

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933

Release No. 10037 / February 9, 2016

SECURITIES EXCHANGE ACT OF 1934

Release No. 77087 / February 9, 2016

ACCOUNTING AND AUDITING ENFORCEMENT

Release No. 3741 / February 9, 2016

ADMINISTRATIVE PROCEEDING

File No. 3-17107

In the Matter of

**MONSANTO COMPANY,
SARA M. BRUNNQUELL, CPA,
ANTHONY P. HARTKE, CPA, AND
JONATHAN W. NIENAS,**

Respondents.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933, SECTIONS 4C AND 21C OF
THE SECURITIES EXCHANGE ACT OF
1934, AND RULE 102(e) OF THE
COMMISSION'S RULES OF PRACTICE,
MAKING FINDINGS AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 ("Securities Act") and Section 21C of the Securities Exchange Act of 1934 ("Exchange Act") against Monsanto Company ("Monsanto"), Sara M. Brunnquell, Anthony P. Hartke, and Jonathan W. Nienas; and that public administrative proceedings be, and hereby are, instituted against Brunnquell and Hartke pursuant to Exchange Act Section 4C and Rule 102(e)(1)(iii) of the Commission's Rules of Practice.

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the

findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order, as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds¹ that:

SUMMARY

1. Monsanto is an agricultural seed and chemical company that manufactures and sells glyphosate, a herbicide, under the trade name "Roundup." During fiscal years 2009, 2010, and 2011,² Monsanto improperly accounted for millions of dollars of rebates offered to Roundup distributors and retailers in the U.S. and Canada to incent them to purchase Roundup. Monsanto also improperly accounted for rebate payments to Roundup customers in Canada, France, and Germany as selling, general, and administrative expenses ("SG&A") rather than rebates, which boosted Roundup gross profit in those countries. Monsanto did not have sufficient internal accounting controls to identify and properly account for rebate payments promised to customers.

2. As a result, Monsanto materially misstated its consolidated earnings, and its revenues and earnings for its Roundup business lines,³ in its periodic reports filed with the Commission for fiscal years 2009, 2010, and 2011.⁴ As a result of the improper accounting, Monsanto met consensus earnings-per-share analyst estimates for fiscal year 2009.

3. On November 14, 2011, Monsanto restated its 2009 and 2010 annual reports on Form 10-K and its 2011 quarterly reports on Form 10-Q (collectively "the Restatement").

4. As a result of the conduct described herein, Monsanto violated Securities Act Sections 17(a)(2) and 17(a)(3), the reporting provisions of Exchange Act Section 13(a) and Rules 12b-20, 13a-1, 13a-11, and 13a-13, the books and records provisions of Exchange Act Section 13(b)(2)(A), and the internal accounting control provisions of Exchange Act Section 13(b)(2)(B).

5. Sara M. Brunnquell, Monsanto's External Reporting Lead, Anthony P. Hartke, a U.S. Business Analyst at Monsanto, and Jonathan W. Nienas, Monsanto's former U.S. Strategic Account Lead, caused Monsanto to violate Securities Act Sections 17(a)(2) and 17(a)(3), Exchange Act Sections 13(a) and 13(b)(2)(A), and Rules 12b-20, 13a-1, 13a-11, and 13a-13. These individuals also violated Exchange Act Rule 13b2-1, and Nienas violated Exchange Act Section 13(b)(5).

¹ The findings herein are made pursuant to the Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

² Monsanto's fiscal year runs from September 1 to August 31.

³ Monsanto's periodic filings report the results of its Roundup business as part of the Agricultural Productivity segment.

⁴ Monsanto filed earnings releases for 2009, 2010, and 2011 on Forms 8-K, which were also misstated.

RESPONDENTS

6. Monsanto Company is a Delaware corporation with its principal place of business in St. Louis, Missouri. Monsanto's common stock is registered with the Commission under Section 12(b) of the Exchange Act and trades on the New York Stock Exchange under the ticker symbol "MON." Monsanto produces seeds and chemicals, such as Roundup, that are used in the agricultural industry.

7. Sara M. Brunnquell, 45, is a resident of St. Louis, Missouri. Brunnquell was the External Reporting Lead at Monsanto from April 2009 through October 2015. In that capacity, she reported to the Controller of Monsanto. Brunnquell currently holds the title of Global Commercial Operations Lead, Climate. She is a Certified Public Accountant in the state of Missouri and maintained an active license from 1995 to 2004 and 2014 to 2015.

8. Jonathan W. Nienas, 54, is a resident of Ballwin, Missouri. Nienas, who had been an employee of Monsanto since 1980, was the U.S. Strategic Account Lead for the Roundup Division from September 1, 2009 until he retired in January 2014.

9. Anthony P. Hartke, 46, is a resident of Chesterfield, Missouri. Hartke held the title of U.S. Business Analyst in the Roundup Division from July 2008 to August 2010. He is currently Regional FP&A Analysis Lead at the company. Hartke is a Certified Public Accountant and maintained an active license in Missouri from 1994 to 2010.

ACCOUNTING STANDARDS

10. The accounting standard governing Monsanto's rebate programs is set forth in Emerging Issues Task Force ("EITF") Issue No. 01-9, "Accounting for Consideration Given by a Vendor to a Customer (Including a Reseller of the Vendor's Products)," codified as ASC 605-50.⁵ Specifically, Issue 6 of EITF 01-9 (ASC 605-50-25-7) requires a vendor like Monsanto to recognize a rebate obligation as a reduction of revenue based on a systematic or rational allocation of the cost of honoring the rebate offer to each underlying transaction that results in progress by the customer towards earning the rebate. Issue 4 of EITF 01-9 (ASC 605-50-25-3) requires a vendor to recognize the cost of certain sales incentives at the later of the date at which the related revenue is recognized or the date at which the sales incentive is offered.

11. Issue 1 of EITF 01-9 (ASC 605-50-45-1) addresses the circumstances in which a vendor may record payments to customers as a cost or expense (e.g., under the SG&A accounting classification) rather than as a reduction of revenue. EITF 01-9 (ASC 605-50-45-1) requires a vendor like Monsanto to recognize payments to customers to perform services on its behalf (and which provide an identifiable benefit to the vendor) as a reduction of revenue for the amount of the payments that exceeds the estimated fair value of the services rendered. If the services provided by customers do not provide a benefit to the vendor, it should recognize the total amount as a reduction of revenue.

⁵ EITF 01-9 was the applicable accounting guidance during Monsanto's fiscal year 2009 and was codified into the Accounting Standards Codification ("ASC") within ASC 605-50 for fiscal years 2010 and 2011.

FACTS

Monsanto Loses Roundup Market Share to Generic Producers in Fiscal Year 2009

12. Roundup historically was one of Monsanto's most profitable products, and the company sells it to both retailers and distributors.⁶ After the patent expired in 2000, competition from generic glyphosate producers began to erode Monsanto's profit margins. By fiscal year 2009, generic competitors were undercutting Monsanto's prices in the U.S. and Canada by more than 70%. Monsanto was losing share in these markets as customers – concerned that they could not profitably sell high-priced Roundup – shifted their purchases to generic brands. By the end of fiscal year 2009, Monsanto had lost more than half of its share of the glyphosate market (dropping from 55% market share to less than 25%).

13. Monsanto faced significant glyphosate price competition in fiscal year 2009. Instead of lowering Roundup prices in the U.S., the company rolled out several price protection programs in the second and third fiscal quarters to address customers' concerns about the relatively high price of Roundup. Customers believed that Monsanto would soon lower Roundup prices and were concerned that their high-priced Roundup inventories would be unprofitable. The price protection programs were intended to persuade customers to purchase more Roundup. By the fourth quarter of fiscal year 2009, Monsanto was well short of its annual gross profit goals for Roundup in the U.S., and many of its retailers held significant volumes of Roundup purchased at uncompetitive price levels.

The 2010 U.S. Loyalty Bonus Program

14. To address the channel inventory problem for retailers while still meeting Monsanto's earnings goals for fiscal year 2009, Monsanto's marketing group began developing a sales incentive program to provide rebates to customers to lower their inventory costs while encouraging them to purchase Roundup in fiscal year 2009.

15. In late May 2009, Monsanto's sales force began telling retailers in the U.S. that, if they "maximized" their Roundup purchases during the fourth quarter of fiscal year 2009, Monsanto would allow them to participate in a loyalty program to be released in the first quarter of fiscal year 2010. The sales force told retailers that this program, officially known as the 2010 U.S. Loyalty Bonus Program ("LBP"), would make their inventories profitable despite anticipated Roundup price cuts. In making these communications to retailers, Monsanto's sales force used talking points on the LBP that Tony Hartke, an accountant working in the Roundup Division, had helped to develop and that Sara Brunnquell, the company's External Reporting Lead at that time, had approved.

16. Telling retailers about the LBP incited them to purchase Roundup in the fourth quarter of fiscal year 2009, despite the fact that generic alternatives were significantly less expensive at the time. Customers purchased approximately 8.7 million Roundup Equivalent

⁶ Monsanto does not sell Roundup directly to growers.

Gallons (“REGs”)⁷ in the fourth quarter, which represented approximately 33% of the Roundup that Monsanto sold in the U.S. in fiscal year 2009.

17. Monsanto did not officially release the written details of the LBP in the U.S. until August 20 and September 10, 2009.⁸ Under the LBP, if retailers achieved a 2010 sales target, they would be entitled to a rebate for each REG of Roundup held in their inventory at the end of fiscal year 2009. The amount of the rebate was equal to the difference between the price retailers paid for Roundup in fiscal year 2009 and the new fiscal year 2010 prices, which Monsanto released in late August and early September 2009. The Roundup prices released at the beginning of fiscal year 2010 were approximately 50% lower than they had been in fiscal year 2009. The program documents for the LBP required retailers to complete certain activities in order to receive payments under the program (hereinafter “the LBP Requirements”). For example, the LBP required retailers to fill their tanks with Roundup in the first quarter of fiscal year 2010 and to make Roundup their lead recommendation to growers.

18. Monsanto prepaid the LBP rebates to retailers in the second quarter of fiscal year 2010, well before they met their volume targets, if retailers had made “substantial progress” toward completing the LBP Requirements. These payments totaled approximately \$194 million. The program included a clawback mechanism by which Monsanto could recover any rebates from retailers that missed their annual volume targets by August 31, 2010. Nevertheless, in May 2010, Monsanto announced that it was waiving the LBP Requirements and would not clawback any unearned payments under the LBP.

19. Monsanto improperly accounted for the LBP under EITF 01-9 (Issue 4) by recognizing the related revenue reductions in fiscal year 2010 and ignoring the fact that the company used the program to incent sales in the fourth quarter of fiscal year 2009.

20. Hartke helped to prepare the program documents and obtain approval for the LBP, and Brunnquell approved the improper accounting methodology for the program. In justifying this accounting treatment, Brunnquell indicated to the company’s outside auditor that the company had not communicated the LBP to customers until August 20, 2009. That statement influenced the auditor’s conclusion that the LBP did not incent more than a de minimis amount of sales during fiscal year 2009, which ended on August 31, 2009.

21. Brunnquell and Hartke knew or should have known that Monsanto’s sales force had used the LBP to incent retailers to purchase material amounts of Roundup in the fourth quarter of fiscal year 2009 and that EITF 01-9 (Issue 4) required Monsanto to record the portion of LBP costs related to those sales in fiscal year 2009.⁹

⁷ The Roundup Equivalent Gallon is a benchmark to compare glyphosate products that have different concentration levels.

⁸ Monsanto released a version of the LBP for a small customer base of its lowest quality of Roundup on August 20, 2009, and then it released another version of the LBP for the bulk of its Roundup products on September 10, 2009. The two different versions of the LBP were virtually identical.

⁹ In the Restatement, Monsanto treated the LBP as a five quarter program starting in the fourth quarter of fiscal year 2009 and, allocating the program costs based on actual and estimated sales, recognized \$24 million in additional rebate costs during fiscal year 2009.

The 2010 Earnback Program

22. In fiscal year 2009, Monsanto offered distributors a rebate on their total purchases of Roundup if they met agreed-upon volume targets. Monsanto offered these rebates pursuant to separate agreements with each distributor called Long Term Agreements (“LTAs”). LTAs generally contained a three-tiered volume target that allowed distributors to earn a progressively larger rebate percentage as their volume of purchases increased. Distributors generally needed the LTA rebates in order to sell Roundup profitably.

23. Throughout fiscal year 2009, Monsanto accrued substantial amounts pursuant to EITF 01-9 (Issue 6) to allocate LTA rebates to the underlying revenue transactions reflecting the distributors’ progress toward earning the LTA rebates. It planned to recognize the rebates as a reduction in Roundup revenue generated in fiscal year 2009 consistent with a systematic and rational allocation required by GAAP.

24. In the last few months of fiscal year 2009, Monsanto reversed approximately \$57.3 million of these accruals because seven customers did not achieve their LTA targets and did not qualify for the LTA rebates. The accrual reversal boosted Monsanto’s reported revenues and gross profit reported on a consolidated and segment basis for fiscal year 2009.

25. Monsanto created the “2010 Earnback Program” to allow the seven distributors to “earn back” their LTA rebates in fiscal year 2010. On paper, the program required these distributors to meet fiscal year 2010 volume targets and to complete a series of activities, such as promoting Roundup to retailers. As with the LBP, Monsanto made prepayments to several of these distributors in the second quarter of fiscal year 2010 (December 2009), which were subject to clawback if the customers failed to meet their volume targets by the end of that fiscal year. As with the LBP, Monsanto later waived the Earnback Program requirements in May 2010, including its right to clawback the prepayments.

26. In fiscal year 2009, Monsanto’s second largest customer, Customer A, had a three-tiered LTA target, with minimum and maximum targets of 5.0 million and 5.7 million REGs. The minimum rebate percentage was 6.5% and the maximum percentage was 10.5%. Customer A was approximately 200,000 REGs short of meeting its minimum LTA target (5.0 million REGs) in August 2009, and it had submitted orders for enough additional REGs to meet the top-tier target (5.7 million REGs) and earn the 10.5% rebate.

27. On August 10, 2009, Jon Nienas¹⁰ offered Customer A the opportunity to be paid an amount calculated with the maximum LTA rebate percentage of 10.5%, if it agreed to purchase less than the minimum target of 5.0 million REGs. As recorded in the contemporaneous notes of the Customer A negotiator, Nienas asked Customer A to “not trigger [the] LTA” and indicated that “4,980[,000 REGs] will pay [the] LTA in full [at] 10.5%” with “[p]ayment by end of calendar year.” He asked Customer A to hold its pending orders for Roundup to “appear as if [it] didn’t make” its minimum LTA volume target for fiscal year 2009. He told Customer A that the 10.5% rebate payment would be tied to “activities” but that it should

¹⁰ At the time, Nienas was transitioning into the role of U.S. Strategic Account Lead in the Roundup Division.

easily achieve them.

28. Customer A accepted Monsanto's offer and earned the top-tier LTA rebate of 10.5%, for a total payment of \$20.2 million, while missing its minimum LTA target by less than 100,000 REGs. This rebate was paid under the Earnback Program.

29. Monsanto prepaid the Earnback payment to Customer A in the second quarter of fiscal year 2010. At the time of payment, Nienas sent a confirmation letter to Customer A stating that it had earned the payment (even though it had not met any fiscal year 2010 volume targets under the Earnback Program). The purpose of the confirmation letter was to enable Customer A to record the payment in its fiscal year 2009. Nienas knew that as of the date of the confirmation letter Customer A had not yet met any fiscal year 2010 volume targets under the Earnback Program.

30. Similarly, at the end of fiscal year 2009, Monsanto's largest Roundup customer, Customer B, was approximately 621,000 REGs from its minimum LTA target and about 2.5 million REGs from its maximum target. To achieve its maximum LTA rebate, Customer B requested, and Monsanto initially agreed, to a "bill and hold" transaction,¹¹ because Customer B lacked the capacity to store the volume of Roundup needed to qualify for the maximum LTA rebate. During the last week of the fiscal year, Nienas informed Customer B that the transaction would not be necessary. Nienas said that Monsanto would pay Customer B its LTA rebate using the maximum percentage rate of 9.1% (resulting in a rebate of \$24.3 million).

31. Customer B asked for a written confirmation of Monsanto's commitment to pay the maximum LTA rebate. Upon learning of the request, Nienas told Hartke that Monsanto had agreed to pay Customer B at its maximum LTA rebate rate. Hartke informed Nienas that the confirmation was not in accordance with the company's delegation of authority policy, but did not take further action to ensure that the payment was properly recorded.

32. On October 7, 2009, Customer B provided a draft confirmation letter to Nienas. Nienas executed the letter the following day promising that Monsanto would pay Customer B the maximum LTA rebate rate on fiscal year 2009 purchases of Roundup. The rebate totaled \$24.3 million, and Monsanto later paid it in December 2009 under the Earnback Program.

33. Monsanto relied upon the failures of Customers A and B to meet their minimum LTA volume targets as the basis for reversing LTA accruals in the fourth quarter of fiscal year 2009. Hartke participated in recording the reversal of these accruals. The oral and written side agreements to pay Customers A and B their 2009 LTA rebates created rebate obligations for Monsanto in fiscal year 2009 and contradicted the basis for reversing the accruals, which Nienas and Hartke should have known. Monsanto improperly increased its fiscal year 2009 revenues and gross profits by approximately \$44.5 million when it deferred recording these liabilities until

¹¹ In a "bill and hold" transaction, the vendor agrees to a customer request to store products that the customer has purchased. The customer receives the risks and rewards of owning the products, despite the fact that they remain with the vendor for a certain period of time.

fiscal year 2010.¹²

The 2011 Earnback Program

34. The next year, Monsanto offered a second iteration of the Earnback Program for fiscal year 2011 to Customer B and its third-largest Roundup distributor, Customer C. Both companies missed their 2010 LTA targets, but received their maximum LTA rebates in the form of Earnback payments in fiscal year 2011 (December 2010). Monsanto reversed fiscal year 2010 LTA accruals for these customers, which increased its reported revenues and gross profits on a consolidated and segment basis for the fourth quarter of fiscal year 2010.

35. As with the 2010 Earnback Program, Monsanto prepaid the 2011 Earnback rebates to Customers B and C more than eight months before the program was scheduled to end. Although the 2011 Earnback program obligated the distributors to perform certain activities and to purchase Roundup in the future, Nienas provided confirmations to Customers B and C, at the time of prepayment, stating that they had met all program requirements necessary to earn the payments. Nienas knew that the customers had not met the requirements of the 2011 Earnback Program in December 2010 when he signed the confirmations. The 2011 Earnback payments to Customers B and C totaled approximately \$48 million.

36. The manner in which Monsanto administered the previous Earnback Program in 2010 – by using side agreements with the customers and subsequently waiving the clawback provisions – demonstrated that Monsanto also lacked the intent to enforce the terms of the 2011 Earnback Program. By the end of fiscal year 2010, competitive pressures in the Roundup business also made it highly unlikely that Monsanto would deny LTA payments to large distributors that relied upon the LTA payments to sell Roundup profitably (as they would likely shift their glyphosate purchases to generic manufacturers if Monsanto actually withheld their LTA payments). In these circumstances, all \$48 million of the rebate costs for the “2011” Earnback Program should have been recorded in fiscal year 2010, as Monsanto lacked an appropriate basis under ASC 605-50 to recognize any of these costs to fiscal year 2011.¹³

The 2010 Loyalty Bonus Program in Canada

37. Low-priced generic glyphosate had the same effect in Canada in early 2009 as it had in the U.S., and Monsanto responded similarly by announcing a price protection program in April 2009 without actually lowering prices. The program was called the Price Risk Protection Program (“PRPP”), and it covered Roundup purchased in Canada through the end of calendar year 2009 (spanning fiscal years 2009 and part of 2010) that remained in a customer’s inventory at the time of any price decrease that year.

38. When Monsanto lowered U.S. prices in September 2009, it did not immediately follow suit in Canada because the PRPP would have triggered significant payment obligations

¹² In the Restatement, Monsanto recognized the costs of the 2010 Earnback Program over fiscal years 2009 and 2010, based upon actual and projected sales volume. Monsanto recorded approximately \$20 million in Earnback rebates in fiscal year 2009 and approximately \$41 million in fiscal year 2010.

¹³ In its Restatement, Monsanto recorded the \$48 million as a reduction of revenue in fiscal year 2010.

that year. Under EITF 01-9 and ASC 605-50-25-1, Monsanto would have been required to accrue for payment obligations under the PRPP if it expected to lower prices in 2009. Monsanto represented to its auditor that it did not intend to lower Roundup prices in Canada during calendar year 2009 (the term of the PRPP). Before the end of fiscal year 2009, Monsanto began planning to cancel the PRPP so it could lower Canadian prices without triggering the accrual obligation. Monsanto, however, could not cancel the PRPP unilaterally – it needed customers to surrender their rights under the program as they had relied on the PRPP in purchasing Roundup during fiscal year 2009. Monsanto thus offered them an inducement to cancel the PRPP. Specifically, Monsanto’s sales and marketing employees promised customers that, if they signed cancellation forms, it would pay them amounts equivalent to the amounts payable under the PRPP through a sales incentive program similar to the U.S. LBP (hereinafter “the LBP Canada”). Customers responsible for purchasing approximately 89% of the Roundup that Monsanto sold in Canada agreed to the program switch and executed written cancellation forms in late September 2009.

39. Shortly thereafter, Monsanto’s External Reporting Lead, Sara Brunnquell, asked the company’s auditor what the effect of cancelling the PRPP would be, without disclosing that certain customers had already signed the cancellation forms. The lead client service partner for the audit firm told Brunnquell that there could be accounting consequences in fiscal year 2009, because presumably Monsanto would have to pay customers consideration for their agreement to cancel the PRPP. After this discussion with the company’s auditor, she decided to treat the cancellations as being ineffective for accounting purposes. Brunnquell later made written representations to the auditor that the PRPP was still in effect several weeks after certain customers had signed the cancellation forms.

40. Monsanto rolled out the LBP Canada to customers in late September 2009 and began paying rebates under the program in January 2010. Monsanto calculated these rebates by multiplying the number of gallons in each customer’s ending inventory as of September 9, 2009 by the difference between the prices customers originally paid for Roundup and the new prices that Monsanto expected to release in January 2010.

41. Monsanto improperly recorded approximately \$43 million in rebates under the LBP Canada as a reduction of revenue in fiscal year 2010. Brunnquell approved this accounting treatment, even though she knew or should have known that customers had signed the PRPP cancellations and that Monsanto had offered the LBP Canada to induce them to do so. She should have known that EITF 01-9 and ASC 605-50-25 required Monsanto to record the rebate obligations under the LBP Canada as a reduction in revenue during fiscal year 2009.¹⁴

The 2010 SG&A Program in Canada

42. When Monsanto eventually lowered Roundup prices in Canada in January 2010, it had to lower them further than it had originally planned when it released the LBP Canada. The reason was that the price of competitors’ glyphosate had fallen further than Monsanto had expected. But lowering Roundup prices by an additional increment meant that the fixed rebates under the LBP Canada were insufficient to make the Roundup volumes held by customers

¹⁴ Monsanto did not address the LBP Canada in its Restatement.

competitive. To bridge this unexpected gap, Monsanto offered and paid a second round of rebates to Canadian customers through a program it called the “LBP2.”

43. In early March 2010, executives at Monsanto approved the LBP2, which was budgeted to rebate customers approximately \$18 million. Monsanto planned to account for the LBP2 as a reduction in revenue which would have decreased its net sales and gross profits in Canada. Monsanto began paying the LBP2 rebates to customers by issuing them credits on account or, in some cases, checks.

44. In April 2010, Monsanto’s executives, with assistance from Brunnquell, decided to convert the LBP2 from a rebate program to a program where the payments would be recorded as SG&A expenses. Certain expenses related to SG&A programs, in which a vendor pays its customers to perform marketing services on its behalf, are not recorded as reductions of revenue and therefore do not affect gross profit.

45. Monsanto’s employees in Canada created program documents that detailed certain marketing services that customers were supposed to perform for Monsanto. They internally set the value of the services at approximately \$18 million, with a pre-determined amount for each customer that exactly equaled the rebates that the approved LBP2 had already paid them.

46. Monsanto obtained a fair value estimate of the services from an independent marketing company, and it showed the services were worth approximately \$6 million. Monsanto did not use the estimate and instead its employees created an internal cost estimate to set the amount at approximately \$18 million. There is no evidence that the internal cost estimate accurately reflected the fair value of the services.

47. To obtain payments under the SG&A program, customers had to certify that they performed the marketing services described in the program documents. Customers signed the certifications, but there is no other evidence that they performed these marketing services for Monsanto.

48. To account for the SG&A payments, Monsanto reversed the LBP2 rebate credits on customer accounts and then re-posted these same amounts to the customer accounts as SG&A payments consistent with the amounts in the unsupported internal cost estimate.

49. In the end, the SG&A program in Canada cost approximately \$14 million, and not \$18 million, because one customer refused to sign the program certification.¹⁵ Monsanto improperly accounted for these program costs as SG&A expenses in fiscal year 2010. Brunnquell approved the accounting treatment, even though she should have known that the payments were rebates and that Monsanto did not receive an identifiable benefit from the customers under ASC 605-50-45-2. Monsanto was required to record these rebate payments as a

¹⁵ At the time, Monsanto nevertheless paid the rebate to the customer and recorded the payment as a reduction of revenue in fiscal year 2010.

reduction of revenue in fiscal year 2010.¹⁶

The 2010 SG&A Programs in France and Germany

50. In France and Germany, Monsanto's customers had large inventories of Roundup bought at the high fiscal year 2009 prices that they could not profitably sell in fiscal year 2010. Without some form of rebate, these customers were unlikely to purchase more Roundup.

51. Monsanto decided to make payments to customers in France and Germany through an SG&A program.¹⁷ Monsanto's employees drafted a program in which customers received \$5 for each liter of Roundup that they sold from inventory. The program's budget was \$24 million for France and \$8.5 million for Germany. Customers were supposed to treat 25% of the payments as compensation for providing marketing services to Monsanto. Monsanto expected customers to use the other 75% of the money for "price supports," which were essentially rebates.

52. Monsanto offered the same SG&A program in Germany in fiscal year 2011 (approximately \$10 million).

53. There is no evidence that customers performed any marketing services on Monsanto's behalf.

54. Monsanto improperly accounted for the payments in France and Germany as SG&A expenses. Monsanto knew or should have known that it did not receive an identifiable benefit from the customers under ASC 605-50-45-2. Therefore, it was required to record these rebate costs as a reduction of revenue in the fiscal years in which the payments were made (i.e., 2010 and 2011).¹⁸

Monsanto Offered Securities During the Relevant Time Period

55. Monsanto offered securities in fiscal years 2009, 2010, and 2011 pursuant to a Form S-8 that it originally filed on January 21, 2005. The Form S-8 incorporated by reference all subsequent periodic filings under the Exchange Act for securities sold under this registration statement. Thus, it incorporated Monsanto's Forms 10-K for fiscal years 2009 and 2010 and its Forms 10-Q for fiscal year 2011.

56. Monsanto also filed a Form S-3ASR (automatic shelf registration) on October 31, 2008, which incorporated by reference subsequent periodic filings under the Exchange Act. When Monsanto filed a Form 424B2 prospectus supplement on April 13, 2011, it incorporated by reference the company's Form 10-K for fiscal year 2010.

¹⁶ In its Restatement, Monsanto recorded the payments under this program as a reduction of revenue in fiscal year 2010 and not as SG&A.

¹⁷ Monsanto could not use a rebate program like the U.S. LBP because of concerns that it might violate antitrust laws in the European Union.

¹⁸ Monsanto's Restatement did not address the programs in France or Germany.

VIOLATIONS

57. Securities Act Section 17(a)(2) prohibits any person from obtaining money or property in the offer or sale of securities by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

58. Securities Act Section 17(a)(3) prohibits any person from engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser in the offer or sale of securities.

59. Exchange Act Section 13(a) and Rules 13a-1, 13a-11, and 13a-13 thereunder require that every issuer of a security registered pursuant to Exchange Act Section 12 file with the Commission, among other things, annual, quarterly, and current reports as the Commission may require.

60. Rule 12b-20 under the Exchange Act requires that, in addition to the information expressly required to be included in a statement or report filed with the Commission, there shall be added such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading.

61. Exchange Act Section 13(b)(2)(A) requires reporting companies to make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect transactions and dispositions of their assets.

62. Exchange Act Section 13(b)(2)(B) requires all reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with GAAP.

63. Exchange Act Section 13(b)(5) prohibits any person from knowingly circumventing or knowingly failing to implement a system of internal accounting controls or knowingly falsifying any book, record, or account described in Section 13(b)(2).

64. Rule 13b2-1 under the Exchange Act prohibits any person from, directly or indirectly, falsifying or causing to be falsified, any book, record, or account subject to Exchange Act Section 13(b)(2)(A).

65. As a result of the conduct described above, Monsanto violated Securities Act Sections 17(a)(2) and 17(a)(3) and Exchange Act Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder.

66. As a result of the conduct described above, Nienas caused Monsanto to violate Securities Act Sections 17(a)(2) and 17(a)(3), Exchange Act Sections 13(a) and 13(b)(2)(A), and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder. Nienas also directly violated Exchange Act Section 13(b)(5) and Rule 13b2-1.

67. As a result of the conduct described above, Brunnquell caused Monsanto to

violate Securities Act Sections 17(a)(2) and 17(a)(3), Exchange Act Sections 13(a) and 13(b)(2)(A), and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder. Brunnquell also willfully¹⁹ violated Rule 13b2-1.

68. As a result of the conduct described above, Hartke caused Monsanto to violate Securities Act Sections 17(a)(2) and 17(a)(3), Exchange Act Sections 13(a) and 13(b)(2)(A), and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder. Hartke also willfully²⁰ violated Rule 13b2-1.

MONSANTO'S REMEDIAL EFFORTS

In determining to accept Monsanto's Offer, the Commission considered remedial acts undertaken by Monsanto and cooperation afforded the Commission staff in connection with its investigation.

IV.

Respondent Monsanto has undertaken to:

- A. Retain, at Monsanto's expense within 30 days of issuance of this Order, a qualified independent ethics and compliance consultant (the "Consultant") with extensive experience in developing, implementing and overseeing organizational compliance and ethics programs, not unacceptable to the staff, to conduct an ethics and compliance program assessment of Monsanto's Crop Protection business focused on the components of the program delineated in (1)-(2) below. The Consultant shall also have expertise in, or retain someone with expertise in, internal accounting controls and public company financial reporting as well as vendor rebate and market funding programs. Taking into account the Company's remedial actions to date, Monsanto shall cause the Consultant to analyze whether the components of Monsanto's ethics and compliance program for its Crop Protection business as they relate to the areas described in (1)-(2) below have been implemented successfully and are having the desired effects. The Consultant will determine whether the culture is supportive of ethical and compliant conduct, including strong, explicit, and visible support and commitment by the Board and senior management. In discharging this undertaking, the Consultant shall:
 - 1. evaluate and assess the effectiveness of the internal accounting controls and financial reporting policies and procedures with respect to Monsanto's rebate and market funding programs for its Crop Protection business, including but not limited to:

¹⁹ This use of the word "willfully" does not reflect a finding that Respondent acted with the intent to violate the law or knowledge that she was doing so. A willful violation of the securities laws means "'that the person charged with the duty knows what he is doing.'" *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "'also be aware that he is violating one of the Rules or Acts.'" *Id.* (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

²⁰ See fn. 19, *supra*.

- a. whether Monsanto's internal accounting controls with respect to Monsanto's rebate and market funding programs for its Crop Protection business are sufficient to provide reasonable assurances that the company is maintaining fair and accurate books, records and accounts, with particular emphasis on whether they are designed to address the integrity of its revenue accounting and ensure consistent accuracy and integrity given the global nature of Monsanto's business; and
 - b. whether Monsanto has specific accounting and financial reporting controls and procedures sufficient to ensure that all rebate and/or market funding programs for its Crop Protection business comply with applicable accounting rules and policies.
 2. evaluate whether there are proper resources, oversight and independence of the compliance and ethics function for the Crop Protection business, including seniority of corporate executives responsible for implementation and oversight, reporting lines, autonomy and independence, compensation and rewards, consistent discipline, resources, and access to information and personnel. The review shall consider the sufficiency of training and guidance overall as well as specifically related to anti-retaliation and whistleblowing policies.
- B. Provide the Consultant with complete access and resources to review key documents (e.g., business principles, Code of Conduct, policies and procedures, risk assessments, performance evaluation forms, relevant internal training materials and internal communications). In reviewing the creation, administration and implementation of the compliance and ethics program as it relates to the areas addressed in paragraph A, the Consultant shall conduct an assessment survey and interview relevant personnel. The assessment need not be a comprehensive review of all business lines, activities and markets, but may use a risk-based approach. The Consultant shall consider, however, the breakdown of internal controls in multiple markets in which the Crop Protection business operated during the relevant time period of this action;
 - C. Provide a report to Commission staff and Monsanto's General Counsel and Chief Ethics and Compliance Officer, as described below, regarding the Consultant's findings and recommendations;
 - D. Provide a copy of the engagement letter detailing the Consultant's responsibilities to Brian O. Quinn, Assistant Director, Division of Enforcement, U.S. Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549;
 - E. Cooperate fully with the Consultant, including providing the Consultant with access to its files, books, records and personnel as reasonably requested for the above-described review except to the extent such files, books, or records are protected from disclosure by any applicable protection or privilege such as the attorney-client privilege or the attorney work product doctrine. To the extent that the Consultant believes that documents are being withheld unreasonably, Monsanto shall work cooperatively with the Consultant to resolve the matter, and if they are unable to reach agreement, the Consultant shall

promptly notify Commission staff. To ensure the independence of the Consultant, Monsanto shall not have the authority to terminate the Consultant without prior written approval of Commission staff and shall compensate the Consultant and persons engaged to assist the Consultant for services rendered pursuant to this Order at their reasonable and customary rates;

- F. Require the Consultant to report to Commission staff on his/her activities as the staff shall request;
- G. Permit the Consultant to engage such assistance, clerical, legal or expert, as necessary and at reasonable cost, to carry out his/her activities, and the cost, if any, of such assistance shall be borne exclusively by Monsanto;
- H. Require, within 120 days of the issuance of this Order (unless otherwise extended by Commission staff for good cause), the Consultant to complete the review and report to Commission staff and Monsanto's General Counsel and Chief Ethics and Compliance Officer concerning:
 - 1. the scope and methodologies used by the Consultant in order to complete the review;
 - 2. Monsanto's compliance with the review;
 - 3. the adequacy of Monsanto's existing policies, practices and procedures regarding the matters assessed; and
 - 4. the Consultant's recommendations, if necessary, regarding modification or supplementation of Monsanto's policies, practices and procedures related to the matters assessed (the "Recommendations").
- I. Adopt and implement, within 120 days of Monsanto's receipt of the Recommendations, all of the Recommendations; provided, however, that as to any Recommendation that Monsanto considers to be, in whole or in part, unduly burdensome or impractical, Monsanto may submit in writing to the Consultant and Commission staff (at the address set forth above), within 60 days of receiving the Recommendations, an alternative policy, practice or procedure designed to achieve the same objective or purpose. Monsanto and the Consultant shall then attempt in good faith to reach an agreement relating to each Recommendation that Monsanto considers to be unduly burdensome or impractical and the Consultant shall reasonably evaluate any alternative policy, practice or procedure proposed by Monsanto. Such discussion and evaluation shall conclude within 90 days after Monsanto's receipt of the Recommendations, whether or not Monsanto and the Consultant have reached an agreement. Within 14 days after the conclusion of the discussion and evaluation by Monsanto and the Consultant, Monsanto shall require that the Consultant inform Monsanto and Commission staff (at the address set forth above) of his/her final determination concerning any Recommendation that Monsanto considers to be unduly burdensome or impractical. Monsanto shall abide by the determinations of the Consultant and, within 60 days after final agreement between Monsanto and the

Consultant or final determination by the Consultant, whichever occurs first, Monsanto shall adopt and implement all of the Recommendations that the Consultant deems appropriate;

- J. Require the Consultant to enter into an agreement that provides that, for the period of engagement and for a period of two years from completion of the engagement, the Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with Monsanto or any of its present or former affiliates, directors, officers, employees or agents acting in their capacity as such. The agreement will also provide that the Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Consultant in the performance of his/her duties under this Order shall not, without the prior written consent of Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with Monsanto, or any of its present or former affiliates, directors, officers, employees or agents acting in their capacity as such, for the period of the engagement and for a period of two years after the engagement;
- K. Certify, in writing, compliance with the undertakings set forth above, including implementation of all Recommendations. The certification shall identify the undertakings, provide written evidence of compliance in the form of a narrative, and be supported by exhibits sufficient to demonstrate compliance. The Commission staff may make reasonable requests for further evidence of compliance, and Respondent agrees to provide such evidence. The certification and supporting material shall be submitted to Brian O. Quinn, with a copy to the Office of Chief Counsel of the Enforcement Division, no later than sixty (60) days from the date of the completion of the undertakings.

Monsanto may apply to Commission staff for an extension of the deadlines described above before their expiration, and upon a showing of good cause by Monsanto, Commission staff may, in its sole discretion, grant such extensions for whatever time period it deems appropriate.

V.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Section 8A of the Securities Act, Section 21C of the Exchange Act, and Rule 102(e)(1)(iii) of the Commission's Rules of Practice, it is hereby ORDERED, effective immediately, that:

- A. Respondent Monsanto cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act, Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act, and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder;
- B. Respondent Brunnquell cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the

Securities Act, Sections 13(a) and 13(b)(2)(A) of the Exchange Act, and Rules 12b-20, 13a-1, 13a-11, 13a-13, and 13b2-1 thereunder; and

- C. Brunnquell is denied the privilege of appearing or practicing before the Commission as an accountant.
- D. After two years from the date of this Order, Brunnquell may request that the Commission consider her reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:
 - 1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Brunnquell's work in her practice before the Commission will be reviewed either by the independent audit committee of the public company for which she works or in some other acceptable manner, as long as she practices before the Commission in this capacity; and/or
 - 2. an independent accountant. Such an application must satisfy the Commission that:
 - a. Brunnquell, or the public accounting firm with which she is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;
 - b. Brunnquell, or the registered public accounting firm with which she is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the respondent's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;
 - c. Brunnquell has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and
 - d. Brunnquell acknowledges her responsibility, as long as she appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board, including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.
- E. The Commission will consider an application by Brunnquell to resume appearing or practicing before the Commission provided that her state CPA license is current and she has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement

by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Brunnquell's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.

- F. Respondent Hartke cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act, Sections 13(a) and 13(b)(2)(A) of the Exchange Act, and Rules 12b-20, 13a-1, 13a-11, 13a-13, and 13b2-1 thereunder; and
- G. Hartke is denied the privilege of appearing or practicing before the Commission as an accountant.
- H. After one year from the date of this Order, Hartke may request that the Commission consider his reinstatement by submitting an application (attention: Office of the Chief Accountant) to resume appearing or practicing before the Commission as:
 - 1. a preparer or reviewer, or a person responsible for the preparation or review, of any public company's financial statements that are filed with the Commission. Such an application must satisfy the Commission that Hartke's work in his practice before the Commission will be reviewed either by the independent audit committee of the public company for which he works or in some other acceptable manner, as long as he practices before the Commission in this capacity; and/or
 - 2. an independent accountant. Such an application must satisfy the Commission that:
 - a. Hartke, or the public accounting firm with which he is associated, is registered with the Public Company Accounting Oversight Board ("Board") in accordance with the Sarbanes-Oxley Act of 2002, and such registration continues to be effective;
 - b. Hartke, or the registered public accounting firm with which he is associated, has been inspected by the Board and that inspection did not identify any criticisms of or potential defects in the respondent's or the firm's quality control system that would indicate that the respondent will not receive appropriate supervision;
 - c. Hartke has resolved all disciplinary issues with the Board, and has complied with all terms and conditions of any sanctions imposed by the Board (other than reinstatement by the Commission); and
 - d. Hartke acknowledges his responsibility, as long as he appears or practices before the Commission as an independent accountant, to comply with all requirements of the Commission and the Board,

including, but not limited to, all requirements relating to registration, inspections, concurring partner reviews and quality control standards.

- I. The Commission will consider an application by Hartke to resume appearing or practicing before the Commission provided that his state CPA license is current and he has resolved all other disciplinary issues with the applicable state boards of accountancy. However, if state licensure is dependent on reinstatement by the Commission, the Commission will consider an application on its other merits. The Commission's review may include consideration of, in addition to the matters referenced above, any other matters relating to Hartke's character, integrity, professional conduct, or qualifications to appear or practice before the Commission.
- J. Respondent Nienas cease and desist from committing or causing any violations and any future violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act, Sections 13(a), 13(b)(2)(A), and 13(b)(5) of the Exchange Act, and Rules 12b-20, 13a-1, 13a-11, 13a-13, and 13b2-1 thereunder.
- K. Within 7 days of the entry of this Order, Monsanto shall pay a civil money penalty of \$80,000,000; Brunnquell shall pay a civil money penalty of \$55,000; Hartke shall pay a civil money penalty of \$30,000; Nienas shall pay a civil money penalty of \$50,000, to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.
- L. Payments must be made in one of the following ways:
 - (1) Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
 - (2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
 - (3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169
- M. Payments by check or money order must be accompanied by a cover letter

identifying the Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Brian O. Quinn, Assistant Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

- N. Respondent Monsanto shall comply with the undertakings enumerated above in Section IV.
- O. It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondents Brunnquell, Hartke and Nienas, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by these Respondents under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by these Respondents of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary