

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF ILLINOIS  
EAST ST. LOUIS DIVISION

MONSANTO COMPANY and )  
MONSANTO TECHNOLOGY LLC, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
NORBERT BENING and DAVID BENING, )  
 )  
Defendants. )

Cause No.: 07-261-DRH

**COMPLAINT**

Plaintiffs Monsanto Company and Monsanto Technology LLC (sometimes collectively referred to hereinafter as “Monsanto”), by and through their undersigned counsel, and for their Complaint against Norbert Bening and David Bening (hereinafter sometimes referred to as “Defendants”) state:

**THE PLAINTIFFS**

1. Monsanto Company is a company organized and existing under the laws of the State of Delaware with its principal place of business in St. Louis, Missouri. Monsanto Company is authorized to do and is doing business in Missouri and in this judicial district. Monsanto Company is in the business of developing, manufacturing, licensing and selling agricultural biotechnology, agricultural chemicals and other agricultural products.

2. Monsanto Technology LLC is a company organized and existing under the laws of the State of Delaware with its principal place of business in St. Louis, Missouri. Monsanto Technology LLC is authorized to do and is doing business in Missouri and in this judicial district.

### **THE DEFENDANTS**

3. Defendant Norbert Bening is a resident and domiciliary of Washington County, Illinois. Defendant Norbert Bening is engaged in a farming business that involves the planting of crops, including soybeans.

4. Defendant David Bening is a resident and domiciliary of Washington County, Illinois. Defendant David Bening is engaged in a farming business that involves the planting of crops, including soybeans.

5. Upon information and belief, Defendants Norbert and David Bening engage in a joint farming operation.

### **JURISDICTION AND VENUE**

6. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, in that one or more of Plaintiffs' claims arise under the laws of the United States, as well as 28 U.S.C. § 1338, granting district courts original jurisdiction over any civil action regarding patents. Additionally, this Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over Plaintiffs' non-federal question claims, such that they form part of the same case or controversy.

7. This Court has personal jurisdiction over Defendants and venue is proper in this judicial district insomuch as the Defendants are domiciled in this judicial district.

### **GENERAL ALLEGATIONS**

8. After the investment of substantial time, expense, and expertise, Monsanto developed a new plant biotechnology that involves the transfer into crop seed of a gene that causes such seed to be resistant to Roundup® branded herbicides.<sup>1</sup> Roundup® is a non-selective herbicide manufactured by Monsanto, which causes severe injury or crop destruction to soybean varieties that are not Roundup Ready®. This technology has been utilized in several agricultural

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<sup>1</sup> Roundup® and Roundup Ready® are registered trademarks of Monsanto Technology LLC.

crops, including soybeans. The genetically improved seeds are marketed by Monsanto as Roundup Ready® soybeans.

9. Monsanto's Roundup Ready® seed biotechnology is protected under patents issued by the United States Patent Office, including U.S. Patent Number 5,352,605 (the "605 patent") and U.S. Patent Number US RE39,247 E (the "247 patent"), true and accurate copies of which are attached hereto as Exhibits 1 and 2 and incorporated herein by reference. The aforementioned patents were issued and assigned to Monsanto prior to some or all of the events giving rise to this action.

10. Monsanto licenses the use of Roundup Ready® seed technology to farmers at the retail marketing level.

11. The required statutory notice that Roundup Ready® biotechnology is patented is placed on the labeling of all bags containing Roundup Ready® seed. In particular, each bag of Roundup Ready® seed is marked with notice of at least U.S. Patent No. 5,352,605.

12. Under the terms of Monsanto's licensing system, through which Monsanto's patented Roundup Ready® crop seed technology is licensed, a purchaser is only authorized to use the seed for planting a commercial crop in a single growing season, and is prohibited from saving any of the crop produced from the purchased seed for planting or selling saved seed from the crop produced from the purchased seed, or otherwise supplying or transferring any seed produced from the purchased seed to anyone for planting. The only permissible use of the patent protected seed is to market the crop derived therefrom as a commodity.

13. Monsanto sought information and materials relating to Defendants' farming operation that would assist Monsanto in confirming the scope of Defendants' compliance with U.S. patent law and the restrictions associated with the use of seed containing Monsanto's

patented biotechnology, including records of the Farm Service Agency (“FSA”) of the United States Department of Agriculture, agricultural purchase receipts/records, and crop production sales receipts/records. With limited exception, Defendants have failed to provide any of the requested information as of the date this Complaint is filed. In the absence of such information and materials, Monsanto resorts to the judicial process and the aid of discovery to obtain such information and materials.

14. Upon information and belief, in at least 2006, fields farmed by Defendants were planted with “saved,” bin-run Roundup Ready® soybeans, that is, soybean seed which was produced from the Roundup Ready® soybean seed which was planted in 2005 or an earlier year.

15. Upon information and belief, subsequent to the planting and the germination of the saved Roundup Ready® soybean seed in 2006, those same fields were sprayed with a chemical. This spraying was conducted “over the top,” that is, there was no effort being made by those conducting the spraying to insure that the chemical being sprayed did not come in contact with newly germinated soybean plants. Upon information and belief, Defendants’ fields planted with the saved, bin-run Roundup Ready® soybean seed were sprayed with a herbicide containing glyphosate.

16. Upon information and belief, Defendants knowingly, intentionally and willfully planted unlicensed, saved Roundup Ready® seed without authorization from Monsanto and in violation of Monsanto’s patent rights.

**COUNT I - PATENT INFRINGEMENT - PATENT NO. 5,352,605**

17. Each and every material allegation set forth in the above numbered paragraphs is hereby incorporated by reference just as if it were explicitly set forth hereunder.

18. On October 4, 1994, United States Patent No. 5,352,605 was duly and legally issued for an invention in Chimeric Genes for Transforming Plant Cells Using Viral Promoters, and since that date, Monsanto has been and still is the owner of that patent. *See* Exhibit 1. This invention is in the fields of genetic engineering and plant biology.

19. Upon information and belief, without authorization or license, Defendants have made, used, offered to sell and/or sold Monsanto's patented invention within the United States during the term of Patent No. 5,352,605, and in violation of 35 U.S.C. § 271.

20. Upon information and belief, Defendant's infringing activities were undertaken with full knowledge and with notice that Defendants were in violation of Monsanto's patent rights.

21. Pursuant to 35 U.S.C. § 283, Monsanto is entitled to injunctive relief in accordance with the principles of equity to prevent the infringement of rights secured by its patents.

22. Pursuant to 35 U.S.C. § 284, Monsanto is entitled to damages adequate to compensate for the infringement, although in no event less than a reasonable royalty, together with such interest and costs to be taxed to Defendants. Monsanto requests that these damages be trebled pursuant to 35 U.S.C. § 284 in light of Defendants' knowing, willful, deliberate and conscious infringement of the patent rights at issue and that Monsanto recover its reasonable attorneys' fees pursuant to 35 U.S.C. § 285.

**COUNT II - PATENT INFRINGEMENT - PATENT NO. US RE39,247 E**

23. Each and every material allegation set forth in the above numbered paragraphs is hereby incorporated by reference just as if it were explicitly set forth hereunder.

24. On August 22, 2006, United States Patent No. US RE39,247 E was duly and legally reissued for an invention in Glyphosate-Tolerant 5-Enolpyruvylshikimate-3-Phosphate Synthases. This was the reissue of Patent No. 5,633,435, issued on May 27, 1997, and since that date, Monsanto has been and still is the owner of that patent. *See* Exhibit 2. This invention is in the fields of genetic engineering and plant biology.

25. Upon information and belief, without authorization or license, Defendants have made, used, offered to sell and/or sold Monsanto's patented invention within the United States during the term of Patent No. 5,352,605 and/or Patent No. US RE39,247 E, and in violation of 35 U.S.C. § 271.

26. Upon information and belief, Defendants' infringing activities were undertaken with full knowledge and with notice that Defendants were in violation of Monsanto's patent rights.

27. Pursuant to 35 U.S.C. § 283, Monsanto is entitled to injunctive relief in accordance with the principles of equity to prevent the infringement of rights secured by its patents.

28. Pursuant to 35 U.S.C. § 284, Monsanto is entitled to damages adequate to compensate for the infringement, although in no event less than a reasonable royalty, together with such interest and costs to be taxed to Defendants. Monsanto requests that these damages be trebled pursuant to 35 U.S.C. § 284 in light of Defendants' knowing, willful, deliberate and conscious infringement of the patent rights at issue and that Monsanto recover its reasonable attorneys' fees pursuant to 35 U.S.C. § 285.

**COUNT III - CONVERSION**

29. Each and every allegation set forth in the above-numbered paragraphs is hereby incorporated by reference just as if it were explicitly set forth hereunder.

30. Upon information and belief, by making, using, offering to sell or selling Roundup Ready® soybean seed without authority, Defendants intentionally and wrongfully exercised dominion, ownership and control over Roundup Ready® technology which was the property of Monsanto under the terms of the '605 and '247 Patents and which is only legitimately available to third parties through an express and limited license from Monsanto.

31. Upon information and belief, Defendants' conversion of Monsanto's property rights was malicious and willful.

32. As a result, Monsanto is entitled to damages equal to the value of the Roundup Ready® soybean seed at the time of the conversion; which is an amount equal to the applicable sale price.

33. As Defendants' conversion of Monsanto's property rights was malicious and willful, Monsanto is entitled to punitive damages.

**COUNT IV - UNJUST ENRICHMENT**

34. Each and every allegation set forth in the above-numbered paragraphs is hereby incorporated by reference just as if it were explicitly set forth hereunder.

35. Upon information and belief, Defendants' conduct, as described in the above-numbered paragraphs, has resulted in a benefit being conferred upon Defendants and Defendants' appreciation of the benefit in that Defendants illegally made, used, sold and offered to sell, or otherwise transferred unlicensed Roundup Ready® soybean seed, during at least 2006 in contravention of Monsanto's patent rights.

36. As a result, Defendants have been unjustly enriched and obtained profits that in equity and good conscience belong to Monsanto.

37. Defendants' acceptance and retention of this benefit under the circumstances renders Defendants retention of these benefits inequitable.

38. As a result, Monsanto is entitled to damages in an amount to be proven at trial.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs Monsanto Company and Monsanto Technology LLC request judgment in their favor and against Defendants providing the following remedies:

- a. A protective order prohibiting Defendants from:
  - (1) selling, destroying, tampering, or engaging in any other action or activity which may result in the destruction or spoliation of any seed containing the Roundup Ready® gene technology which is either stored by Defendants or is presently located on or growing in fields owned, leased, operated, controlled or otherwise farmed by Defendants or on their behalf;
  - (2) any action that would hinder Monsanto's ability to discover all stored seed and identify all planted soybean fields owned, leased, operated, controlled or farmed by Defendants or on their behalf for the purpose of conducting confirmation testing for the presence of Monsanto proprietary gene technology.
- b. Entry of judgment for damages, together with interest and costs, to compensate Monsanto for Defendants' patent infringement;
- c. Trebling of damages awarded for Defendants' infringement of Monsanto's patent rights, together with reasonable attorneys' fees and costs;
- d. Entry of a permanent injunction against Defendants to prevent Defendants from making, using, planting, selling, or offering to sell or otherwise transferring any Roundup Ready® crop seed in order to protect against future infringement of Monsanto's rights secured by its patent rights;
- e. Entry of judgment for damages, together with interest and costs, to compensate Monsanto for Defendants' conversion of Plaintiffs' property rights;

- f. Entry of a punitive damages award against Defendants for their willful and malicious conversion of Monsanto's property;
- g. Entry of judgment for damages, together with interest and costs to compensate Monsanto for Defendants' unjust enrichment and the profits obtained that in equity and good conscience belong to Monsanto; and
- h. For such other and further as the Court shall deem appropriate.

Respectfully submitted,

HUSCH & EPPENBERGER, LLC

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