.

B. Monsanto advertises and sells its pesticide products throughout the United States, including New York State.

Advertising Practices

C. Monsanto advertises its pesticide products in broadcast and print media, including television, radio, magazines, brochures, and at point-of-purchase displays.

D. In its advertisements, Monsanto has made claims regarding the safety of some of its pesticide products. Samples of these advertisements are attached as Exhibits A-J.

E. For example, in some of its advertisements, Monsanto made the following claims about the human and environmental safety of its glyphosate-containing pesticide products:

a) Remember that environmentally friendly Roundup herbicide is biodegradable. It won't build up in the soil so you can use Roundup with confidence along customers' driveways, sidewalks and fences ...

See Exhibit A.

b) And remember that Roundup is biodegradable and won't build up in the soil. That will give you the environmental confidence you need to use Roundup everywhere you've got a weed, brush, edging or trimming problem.

See Exhibit B.

c) Roundup --- biodegrades into naturally occurring elements.

See Exhibit C.

d) Remember that versatile Roundup herbicide stays where you put it. That means there's no washing or leaching to harm customers' shrubs or other desirable vegetation.

See Exhibit D.

e) This non-residual herbicide will not wash or leach in the soil. It ... stays where you apply it.

See Exhibit E.

f) You can apply Accord with ... confidence because it will stay where you put it ... it bonds tightly to soil particles, preventing leaching. Then, soon after

application, soil microorganisms biodegrade Accord into natural products.

See Exhibit F.

g) Glyphosate is less toxic to rats than table salt following acute oral ingestion.

See Exhibit G.

h) Glyphosate's safety margin is much greater than required. It has over a 1,000-fold safety margin in food and over a 700-fold safety margin for workers who manufacture it or use it.

See Exhibit H.

i) You can feel good about using herbicides by Monsanto. They carry a toxicity category rating of 'practically non-toxic' as it pertains to mammals, birds and fish.

See Exhibit I.

j) "Roundup can be used where kids and pets'll play and breaks down into natural material." This ad depicts a person with his head in the ground and a pet dog standing in an area which has been treated with Roundup.

See Exhibit J.

F. Based on his investigation, the Attorney General believes that Monsanto's advertising represents, directly and by implication, that:

a) Monsanto's glyphosate-containing pesticide products and the components thereof are safe and will not cause any harmful effects to people or the environment.

- b) Monsanto's glyphosate-containing pesticide products and the components thereof are safe because they will quickly break down into natural substances.
- c) Monsanto's glyphosate-containing pesticide products and the components thereof stay where they are applied and will not move through the environment by any means.
- d) Monsanto's glyphosate-containing pesticide products and the components thereof are good for the environment.
- e) Monsanto's glyphosate-containing pesticide products and the components thereof are less toxic than certain common household products.
- f) The characterization of Monsanto's glyphosate-containing pesticide products and the components thereof as practically non-toxic implies broad application to all potential toxic effects (acute and chronic).
- g) The characteristics of Monsanto's glyphosate-containing pesticide products can be adequately described by the characteristics of glyphosate alone.

G. The Attorney General finds that the representations set forth in paragraphs E and F above constitute false and misleading advertising.

H. The pesticides manufactured, formulated, or distributed by respondent are regulated under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA").

I. FIFRA requires that all pesticides be registered with the Environmental Protection Agency ("EPA") prior to their distribution, sale or use, except as described by the Act.

J. Because all pesticides are toxic at least to some degree, to plants or animals (including humans), EPA requires as part of the registration process, among other things, a variety of tests to evaluate the

potential for exposure to pesticides, and their toxicity to people, other potential non-target organisms and other adverse effects on the environment.

K. Registration by EPA, however, is not an assurance or finding of safety because the determination which the Agency must make in registering or re-registering a product is not that the product is "safe," but rather that use of the product in accordance with its label directions "will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(D).

L. FIFRA defines "unreasonable adverse effects on the environment" to mean "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb). FIFRA thus calls on EPA to make a risk/benefit analysis in determining whether a registration should be granted (or allowed to continue).

M. The pesticide products distributed, sold, or manufactured by Monsanto have been registered with the EPA and New York State.

N. The data necessary for registration has changed over time. Therefore, pesticide products originally registered some years ago may not have been subjected to the full battery of tests now required for new products.

O. FIFRA generally requires that the health and safety testing of pesticide products be conducted by the registrant. The data produced by the registrants must be submitted to EPA for review and evaluation. EPA has issued protocols for how the tests are to be conducted and has specified laboratory practices which should be followed in conducting such tests.

P. An evaluation of each pesticide product distributed, sold, or manufactured by Monsanto was completed at the time that product was initially registered. EPA is now in the process of re-evaluating all

pesticide products through a process required by Congress called "re-registration." In order to re-evaluate these pesticides, EPA is demanding the completion of additional tests and the submission of data for review and evaluation by EPA. EPA's re-registration effort is now completed for glyphosate, the active ingredient in Roundup and Accord. The claims which constitute the subject of this agreement were made prior to the completion of this re-registration process.

Q. Monsanto's absolute claims that Roundup "will not wash or leach in the soil" is not accurate because glyphosate, the active ingredient, may move through some types of soil under some conditions after application, in particular, soil particles with glyphosate bound to them can "wash" through or over soils.

R. Monsanto's absolute claim that its Accord (and Roundup) herbicide "stays where you put it" is not accurate for the same reasons set forth in paragraph Q above.

S. Monsanto's claims contradict the following statements required on the EPA-approved label for Roundup at the time the claims were made:

ENVIRONMENTAL HAZARDS

Avoid direct application to any body of water. Do not contaminate water by disposal of waste or cleaning of equipment.

AVOID DRIFT, EXTREME CARE MUST BE USED WHEN APPLYING THIS PRODUCT TO PREVENT INJURY TO DESIRABLE PLANTS AND CROPS.

Do not allow the herbicide solution to mist, drip, drift, or splash onto desirable vegetation since minute quantities of this herbicide can cause severe damage or destruction to the crop, plants, or other areas on which treatment was not intended.

T. Similarly, the EPA-approved label for Accord, another glyphosate-containing product, contained the following statements at the time Monsanto's claims were made:

Environmental Hazards

Do not contaminate water by disposal of waste or cleaning of equipment.

In case of SPILL or LEAK, soak up and remove to a landfill.

ENDANGERED SPECIES RESTRICTIONS

Before using this product in forests in a county listed below, you must contact the Endangered Species Specialist in the Regional/Field Office of the U.S. Fish and Wildlife Service (FWS) indicated below.

Violations of the Federal Insecticide, Fungicide and Rodenticide Act

U. FIFRA prohibits sellers and/or distributors of pesticides from making certain advertising claims about its products. 7 U.S.C. § 136j(a)(1)(B).

V. Under FIFRA it is unlawful, among other things, to distribute, sell, or offer for sale:

(B) any registered pesticide if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under section 136a of this title.

7 U.S.C. § 136j(a)(1).

W. The Attorney General finds that as set forth in paragraphs E, F, S, and T above, Monsanto's claims constitute a violation of FIFRA, 7 U.S.C. § 136j(a)(1)(B).

Violations of State Law

X. General Business Law (GBL) § 350 prohibits false and misleading advertising in New York State.

Y. The Attorney General finds that by reason of the foregoing, Monsanto has engaged in false and misleading advertising in violation of GBL § 350.

Z. The Attorney General finds that the foregoing constitutes repeated and persistent illegal conduct within the meaning of Executive Law § 63(12).

IT NOW appears that Monsanto is willing to enter into this Assurance of Discontinuance. Monsanto does not necessarily agree with the Attorney General's findings of fact or legal conclusions and does not admit that it has violated any federal, state or local law, code or regulation. Monsanto is willing to execute this Assurance for settlement purposes only. The Attorney General is now willing to accept this Assurance of Discontinuance pursuant to Executive Law § 63(15), in lieu of commencing a statutory proceeding.

RELIEF

IT IS HEREBY AGREED by Monsanto, its subsidiaries, its agents,¹ assigns, successors (including purchasers of product lines), employees, officers and any other individuals or entities through whom it may act (collectively referred to as "Monsanto") that:

1. Monsanto will immediately cease and desist from making any of the specific statements contained in paragraph E above, except to the extent that such statements are not prohibited by paragraph 3 herein.

2. Monsanto will immediately inform, in writing, its distributors and any retailers to whom it directly provides advertising materials in New York State that they are to immediately cease and desist from disseminating any advertising materials that contain any of the statements contained in paragraph E above

¹For purposes of this Agreement "agents" does not include independent distributors or independent retailers.

and/or that in any way violate the terms of this Assurance. Monsanto will, in the same written notification

- 1) inform its distributors and retailers that Monsanto will, at its expense, remove or destroy any such noncomplying materials, and
- 2) inform the distributor(s) and retailers(s) that its failure to fully comply with this directive will result in Monsanto taking immediate action to terminate any and all contracts with the independent distributors and/or retailers.

3. Monsanto will immediately cease and desist from publishing or broadcasting any advertisements that represent, directly or by implication, that:

a) its glyphosate-containing pesticide products or any component thereof are safe, non-toxic, harmless or free from risk. Nothing in this subparagraph shall preclude Monsanto from making representations regarding the degree and type of risk associated with its pesticide products provided that Monsanto has evidence to substantiate the representations.

Such substantiation, to be submitted, upon request, under paragraph 5 of the Relief Section herein, shall include the identification of the sorts of hazards (i.e. acute and/or chronic toxicity) and exposure (i.e. route, duration and magnitude) considered. Monsanto shall not make any such representation if it is inconsistent with any portion of the statement required as part of the EPA registration process for that pesticide and as such statement may be subsequently amended;

b) its glyphosate-containing pesticide products or any component thereof manufactured, formulated, distributed or sold by Monsanto are biodegradable, unless Monsanto can substantiate pursuant to paragraph 5 of the Relief Section herein that the entire product will completely break down into elements found in nature within a reasonably short period of time, consistent with the Federal Trade Commission Guidelines ("FTC Guidelines") on Environmental Marketing Claims. Provided, however, that Monsanto may make qualified biodegradation claims if in compliance with FIFRA, its implementing regulations and FTC Guidelines. Further, provided that nothing in this paragraph shall preclude Monsanto from discussing or explaining the degradation process as long as that discussion or explanation is qualified by a statement of the timeframe for that process, and Monsanto can substantiate such claims pursuant to paragraph 5 of the Relief Section herein;

c) its glyphosate-containing pesticide products or any component thereof stay where they are applied under all circumstances and will not move through the environment by any means. Nothing in this subparagraph shall preclude Monsanto from making representations as to the likelihood of its glyphosate-containing products moving through various types of soil, the likelihood of its glyphosate-containing products leaching into groundwater, or that its glyphosate-containing products will not affect nearby vegetation as a result of movement in or on soil, provided that Monsanto has evidence to substantiate such representations as required pursuant to paragraph 5 of the Relief Section herein;

d) its glyphosate-containing pesticide products or any component thereof are "good" for the environment or are "known for their environmental characteristics." Nothing in this subparagraph shall preclude Monsanto from making representations, or giving examples, that its glyphosate-containing products may be used in specific instances to benefit the environment or may have "favorable environmental characteristics" in certain situations, provided that the specific circumstances under which these statements may be true are explained or described in the text and Monsanto has evidence to substantiate such representations as required in subparagraph (a) above;

e) glyphosate-containing pesticide products or any component thereof are safer or less toxic than common consumer products other than herbicides;

f) its glyphosate-containing products or any component thereof might be classified as "practically non-toxic." Nothing in this subparagraph shall prohibit Monsanto from making qualified representations or claims regarding technically-defined categories such as "practically non-toxic" or "slightly toxic" if (1) Monsanto possesses and relies upon scientifically-accepted testing substantiating the representation or claim; and (2) the representation or claim is qualified to identify (a) the toxic effect(s) actually evaluated in such testing; (b) the exposure route(s) actually evaluated in such testing; and (c) the animals tested. Monsanto shall not make any such representation if it is inconsistent with any portion of the statement required as part of the EPA registration process for that pesticide and as such statement may be subsequently amended;

g) to the extent that any representations are based on data for individual components (*e.g.*, the active ingredient), rather than for mixtures

(formulated product) as applied, such representations must be clear as to whether the claim is being made for the active ingredient or for the product.

h) Notwithstanding any of the restrictions or limitations contained in this paragraph, nothing in this paragraph shall preclude or prohibit Monsanto from making claims for any of its pesticide products in advertisements when such claims have been approved by EPA for use on the label of such pesticide products, provided such claims as presented in advertising are not false or misleading in such context.

i) If a New York State court or the New York State Legislature determines that standards of advertising under New York law are less stringent than those contained herein, or if any prohibitions or limitations contained in this paragraph are modified or superseded by any revisions to FIFRA and/or its implementing regulations which are inconsistent with the restrictions contained in this paragraph, Monsanto may request that the Attorney General modify the terms of this Assurance of Discontinuance.

Likewise, if as a result of a conciliation or administrative action, the Attorney General adopts standards of advertising which are less stringent than those contained herein, Monsanto may request that the Attorney General modify the terms of this Assurance of Discontinuance. If the Attorney General finds that the standards have changed, he shall consent to a modification.

4. Within 60 days from the date of execution of this Assurance, Monsanto will file an affidavit with the Attorney General of New York detailing its compliance with the terms of this Assurance.

5. Monsanto agrees to maintain each advertisement disseminated in New York for its pesticide products for two years after the last date of dissemination, publication, or broadcast, of the advertisements in New York and to provide copies of all such advertisements to the Attorney General following receipt of a written request. In addition, Monsanto agrees to provide substantiation for any claims that are the subject of the relief section herein and that are contained in any of its advertisements disseminated in New York and which the Attorney General requests in writing. Such substantiation shall

be presented to the Attorney General following receipt of a written request. This paragraph in no way precludes the Attorney General from asserting any rights he may otherwise have under the law.

6. Upon the execution of this Assurance of Discontinuance, Monsanto shall pay to the Attorney General \$50,000 in costs.

7. The acceptance of this Assurance by the Attorney General shall not be deemed approval by the Attorney General of any of Monsanto's pesticide advertising or business practices, and Monsanto shall not make any representations to the contrary.

8. Acceptance of this Assurance by the Attorney General shall constitute satisfaction of any claims which could have been brought as of the date of such acceptance regarding Monsanto's pesticide advertising in New York.

9. Nothing contained herein shall be deemed to relieve Monsanto of any obligations which were assumed by companies, corporations, entities and/or partnerships, which were Monsanto's predecessors-in-interest, under any contracts, agreements, Assurances of Discontinuances, or Stipulations entered into with the New York State Attorney General's Office.

10. Nothing contained herein shall be construed so as to deprive any person of any private right under the law.

WHEREFORE, the following signatures are affixed hereto as of the day of , 1996.

DENNIS C. VACCO
Attorney General of the
State of New York

CONSUMER FRAUDS
AND PROTECTION BUREAU
By:

ENVIRONMENTAL PROTECTION
BUREAU
By:

SHIRLEY F. SARNA
Assistant Attorney General
In Charge

WILLIAM S. HELMER
Assistant Attorney General
In Charge

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