

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MONSANTO COMPANY and)	
MONSANTO TECHNOLOGY LLC,)	
)	
Plaintiffs,)	
)	Cause No.:
v.)	
)	
RANDY FOSTER,)	
)	
Defendant.)	

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 Randy Foster (hereinafter sometimes referred to as “Defendant” or “Defendant Foster”) 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 DEFENDANT

3. Defendant Randy Foster is a resident and domiciliary of Dunklin County, Missouri. Defendant Foster is engaged in a farming business that involves the planting of crops, including soybeans.

JURISDICTION AND VENUE

4. 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.

5. This Court has personal jurisdiction over Defendant Foster and venue is proper in this judicial district inasmuch as the parties agreed to personal jurisdiction in this judicial district and have designated this Honorable Court as the forum and venue for all disputes arising under the licensing agreement executed by Defendant Foster. A true and accurate copy of the licensing agreement executed by or on behalf of Defendant Foster in 2004 is attached hereto as Exhibit 1 and incorporated herein by this reference.

GENERAL ALLEGATIONS

6. 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.¹ 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

¹ 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.

7. 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 2 and 3 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.

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

9. 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.

10. A 2004 licensing agreement was executed by and/or on behalf of Defendant Foster. (*See Exhibit 1*).

11. 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.

12. Monsanto sought information and materials relating to Foster's farming operation from Foster that would assist Monsanto in confirming the scope of Defendant's compliance with U.S. patent law and the licensing agreement he executed, including, without limitation, the inspection and sampling of crop production and fields, records of the Farm Service Agency ("FSA") of the United States Department of Agriculture, agricultural purchase receipts/records, and crop production sales receipts/records. Defendant has not provided the requested information or materials. 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.

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

14. 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, Defendant Foster's fields planted with the saved, bin-run Roundup Ready® soybean seed were sprayed with a herbicide containing glyphosate.

15. Upon information and belief, Defendant Foster knowingly, intentionally and willfully planted unlicensed, saved Roundup Ready® seed without authorization from Monsanto and in violation of Monsanto's patent rights.

16. Pursuant to the terms of the 2004 licensing agreement which Defendant Foster executed, Defendant agreed to allow Monsanto to review Farm Service Agency crop reporting

information including Summary Acreage History Report, Form 578 and corresponding aerial photographs, Risk Management Agency claim documentation, dealer/retailer invoices for seed and chemical transactions, and to allow Monsanto to examine any copy any records and receipts that could be relevant to Defendant's compliance with the terms of the Agreement. *See* Exhibit 1.

17. On or about March 13, 2007, Monsanto, through its counsel, requested Defendant Foster, pursuant to the 2004 licensing agreement, produce Farm Service Agency Records including Form 578 (producer print and farm and tract detail), aerial maps and Form 1026A for the years 2004 through 2006; receipts evidencing Defendant's purchase of soybean seed and herbicides for crop years 2004, 2005 and 2006; and all seed cleaning receipts, invoices and records for 2004 through 2006.

18. Despite his contractual obligation to do so, Defendant did not, and has not, produced several of the requested documents, including the Farm Service Agency Form 578 farm and tract detail and aerial maps for the years 2004 through 2006 and the Form 578 (producer print) for 2006, notwithstanding follow up requests for same, including by letter dated April 16, 2007.

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

19. 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.

20. 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 2. This invention is in the fields of genetic engineering and plant biology.

21. Upon information and belief, without authorization or license, Defendant Foster has 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.

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

23. 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.

24. 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 Defendant. Monsanto requests that these damages be trebled pursuant to 35 U.S.C. § 284 in light of Defendant Foster's 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

25. 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.

26. 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 3. This invention is in the fields of genetic engineering and plant biology.

27. Upon information and belief, without authorization or license, Defendant has 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.

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

29. 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.

30. 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 Defendant. Monsanto requests that these damages be trebled pursuant to 35 U.S.C. § 284 in light of Defendant's 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

31. 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.

32. Upon information and belief, by making, using, offering to sell or selling Roundup Ready® soybean seed without authority, Defendant Foster 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.

33. Upon information and belief, Defendant Foster's conversion of Monsanto's property rights was malicious and willful.

34. 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.

35. As Defendant Foster's conversion of Monsanto's property rights was malicious and willful, Monsanto is entitled to punitive damages.

COUNT IV - UNJUST ENRICHMENT

36. 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.

37. Upon information and belief, Defendant Foster's conduct, as described in the above-numbered paragraphs, has resulted in a benefit being conferred upon Defendant Foster and Defendant Foster's appreciation of the benefit in that Defendant Foster 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.

38. As a result, Defendant Foster has been unjustly enriched and obtained profits that in equity and good conscience belong to Monsanto.

39. Defendant Foster's acceptance and retention of this benefit under the circumstances renders Defendant Foster's retention of these benefits inequitable.

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

COUNT V - BREACH OF CONTRACT

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

42. The conduct of Defendant Foster, as set forth above, is a breach of the 2004 licensing agreement (*see* Exhibit 1) which, among other provisions, prohibits the saving, planting and/or transfer or sale of saved Roundup Ready® soybean seed or use of any portion of seed grown from newly purchased Roundup Ready® soybean seed for anything other than marketing the crop derived therefrom into a terminal market as a commodity.

43. As a direct and proximate result of this breach, Monsanto has been damaged and is entitled to damages for breach of the licensing agreement, as well as reasonable attorneys' fees and costs under the licensing agreements.

COUNT VI – BREACH OF CONTRACT

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

45. The failure of Defendant Foster to allow Monsanto to review, examine and copy requested documents relevant to the Defendant's compliance with the terms of the 2004 licensing agreement is a breach of the 2004 licensing agreement.

46. Monsanto requests that the Court grant it the remedy of specific performance and that the Court enter an order directing Defendant Foster to immediately provide Farm Service Agency Form 578 farm and tract detail and aerial maps for the years 2004 through 2006, Farm Service Agency Form 578 (producer print) for the year 2006, and any dealer/retailer invoices for seed and chemical transactions for years 2004 through 2006 which have not been previously produced to Monsanto.

PRAYER FOR RELIEF

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

- a. A protective order prohibiting Defendant Foster 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 Defendant or is presently located on or growing in fields owned, leased, operated, controlled or otherwise farmed by Defendant Foster or on his 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 Defendant Foster or on his 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 Defendant Foster's patent infringement;
- c. Trebling of damages awarded for Defendant Foster's infringement of Monsanto's patent rights, together with reasonable attorneys' fees and costs;
- d. Entry of a permanent injunction against Defendant Foster to prevent Defendant Foster 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 Defendant Foster's conversion of Plaintiffs' property rights;
- f. Entry of a punitive damages award against Defendant Foster for his willful and malicious conversion of Monsanto's property;
- g. Entry of judgment for damages, together with interest and costs to compensate Monsanto for Defendant Foster's unjust enrichment and the profits obtained that in equity and good conscience belong to Monsanto;
- h. Entry of judgment for damages, together with interest, Monsanto's attorneys' fees and costs to compensate Monsanto for Defendant Foster's breach of the licensing agreement;
- i. Entry of judgment granting the relief of specific performance ordering Defendant Foster to immediately provide immediately provide Farm Service Agency Form 578 farm and tract detail and aerial maps for the years 2004 through 2006, Farm Service Agency Form 578 (producer print) for the year 2006, and any dealer/retailer invoices for seed and chemical transactions for years 2004 through 2006 which have

not been previously produced to Monsanto.

- i. For such other and further as the Court shall deem appropriate.

Respectfully submitted,

HUSCH & EPPENBERGER, LLC

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Attorneys for Plaintiffs Monsanto Company and
Monsanto Technology LLC

CERTIFICATE OF SERVICE

I hereby certify that the foregoing will be served via hand delivery service upon the following non-participants in Electronic Case Filing at the same time service of process is accomplished.

Randy Foster
612 Allen Road
Campbell, Missouri 63933

/s/ Christian Mullgardt