

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

BASF PLANT SCIENCE GMBH and )  
BASF PLANT SCIENCE L.L.C., )  
 )  
Plaintiffs, )  
v. ) C.A. No. \_\_\_\_\_  
 )  
PIONEER HI-BRED INTERNATIONAL, ) **JURY TRIAL DEMANDED**  
INC. and E. I. DU PONT DE NEMOURS )  
AND COMPANY, )  
 )  
Defendants. )

**COMPLAINT**

1. Plaintiffs BASF Plant Science GmbH and BASF Plant Science L.L.C. (collectively “Plaintiffs”) for their complaint against defendants Pioneer Hi-Bred International, Inc., and E. I. du Pont de Nemours and Company (collectively “Defendants”) allege as follows:

**NATURE OF THE ACTION**

2. Plaintiff BASF Plant Science GmbH (“BPS”) seeks damages and injunctive relief for Defendants’ infringement of U.S. Patent No. 5,750,866 (“the ‘866 patent”), entitled “AHAS Promoter Useful For Expression of Introduced Genes In Plants.” A true and correct copy of the ‘866 patent is attached as Exhibit A. This patent relates to plants and plant biotechnology, including genetically modified plants that are resistant to certain herbicides.

3. Plaintiff BASF Plant Science L.L.C. (“BPS LLC”) seeks a declaratory judgment of the non-infringement, invalidity, and unenforceability of United States Patent No. 5,141,870 (“the ‘870 patent”), entitled “Nucleic Acid Fragment Encoding Herbicide Resistant Plant Acetolactate Synthase,” and United States Patent No. 5,605,011 (“the ‘011 patent”), also entitled “Nucleic Acid Fragment Encoding Herbicide Resistant Plant Acetolactate Synthase.”

True and correct copies of the '870 patent and the '011 patent are attached as Exhibits B and Exhibit C, respectively.

### **JURISDICTION AND PARTIES**

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a) because this action arises under the patent laws of the United States, 35 U.S.C. §§ 1 *et seq.*, and under the Federal Declaratory Judgments Act, 28 U.S.C. §§ 2201 and 2202.

5. Plaintiff BPS is a corporation organized and existing under the laws of Germany with its principal place of business at Carl-Bosch-Straße 38, 67063 Ludwigshafen, Germany. BPS is the assignee and owner of the '866 patent.

6. Plaintiff BPS LLC is a company organized and existing under the laws of Delaware with its principal place of business at 26 Davis Drive, Research Triangle Park, North Carolina 27709.

7. Defendant Pioneer Hi-Bred International, Inc. ("Pioneer") is a corporation organized under the laws of Iowa with its principal place of business at 7100 NW 62nd Avenue, Johnston, Iowa 50131. Defendant Pioneer is licensed to do business and does business in Delaware, and has an agent for service of process in Delaware. Defendant Pioneer is a wholly-owned subsidiary of Defendant E. I. du Pont de Nemours and Company.

8. Defendant E. I. du Pont de Nemours and Company ("DuPont") is a corporation organized under the laws of Delaware. DuPont does business in Delaware, including at its principal place of business at 1007 Market Street, Wilmington, Delaware 19898, and has an agent for service of process in Delaware.

9. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391 and 1400(b).

## FACTS

10. Plaintiffs are in the business of researching, developing, testing, licensing, and selling multiple types of agricultural products and technologies, including products and technologies that improve crop quality and yield, promoting more efficient agriculture.

11. On May 12, 1998, the '866 patent duly and legally issued to the named inventors, Gabriele Dietrich, Jane Smith, and Jianying Peng, who assigned their rights to American Cyanamid Company ("AmCy"). The '866 patent relates to promoters that are useful for gene expression in plants and facilitates the development of genetically modified crops and crop seeds that are resistant to certain herbicides.

12. In 2001, Plaintiff BPS became the owner of the '866 patent and still owns all rights, title, and interests in and to the '866 patent, including all rights to recover for any past infringement of the '866 patent.

13. On May 30, 2007, Defendant Pioneer submitted a Petition for the Determination of Nonregulated Status for herbicide tolerant corn event DP-098140-6 ("98140 corn") to the U.S. Department of Agriculture. The cover page of the Petition is printed on the letterhead of, and bears the Iowa address of, DuPont Agriculture and Nutrition ("DuPont A&N"), which is the segment or business division within Defendant DuPont under which Defendant Pioneer operates. Defendant Pioneer has since submitted several addenda to that petition (collectively "the Petition"); such addenda were also submitted with cover pages printed on DuPont A&N letterhead bearing DuPont A&N's Iowa address.

14. The Petition describes 98140 corn, including the technology used in and related to 98140 corn, and further identifies the locations in the United States where 98140 corn has been grown and tested.

15. U.S. Patent Application No. 11/869,973, filed on October 10, 2007, relates to 98140 corn and, on information and belief, is co-assigned to both Defendants. U.S. Patent Application Publication No. 2008/0108072 (“the ‘072 Publication”), which published on May 8, 2008, is the publication of the originally filed application for U.S. Patent Application No. 11/869,973 and describes Defendants’ 98140 corn, including the technology used in and related to 98140 corn.

16. Defendants’ 98140 corn and related technology described in the Petition and the ‘072 Publication practice one or more claims of the ‘866 patent.

17. Defendants state in the Petition that they intend to market 98140 corn in the United States under the brand name Optimum<sup>TM</sup> GAT<sup>TM</sup> (“OGAT”).

18. According to Defendants’ publicly available documents and statements, Defendant Pioneer intends to begin marketing its OGAT corn seed as soon as it obtains all of the necessary regulatory approvals and will begin commercial introduction of this product in 2010.

19. In 2006, Defendants signed a joint venture and licensing agreement with Syngenta Group Company and Syngenta Seeds, Inc. (“collectively Syngenta”) that allows Syngenta to market OGAT corn and that set up a 50-50 joint venture entity named Greenleaf Genetics, LLC, that may out-license DuPont biotechnology to seed companies, including offering DuPont’s corn breeding material.

20. Defendants, through their agents, employees, and assigns, have been on notice of the ‘866 patent since at least 2007.

21. Plaintiff BPS has never granted Defendants any rights under the ‘866 patent.

22. Defendants have willfully acted, are acting, and will continue to act with full knowledge and with notice that their activities were, are, and will continue to be in violation of Plaintiff BPS's patent rights under the '866 patent.

23. Starting in 2006 and continuing through May 2009, Defendants, Plaintiffs, and entities affiliated with Plaintiffs engaged in negotiations for potential agreements. Among other topics, these negotiations concerned possible cross-licenses of intellectual property and technology, including, starting in 2007, a possible license to the '866 patent. In November 2008, Plaintiff BPS LLC and Defendants entered into a written Standstill Agreement under which to continue certain negotiations ("Standstill Agreement"). During its effective term, the Standstill Agreement prevented Plaintiffs and Defendants from suing one another either for infringement of patents subject to the Standstill Agreement or for a declaratory judgment concerning such patents. The Standstill Agreement was extended twice and expired on June 1, 2009, at 12:00 A.M., but the parties have continuing obligations under the Standstill Agreement not to disclose any confidential information exchanged during negotiations under the Standstill Agreement. Generally, however, during such negotiations, Defendants and Plaintiff BPS LLC continued to discuss issues concerning the '866 patent. Additionally, during these negotiations, Defendants raised specifically for the first time the issue of DuPont's '870 and '011 patents. On information and belief, Defendants hold forth these patents as valid and enforceable. The confidential discussions about the '870 and '011 patents under the Standstill Agreement caused Plaintiffs to have a reasonable apprehension that, once the Standstill Agreement expired, Defendants would sue Plaintiff BPS LLC for infringement of these patents.

24. On August 25, 1992, the '870 patent issued; on information and belief, Defendant DuPont has owned all rights, title, and interests in and to the '870 patent since that date, including all rights to recover for past infringement of the '870 patent.

25. The '870 patent purports to claim, and the named inventors on the '870 patent purport to have invented, allegedly novel and nonobvious nucleic acid constructs comprising an isolated nucleic acid fragment comprising a nucleotide sequence encoding a plant AHAS protein that contains a point mutation. All of the nucleic acid fragments recited in the claims of the '870 patent were purportedly claimed in now expired patents related to the '870 patent, U.S. Patent Nos. 5,103,659 and 5,378,824 (collectively the "Expired Bedbrook Patents").

26. On February 25, 1997, the '011 patent issued; on information and belief, Defendant DuPont has owned all rights, title, and interests in and to the '011 patent since that date, including all rights to recover for past infringement of the '011 patent.

27. The '011 patent purports to claim, and the named inventors on the '011 patent purport to have invented, allegedly novel and nonobvious methods for controlling the growth of undesired vegetation at a locus where a plant has been cultivated by applying certain herbicides to the plant, where the plant has an isolated nucleic acid fragment comprising a nucleotide sequence encoding a plant AHAS protein that contains a point mutation. All of the nucleic acid fragments recited in the claims of the '011 patent were purportedly claimed in the Expired Bedbrook Patents.

28. AmCy (purchased by BASF Aktiengesellschaft in 2000), Plaintiffs, and entities affiliated with Plaintiffs have been competitors of Defendant DuPont concerning agrochemical products and plant biotechnology during the purported terms of DuPont's '870 patent, '011 patent, and Expired Bedbrook Patents. DuPont unreasonably and inexcusably

delayed asserting its '870 patent, '011 patent, and Expired Bedbrook Patents. AmCy, Plaintiffs, and affiliated entities relied on DuPont's years of silence and inaction and developed their businesses and technology under the reasonable belief that they would not be subject to an infringement lawsuit in which DuPont asserts the '870 patent, the '011 patent, and/or the Expired Bedbrook Patents. Plaintiffs have been prejudiced by DuPont's conduct.

**COUNT I  
(Patent Infringement)**

29. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 28 in their entirety.

30. Defendants have infringed, are infringing, and will continue to infringe, literally and/or under the doctrine of equivalents, one or more claims of the '866 patent, directly, by contributory infringement, and/or by actively inducing infringement.

31. Defendants' infringement of the '866 patent, direct and/or indirect, was, is, and will continue to be willful.

32. As a consequence of Defendants' infringement of the '866 patent, direct and/or indirect, Plaintiff BPS suffered, is suffering, and will continue to suffer damages in an amount not yet determined.

33. As a consequence of Defendants' infringement of the '866 patent, direct and/or indirect, Plaintiff BPS suffered, is suffering, and will continue to suffer irreparable harm for which there is no adequate remedy at law. These injuries will continue unless and until Defendants' infringing activities are enjoined by this Court.

**COUNT II  
(Declaratory Judgment of Non-Infringement)**

34. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 33 in their entirety.

35. Plaintiff BPS LLC reasonably believes that, because it did not agree to license the '870 and '011 patents during negotiations under the Standstill Agreement, Defendant DuPont will sue Plaintiff BPS LLC for infringement of those patents.

36. Plaintiff BPS LLC has not infringed and is not infringing, either literally or under the doctrine of equivalents, any valid claim of either the '870 patent or the '011 patent, either directly or by contributory infringement or by actively inducing infringement.

37. The Standstill Agreement having expired, there is a substantial and continuing justiciable controversy between Plaintiff BPS LLC and Defendants as to the alleged infringement of the '870 patent and the '011 patent. Defendants' actions have created a reasonable apprehension in Plaintiff BPS LLC of imminent harm and loss that will result from Defendants alleging that the '870 patent and the '011 patent are valid and enforceable and that Plaintiff BPS LLC infringes these patents. Accordingly, a substantial controversy of a definite and concrete nature has arisen between Plaintiff BPS LLC and Defendants that is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment of non-infringement.

**COUNT III**  
**(Declaratory Judgment of Invalidity)**

38. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 37 in their entirety.

39. The '870 patent and the '011 patent are invalid because they fail to satisfy the conditions and requirements of the patent laws as set forth in Title 35 of the United States Code and other applicable law, including but not limited to 35 U.S.C. §§ 101, 102, 103, and/or 112, the rules and regulations pertaining to these statutes, and judicially-created law such as obviousness-type double patenting.

40. The Standstill Agreement having expired, there is a substantial and continuing justiciable controversy between Plaintiff BPS LLC and Defendants as to the invalidity of the '870 patent and the '011 patent. Defendants' actions have created a reasonable apprehension in Plaintiff BPS LLC of imminent harm and loss that will result from Defendants alleging that the '870 patent and the '011 patent are valid and enforceable and that Plaintiff BPS LLC infringes these patents. Accordingly, a substantial controversy of a definite and concrete nature has arisen between Plaintiff BPS LLC and Defendants that is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment of invalidity.

**COUNT IV**  
**(Declaratory Judgment of Unenforceability)**

41. Plaintiffs repeat and reallege the allegations of paragraphs 1 through 40 in their entirety.

42. Enforcement of the '870 patent against Plaintiff BPS LLC is barred, in whole or part, by the doctrines of estoppel, laches, acquiescence, and/or waiver.

43. Enforcement of the '011 patent against Plaintiff BPS LLC is barred, in whole or part, by the doctrines of estoppel, laches, acquiescence, and/or waiver.

44. The Standstill Agreement having expired, there is a substantial and continuing justiciable controversy between Plaintiff BPS LLC and Defendants as to the unenforceability of the '870 patent and the '011 patent. Defendants' actions have created a reasonable apprehension in Plaintiff BPS LLC of imminent harm and loss that will result from Defendants alleging that the '870 patent and the '011 patent are valid and enforceable and that Plaintiff BPS LLC infringes these patents. Accordingly, a substantial controversy of a definite and concrete nature has arisen between Plaintiff BPS LLC and Defendants that is of sufficient immediacy and reality to warrant the issuance of a declaratory judgment of unenforceability.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment:

A. Declaring that Defendants have infringed, infringe, and will continue to infringe one or more claims of the '866 patent, directly, by contributory infringement, and/or by actively inducing infringement;

B. Preliminarily and permanently enjoining Defendants and their officers, agents, servants, employees, parents, subsidiaries, successors, assignees, licensees, and attorneys, and all persons acting in concert or participation with them, from further infringing the '866 patent, directly, by contributory infringement, and/or by actively inducing infringement;

C. Awarding Plaintiff BPS damages in an amount adequate to compensate it for Defendants' past and ongoing infringement of the '866 patent, but not less than a reasonable royalty;

D. Awarding Plaintiff BPS pre-judgment and post-judgment interest on the damages caused to them by reason of Defendants' past and ongoing infringement of the '866 patent;

E. Declaring that Defendants' infringement of the '866 patent has been willful, and trebling the damages awarded for that infringement;

F. Declaring that Plaintiff BPS LLC has not infringed, directly, by contributory infringement, or by actively inducing infringement, any valid claims of either the '870 patent or the '011 patent;

G. Declaring that the '870 patent and the '011 patent are invalid;

H. Declaring that the '870 patent and the '011 patent are unenforceable, in whole or in part, against Plaintiff BPS LLC and its officers, partners, employees, agents, parents, subsidiaries, successors, assignees, licensees, servants, and attorneys, and all persons acting in

concert or participation with them, due to the doctrines of estoppel, laches, acquiescence, and/or waiver;

I. Enjoining Defendants and their officers, partners, employees, agents, parents, subsidiaries, successors, assignees, licensees, servants, and attorneys, and all persons acting in concert or participation with them, from instituting or prosecuting any lawsuit or proceeding placing at issue the right of Plaintiff BPS LLC and its officers, partners, employees, agents, parents, subsidiaries, successors, assignees, licensees, servants, and attorneys, and all persons acting in concert or participation with them, to engage in activities that allegedly infringe, directly or indirectly, any claim of either the '870 patent or the '011 patent;

J. Declaring that this is an "exceptional case" pursuant to 35 U.S.C. § 285 and ordering Defendants to pay Plaintiffs' attorney fees and costs; and

K. Awarding such other and further relief as this Court may deem just and proper.

### **JURY DEMAND**

Trial by jury is demanded on all issues for which a jury trial is available.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

*/s/ Jack B. Blumenfeld*

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Jack B. Blumenfeld (#1014)  
1201 North Market Street  
P.O. Box 1347  
Wilmington, DE 19899  
jblumenfeld@mnat.com  
(302) 658-9200

*Attorneys for Plaintiffs  
BASF Plant Science GmbH and BASF Plant  
Science L.L.C.*

OF COUNSEL:

Kenneth A. Gallo  
Kent E. Kemeny  
Karen Berenthal  
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP  
2001 K Street NW  
Washington, DC 20006-1047  
(202) 223-7300

John E. Nathan  
Jayson L. Cohen  
PAUL, WEISS, RIFKIND, WHARTON & GARRISON, LLP  
1285 Avenue of the Americas  
New York, NY 10019-6064  
(212) 373-3000

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