

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

SYNGENTA SEEDS, INC.  
11055 Wayzata Boulevard  
Minnetonka, MN 55305

Plaintiff,

v.

BAYER BIOSCIENCE N.V.  
Technologiepark 38  
9052 Gent Belgium

Defendant.

Civil Action No.

**COMPLAINT FOR DECLARATORY JUDGMENT**

1. Syngenta Seeds, Inc. (“Syngenta”) seeks declaratory judgment of invalidity and noninfringement for three United States patents assigned to Bayer Bioscience N.V. (“Bayer”).
2. Syngenta has developed and plans to sell corn containing combinations of insect resistance traits derived from the bacterium *Bacillus thuringiensis* (“Bt”).
3. Bayer has asserted that Syngenta’s development and commercialization activities infringe one or more Bayer patents.
4. Syngenta does not infringe any valid claim of the Bayer patents and does not need a license for its ongoing development and commercialization activities.
5. Nonetheless, to avoid the possibility of litigation, Syngenta sought a license to the Bayer patents. The license negotiations between Syngenta and Bayer have spanned over two years and are now at an impasse.
6. Absent a decision from this Court, Syngenta must decide between abandoning its otherwise permissible development and commercialization activities or risk suit from Bayer.

### **THE PARTIES**

7. Plaintiff Syngenta is a company organized and existing under the laws of the State of Delaware, with its principal place of business at 11055 Wayzata Boulevard, Minnetonka, Minnesota.

8. Upon information and belief, Defendant Bayer is a company organized under the laws of Belgium and having its principal place of business at Technologiepark 38, 9052 Gent, Belgium.

### **JURISDICTION AND VENUE**

9. This is an action for declaratory judgment pursuant to 28 U.S.C. §§ 2201(a) and 2202.

10. This Court has subject matter jurisdiction over the action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

11. This Court has personal jurisdiction over Bayer pursuant to 35 U.S.C. § 293. On information and belief, Bayer does not reside in the United States and has not filed a written designation naming a person residing in the United States whom may be served process in connection with any of the Bayer patents.

12. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(d).

### **THE PATENTS IN SUIT**

13. Syngenta is seeking declaratory judgment of non-infringement and invalidity regarding U.S. Patent Nos. 5,866,784; 5,908,970; and 6,172,281 (“the Bayer Patents”).

#### **U.S. Patent No. 5,866,784**

14. U.S. Patent No. 5,866,784 (“the ’784 patent”) is titled “Recombinant Plant Expressing Non-Competitively Binding Insecticidal Crystal Proteins.”

15. Herman Van Mellaert, Johan Botterman, Jeroen Van Rie and Henk Joos are listed as inventors on the face of the '784 patent.

16. Plant Genetic Systems N.V. is the assignee listed on the face of the '784 patent.

17. On information and belief, the '784 patent is currently assigned to Bayer Bioscience N.V. The document assigning the '784 patent to Bayer Bioscience N.V. is recorded with the U.S. Patent and Trademark Office at Reel/Frame 014788/0229.

18. The '784 patent claims priority to a foreign filing date of May 31, 1989.

**U.S. Patent No. 5,908,970**

19. U.S. Patent No. 5,908,970 ("the '970 patent") is titled "Recombinant Plant Expressing Non-Competitively Binding BT Insecticidal Crystal Proteins."

20. Herman Van Mellaert, Johan Botterman, Jeroen Van Rie, and Henk Joos are listed as inventors on the face of the '970 patent.

21. Plant Genetic Systems N.V. is the assignee listed on the face of the '970 patent.

22. The last recorded assignment document for the '970 patent indicates the '970 was assigned to Aventis Cropscience N.V. That assignment document is recorded at the United States Patent and Trademark Office at Reel/Frame number 010639/0208.

23. On information and belief, Aventis Cropscience N.V. is a predecessor in interest to Bayer Bioscience N.V., and the '970 patent is currently assigned to Bayer Bioscience N.V.

24. The '970 patent claims priority to a foreign filing date of May 31, 1989.

**U.S. Patent No. 6,172,281**

25. U.S. Patent No. 6,172,281 ("the '281 patent") is titled "Recombinant Plant Expressing Non-Competitively Binding BT Insecticidal Crystal Proteins."

26. Herman Van Mellaert, Johan Botterman, Jeroen Van Rie, and Henk Joos are listed as inventors on the face of the '281 patent.

27. Aventis CropScience N.V. is the assignee listed on the face of the '281 patent.

28. On information and belief, the '281 patent is currently assigned to Bayer Bioscience N.V. The document assigning the '281 patent to Bayer Bioscience N.V. is recorded with the U.S. Patent and Trademark Office at Reel/Frame 014788/0662.

29. The '281 patent claims priority to a foreign filing date of May 31, 1989.

#### **EVENTS GIVING RISE TO THIS SUIT**

30. Syngenta has developed and plans to sell corn containing combinations of insect resistance traits derived from Bt.

31. Syngenta and Bayer have been negotiating a license to the Bayer Patents since at least July 2007.

32. In the course of those negotiations, representatives from Syngenta and Bayer have had numerous discussions about licensing the Bayer Patents to Syngenta and have exchanged draft license agreements and term sheets.

33. Bayer, through its representative Phillipe Dumont, notified Syngenta on at least July 23, 2009 that Syngenta's development and planned sale of corn containing combinations of Bt-derived insect resistance traits required a license to the Bayer Patents.

34. The negotiations between Syngenta and Bayer are now at an impasse.

35. Syngenta's development and commercialization activities do not and will not infringe any valid claims of the Bayer patents.

36. The claims of the Bayer patents are invalid for failure to meet the requirements of patentability of 35 U.S.C., *inter alia*, §§ 103 and 112.

37. In light of all the facts and circumstances, an actual controversy exists between Syngenta and Bayer as to whether the Bayer patents are not infringed and/or invalid.

### **COUNT I**

#### **Declaratory Judgment of Non-Infringement, U.S. Patent No. 5,866,784**

38. Syngenta repeats and incorporates by reference each of the preceding paragraphs of this complaint.

39. A case of actual controversy exists between Syngenta and Bayer concerning Syngenta's non-infringement of the claims of the '784 patent which requires a declaration of rights by this Court.

40. Syngenta does not and will not literally infringe any valid claim of the '784 patent.

41. Syngenta does not and will not infringe any valid claim of the '784 patent under the doctrine of equivalents, because, *inter alia*, the doctrine of prosecution history estoppel precludes a finding that Syngenta infringes by equivalence.

### **COUNT II**

#### **Declaratory Judgment of Invalidity, U.S. Patent No. 5,866,784**

42. Syngenta repeats and incorporates by reference each of the preceding paragraphs of this complaint.

43. A case of actual controversy exists between Syngenta and Bayer concerning the invalidity of the claims of '784 patent which requires a declaration of rights by this Court.

44. The claims of the '784 patent are invalid for failure to meet the requirements of patentability of 35 U.S.C., *inter alia*, §§ 103 and 112.

45. As of the effective filing date of the '784 patent, claims directed to stable transformation of corn were not enabled.

46. As of the effective filing date of the '784 patent, Plant Genetic Systems, Bayer's predecessor in interest to the '784 patent, could not stably transform corn.

47. The claims of the '784 patent are obvious under 35 U.S.C. § 103 over a variety of references, alone or in combination with each other, or the knowledge of one of ordinary skill in the art, including without limitation: Plant transformed with a DNA sequence from *Bacillus thuringiensis*, European Patent Publication 0305275 (published Jan. 3, 1989); Christina Hofmann et al., *Specificity of Bacillus thuringiensis  $\delta$ -endotoxins is correlated with the presence of high-affinity binding sites in the brush border membrane of target insect midguts*, 85 PROC. NAT'L ACAD. SCI. USA 7844 (1988); Terry Stone et al., *Selection of tobacco budworm for resistance to a genetically engineered Pseudomonas fluorescens containing the  $\delta$ -endotoxin of Bacillus thuringiensis susbp. kurstaki*, 53 J. Invertebrate Pathology 228 (1989).

48. Thus, Syngenta is entitled to a declaratory judgment that the claims of the '784 patent are invalid.

### COUNT III

#### **Declaratory Judgment of Non-Infringement, U.S. Patent No. 5,908,970**

49. Syngenta repeats and incorporates by reference each of the preceding paragraphs of this complaint.

50. A case of actual controversy exists between Syngenta and Bayer concerning Syngenta's non-infringement of the claims of the '970 patent which requires a declaration of rights by this Court.

51. Syngenta does not and will not literally infringe any valid claim of the '970 patent.

52. Syngenta does not and will not infringe any valid claim of the '970 patent under the doctrine of equivalents, because, *inter alia*, the doctrine of prosecution history estoppel precludes a finding that Syngenta infringes by equivalence.

#### COUNT IV

##### **Declaratory Judgment of Invalidity, U.S. Patent No. 5,908,970**

53. Syngenta repeats and incorporates by reference each of the preceding paragraphs of this complaint.

54. A case of actual controversy exists between Syngenta and Bayer concerning the invalidity of the claims of '970 patent which requires a declaration of rights by this Court.

55. The claims of the '970 patent are invalid for failure to meet the requirements of patentability of 35 U.S.C., *inter alia*, §§ 103 and 112.

56. As of the effective filing date of the '970 patent, claims directed to stable transformation of corn were not enabled.

57. As of the effective filing date of the '970 patent, Plant Genetic Systems, Bayer's predecessor in interest to the '970 patent, could not stably transform corn.

58. The claims of the '970 patent are obvious under 35 U.S.C. § 103 over a variety of references, alone or in combination with each other or the knowledge of one of ordinary skill in the art, including without limitation: Plant transformed with a DNA sequence from *Bacillus thuringiensis*, European Patent Publication 0305275 (published Jan. 3, 1989); Christina Hofmann et al., *Specificity of Bacillus thuringiensis  $\delta$ -endotoxins is correlated with the presence of high-affinity binding sites in the brush border membrane of target insect midguts*, 85 PROC. NAT'L ACAD. SCI. USA 7844 (1988); Terry Stone et al., *Selection of tobacco budworm for resistance to*

*a genetically engineered Pseudomonas fluorescens containing the  $\delta$ -endotoxin of Bacillus thuringiensis susbp. kurstaki*, 53 J. Invertebrate Pathology 228 (1989).

59. Thus, Syngenta is entitled to a declaratory judgment that the claims of the '970 patent are invalid.

## COUNT V

### **Declaratory Judgment of Non-Infringement, U.S. Patent No. 6,172,281**

60. Syngenta repeats and incorporates by reference each of the preceding paragraphs of this complaint.

61. A case of actual controversy exists between Syngenta and Bayer concerning Syngenta's non-infringement of the claims of the '281 patent which requires a declaration of rights by this Court.

62. Syngenta does not and will not literally infringe any valid claim of the '281 patent.

63. Syngenta does not and will not infringe any valid claim of the '281 patent under the doctrine of equivalents, because, *inter alia*, the doctrine of prosecution history estoppel precludes a finding that Syngenta infringes by equivalence.

## COUNT VI

### **Declaratory Judgment of Invalidity, U.S. Patent No. 6,172,281**

64. Syngenta repeats and incorporates by reference each of the preceding paragraphs of this complaint.

65. A case of actual controversy exists between Syngenta and Bayer concerning the invalidity of the claims of '281 patent which requires a declaration of rights by this Court.

66. The claims of the '281 patent are invalid for failure to meet the requirements of patentability of 35 U.S.C., *inter alia*, §§ 103 and 112.



67. As of the effective filing date of the '281 patent, claims directed to stable transformation of corn were not enabled.

68. As of the effective filing date of the '281 patent, Plant Genetic Systems, Bayer's predecessor in interest to the '281 patent, could not stably transform corn.

69. The specification of the '281 patent does not provide adequate written description for claims directed to "genes encoding different *Bacillus thuringiensis* proteins, or insecticidal portions thereof."

70. The claims of the '281 patent are obvious under 35 U.S.C. § 103 over a variety of references, alone or in combination with each other or the knowledge of one of ordinary skill in the art, including without limitation: Plant transformed with a DNA sequence from *Bacillus thuringiensis*, European Patent Publication 0305275 (published Jan. 3, 1989); Christina Hofmann et al., *Specificity of Bacillus thuringiensis  $\delta$ -endotoxins is correlated with the presence of high-affinity binding sites in the brush border membrane of target insect midguts*, 85 PROC. NAT'L ACAD. SCI. USA 7844 (1988); Terry Stone et al., *Selection of tobacco budworm for resistance to a genetically engineered Pseudomonas fluorescens containing the  $\delta$ -endotoxin of Bacillus thuringiensis susbp. kurstaki*, 53 J. Invertebrate Pathology 228 (1989).

71. Thus, Syngenta is entitled to a declaratory judgment that the claims of the '281 patent are invalid.

#### **PRAYER FOR RELIEF**

Wherefore, Syngenta respectfully requests that the Court enter a Judgment and Order:

- a. declaring the claims of the '784 patent invalid;
- b. declaring the claims of the '784 patent are not infringed by Syngenta;
- c. declaring the claims of the '970 patent invalid;
- d. declaring the claims of the '970 patent are not infringed by Syngenta;


- e. declaring the claims of the '281 patent invalid;
- f. declaring the claims of the '281 patent are not infringed by Syngenta; and
- g. granting Syngenta such other and further relief as the Court may deem appropriate.

**JURY DEMAND**

Syngenta demands a jury trial.

Dated: December 15, 2009

Respectfully submitted,



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