

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

MERIAL LIMITED
and BASF AGRO B.V., ARNHEM (NL),
WÄDENSWIL BRANCH,

Plaintiffs,

v.

VIRBAC S.A.
and VIRBAC CORPORATION,

Defendants.

Civil Case No. 4:10-cv-181

JURY TRIAL DEMANDED

COMPLAINT FOR PATENT INFRINGEMENT

Plaintiffs Merial Limited (“Merial”) and BASF Agro B.V., Arnhem (NL), Wädenswil Branch (“BASF”) (collectively “Plaintiffs”) for their Complaint for Patent Infringement (“Complaint”) against defendants Virbac S.A. and Virbac Corporation (collectively “Virbac” or “Defendants”) hereby allege as follows:

NATURE OF ACTION

1. This is an action in which BASF and Merial seek injunctive relief and damages under the patent laws of the United States, 35 U.S.C. § 1 *et seq.*, from Defendants’ infringement of United States Patent No. 5,232,940, entitled “Derivatives of N-Phenylpyrazoles” (“the ’940 patent”). A true and correct copy of the ’940 patent is attached as Exhibit A.

2. The ’940 patent covers the chemical commonly known as fipronil. Fipronil is useful as a pesticide in the control of fleas and ticks. The United States Patent and Trademark (“PTO”)

Office duly and legally issued the '940 patent on August 3, 1993, and accordingly the '940 is presumed to be valid and enforceable pursuant to 35 U.S.C. § 282 and other applicable law.

3. In addition to the United States, many other countries have issued counterpart patents to the '940 patent. These counterpart patents cover the compound commonly known as fipronil and its use as a pesticide.

THE PARTIES

4. Merial is a company limited by shares registered in England and Wales with a registered office in England. Merial is domesticated in the State of Delaware, as Merial LLC. Merial's operational headquarters are located in Duluth, Georgia. Merial develops, produces and sells animal health products for livestock, pets, and wildlife.

5. BASF is a limited liability company organized under the laws of The Netherlands, with its registered office at Groningensingel 1, Arnhem Gelderland, 6835 EA, The Netherlands, acting through its Swiss branch office, organized under the laws of Switzerland and registered at the Handelsregisteramt Zürich, Zürich, Switzerland, with its place of business at Moosacherstraße 2, CH-8804 Au, Switzerland and its head office postal address at Postfach 69, CH-8820 Wädenswil, Switzerland.

6. BASF is the assignee and owner of the '940 patent and its foreign counterpart patents. BASF has granted to Merial the exclusive license to the '940 patent and its foreign counterpart patents in the animal health field.

7. Upon information and belief, Virbac S.A. ("VSA") is a publicly traded company organized under the laws of France with its registered office at 1ère avenue 2065 LID, 06511 Carros, France, and business mailing address at 13ème rue LID – BP 27, F 06511 Carros

CEDEX, France.

8. Upon information and belief, Virbac Corporation (“VC”) is a corporation organized under the laws of Delaware and headquartered at 3200 Meacham Boulevard, Fort Worth, Texas 76137-4611. Upon information and belief, VC is a wholly-owned subsidiary and the U.S. affiliate of VSA.

9. VSA and VC do business in Texas and in this District through, *inter alia*, ongoing business activities at their regular and established place of business in Fort Worth, and by selling and causing others to sell their products in Texas and in this District.

10. Upon information and belief, VSA does business worldwide as the Virbac Group or simply Virbac, and the Virbac Group operates in the United States largely through VC, a member of the Virbac Group. Upon information and belief, the five-member executive board of VSA is responsible for the strategic and operational management of VSA. Upon information and belief, the following executive board members of VSA are also directors of the board of directors of VC: Éric Marée serves as chairman of the executive board of VSA and chairman of the board of directors of VC; Pierre Pagès is a member of the executive board and chief operating officer of VSA and a director of VC; Michel Garaudet is a member of the executive board and chief financial officer of VSA and a director of VC.

11. Defendants have committed infringing acts in Texas and in this District.

JURISDICTION AND VENUE

12. This Court has subject matter over this matter pursuant to 28 U.S.C. §§ 1331 and 1338(a).

13. This Court has personal jurisdiction over Defendants by virtue of their residence in Texas

and this District, their actions that directly infringe or that induce or contribute to the infringement of the '940 patent in Texas and this District, and their systematic and continuous contacts with Texas and this District. Defendants have directly infringed, induced infringement of, or engaged in contributory infringement of the '940 patent in this District, by making, using, offering to sell, selling, or importing, or causing to be made, used, offered for sale, sold, or imported fipronil and/or fipronil-containing animal health compositions.

14. Venue is proper in this District in accordance with 28 U.S.C. §§ 1391 and 1400(b).

MERIAL'S FIPRONIL-CONTAINING PRODUCTS

15. Among Merial's most successful animal health products are its FRONTLINE® products, which are covered by the '940 patent and its foreign counterparts and which are approved by the United States Environmental Protection Agency ("EPA") for eliminating flea and tick infestations. Fipronil is the active ingredient in Merial's FRONTLINE® products.

16. The lawful sale of a fipronil-containing animal health composition in the United States requires the approval of the United States Environmental Protection Agency ("EPA"). In order to obtain the EPA's approval of a fipronil-containing animal health composition, the EPA requires an applicant to submit testing data and information on the composition so that the EPA can make regulatory judgments about the composition's risks and benefits.

17. Merial has expended great sums developing and obtaining regulatory approval for Merial's fipronil-containing animal health compositions, such as its FRONTLINE® brand products and for its exclusive license to the '940 patent and related foreign patents.

VIRBAC'S INFRINGING STUDIES

18. In July 2009, Merial obtained from the EPA information that suggested that Virbac had

submitted data to the EPA from several studies of fipronil-containing animal health compositions that are dated from 2007 through 2009, and were conducted by or on behalf of Virbac. As a result, in August 2009, Merial wrote to Virbac to request information about the studies and an explanation of why the studies were not acts of infringement of the '940 patent.

19. Virbac responded to Merial, on August 25, 2009, and denied that it had conducted any studies of fipronil-containing animal health compositions in the United States. In that letter, Virbac conceded that conducting studies on fipronil-containing animal health compositions in the United States for the purpose of an EPA registration would be an act of infringement.

20. On September 18, 2009, Merial wrote to Virbac requesting confirmation that Virbac had not performed or induced others to perform on its behalf studies in the United States of fipronil-containing animal health compositions.

21. On September 22, 2009, Virbac acknowledged that it had submitted proposed study protocols to the EPA, but claimed that any information submitted did not relate to any actual studies performed by or on behalf of Virbac.

22. A few weeks later, Virbac sent a follow-up letter admitting that, contrary to its prior representations to Merial, four studies of fipronil-containing animal health compositions ("Virbac's Fipronil Test Products") had been conducted on its behalf in the United States from 2007 through 2009. Virbac's Fipronil Test Products include, or have included, compositions containing fipronil as an active ingredient in approximate quantities by weight of 1.8g, 3.3g, 5.0g, and 5.4g in combination with other ingredients such as Permethrin or Fampronic. At least two of the infringing studies compared Virbac's Fipronil Test Products to a Merial FRONTLINE® product. As a result, Virbac now possesses critical data about the performance

of Virbac's Fipronil Test Products against Merial's FRONTLINE® products.

COUNT 1

Infringement of the '940 Patent

23. The allegations of paragraphs 1-22 of this Complaint are incorporated herein by reference as if set forth in their entirety.

24. Defendants have made, used, offered to sell, or sold within, or imported into, the United States, or have caused to be made, used, offered for sale, or sold within, or imported into, the United States, fipronil and/or fipronil-containing animal health compositions, including but not limited to the studies of Virbac's Fipronil Test Products ("Virbac's Infringing Activities").

25. Virbac's Infringing Activities infringed one or more claims of the '940 patent, including, but not limited to, one or more of Claims 1, 4, 6, 7, 9, 10, 13-18, 22-26, 28-31, 40-42, 44, 48, 55, 61-67, and 69-74 (the "preliminarily asserted claims").

26. Through at least the above described Virbac's Infringing Activities, Defendants have directly infringed, induced infringement of, and/or engaged in contributory infringement of one or more of the preliminarily asserted claims of the '940 patent in violation of 35 U.S.C. § 271.

27. Merial and Virbac are direct competitors in the animal health field.

28. Upon information and belief, Virbac intends to sell fipronil-containing animal health products in the United States after the August 3, 2010 expiration of the '940 patent or in foreign countries after the expiration of the corresponding foreign counterpart patents.

29. Upon information and belief, Virbac's Infringing Activities have advanced Defendants' research and development of Virbac's Fipronil Test Products and thereby advanced the development of commercial fipronil-containing animal health products.

30. Virbac's Infringing Activities have also provided Defendants with data that may be submitted to the EPA or similar regulatory agencies in the United States or abroad to obtain approval to offer for sale and sell fipronil-containing animal health products.

31. Upon information and belief, Virbac's Infringing Activities will permit Defendants to bring to market fipronil-containing animal health products that will, and are intended to, compete with at least Merial's FRONTLINE® brand products sooner than if they had not engaged in such infringing activities – to the detriment of BASF and Merial, and in violation of BASF and Merial's lawful rights under the '940 patent.

32. Neither BASF nor Merial authorized Defendants to make, have made, use, have used, offer to sell, have offered to sell, sell, or have sold within, or import or have imported into, the United States fipronil, any fipronil-containing animal health composition, including Virbac's Fipronil Test Products, or any other material or actual or prospective product covered by the '940 patent.

33. Upon information and belief, Defendants have had notice of the '940 patent, and their infringement of the '940 patent has been knowing, deliberate, and willful.

34. As a direct result of Defendants' infringement of the '940 patent, BASF and Merial will suffer irreparable harm and damage.

35. BASF and Merial have no adequate remedy at law for Defendants' infringing acts. Unless and until these infringing acts are enjoined by this Court and an adequate injunction is issued to restore the status quo that existed prior to Defendants' infringement by equitably resetting Defendants to a position that they would have occupied if they had not infringed the '940 patent, BASF and Merial will continue to be damaged and irreparably harmed.

DEMAND FOR A JURY TRIAL

36. BASF and Merial demand a trial, pursuant to Fed. R. Civ. P. 38(b), as to all issues that may be tried by a jury.

REQUEST FOR RELIEF

WHEREFORE, BASF and Merial, individually and collectively, pray that the Court:

- (a) Enter a judgment that Defendants have infringed, directly and indirectly by contributory and induced infringement, one or more claims of the '940 patent;
- (b) Preliminarily and permanently enjoin Defendants and those in concert with them from further acts of direct infringement, contributory infringement, and inducement of infringement of the '940 patent;
- (c) Preliminarily and permanently enjoin Defendants from making, using, offering to sell, or selling within, or importing into, the United States, or causing to be made, used, offered for sale, or sold within, or imported into, the United States, any infringing material or product, including without limitation fipronil and any fipronil-containing animal health composition, for a period of time suitable to equitably reset Defendants to a position that they would have occupied if they had not infringed the '940 patent;
- (d) Award BASF and Merial damages adequate to compensate them for Defendants' infringement of the '940 patent;
- (e) Enter judgment that Defendants' infringement of the '940 patent has been knowing and willful;
- (f) Enter judgment increasing damages, up to treble the monetary award, pursuant to

35 U.S.C. § 284 in view of the willful nature of Defendants' infringement;

- (g) Enter judgment that this is an exceptional case pursuant to 35 U.S.C. § 285;
- (h) Award BASF and Merial their attorneys' fees, costs, expenses, and pre- and post-judgment interest, and
- (i) Order such further relief as the Court deems just and proper.

Dated: March 18, 2010

Respectfully submitted,

/s/ Hilda C. Galvan

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