IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

UNITED STATES OF AMERICA	
v.	NO. 7:22-CR-00049-DC
(1) AGHORN OPERATING, INC., et al.	

NOTICE OF INTENT TO OFFER INTRINSIC EVIDENCE AND EVIDENCE PURSUANT TO FEDERAL RULE OF EVIDENCE 404(b)

I. INTRODUCTION

The tragic deaths that occurred in this case did not happen in a vacuum, but instead were years in the making and the result of a widespread and pervasive pattern of disregarding worker safety and the environment. Given the chronic and varied nature of this conduct, which arose out of a deeply ingrained corporate culture of ignoring the law and a callous disregard for employee safety, it was not a matter of if, but when, someone would get killed.

What happened to Jacob and Natalee Dean was no accident or mistake but rather the direct result of conscious decisions to operate in violation of safety and environmental laws. Aghorn Operating, Inc. had a documented and notorious record stretching back decades.

Evidence proving the charged crimes will be intrinsic (or "inextricably intertwined") with the charges and therefore independently admissible without resort to Fed. R. Evid. (Rule) 404(b). Alternatively, evidence will also be admissible as other evidence of crimes, wrongs or acts under that rule.

In accordance with Rule 404(b)(3), the United States hereby provides notice of its intent to offer evidence that may be construed as other crimes, wrongs, or acts of the Defendants under

Rule 404(b)(2). While the notice is provided broadly out of an abundance of caution, it does not change the character of any evidence that is intrinsic to the alleged conduct and therefore not covered by 404(b), but instead governed by Rules 401 and 402.

II. BACKGROUND

The first two counts in the Indictment allege over two years of crimes relating to the release of hydrogen sulfide (H2S), an acute toxic substance that is the leading cause of sudden death in the workplace. (Indictment, Doc. 1 at 8-9). Three counts allege willful violations of Occupational, Safety, and Health Administration (OSHA) laws that caused the death of employee Jacob Dean on October 26, 2019. (Id. at 10-11). Two counts allege obstruction of the OSHA investigation into that fatality in 2019 and 2020. (Id. at 11-13). The final two counts charge over two-years' of crimes relating to failure to conduct required tests to assess whether wells were leaking, and false statements regarding whether those tests were performed. (Id. at 13-14).

Evidence relevant to the charged crimes dates back almost twenty-years. For example, to show that defendant Aghorn was aware of the high amount of H2S as well as its deadly nature, the Indictment refers to a 2003 contingency plan which described the company's:

> approximately 1200 wells 'with various concentrations of hydrogen sulfide' located in residential and publicly accessible areas such as public roadways. The company attached a Data Sheet to the plan describing H2S as '[e]xtremely hazardous' and capable of causing 'immediate death' at very high concentrations.

(Id. at 6). The Indictment also alleges that, on January 10, 2012, five years before the charged time period, "Aghorn wrote to the RRC that the hydrogen sulfide concentration of its produced water was 96,000 ppm." (Id.).

The Grand Jury found that all the charges in the Indictment were related and part of a

common scheme. (Id. at 8). Specifically:

> The Grand Jury charges in this Indictment various types of conduct to include charges relating to the control of H2S and failure to conduct well pressure tests. The charges in this Indictment constitute a common plan or scheme by the Defendants to enrich themselves by maximizing the production of oil at Aghorn while minimizing costs, without concern for environmental pollution and worker safety risks, and to ensure that this activity was not discovered by regulators.

(Id.).

The charges here include years of crimes before the fatalities as well as obstructing an investigation into the cause of that tragedy. In addition to worker safety crimes, the defendants allegedly disregarded environmental laws designed to ensure that oil does not leak into drinking water, and then lied to cover up these crimes. The widespread, longstanding, and varied nature of these related charges is the starting point in this analysis.

III. LAW

A. Intrinsic Evidence

Where evidence is "inextricably intertwined" with the charged offense, it is not "extrinsic," and thus not subject to the evidentiary bar in Rule 404(b)(1). United States v. Crawley, 533 F.3d 349, 353-54 (5th Cir. 2008); United States v. Stovall, 825 F.2d 817, 825 (5th Cir. 1987); United States v. Torres, 685 F.2d 921, 924 (5th Cir. 1982) ("An act is not extrinsic, and Rule 404(b) is not implicated, where the evidence of that act and the evidence of the crime charged are inextricably intertwined."). Intrinsic evidence is not rendered inadmissible simply "because the defendant is indicted for less than all of his actions." United States v. Aleman, 592 F.2d 881, 885 (5th Cir. 1979) (evidence of a cocaine transaction admissible even though defendant was on trial for dealing heroin).

"'Other acts' evidence is intrinsic when it is inextricably intertwined with the charged offense, when both acts are part of the same criminal episode, or when the 'other act' was a necessary preliminary step toward the completion of the charged crime." Crawley, 533 F.3d at 354. Intrinsic evidence is generally admissible "so that the jury may evaluate all the circumstances under which the defendant acted." United States v. Sumlin, 489 F.3d 683, 689 (5th Cir. 2007), quoting United States v. Royal, 972 F.2d 643, 647 (5th Cir. 1992); United States v. Navarro, 169 F.3d 228, 233 (5th Cir. 1999); United States v. Smith, 930 F.2d 1081, 1087 (5th Cir. 1991).

Evidence of failure to follow safety procedures prior to a charged incident is relevant to show that the charged incident "was the result of a general failure to implement the safety practices." United States v. E.I. Du Pont De Nemours and Co., Case No. H-21-16, -- F.Supp.3d --, 2022 WL 3566843 at *11 (S.D. Texas, August 18, 2022). Similarly, historical chronological events relevant to the charged conduct is intrinsic and admissible. See United States v. Senffner, 280 F.3d 755, 764 (7th Cir. 2002) ("chronological unfolding of events that led to an indictment, or other circumstances surrounding the crime" are inextricably intertwined and not "other acts"). This includes evidence of interactions with a regulatory agency prior to the time charged in an indictment. See United States v. Cooper, 482 F.3d 658, 662-63 (4th Cir. 2007) (violations occurring over a five year period prior to the charged conduct was intrinsic and admissible).

As stated in the Advisory Committee's Notes to Fed. R. Evid. 401, "evidence which is essentially background in nature . . . is universally offered and admitted as an aid to understanding." Such evidence is intrinsic if "evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or . . . the other acts were 'necessary preliminaries' to the crimes charged." United States v. Williams, 900 F.2d 823, 825 (5th Cir. 1990); United

States v. Powers, 168 F.3d 741, 749 (5th Cir. 1999).

B. Extrinsic 404(b) Evidence

1. In General

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." United States v. Shaw, 701 F.2d 367, 386 (5th Cir. 1983), abrogated on other grounds by Greer v. Miller, 483 U.S. 756, 763 (1987). Evidence of another crime, wrong, or act may be admissible for "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2).

Extrinsic, or "other act" evidence, is admissible if it is "relevant to an issue other than the defendant's character," and if it "possess[es] probative value that is not substantially outweighed by its undue prejudice" and meets the other requirements of Rule 403. United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978). As reflected in the language of the rule, extrinsic evidence is not limited to prior crimes, but extends to non-criminal acts or wrongs. Fed. R. Evid. 404(b)(2); United States v. Rubio-Gonzalez, 674 F.2d 1067, 1075 (5th Cir. 1982); United States v. Harris, 2017 WL 2118284 at *3 (E.D. Texas, May 12, 2017).

For example, evidence of prior drug activities is commonly used to prove knowledge and intent. United States v. Kinchen, 729 F.3d 466, 474 (5th Cir. 2013). In this context, "proof of prior drug activities is more probative than prejudicial in proving Rule 404(b) exceptions such as knowledge or intent." Id. (internal quotation marks omitted), citing United States v. Thomas, 348 F.3d 78, 86 (5th Cir. 2003), and United States v. Harris, 932 F.2d 1529, 1534 (5th Cir. 1991).

2. Evidence of Other Violations and Regulatory Compliance History

The Fifth Circuit has squarely held that it is permissible to admit uncharged violations to

show intent and lack of mistake. United States v. Pruett, 681 F.3d 232, 244-45 (5th Cir. 2012). In Pruett, evidence of a "large amount of uncharged conduct" was admitted in a case involving illegal wastewater discharges, including "permit violations at other (unindicted) plants operated by Appellants." (Id. at 244 and n.8). This extensive evidence of uncharged violations included "two witnesses [who] testified exclusively as to uncharged conduct and five others [who] testified as to both charged and uncharged conduct." (Id. at n.8). The evidence was relevant to intent and to allow the government to refute a defense that the charged conduct consisted of "isolated and accidental incidents." (Id. at 244); see also United States v. Cordell, 912 F.2d 769, 775 (5th Cir. 1990) (past civil violations of lending limits admissible in bank fraud prosecution to show motive and intent); United States v. Parsons, 83 Fed. Appx. 656, 658 (5th Cir. 2003) (evidence of past regulatory violations relevant to intent in fraud case). The court further found that an environmental violation involving raw sewage "is not particularly emotionally charged or incendiary" and therefore did not cause unfair prejudice. Pruett, 681 F.3d at 245 (contrasting evidence of "highly prejudicial" "violent crimes"); see also United States v. Scott, 668 Fed. Appx. 609, 610 (5th Cir. 2016) (admission of uncharged tax returns "were not the type of evidence that plays on the jury's emotions").

The Fifth Circuit rule allowing evidence of other violations and regulatory compliance history is in accord with other circuits. Cooper, 482 F.3d at 663 (allowing years of uncharged prior violations to prove the "absence of mistake or accident"). A survey of these cases shows that poor safety track records are often admitted as either intrinsic to the crime or permissible 404(b) evidence.

In a water pollution criminal case, the Fourth Circuit allowed evidence of "undated instances of dumping" as probative of the defendant's knowledge and intent. United States v.

Michael Blankenship, 789 Fed. Appx. 362, 365 (4th Cir. 2019) ("evidence that Blankenship had dumped sewage on other occasions was probative of his knowledge and intent to dump sewage and that it was not an accident"). The Tenth Circuit reached the same result and affirmed the admission of "past encounters" with the regulatory agency and regulations in another water pollution criminal case. United States v. Hubenka, 438 F.3d 1026, 1036 (10th Cir. 2006).

In a worker safety prosecution, the Eighth Circuit affirmed the admission of other acts that violated worker safety regulations, occurring one year after and seven years before the employee's death, as relevant to knowledge and intent. United States v. DNRB, 895 F.3d 1063, 1068 (8th Cir. 2018). The acts occurred both at the site of the fatality as well as other company sites, and the court found they "corroborated other evidence concerning DNRB's intent," rejecting the defendant's contention that the evidence was "irrelevant" and "prejudicial." Id.

The District Court in the Southern District of West Virginia acted well within its discretion when it admitted evidence of uncharged violations in an analogous worker safety case involving the death of 29 coal miners. United States v. Donald Blankenship, Case No. 5:14-cr-00244 at Doc. 552 (S.D.W.V., Dec. 9, 2015), conviction aff'd, 846 F.3d 663 (4th Cir. 2017).[1] There, the defendant sought to exclude evidence from outside the indictment period, including correspondence authored by the defendant, violations at other facilities, and citations issued by federal mine safety inspectors. (Id. at Docs. 305, 307-09, 311). The United States opposed this effort in an exhaustive brief accurately pointing out that the evidence was both intrinsic and allowed under 404(b), stressing that proof of motive, intent, knowledge, and absence of mistake or accident is admissible even if outside the charged time period, and that the court should admit evidence that the defendant's company "condoned and permitted routine violations of safety

[1] The defendant, Donald Blankenship, is unrelated to the defendant in the United States v. Michael Blankenship case cited above. Given the common last name, the Blankenship cases include the first names of the defendants.

regulations." (Id. at Doc. 330 at 13, 30, see also 2015 WL 5265667 at *6, 13). The court ruled in favor of the United States on nearly all of these motions in a decisive and sweeping order, finding significant pieces of evidence "intrinsic to the charges" and "directly relevant to the Defendant's intent, an issue relevant to the charges," and that prior violations were "probative to issues of the Defendant's knowledge and willfulness." (Id. at Doc. 552 at 2-4). In affirming the conviction, the Fourth Circuit cited the "serious risks" posed at the mine, and that the defendant fostered a non-compliant attitude "by directing mine supervisors to focus on 'run[ning] coal' rather than safety compliance and to forego construction of safety systems." 846 F.2d at 667 (brackets in original).

That same court reached a similar conclusion in admitting uncharged prior acts as both intrinsic and under 404(b) in United States v. Zuspan, Case No. 3:11-00235, 2012 WL 3144588 (S.D.W.V., Aug. 1, 2012). The defendant in that case was charged with knowingly discharging untreated sewage waste on February 1, 2011, and the United States sought to admit evidence of "a number of prior instances" that arose out of the defendant's handling of septic waste. 2012 WL 3144588 at *1, 3. The court admitted the evidence, holding that "prior bad acts are admissible to prove knowledge of the impropriety of the alleged discharge and absence of mistake or accident." Id. at *4.

The District Court in the Eastern District of Pennsylvania admitted evidence of uncharged violations in a worker safety criminal case involving the death of an employee from a fall at a roofing job. Order and Attached Mot., United States v. McCullagh, No. 2:15-CR-00237 (E.D. Pa. Aug. 10, 2015), Doc. No. 13; see also Judgment in a Criminal Case, United States v. McCullagh, No. 2:15-CR-00237 (E.D. Pa. Mar. 30, 2016), Doc. No. 1, 2016 WL 8465944. There, the defendant was charged with four counts of making false statements, in violation of 18

U.S.C. § 1001, one count of obstructing proceedings, in violation of 18 U.S.C. § 1505, and one count of willfully violating OSHA regulations resulting in the death of an employee, in violation of 29 U.S.C. § 666(e), and thus all of the charges in that case are also charged in this case. Id. at 1; and Indictment, United States v. McCullagh, No. 2:15-CR-00237 (E.D. Pa. July 9, 2015), Doc. No. 1. The District Court broadly admitted uncharged conduct, including a previous "citation" for the same conduct, as well as "testimony from the defendant's former employees that the defendant regularly failed to provide fall protection equipment," to show that "any failure to provide fall protection equipment on the day of the fatality was intentional rather than the product of mistake or accident," adding that "the government's proffered evidence has high probative value as it goes directly to proving essential elements of the charged offenses and to meeting possible defenses." Order, McCullagh, Case No. 2:15-CR-00237, Doc. No. 13 at 1-2. An essential element in that case, as here, is that a "willful" violation occurred under the OSH Act (29 U.S.C. § 666(e)), and the court elaborated as follows:

> Evidence that the defendant repeatedly failed to provide fall protection equipment to his employees prior to the fatality is relevant to show the defendant's knowledge of the absence of fall protection equipment on the day of the fatality, and that the defendant's statements to OSHA to the contrary were made knowingly, intentionally, and not by mistake or accident.

Id. at 2.

The admissible extrinsic acts are not limited to the site subject to the prosecution but extend to other company facilities. In Pruett, for example, extrinsic evidence at "other (unindicted) plants operated by Appellant" was properly admitted (681 F.3d at 244 n.8), as were violations that "occurred at other sites" in DNRB (895 F.3d at 1068).

3. Intent, Lack of Accident, Absence of Mistake, and Other Permitted Uses

As discussed, evidence that relates to the charged conduct, even if outside the charged

time period, is intrinsic and thus not subject to the prohibition of Rule 404(b)(1). For example, in this case, that would include prior hydrogen sulfide releases or knowledge of the toxic gas, which would be directly relevant to Counts 1-4 in the Indictment. Likewise, another example would be evidence of pressure testing before the time period charged relating to the pressure test crimes in Counts 8-9. These are not "other acts" but rather intrinsic to the charged offenses because they show knowledge of hazards and failure to correct them.

Separate from the admissibility of intrinsic evidence, "other act" evidence is also admissible if offered for the permissible purposes of "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2); see also Huddleston v. United States, 485 U.S. 681, 685 (1988) (extrinsic acts evidence may be critical to disputed issue, "especially when that issue involves the actor's state of mind"). For intent, the "reasoning is that because the defendant had unlawful intent in the extrinsic offense, it is less likely that he had lawful intent in the present offense." Beechum, 582 F.2d at 911. By analogy, in a crack cocaine conspiracy case, evidence that the defendant ran a crack house ten years earlier was admitted "to prove his knowledge of and experience with crack cocaine sales in the area and his continuing intent to sell crack cocaine." United States v. Peters, 283 F.3d 300, 312 (5th Cir. 2002).

Courts have expansively admitted other act evidence to prove intent. For example, the elements of the charged and extrinsic offenses need not be identical. Beechum, 582 F.2d at 913 ("It is not necessary that the physical elements of the charged and extrinsic offenses concur for this inference to be drawn and relevancy established."). Likewise, worker safety violations at other company sites were properly admitted in a worker safety prosecution arising out of an employee death (DNRB, 895 F.3d at 1068), and in a water pollution case, it was sufficient

merely to show that the prior acts "took place in a geographic area in proximity to Defendant's business operations." Zuspan, 2012 WL 3144588 at *3. Undated other acts of dumping were admitted in a water pollution prosecution. Michael Blankenship, 789 Fed. Appx. at 365.

4. Remoteness in Time

In assessing whether to admit extrinsic evidence, a judge "should also consider how much time separates the extrinsic and charged offenses: temporal remoteness depreciates the probity of the extrinsic offense." Beechum, 582 F.2d at 915. However, remoteness in time between the charged acts and the extrinsic evidence does not mandate exclusion and courts have routinely admitted extrinsic acts that occurred many years before. United States v. Broussard, 80 F.3d 1025, 1040 (5th Cir. 1996); see e.g., Peters, 283 F.3d at 312 (10 year old conduct admitted); Rubio-Gonzalez, 674 F.2d at 1074-75 (affirmed admission that the defendant twice entered the country, even though one of the acts occurred over 10 years prior to the trial). The Fifth Circuit upheld the admission of a nearly 18-year-old prior conviction (United States v. Hernandez–Guevara, 162 F.3d 863, 872–73 (5th Cir. 1998)), and affirmed the decision of the trial court to admit into evidence a defendant's 16-year-old conviction because it was probative of knowledge or absence of mistake or accident, adding that the "age of an extrinsic offense does not serve as a per se bar to admission." United States v. Moore, 433 Fed. Appx. 308, 309-10 (5th Cir. 2011).

The Fifth Circuit precedent allowing the admission of dated acts is consistent with established law, with courts allowing extrinsic evidence occurring well over a decade before the charged crimes, and there "is no absolute rule regarding the number of years that can separate offenses." United States v. Strong, 415 F.3d 902, 905-06 (8th Cir. 2005) (admitted prior firearm convictions where 16 years separated the charged offense); see also United States v. Walker, 470 F.3d 1271, 1275 (8th Cir. 2006) (prior crimes occurring eight years ago did not "significantly

diminish the probativeness of the evidence").

In United States v. Johnson, 132 F.3d 1279, 1283 (9th Cir. 1997), the court admitted evidence of prior uncharged acts "notwithstanding the thirteen or more years that had elapsed since the events about which the witnesses testified." In United States v. Wimberly, 60 F.3d 281, 284-285 (7th Cir. 1995), a prosecution for engaging in a sexual act with a minor, the court of appeals affirmed the admission of uncharged extrinsic evidence that the defendant had admitted to his psychotherapist that he molested a child 13 years prior to the charged offenses. See also United States v. Trogdon, 575 F.3d 762, 766 (8th Cir. 2009) (11 year-old prior conviction "was not so remote in time as to be inadmissible under our cases"); United States v. Uzenski, 434 F.3d 690, 710 (4th Cir. 2006) (admitting defendant's "prior attempts at making pipe bombs as a teenager"); United States v. Macedo, 406 F.3d 778, 792-793 (7th Cir. 2005) (admitting "prior bad act" testimony that defendant engaged in drug sales 9 years before charged offense); United States v. Sutton, 77 Fed. Appx. 892, 896-897 (7th Cir. 2003) (admitting evidence of defendant's marijuana storage 14 years earlier in drug possession and distribution case); United States v. Queen, 132 F.3d 991, 996 (4th Cir. 1997) (admitting evidence of prior similar acts committed 8 years before charged conduct); United States v. Rude, 88 F.3d 1538, 1550 (9th Cir. 1996) (admitting evidence in fraud prosecution of two prior alleged frauds, stating "we are not troubled by the fact that [the alleged frauds] occurred seven and eight years earlier."); United States v. Smith, 282 F.3d 758, 768-769 (9th Cir. 2002) (admitting testimony in marijuana-smuggling prosecution that defendant grew marijuana and engaged in cocaine transactions 11 years earlier); United States v. McCarthy, 97 F.3d 1562, 1573 (8th Cir. 1996) (admitting testimony in drug-related prosecution that defendant engaged in drug smuggling 17 years earlier); United States v. Engleman, 648 F.2d 473, 479 (8th Cir. 1981) (admitting testimony in mail-fraud case of

defendant's complicity in the death of another 13 years earlier).

5. Similar in Kind

"[E]quivalence of the elements of the charged and extrinsic offenses is not required." Beechum, 582 F.2d at 915; see also United States v. Young, 753 F.3d 757, 768 (8th Cir. 2014) ("the prior act need not duplicate the charged conduct but be similar enough to support an inference of criminal intent"). Rather, it is sufficient that the defendant "indulg[ed] himself in the same state of mind in the perpetration of both the extrinsic and charged offenses." Beechum, 582 F.2d at 911 (emphasis added); see also Queen, 132 F.3d at 996 (same, citing Beechum). The Fifth Circuit has repeatedly approved the admission of extrinsic evidence of different other acts than those at issue in the trial. See e.g. United States v. Killian, 639 F.2d 206, 211-212 (5th Cir. 1981) (evidence of pistols and amphetamines admitted in cocaine conspiracy trial); Aleman, 592 F.2d at 884-885 (evidence of cocaine transaction admitted in trial for dealing heroin); Beechum, 582 F.2d at 904-905 (in prosecution of postal carrier for stealing silver dollar, evidence admitted that he also possessed two credit cards that were not issued to him).

Other worker safety violations have been admitted under 404(b) as there is no requirement that they be identical violations, only that they are "sufficiently similar to support an inference of criminal intent." DNRB, 895 F.3d at 1068. After the mine fatalities in Donald Blankenship, the court admitted evidence "related to citations issued" at the mine, finding they were "probative to issues of the Defendant's knowledge and willfulness." (Donald Blankenship at Doc. 552 at 3-4).

Various differences between the other acts and the charged conduct have not constituted a bar to admission, provided they show one of the permissible purposes set out in Fed. R. Evid. 404(b)(2). For example, in United States v. Aramony, the court admitted evidence of one

defendant's previous sexual advances towards women to show motive in a fraudulent scheme to use company funds for personal relationships. 88 F.3d 1369, 1378 (4th Cir. 1996). Similarly, in United States v. Jones, the court admitted evidence of a defendant's prior sexual misconduct in a mail fraud case as relevant to his "intent to commit mail fraud because it showed his abuse of authority." 210 F.3d 363 (Table) (4th Cir. 2000).

6. Post Crime Acts and Statements

Evidence of acts which took place after the charged crime can also be admissible. United States v. Webb, 625 F.2d 709, 710 (5th Cir. 1980); United States v. Peterson, 244 F.3d 385, 392 (5th Cir. 2001) ("Our prior decisions clearly allow for evidence of 'bad acts' subsequent to the subject matter of the trial for the purpose of demonstrating intent."); Roe v. United States, 316 F.2d 617, 623 (5th Cir. 1963); see also United States v. Myers, 550 F.2d 1036, 1044 n.10 (5th Cir. 1997) (an uncharged crime is admissible under Rule 404(b) even where it occurs after the charged crime); United States v. Alston, 460 F.2d 48, 55 (5th Cir. 1972) ("settled law that prior or subsequent incidents may be introduced to establish knowledge or intent"); United States v. Jackson, 451 F.2d 259, 262 (5th Cir. 1971); United States v. Mancuso, 444 F.2d 691, 695 (5th Cir. 1971). This includes admitting a subsequent unindicted false statement to show intent or knowledge to commit the charged crime. United States v. Osum, 943 F.2d 1394, 1397–1405 (5th Cir. 1991).

Subsequent accidents not specified in the indictment were admissible in a case in which a bus driver was charged with mail fraud offenses in connection with fraudulent insurance claims. Osum, 943 F.2d at 1397-1405. The court affirmed that this evidence was correctly admitted as the subsequent fraudulent insurance claims showed the defendant's intent to file the fraudulent claim in the charged act, and the prejudicial nature of the testimony did not outweigh its

probative value. Id. at 1404, citing Beechum, 582 F.2d at 911; see also United States v. Nguyen, 504 F.3d 561, 567–75 (5th Cir. 2007) (subsequent fraudulent sales admitted to show knowledge and criminal intent).

7. Amount of 404(b)

The Fifth Circuit has affirmed the admission of a "large amount of uncharged conduct" (Pruett, 681 F.3d at 244 and n.8), and this generous standard is limited only by the prohibition that the extrinsic evidence cannot "occupy more of the jury's time than the evidence of the charged offenses." United States v. Jones, 930 F.3d 366, 375 (5th Cir. 2019), quoting United States v. Hernandez-Guevara, 162 F.3d 863, 872 (5th Cir. 1998); see also United States v. Fortenberry, 860 F.2d 628, 632 (5th Cir. 1988) (reversible error in admitting extrinsic evidence of "violent crimes" that "occupied more of the jury's time than the evidence of the charged offenses"). A "substantial amount" of extrinsic evidence can be admitted, provided it does not occupy more of the jury's time than the evidence of the charged crimes and thus does not "overwhelm the charged conduct." Pruett, 681 F.3d at 244; see also Scott, 668 Fed. Appx. at 610 ("Our court has affirmed the admission of a 'substantial' amount of uncharged conduct under Rule 404(b) when the uncharged offenses were the same type of crime as the charged offenses, and 'did not overwhelm the charged conduct.'").[2]

[2] United States v. Riddle, 103 F.3d 423 (5th Cir. 1997) did not squarely address the quantum of evidence issue, and is factually distinguishable in several material respects. Riddle was a bank fraud case in which the trial court allowed evidence of "extraneous loans" tending to show that the defendant acted "unwisely" and was "an irresponsible banker," which the court found was "attenuated" to any authorized 404(b) purpose, since the defendant "was not on trial for irresponsibility." Id. at 433. The evidence, which the court characterized as "extensive and undiscriminating," was admitted through part of the testimony of nine government witnesses encompassing "more than a full day" of a 17 day trial. Id. at 432, 434. The unique facts and limited precedential impact of Riddle is evidenced by its failure to warrant mention in Pruett, when the court affirmed the admission of a "large" and "significant" amount of uncharged conduct. 681 F.3d at 244 and n.8 (admitting extrinsic evidence consisting "two witnesses [who] testified exclusively as to uncharged conduct and five others testified as to both charged and uncharged conduct"). The overriding concern for the court in Riddle was the nature of the extrinsic evidence rather than the amount.

8. Prejudice

In order for extrinsic evidence to be unfairly prejudicial it must be of a "'heinous nature' that would inflame the jury to act irrationally." Kinchen, 729 F.3d at 474, citing Beechum, 582 F.2d at 917. Regulatory violations are generally "not particularly emotionally charged or incendiary" and therefore, unlike "violent crimes," do not cause unfair prejudice. Pruett, 681 F.3d at 245. The balancing of probative value versus unfair prejudice "calls for a commonsense assessment of all the circumstances surrounding the extrinsic offense." Beechum, 582 F.2d at 914.

9. Limiting Instruction

Any potential unfair prejudice may be cured by a limiting instruction. Fed. R. Evid. 105; Fifth Circuit Pattern Jury Instructions (Criminal Cases) at 1.32 Similar Acts (2019 Edition); Beechum, 582 F.2d at 917 (trial court "gave extensive instructions to the jury on the limited use of extrinsic offense evidence employed to prove unlawful intent"). This ensures the jury considers the evidence only for the limited purpose, for example, of showing absence of mistake. See e.g., Kinchen, 729 F.3d at 474 (prejudicial effect of evidence further diminished by the district court's instructions to the jury regarding the limited purpose for which evidence of other similar acts may be considered); Pruett, 681 F.3d at 245; United States v. Charles, 366 Fed. Appx. 532, 539 (5th Cir. 2010); Cordell, 912 F.2d at 775 ("Any prejudice the evidence might have caused was cured by the trial court's constant and careful admonitions to the jury about the meaning and purpose of the evidence.").

IV. NOTICE

A. Legal Requirements

The United States is required to provide reasonable notice of evidence of other crimes, wrongs, or acts it intends to offer at trial. Fed. R. Evid. 404(b)(3). Specifically, the prosecutor must:

> (A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
>
> (B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
>
> (C) do so in writing before trial — or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Id.

In this Notice and attached Appendix (which is incorporated herein by reference), the United States provides notice of various strands of evidence, including specific intrinsic or other acts it intends to introduce. This extensive disclosure far exceeds the "reasonable" notice requirement. Provided it meets this requirement and otherwise complies with 404(b)(3), the United States is not required to identify every witness or exhibit.[3] Thus, the specific listing of evidence does not limit the United States from offering additional evidence provided it reasonably fits within the ambit and general subject matters identified in this notice.

[3] See generally, United States v. Stroud, No. 3:19-CR-00439-X, 2022 WL 1063029, at *1, and Dkt. 91, p. 1-4 (N.D. Tex., Apr. 8, 2022) (notice did not specify each act or statement, but rather provided three categories of potential bad act evidence); United States v. Williams, No. CR 20-55, 2021 WL 7711265, at *21, and Dkt. 138, p. 4 (E.D. La., Dec. 16, 2021), aff'd, 30 F.4th 263 (5th Cir. 2022) (Government's notice of intent to use 404(b) evidence provided a non-exhaustive list of potential evidence: "Specifically, some of this evidence will consist of testimony and records regarding the following[]"); United States v. Lockett, No. CR 20-00091-BAJ-RLB, 2022 WL 2116202, at *3, and Dkt. 57, p. 3 (M.D. La., June 13, 2022) (Government provided notice of intent to use evidence of "[t]he facts and circumstances involved in Defendant's previous drug trafficking activities").

B. Notice of Evidence

1. Knowledge of H2S and Hazards Prior to Charged Time Period

Aghorn was aware of both the presence and dangers of hydrogen sulfide, and evidence of this awareness prior to the charged time period bears directly on intent and is thus unquestionably intrinsic and admissible. The company informed the RRC in a 1997 filing that the H2S concentration in its produced water was 110,000 ppm, and filed another notice in 2012 asserting the H2S concentration to be 96,000 ppm. These numbers are astronomical, particularly considering that only 100 ppm of H2S in the air is considered immediately dangerous to life and health.

In 2003, Aghorn prepared a contingency plan "to alert and protect the public" in the event of an H2S leak. In that plan, Aghorn stated that there were approximately 1,200 wells "with various concentrations of hydrogen sulfide" located in residential and publicly accessible areas such as roadways. The company attached a data sheet to the plan describing H2S as "[e]xtremely hazardous" and capable of causing "immediate death" at very high concentrations.

Aghorn's files show a knowledge of the dangers of H2S, such as an undated pamphlet describing it as "one of the most vicious and deadly hazards" and stressing the need to control leaks. This document emphasizes the need to "control or stop" any source of H2S leakage:

> The first concern in every gaseous area is to control or stop the source of gas leakage. Every effort should be exerted to make the work area gas free. Control of leaks, re-design of process equipment, maintenance and proper ventilation usually will ensure safe working conditions.

Defendant Day was well aware of the hazards of H2S, which will be proven by evidence from both during[4] and prior to the charged time period. In or about 2013, a

[4] This includes a training exam he took on February 13, 2019, which documents his knowledge that H2S is hazardous when inhaled and federal law mandates respiratory protection from the deadly gas. That exam also

former employee (M.H.) was exposed to H2S at Aghorn's Yarbrough lease, which M.H. likened to getting "hit by a tank" and causing vomiting, nausea, and a headache. M.H. notified Defendant Day of this incident, who asked M.H. if he was good to work, prompting M.H. to recall that he could not believe how Aghorn did not care about worker safety.

2. H2S Exposure at the Station Prior to the Charged Time Period

Contractors and employees were routinely exposed to H2S at the Foster "D" Waterflood Station (the "Station") well before time periods charged in the Indictment. This is inextricably related to the intent of Defendants Aghorn and Day and thus intrinsic to the charges. They would alternatively be admissible under 404(b) since the longtime pattern of H2S exposure shows intent and lack of mistake for the charged time periods.

Aghorn emitted high amounts of H2S since purchasing the Station in the 1990's, and a former pumper who worked there at the time (B.B.) [5] recalled that the site had been "deadly" for years with H2S levels in excess of 500 ppm. He recalled "how gassy" it was at the Station, adding that if there was a "big leak" "the gas was so bad, you couldn't run directly in there." This former pumper, who worked there from approximately 1996 to 2002, said the previous owner of the Station prioritized safety, but "when Aghorn took over, they just let it go."

The H2S exposure included employees from a pump maintenance company, Knighten Machine and Service, Inc. (Knighten), who regularly worked at the Station, including G.F., who

reflects his knowledge that losing consciousness, dizziness, and headaches are symptoms of H2S exposure, and that stationary monitors are one of the methods to detect H2S, referring to them as "fixed" electronic detectors.

[5] Individuals are identified by initials in this Brief and the Appendix. The Appendix provides Bates-numbered documents identifying specific source documents, including interview reports identifying the individuals. The defendants have been provided these documents in discovery.

recalled being dispatched there where he was exposed to high levels of H2S, causing him to vomit and have a headache and shortness of breath, which he brought to the attention of an Aghorn employee. G.F. stated that he did not see any stationary H2S monitors, and his personal hand-held monitor gave a consistent reading of 83-90 ppm of H2S. A Knighten invoice confirmed that, on December 17, 2015, G.F. "started to experience high level of H2S," and "left location." This invoice was signed by Defendant Day, showing that he was aware of the Knighten employee's exposure and departure from the Station.

Another Knighten employee, T.C., who started working there around 2013, said he "dreaded" going out to the Station, which he did around every other month, causing him to get lightheaded and his H2S monitor to go off "all the time." T.C. added that most of the time he was told to just fix the pump that was leaking the worst, rather than do a full preventative maintenance job. He never observed any stationary monitors or lights activate and the high H2S levels made him feel uneasy. T.C. observed "some fans, but they were never on."

R.H. worked at Knighten on and off since 2008. He characterized the Station as dangerous due to high levels of H2S and stated that his monitor, which would detect up to a limit of 100 ppm, would read "OL" (over limit) when he worked there. H2S levels exceeding 100 ppm are "immediately dangerous to life and health" (IDLH). See 29 C.F.R. § 1910.134(b).

J.M. worked at Knighten from approximately 2015 to 2019, and estimated he was at the Station 10 to 12 times, and stated substantially that the facility was in bad condition and he told Aghorn employees the H2S concentration was high. J.M. added that his personal H2S monitor alerted over limit almost every time he was at the Station, at which time he got "out of there." J.M. described Aghorn as "penny pinchers" who "fixed the bare minimum" to keep the facility running, and added that he informed both Aghorn and Knighten that the pumps "were garbage."

Regarding the Dean fatalities, J.M. stated that "[i]t could have been any one of us that died . . . that site is dangerous."

Likewise, testimony about high H2S levels by former Aghorn employees is intrinsic because it shows Defendants failed to address longstanding safety issues. For example, J.F., a former Aghorn employee worked there in 2015-16, recalled his H2S monitor alerting him to the presence of H2S inside the Station pump house building over 100 ppm at least once a week. Another former employee, R.M., who worked there from approximately 2008-12, smelled H2S at the Station before he got there, never observed the ventilation fans working, and would go in fast to check things out and get out knowing of the high H2S content.

Just as in McCullagh, the charges in this case include both willful violations of the OSH Act (Counts 3-6) and obstructing OSHA (Counts 6-7), and likewise the evidence cited in this Notice "has high probative value as it goes directly to proving essential elements of the charged offenses and to meeting possible defenses." Order, McCullagh, No. 2:15-CR-00237, Doc. No. 13 at 1-2. The evidence here shows the failure to control toxic H2S gas on the day of the fatalities "was intentional rather than the product of mistake or accident." Id.

3. The Venting of H2S into the Air at the Station

The Defendants caused releases of H2S both inside and outside the pump house at the Station, and both impacted the ambient air. For example, people inside the poorly ventilated building were subjected to high levels of the toxic gas which in turn migrated outside via the building's two bay doors. In addition, H2S was vented outside directly from tanks and inoperable flare stacks at the Station and the adjacent Foster D Tank Battery. These H2S releases are similar types of conduct and result from "the same state of mind." Beechum, 582 F.2d at 911. Note that

in Count One, Aghorn and Day are charged with failing to take such steps as are necessary to prevent releases of H2S into the ambient air. See ECF at Doc 1 at p. 9.

A RRC inspection on September 18, 2013, documented the venting of H2S gas out of the "west fiberglass tank thief hatch" as well as the danger that illegal conduct posed:

> The H2S gas being produced at these batteries is being vented. The facilities are in a sensitive area and the operator does not have authority to vent H2S gas. All gas produced must be used for legal means or flared.

October 17, 2013 RRC Notice. Witnesses will testify to numerous instances of venting taking place over a period of years. Aghorn employees were aware that this illegal activity occurred, and that it placed employees, contractors, and the public at risk.

Former Aghorn employee J.D., who worked there from approximately November of 1999 to October 2019, will testify about venting from both the Station and adjacent Tank Battery,[6] and that the flare at the Station sometimes did not work properly, and the flare at the Tank Battery frequently did not work and that H2S gas was vented there for years. J.F., the former Aghorn employee who worked there in 2015-16, stated that the flare at the Station operated "very rarely" and that it should be working 95% of the time since it is located in a "sour gas area within a residential area." R.M., who worked there from approximately 2008-12, stated that the flare at the Station was "always venting" H2S and only sometimes was it lit and burning, adding that the pilot light on all flares should always be lit.

The venting spewed the H2S into the residential area near the Station, with one neighbor (C.H.) stating that, before the October 26, 2019 fatalities, he smelled H2S (rotten egg odor) "all the time" and the flare was operating "sometimes" and when it was operating, he did not smell the H2S. Another neighbor (J.S.) described a "rotten eggs" stench coming from the Station,

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[6] The Foster "D" Waterflood Station (the "Station") area has two flares, one at the Station itself, and another at the adjacent Foster "D" Tank Battery.

adding that when there is little or no wind the smell is at a much higher concentration, while yet another neighbor (C.C.) described a constant odor emanating from the Station, and we "get used to it. . . it smells like sewer with a pungent order." An EPA Toxicologist documented instances where H2S emissions from the Station were "noticeable off-site" and "[i]ndividuals who reside or work adjacent to the site described being able to smell H2S routinely," citing one neighbor who "would get migraine headaches from the odor."

Failing to flare exposes people to noxious H2S gas. As indicated by the RRC Notice, flaring ensures that H2S exposure will be minimized in "sensitive" areas. It is well established that flaring is carried out in large part to reduce the negative impacts of releasing hydrogen sulfide into the ambient air. See Regency Field Servs., LLC v. Swift Energy Operating, LLC, 622 S.W.3d 807, 812 (Tex. 2021) (natural gas producers must carefully dispose of hydrogen sulfide by, for example, flaring it off); see also 16 Tex. Admin. Code § 3.36(c)(8) (2022) ("For intentional releases of a potentially hazardous volume of hydrogen sulfide gas, the gas must be flared unless permission to vent is obtained from the [Texas Railroad C]ommission[.]"); Colter Ellis et al., Unconventional Risks: The Experience of Acute Energy Development in the Eagle Ford Shale, 20 Energy Rsch. & Soc. Sci. 91, 94 (2016) (one reason for flaring is to reduce emissions of H2S, a poisonous gas).

4. Prior Leaks and Equipment Malfunctions at the Station

Leaks and pump malfunctions were common occurrences at Aghorn. When, on October 26, 2019, Jacob Dean responded to a produced water leak from a malfunctioning pump at the Station, he drove to a site containing antiquated and poorly maintained equipment with a long history of leaks and spills.

Aghorn had a record of previous violation notices relating to spills and was thus aware that the conduct was illegal. This historical pattern of leaks, occurring prior to charged time periods, is "admissible to prove knowledge of the impropriety of the alleged discharge and absence of mistake or accident." (Zuspan, 2012 WL 3144588 at *4), and refute a defense that the alleged crimes consisted of "isolated and accidental incidents." Pruett, 681 F.3d at 244.

According to a former Aghorn employee (J.D.), the pumps at the Station always leaked, and only a small fraction of those leaks were reported to the RRC. He added that Defendant Day told him to keep conversations with the RRC at a minimum and he would take care of them.

J.M. worked at Knighten from approximately 2015 to 2019, and estimated he was at the Station 10 to 12 times, and that he informed both Aghorn and Knighten that the pumps "were garbage." His former colleague at Knighten, T.C., who started working there around 2013, recalled leaks so bad that the pump would fill up the crank case with water and he would have to drain it out, and that most of the time he was told to just fix the pump that was leaking the worst, rather than do a full preventative maintenance job.

The RRC conducted a September 3, 2015 inspection at the Station and found the facility "[n]on-compliant," due to a produced water spill that occurred on August 23, 2015. Another inspection on January 4, 2016 also recorded a "[n]on-compliant," status due to a produced water spill reported by C.H., a neighbor, who described a flow line leaking for over a month in late 2015, and the lease being covered in black oil.[7] The RRC directed that produced water spills "must be cleaned so that ground or surface water contamination does not occur."

[7] Produced water is a byproduct of oil extraction. Am. Petroleum Inst. v. E.P.A., 661 F.2d 340, 343 (5th Cir. 1981). Oil reservoirs also contain "fossil seawater," which is recovered along with the oil. Id. Once extracted, the mixture of oil and water is processed and separated. Id. The oil is sold, but the "unsavory" liquid that remains ("produced water"), is an "unwanted commodity" that still contains residual oil. Id.; BP Expl. & Oil, Inc. (93-3310) v. U.S. E.P.A., 66 F.3d 784, 792 (6th Cir. 1995).

On December 27, 2012, a RRC inspection documented a large leak of oil and produced water near the Station, and found Aghorn non-compliant with water protection and oil spill clean-up requirements. That inspection was prompted by a citizen (C.C.) who observed a significant amount of liquid in a field migrating toward nearby residences.

5. The Venting of H2S into the Air at other Aghorn Facilities

Aghorn also vented gas at its other facilities. [8] This is relevant to the intent of both the company and its managers. These H2S releases are similar types of conduct and result from "the same state of mind." Beechum, 582 F.2d at 911.

Less than two months before the Dean fatalities, on August 30, 2019, at its J.E. Bagley lease, [9] the RRC found noncompliance after a FLIR camera detected H2S vapors escaping from a battery, as well as an "[o]dor on site." The inspection report noted that the facility was in "a designated H2S field" that was "in close proximity to public roads and housing," which was described as a "sensitive area." This was a repeat offense, as the RRC cited Aghorn for a similar violation the previous year after a July 16, 2018 inspection, where it detected "vapors from [a] non-working flare stack," adding that flaring was required for "safety reasons" and noting that the facility was in a sensitive area near a street and residences.

An employee (B.B.) of a business near Aghorn's Gist lease smelled H2S gas almost weekly during an approximate ten year period from 2012 to 2022. She added that the gas gave her migraine headaches which caused her to lose time at work, and described the smell at times as "unbearable." According to B.B., the smell came from a well located in the back of the store

[8] As discussed above, the admissible extrinsic acts are not limited to the site subject to the prosecution, but extend to other company facilities. In Pruett, for example, extrinsic evidence at "other (unindicted) plants operated by Appellant" was properly admitted (681 F.3d at 244 n. 8), as was evidence of violations that "occurred at other sites" in DNRB (895 F.3d at 1068).

[9] The facilities are also grouped into "leases," and each lease can have multiple wells.

where she worked, which was identified with a placard entitled "Gist lease well #2, RRC 01620." The RRC identified Aghorn as the owner of this well.

On June 16, 2017, the RRC documented venting coming from two flare stacks at the Gist lease, and contacted Aghorn which performed maintenance, causing the venting to cease, and "[a]ll violations were corrected onsite." On June 20, 2017, a caller to the RRC (H.C.) reported a "strong H2S odor" coming from the same unit. In February of 2020, another neighbor (D.B.) near the Gist lease complained to the RRC about the H2S odor, stated that his wife has chronic migraines, and that: "I just want to live here, without getting blasted with gas from their [Aghorn's] wells." On February 7, 2020, the RRC recorded a complaint of "an H2S smell" from Aghorn's Gist A lease, and the need to "confirm if it is leaking again." An EPA Toxicologist described H2S releases from Aghorn facilities as "a chronic issue."

6. Prior Leaks and Equipment Malfunctions at other Aghorn Facilities

As discussed above, leaks were common at the Station where Jacob and Natalee Dean were killed. They also regularly occurred at other Aghorn leases, and are thus relevant to intent and lack of mistake of the charged conduct, and refute a defense that the alleged crimes consisted of "isolated and accidental incidents." Pruett, 681 F.3d at 244.

Former Aghorn employee J.D. estimated he observed over 100 leaks and spills during his tenure at Aghorn, and only a small fraction were reported to the RRC. He added that it was common practice to just put fresh dirt over a spill unless the RRC ordered Aghorn to remediate it, and that the company would dispose of oil in unlined pits, and a backhoe operator once complained to him: "I can't cover it up, it's just mush." Another former employee (R.M.), who worked there from approximately 2008-12, stated he did some things wrong while employed at Aghorn including covering up oil spills because he "had to," adding that he covered up so many

spills he could not count them and the piles of dirt were sometimes high enough to make a mound over the well head.

On or about August 12, 2013, at Aghorn's Gist Etal lease, well number five, an oil leak occurred and the free fluid was poured into a hole and covered up, and a RRC inspector told an Aghorn employee that this was a "no-no." The complainant (T.H.) reporting this incident will testify that the well "always leaked and nothing was ever done," and he "could smell live oil every day" that "would make you sick to your stomach." T.H. also observed an employee use a backhoe to dig a hole and bury oil. Aghorn records reflect remediation at this site on the day of the inspection.

On July 10, 2018, J.W. observed a leaking well-head at Aghorn's Gist C lease and complained to the RRC that it had not been cleaned up and Aghorn had "just been throwing dirt on top of the area." In response, the RRC conducted three inspections, the first on July 10, 2018, and found Aghorn had illegally leaked oil and failed to remediate the soil. A second inspection was conducted eight days later, on July 18, 2018, finding the same noncompliant conditions, and contacting "Aghorn Rep. Trent." A third inspection was conducted on November 8, 2018, which documented that the leak was finally remediated. J.W. stated that Aghorn "skirted around the laws," and he "was upset that enforcement agencies did not do their jobs to include the EPA and RRC," adding that he knew from his past employment in the oil field industry that dirt was required to be removed all the way down to the clean dirt.

In late April of 2019, at Aghorn's Foster-Johnson Unit lease, produced water leaked from an injection transfer pipeline, impacting a nearby resident (J.A.). Aghorn employees told J.A. that the substance was "only water," though J.A. said the vegetation in her yard died, she smelled a bad odor, and did not want her children playing in the grass, prompting her to notify the RRC

on April 30, 2019, which conducted an inspection on May 2, 2019, and found there had been a produced water leak and that the "affected area" would be cleaned up to the satisfaction of J.A. This was a large leak: 125 barrels, which is 5,250 gallons.

7. Stationary H2S Monitors at other Aghorn Facilities

The Station had eight stationary monitors that were designed, in the event of an H2S release, to display on a control panel and activate a light at the top of the pump house. On the night of October 26, 2019, none of the monitors were operable and readable at the control panel, and thus they did not trigger that light and warn Jacob or Natalee Dean of the toxic level of H2S. (Indictment, Doc. 1 at 7).

Given that Aghorn's corporate knowledge is a key element of the charged offenses, its practices regarding stationary H2S monitors at all of its sites are "inextricably intertwined" to this case, making this evidence intrinsic and not subject to 404(b). It would alternatively be admissible under 404(b) since the failure to install, calibrate and maintain these necessary warning devices at other leases shows intent and lack of mistake for the non-working monitors at the Station.

Those monitors should have notified Jacob of the deadly release of gas, and warned Natalee that she was driving into a death trap, prompting her to stop and call 911. Instead, this worried wife proceeded blindly into the darkness oblivious to both her husband's death as well as her own imminent demise.

These non-functioning monitors were no aberration. Rather, it was the norm at most Aghorn facilities, which placed workers and the public at risk of exposure to this highly toxic gas.

Historically, Aghorn only regularly maintained properly working stationary H2S

monitors at the Gist etal and the Foster C leases, and calibration and maintenance at the monitors at the Foster C lease were eventually discontinued, causing them to also fall into disrepair.[10] Aghorn management was aware of work being done on these monitors, and Defendant Day regularly signed invoices for that work. This evidence is critical to the charged offenses since it shows that Defendant Day, by signing and approving individual invoices for other leases, was responsible for and knowledgeable about which monitors were maintained. Due to his micromanagement of these expenses, he was of course aware that there was no maintenance occurring on the monitors at the Station where Jacob and Natalee died. This is exactly the kind of "evidence which is essentially background in nature" that is "universally offered and admitted as an aid to understanding" and therefore intrinsic to the charges. Advisory Committee's Notes to Fed. R. Evid. 401.

Defendant Day falsely told federal investigators from the CSB that Aghorn facilities "near public housing" were equipped with working stationary H2S monitors. The J.E. Bagley lease is one example of an Aghorn facility handling and venting[11] high H2S gas close to the public without regularly functioning, maintained, and calibrated stationary monitors. A former employee (J.D.) stated that according to his knowledge, this lease did not have working monitors[12] and was located very close to a public road and residences, and tanks at the lease had

[10] A March 13, 2020 contractor work order documented "5 bad H2S Gas Detectors" at the Foster C lease and an employee (J.S.) of the company stated he replaced five inoperable H2S detectors at the Foster C lease, adding that there were residences 50-70 yards away.

[11] See infra, above. Less than two months before the Dean fatalities, on August 30, 2019, the RRC found noncompliance at the J.E. Bagley lease after a FLIR camera detected H2S vapors escaping from a battery, as well as an "[o]dor on site." The inspection report noted that the facility is in "a designated H2S field" that was "in close proximity to public roads and housing," which was described as a "sensitive area." This was a repeat offense, as the RRC cited Aghorn for a similar violation the previous year after a July 16, 2018 inspection, where it detected "vapors from [a] non-working flare stack," adding that flaring was required for "safety reasons" and noted that the facility was in a sensitive area near a street and residences.

[12] In September of 2020, a contractor submitted quotes to Aghorn for an "H2S Sensor" and "H2S Sensor Radio" for the "Bagley Battery" and "JE Bagley," respectively, for a total cost of $31,474. This was almost a year after the Dean fatalities on October 26, 2019, and well after Defendant Day's November 6, 2019 false statement to the CSB

holes at the top that constantly leaked. Aerial and ground photographs confirmed its close proximity to businesses and residences.

Aghorn's Foster Johnson lease also failed to have monitors that alerted others to high H2S levels. Former employee J.D. stated that according to his knowledge, this lease did not have working monitors and was located very close to a public road and residences, adding that the "Foster Johnson Satellite" had "houses all around it." On August 10, 2018, the RRC received a complaint of a "very strong H2S odor" in the vicinity of this lease, and the complainant claimed his personal H2S monitor registered 25 ppm. In 2002, Aghorn filed a declaration with the RRC, asserting that the H2S concentration at this lease was the incredibly high number of 105,102 ppm. Photographs document the close proximity of this lease to residences.

At yet another lease, the Cowden -I-, the RRC twice recorded the lack of H2S monitors, even though the facility was in a "sensitive area" due to being "in close proximity" to a street, houses, and a school. Former employee J.D. also stated that this lease was close to residences, which was confirmed by photographs.

8. Acts Occurring After the Charged Time Period

The tragedy of the Dean fatalities failed to change Aghorn's culture or stop the dangerous practices, and the company continued to emit poisonous gas, cause leaks, and violate the law. A company officer also made false statements designed to mislead others about what happened on that fateful night.

Days after Jacob and Natalie Dean were killed, on November 1, 2019, Aghorn caused a release of H2S at its Foster Johnson lease from a "cloud of gas and oil [that] was shooting up in the air," prompting a response by the Odessa Fire Department, that one firefighter described as

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that Aghorn facilities "near public housing" were equipped with working stationary H2S monitors, while some "in the middle of pastures" were not.

having dangerous levels of H2S and the highest amount of the toxic gas that he had ever seen, requiring an order to evacuate two residences in the vicinity of the leak.

Fourteen days later, on November 14, 2019, H2S was again leaking from an Aghorn site, this time at the Gist lease, prompting another response by the Fire Department, which recorded that a pump jack was emitting 15 ppm of H2S, and an Aghorn representative arrived and asserted that a "packing gland" needed to be replaced "but the company has yet to replace it," adding that "he gets a lot of calls on this pumpjack." The Fire Department left the site when the Aghorn representative assured them that the "hazard was alleviated."

Aghorn caused hundreds of leaks and spills, including those documented by aerial patrols during 2019 to 2021. American Patrols, Inc., an aerial patrol service hired by Aghorn to locate leaks, notified Aghorn about these incidents, and repeatedly texted Aghorn that previously reported spills had not been cleaned up.

In 2020 and 2021, a RRC inspector (A.M.) documented repeated leaks coupled with lack of timely remediation at several Aghorn leases: the Yarbrough & Allen, Paul Moss, Ector AM Fee, and East Harper Unit. The problems included tank batteries overflowing, dirt being thrown on spills, and nothing being done to address the issues.

The Ector County Sheriff's Office documented a spill at Aghorn's East Harper Unit on January 16, 2021. Aerial photos and video depicted the spill at Well No. 240 at the Unit, which is located in West Odessa.

Aghorn made false statements related to the Dean fatalities. This after-the-fact cover-up and deception is relevant to the charged offenses, and includes a false claim to insurance carriers that Natalee Dean "violated company policy (trespass)" by going to the Station to check on her husband the night of her death. In fact, (1) there was no such company policy; (2) the gate to the

Station was routinely left open when work was done there; and (3) other employees brought family members to the Station, with full knowledge of supervisory Aghorn employees.[13]

9. False Pressure Tests Prior to the Charged Time Period

The defendants submitted false pressure tests prior to the charged time period, and evidence of this activity is clearly intrinsic or in the alternative admissible as other acts, as it shows intent and lack of mistake for the charged time periods. The charged conduct in Counts 8 and 9 starts in July 2017, but had been occurring for years prior to that time.

False pressure tests were submitted long before the charged conduct, including the period 2013-17. J.F., who worked at Aghorn in 2015-16, recalled observing Defendant Day and another Aghorn supervisory employee "draw up a lot of charts in the office" and attach a chart recorder to a nitrous tank bottle. Another former employee (R.T.) recalled the tests being done in the office and not on site, and will testify regarding the absence of tests during the period of approximately 2007-17. Expert testimony will identify pressure charts submitted prior to 2017 showing evidence that the tests were not conducted.

V. CONCLUSION

Based on the foregoing, the evidence identified in this Notice is admissible and the Court should permit the jury to hear defendants' history of worker safety and environmental abuses so that it may accurately appraise the evidence. These other acts are admissible either because they are intrinsic to the charged crimes or, alternatively, because they represent permissible 404(b) evidence of intent, knowledge, and lack of mistake or accident.

[13] This is just one example of false and misleading statements and omissions made by Aghorn to obtain insurance coverage, which includes statements about stationary H2S monitors, spills, and Spill Prevention and Countermeasure Plans.

Respectfully submitted,

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Certificate of Service

I certify that on December 13, 2022, I filed this document with the Clerk using the CM/ECF filing system, which will cause a copy of the document to be delivered to counsel of record.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

UNITED STATES OF AMERICA	
v.	NO. 7:22-CR-00049-DC
(1) AGHORN OPERATING, INC., et al.	

APPENDIX TO NOTICE OF INTENT TO OFFER INTRINSIC EVIDENCE AND EVIDENCE PURSUANT TO FEDERAL RULE OF EVIDENCE 404(b)

The government hereby provides this appendix to its notice of its intent to offer evidence that may be construed as crimes, wrongs, or other acts of the defendants under Federal Rule of Evidence 404(b)(2).

The government is providing notice of the evidence listed below out of an abundance of caution and does not concede that they are evidence of other crimes, wrongs, or acts under Rule 404(b). Specifically, the government believes that evidence below is intrinsic to the conduct alleged in Counts One through Nine of the indictment and therefore relevant under Fed. R. Evid. 401 and 402. Nevertheless, the government lists the evidence below as meeting the requirements of Fed. R. Evid. 404(b) in the event that the Court rules that the evidence is not intrinsic:

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Documents and testimony related to knowledge of H2S and hazards prior to charged time period	Various dates	**Knowledge of H2S and hazards prior to charged time period**	Intrinsic (not 404(b)); alternatively, permitted purpose is "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Reasoning: Knowledge of H2S and Hazards Prior to Charged Time Period shows intent and lack of mistake for charged time periods.
AGH_0004105	March 27, 1997	Aghorn to RRC in a 1997 filing (Form H-9) that the H2S concentration in its produced water was 110,000 ppm	Same as above
AGH_0004104	January 10, 2012	Aghorn to RRC in a 2012 filing (Form H-9) that the H2S concentration in its produced water was 96,000 ppm	Same as above
AGH_0004997	February 11, 2003	Aghorn Contingency Plan, including attached data sheet, describing wells, H2S presence and hazards	Same as above
AGH_0004106	Undated	Donaldson Fire and Safety, Inc. pamphlet regarding nature of H2S and need "control or stop" any source of H2S leakage.	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Former Aghorn employee (M.H.) at AGH-OPER-0004625	In or about 2013	Defendant Day was well aware of the hazards of H2S, which will be proven by evidence from both during and prior to the charged time period. A former employee (M.H.) was exposed to H2S at Aghorn's Yarbrough lease, which M.H. likened to getting "hit by a tank" and causing vomiting, nausea, and a headache. M.H. notified Defendant Day of this incident, who asked M.H. if he was good to work, prompting M.H. to recall that he could not believe how Aghorn did not care about worker safety.	Same as above
Documents and testimony relating to H2S Exposure at the Station Prior to Charged Time Period	Various dates	**H2S Exposure at the Station Prior to Charged Time Period**	Intrinsic (not 404(b)); alternatively, permitted purpose is "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Reasoning: Longtime pattern of H2S exposure shows intent and lack of mistake for charged time periods.

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Former Aghorn employee (B.B.) at AGH-OPER-0004271; AGH-OPER-0005389; AGH-OPER-0025159 at 2; and AGH-OPER-0048681 at 2	Various dates	Aghorn emitted high amounts of H2S since purchasing the Station in the 1990's, and a former pumper who worked there at the time (B.B.) recalled that the site had been "deadly" for years with H2S levels in excess of 500 ppm. He recalled "how gassy" it was at the Station, adding that if there was a "big leak" "the gas was so bad, you couldn't run directly in there." This former pumper, who worked there from approximately 1996 to 2002, said the former owner of the Station prioritized safety, but "when Aghorn took over, they just let it go."	Same as above
AGH_0004756-57 (related interview at AGH-OPER-0003678) (G.F.)	12-17-15	Knighten invoice documenting that employee "started to experience high level of H2S," and "left location."	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Various Knighten employees who worked at Station, including those interviewed at: AGH-OPER-0003678 (G.F.); AGH-OPER-0004302 (R.H.); AGH-OPER-0016379 (T.C.); AGH-OPER-0046854 (J.M.); AGH-OPER-0046909 (P.M.); AGH-OPER-0046846 (N.B.); AGH-OPER-0046917 (W.K. and J.S.); AGH-OPER-0017129 (J.S.)	Various dates	Witnesses describe H2S exposure at the Station	Same as above
Various Aghorn employees who worked at the Station, including those interviewed at: AGH-OPER-0017900 and AGH-OPER-0047327 (J.F.); AGH-OPER-0015454 and AGH-OPER-0049490 (R.M.)	Various dates	Witnesses describe H2S exposure at the Station	Same as above
RRC Notice at AGH-OPER-0011467	Notice dated October 17, 2013, regarding an inspection dated September 18, 2013	Documenting the venting of H2S gas out of the "west fiberglass tank thief hatch" as well as the danger that conduct posed	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Various Aghorn employees who worked at the Station, including those interviewed at: AGH-OPER-0017900 and AGH-OPER-0047327 (J.F.); AGH-OPER-0003686, AGH-OPER-0015924, AGH-OPER-0026430, and AGH-OPER-0050012 (J.D.); AGH-OPER-0016454 and AGH-OPER-0049490 (R.M.)	Various dates	**The venting of H2S into the air at the Station (including the adjacent Foster D Tank Battery)**	Same as above
Neighbor of Station (C.H.) interviewed at AGH-OPER-0016382 and AGH-OPER-0049722; RCC Inspection Reports at AGH-OPER-0011214-17 and RRC I.C.E. System Notification (C.H.) at AGH-OPER-0011218	Various dates	The venting of H2S. C.H., stated that, before the October 26, 2019 fatalities, he smelled H2S (rotten egg odor) "all the time" and the flare was operating "sometimes" and when it was operating he did not smell the H2S.	Same as above
Neighbor of Station (J.S.) interviewed at AGH-OPER-0050041 and AGH-OPER-0016016	Various dates	Described a "rotten eggs" stench coming from the Station, adding that when there is little or no wind the smell is at a much higher concentration.	Same as above
Neighbor of Station (C.C.) interviewed at AGH-OPER-0050041 and AGH-OPER-0016016	Various dates	Described a constant odor emanating from the Station, and we "get used to it. . . it smells like sewer with a pungent order."	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Report of EPA Toxicologist Keteles, October 18, 2022, at 12 (AGH-OPER-0050183)	Various dates	An EPA Toxicologist documented instances where H2S emissions from the Station were "noticeable off-site" and "[i]ndividuals who reside or work adjacent to the site described being able to smell H2S routinely," citing one neighbor who "would get migraine headaches from the odor."	Same as above
Documents and testimony relating to prior leaks and pump malfunctions at the Station	Various dates	**Prior leaks and equipment malfunctions at the Station**	Intrinsic (not 404(b)); alternatively, permitted purpose is "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Reasoning: Longtime pattern of prior leaks and equipment malfunctions shows intent and lack of mistake for charged time periods.

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
RCC Inspection to include "Initial/Final Update" at AGH-OPER-0010870; Inspection Report at AGH-OPER-0010872/AGH-OPER-0011216; and RRC I.C.E. System Notification (C.H. Complaint) at AGH-OPER-0011218	January 4, 2016	Produced water leak at Foster D	Same as above
Neighbor of Station interviewed at AGH-OPER-0016382 (C.H.)	Approximately late 2015	Flow line leaking for over a month	Same as above
Former Aghorn employee (J.D.) interview at AGH-OPER-0004628 at 2	Various dates	The pumps at the Foster D always leaked	Same as above
Former Aghorn employee (J.D.) interview at AGH-OPER-0015924 at 2	Various dates	Only a small fraction of leaks were reported to the RRC. Defendant Day told him to keep conversations with the RRC at a minimum and he would take care of them.	Same as above
Former Knighten employee (J.M.) who worked at Station AGH-OPER-0046854 at 2	Approximately 2015 to 2019	Informed both Aghorn and Knighten that the pumps "were garbage."	Same as above
Former Knighten employee (T.C.) who worked at Station AGH-OPER-0016379 at 2	Approximately 2013 to 2019	Recalled leaks so bad that the pump would fill up the crank case with water and he would have to drain it out, and that most of the time he was told to just fix the pump that was leaking the worst, rather than do a full preventative maintenance job.	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
RCC Inspection Report at AGH-OPER-0011431 and RRC I.C.E. System Notification (L.M. spill notification) at AGH-OPER-0011433	September 3, 2015 inspection and August 23, 2015 incident	Produced water leak at Foster D. The RRC conducted a September 3, 2015 inspection at the Station and found the facility "[n]on-compliant," due to a produced water spill that occurred on August 23, 2015. Another inspection on January 4, 2016 also recorded a "[n]on-compliant," status due to a produced water spill reported by C.H., a neighbor, who described a flow line leaking for over a month in late 2015, and the lease being covered in black oil. The RRC directed that produced water spills "must be cleaned so that ground or surface water contamination does not occur."	Same as above
RCC Inspection Report and RRC District Office Notification Forms at AGH-OPER-0011528-530; Citizen (C.C.) who observed spill interviewed at AGH-OPER-0016381	December 27, 2012 inspection and December 23, 2012 incident	Produced water and oil leak at Foster D. On December 27, 2012, a RRC inspection documented a large leak of oil and produced water near the Station, and found Aghorn non-compliant with water protection and oil spill clean-up requirements. That inspection was prompted by a citizen (C.C.) who observed a significant amount of liquid in a field migrating toward nearby residences.	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Documents and testimony relating to the venting of H2S into the air at other Aghorn facilities	Various Dates	**The venting of H2S into the air at other Aghorn facilities**	Intrinsic (not 404(b)); alternatively, permitted purpose is "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Reasoning: Longtime pattern of H2S exposure shows intent and lack of mistake for charged time periods.
RRC Inspection Report at AGH-OPER-0011427	August 30, 2019	Noncompliance at J.E. Bagley lease, after a FLIR camera detected H2S vapors escaping from a battery, as well as an "[o]dor on site." The inspection report noted that the facility is in "a designated H2S field" that was "in close proximity to public roads and housing," which was described as a "sensitive area."	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
RRC Inspection Report at AGH-OPER-0011398	July 16, 2018	RRC cited Aghorn after an inspection, where it detected "vapors from [a] non-working flare stack," at the J.E. Bagley lease, adding that flaring was required for "safety reasons" and noted that the facility was in a sensitive area near a street and residences.	Same as above
An employee (B.B.) of businesses near Aghorn's Gist lease well #2, RRC 01620 at AGH-OPER-0049509	Approximate ten year period from 2012 to 2022	Smelled H2S gas almost weekly during an approximate. She added that this gas caused migraine headaches which caused her to lose time at work, and described the smell at times as "unbearable." According to B.B., the smell came from a well located in the back of the store where she worked, which was identified with a placard entitled "Gist lease well #2, RRC 01620." The RRC identified Aghorn as the owner of this well.	Same as above
RRC Inspection Report at AGH-OPER-0010234/AGH_0011845	June 16, 2017	RRC documented venting coming from two flare stacks at Aghorn's Gist lease, and contacted Aghorn which performed maintenance, causing the venting to cease, and "[a]ll violations were corrected onsite."	Same as above
RRC I.C.E. System Notification (H.C.) Inspection Request at AGH-OPER-0010235/AGH_0011847	June 20, 2017	Caller to RRC (H.C.) reported a "strong H2S odor" coming from Aghorn Gist lease.	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Neighbor of Aghorn Gist lease (D.B.) interviewed at AGH-OPER-0026429 and AGH-OPER-0050037; RRC I.C.E. System Notification (H.C.) Notification Information at AGH-OPER-0023557.	Various dates	Another neighbor (D.B.) near the Gist lease complained to the RRC about the H2S odor, stated that his wife has chronic migraines, and that: "I just want to live here, without getting blasted with gas from their [Aghorn's] wells." On February 7, 2020, the RRC recorded a complaint of "an H2S smell" from Aghorn's Gist A lease, and the need to "confirm if it is leaking again."	Same as above
Report of EPA Toxicologist Keteles, October 18, 2022, at 13 (AGH-OPER-0050183)	Various dates	An EPA Toxicologist described H2S releases from Aghorn facilities as "a chronic issue."	Same as above
Documents and testimony regarding prior leaks and equipment malfunctions at other Aghorn facilities	Various dates	**Prior leaks and equipment malfunctions at other Aghorn facilities**	Intrinsic (not 404(b)); alternatively, permitted purpose is "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Reasoning: Longtime pattern of prior leaks and equipment malfunctions shows intent and lack of mistake for charged time periods.

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Former Aghorn employee (J.D.) interview at AGH-OPER-0015924 at 2-4	Various dates	Estimated he observed over 100 leaks and spills during his tenure at Aghorn, and only a small fraction were reported to the RRC. It was common practice to just put fresh dirt over a spill unless the RRC ordered Aghorn to remediate it, and that the company would dispose of oil in unlined pits, and a backhoe operator once complained to him: "I can't cover it up, it's just mush."	Same as above
Former Aghorn employee (R.M.) AGH-OPER-0049490 at 3	Various dates between approximately 2008-12	He did some things wrong while employed at Aghorn including covering up oil spills because he "had to," adding that he covered up so many spills he could not count them and the piles of dirt were sometimes high enough to make a mound over the well head.	Same as above
RRC Inspection Report at AGH-OPER-0011417	August 12, 2013	At Aghorn's Gist Etal lease, well no. 5, an oil leak occurred and the free fluid was poured into a hole and covered up, and a RRC employee told an Aghorn employee that this was a "no-no."	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Neighbor of Aghorn Gist (T.H.) lease interviewed at AGH-OPER-0026443	August 12, 2013 and other dates	The Gist Etal lease, well no. 5 "always leaked and nothing was ever done," and he "could smell live oil every day" that "would make you sick to your stomach." Regarding the August 2013 complaint, T.H. observed an Aghorn employee use a backhoe to dig a hole and bury oil.	Same as above
Aghorn records (Sharp Roustabout & Construction) at AGH_0013775 and AGH_0013776	August 12, 2013	Aghorn records reflect remediation at Gist Etal lease, well no. 5 on August 12, 2013.	Same as above
RRC I.C.E. System Notification (J.W.) Inspection Request at AGH-OPER-0011392	July 10, 2018	J.W. observed a leaking well-head at Aghorn's Gist C lease and complained to the RRC that it had not been cleaned up and Aghorn had "just been throwing dirt on top of the area."	Same as above
Three RRC Inspection Reports at AGH-OPER-0011390 (July 10, 2018); AGH-OPER-0011404 (July 18, 2018); and AGH-OPER-00011497 (November 8, 2018)	July 10, 2018; July 18, 2018; and November 8, 2018	The RRC conducted three inspections, the first on July 10, 2018 and found Aghorn had illegally leaked oil and failed to remediate the soil. A second RRC inspection was conducted eight days later, on July 18, 2018, finding the same noncompliant conditions, and contacting "Aghorn Rep. Trent." A third inspection was conducted on November 8, 2018, which documented that the leak was finally remediated.	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Neighbor of Aghorn Gist lease (J.W.) interviewed at AGH-OPER-0016018 and AGH-OPER-0049723	July 10, 2018	Leak at the Gist C lease, well no. 8 on July 10, 2018, and that Aghorn "skirted around the laws," and he "was upset that enforcement agencies did not do their jobs to include the EPA and RRC," adding that he knew from his past employment in the oil field industry that dirt was required to be removed all the way down to the clean dirt.	Same as above
Neighbor of Aghorn Foster-Johnson Unit lease interviewed at AGH-OPER-0016382 (J.A.); Aghorn production at AGH_0013779; RRC Inspection Report at AGH-OPER-0011364 (May 2, 2019).	April-May of 2019	In late April of 2019, at Aghorn's Foster-Johnson Unit lease, produced water leaked from an injection transfer pipeline, impacting a nearby resident (J.A.). Aghorn employees told J.A. that the substance was "only water," though J.A. said the vegetation in her yard died, she smelled a bad odor, and did not want her children playing in the grass, prompting her to notify the RRC on April 30, 2019, which conducted an inspection on May 2, 2019, and found there had been a produced water leak and that the "affected area" would be cleaned up to the satisfaction of J.A.	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Documents and testimony regarding stationary H2S monitors at other Aghorn facilities	Various dates	**Stationary H2S Monitors at other Aghorn Facilities**	Intrinsic (not 404(b)); alternatively, permitted purpose is "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Reasoning: practices regarding stationary H2S monitors at all Aghorn sites are "inextricably intertwined" to this case, making this evidence intrinsic and not subject to 404(b). It would alternatively be admissible under 404(b) since the failure to install, calibrate and maintain these necessary warning devices at other leases shows intent and lack of mistake for the non-working monitors at the Station.

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Diversified Solutions Inc. employee (J.S.) regarding stationary H2S monitor testing on March 17, 2020 at AGH-OPER-0009193; former OSHA inspector (A.W.) interviews at AGH-OPER-0010833, and AGH-OPER-0016693; consultant (E.B.) interview at AGH-OPER-0005527	Various dates, including October 26, 2019	The Station had eight stationary monitors that were designed, in the event of an H2S release, to display on a control panel and activate a light at the top of the pump house. On the night of October 26, 2019, none of the monitors were operable and readable at the control panel, and thus they did not trigger that light and warn Jacob or Natalee Dean of the toxic level of H2S in the pump house. (Indictment, Doc. 1 at 7).	Same as above
Documents from Aghorn production--additional H2S materials--cover email June 25, 2020 at AGH-OPER-0011947; Diversified Solutions Inc. employee (J.S.) interview at AGH-OPER-0018191; Former Wellkeeper employee (W.F.) interviews at AGH-OPER-0050038 and AGH-OPER-0050042; Diversified Detection Services, Inc. Invoice and Worker at AGH_0009825; former Aghorn employee (J.D.) deposition AGH-OPER-0048337, including at pp 51-59	Various dates	Historically, Aghorn only regularly maintained properly working stationary H2S monitors at the Gist etal and the Foster C leases, and calibration and maintenance at the monitors at the Foster C lease was eventually discontinued, causing them to also fall into disrepair.	Same as above
Documents from Aghorn production--additional H2S materials--cover email June 25, 2020 at AGH-OPER-0011947	Various dates	Aghorn management was aware of work being done on these monitors, and Defendant Day regularly signed invoices for that work.	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
CSB Interview with Trent Day on November 6, 2019 at 63-64 (AGH-OPER-0004881); Former Aghorn employee (J.D.) interview at AGH-OPER-0050044 at 4; EPA-CID SA (M.M.) investigation report and photos at AGH-OPER-0049448; Map depicting proximity to residences at AGH-OPER-0051263-64; Quotes from Diversified Detection Services for "Bagley Battery" and "JE Bagley," at AGH_0012262	Various dates	Defendant Day falsely told federal investigators from the CSB that Aghorn facilities "near public housing" were equipped with working stationary H2S monitors. The J.E. Bagley lease is one example of an Aghorn facility handling and venting high H2S gas close to the public without regularly functioning, maintained, and calibrated stationary monitors. A former employee (J.D.) stated that according to his knowledge, this lease did not have working monitors and was located very close to a public road and residences, and tanks at the lease had holes at the top that constantly leaked. On May 17, 2022, an EPA Special Agent traveled to this lease, and photographed its close proximity to nearby businesses and residences. In September of 2020, a contractor submitted quotes to Aghorn for an "H2S Sensor" and "H2S Sensor Radio" for the "Bagley Battery" and "JE Bagley," respectively, for a total cost of $31,474.	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Former Aghorn employee (J.D.) interview at AGH-OPER-0050044 at 4; RRC Inspection Report at AGH-OPER-0011410; Aghorn to RRC Form H-9 signed October 6, 2002 for FJU at AGH-OPER-0003218; EPA-CID SA (M.M.) investigation report and photos at AGH-OPER-0050447; Map depicting proximity to residences at AGH-OPER-0051261-62	Various dates	The Foster Johnson lease was another example of an Aghorn facility close to the public without regularly functioning, maintained, and calibrated stationary monitors. A former employee (J.D.) stated that according to his knowledge, this lease did not have working monitors and was located very close to a public road and residences, adding that the "Foster Johnson Satellite" had "houses all around it." On August 10, 2018, the RRC received a complaint of a "very strong H2S odor" in the vicinity of this lease, and the complainant claimed his personal H2S monitor registered 25 ppm. In 2002, Aghorn filed a declaration with the RRC, asserting that the H2S concentration from this lease the astronomically high number of 105,102 ppm. On October 18, 2022, an EPA Special Agent traveled to this lease, and photographed its close proximity to residences.	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
RRC Inspection Reports at AGH-OPER-0011174 (February 9, 2015) and AGH-OPER-0011480 (October 29, 2015); former Aghorn employee (J.D.) interview at AGH-OPER-0050044 at 4; EPA-CID SA (M.M.) investigation report and photos at AGH-OPER-0050403; Map depicting proximity to residences at AGH-OPER-0051259-60	Various dates including February 9, 2015 and October 29 2015	At the Cowden -I-, the RRC twice recorded the lack of H2S monitors, even though the facility was in a "sensitive area" due to being "in close proximity" to a street, houses, and a school. A former employee (J.D.) also stated that this lease was close to residences, and on October 18, 2022, an EPA Special Agent traveled to this lease, and photographed its close proximity to residences.	Same as above
Documents and testimony regarding acts occurring after the charged time period	Various dates	**Acts occurring after the charged time period**	Intrinsic (not 404(b)); alternatively, permitted purpose is "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Reasoning: Longtime pattern of H2S emissions and leaks shows intent and lack of mistake for charged time periods.
Odessa Fire Department (OFD) Incident Report AGH-OPER-0004432	November 1, 2019	Release of oil and gas containing high levels of H2S from Aghorn's Foster Johnson lease, including	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
ODF Engineer (A.Y.) interview at AGH-OPER-0009758	November 1, 2019	Reported to scene (Aghorn's Foster Johnson lease, at or near the 3800 block of North Fremont Street in Odessa) on November 1, 2019, in response to a report of a "cloud of gas and oil [that] was shooting up in the air." A.Y. described dangerous levels of H2S and the highest amount of the toxic gas that he had ever seen, requiring an order to evacuate two residences in the vicinity of the leak.	Same as above
ODF PremierOne Report at AGH-OPER-0004427; OFD Incident Report at AGH-OPER-0004430; and ODF Captain (W.M.) interview at AGH-OPER-0049727	November 13-14, 2019	H2S was leaking from an Aghorn Gist site lease well number 95 [Lease No. 19373, API Number 13531874], prompting response by the Fire Department, which recorded that a pump jack was giving off an alarm of 15 ppm, and an Aghorn representative arrived and asserted that a "packing gland" needed to be replaced "but the company has yet to replace it," adding that "he gets a lot of calls on this pumpjack." The Fire Department left the site when the Aghorn representative assured them that the "hazard was alleviated."	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Select documents from American Patrols, Inc., including at AGH-OPER-GJ-0017244-19957; and C.R. texts at AGH_0012013	Various dates between approximately 2019-21	Aghorn caused hundreds of leaks and spills, including those documented by aerial patrols during 2019 to 2021. Many of these spills were documented and communicated to by American Patrols, Inc., an aerial patrol service hired by Aghorn to locate leaks. American Patrols repeatedly texted Aghorn that previously reported spills that had not been cleaned up.	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Interview of RRC Inspector (A.M.) at AGH-OPER-0030081; RRC Inspection Reports/documents relating to Yarbrough & Allen at AGH-OPER-0023415, 23416, 23417, 23419, 23420, and AGH-OPER-0024347, AGH-OPER-0023442, 23443, 23444, 23445, AGH-OPER-0023447, 23448, AGH-OPER-0023445, AGH-OPER-0023461, AGH-OPER-0023473, AGH-OPER-0023480, 23482; Paul Moss 34 at AGH-OPER-0023471, AGH-OPER-0023666, AGH-OPER-0023538, 23539, AGH-OPER-0024858, 0024859; Ector AM Fee at AGH-OPER-0023457, AGH-OPER-0023472, AGH-OPER-0023639, AGH-OPER-0023540, 23541, AGH-OPER-0024860, 24861, AGH-OPER-0023636; and East Harper Unit at AGH-OPER-0023421, 23422, 23423, AGH-OPER-00621, AGH-OPER-0023479, AGH-OPER-0023633, AGH-OPER-0023543	2020 and 2021	Repeated leaks coupled with lack of timely remediation at several Aghorn leases: the Yarbrough & Allen, Paul Moss, Ector AM Fee, and East Harper Unit. The problems included tank batteries overflowing, dirt being thrown on spills, and nothing being done to address the issues.	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Email from Deputy R.K. at Ector County Sheriff's Office at AGH-OPER-0023176; Photos at AGH-OPER-0023178-81; and Interview of R.K. at AGH-OPER-0049732	January 16, 2021	The Ector County Sheriff's Office documented a spill at Aghorn's East Harper Unit. Aerial photos and video depicted the spill at Well No. 240 at the Unit, which is located in West Odessa.	Same as above
Documents and testimony that Aghorn made false statements related to the Dean fatalities, including Aghorn Operating, Inc., 2020 Underwriting Narrative at AJG0000340	Various dates	Aghorn made false statements related to the Dean fatalities	Intrinsic (not 404(b)); alternatively, permitted purpose is "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Reasoning: subsequent unindicted false statement to show intent or knowledge to commit the charged crime.
Former Aghorn employee (J.D.) interview at AGH-OPER-0026430 at 3; and AGH-OPER-0049469 at 1	Various dates	Deficient site security at Aghorn, and entrance gate to the Station was left open the entire day and locked at the end of the day. Remembers introducing grandson to Aghorn supervisory employees, including Vice-President Trent Day.	Same as above

Doc. No.	Approx. date	Description	404(b) Permitted Purpose and Reasoning
Documents and testimony regarding false pressure tests prior to the charged time period	Various dates	**False pressure tests prior to the charged time period**	Intrinsic (not 404(b)); alternatively, permitted purpose is "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Reasoning: longtime pattern of submitting false pressure tests shows intent and lack of mistake for charged time periods.
Former Aghorn employee (J.F.) at AGH-OPER-0017900 and AGH-OPER-0047327.	2015-16	J.F., the former Aghorn employee, recalled observing Defendant Day and another Aghorn supervisory employee "draw up a lot of charts in the office" and attaching a chart recorder to a nitrous tank bottle.	Same as above
Former Kodiak employee (R.T.) at AGH-OPER-0003692 at 2; and AGH-OPER-0017913 at 1	Approximate period of 2007-17	Former Kodiak employee recalled the tests being done in the office and not on site and will testify regarding the absence of tests.	Same as above
Expert witnesses Jim Kirksey and Rick Davis	Approximate period of 2013-17	Testimony that pressure charts submitted prior to 2017 show evidence that the pressure tests were not conducted.	Same as above