

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

PENNINGTON SEED, INC. and  
AGRESEARCH LIMITED,

Plaintiffs,

vs.

CASE NO. 06-0564-CV-W-RED

FREDDIE ANDERSON D/B/A  
ANDERSON FARMS, FREDDIE  
ANDERSON TRUST, LEONA  
ANDERSON TRUST, and JOHN DOES  
1-10,

Defendants.

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**COMPLAINT FOR DAMAGES AND EQUITABLE RELIEF**

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Plaintiffs Pennington Seed, Inc. and AgResearch Limited (collectively,  
“Plaintiffs”) bring this action against the defendants.

**JURISDICTION AND VENUE**

1. This is an action for relief from patent infringement arising under the Patent Laws of the United States, Title 35 of the United States Code. The subject matter of the patent-in-suit concerns the use of non-toxic endophytes in certain tall fescue grass cultivars.

2. This Court has jurisdiction over the subject matter of this patent action pursuant to 28 U.S.C. § 1331, in that one or more of Plaintiffs' claims arise under the laws of the United States, and 28 U.S.C. § 1338, granting district courts original jurisdiction over any civil action relating to patents. Supplemental jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1367 over all of Plaintiffs' non-federal question claims, such that they form part of the same case or controversy.

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

### **PARTIES**

4. Plaintiff Pennington Seed, Inc. is a corporation organized under the laws of the State of Delaware with its principal place of business in Madison, Morgan County, Georgia. Pennington Seed, Inc. is the exclusive licensee of certain intellectual property in the United States and enjoys with AgResearch Limited the legal right to bring this cause.

5. Plaintiff AgResearch Limited is a corporation organized under the laws of New Zealand with its principal place of business in Hamilton, New Zealand. AgResearch Limited is registered to do business within the United States under the subsidiary AgResearch USA Limited.

6. On information and belief, Defendant Freddie Anderson d/b/a Anderson Farms is a citizen of the State of Missouri and resides at 965 SE Highway 7, Clinton, Henry County, Missouri 64735.

7. On information and belief, Defendant Freddie Anderson Trust is wholly controlled by Defendant Freddie Anderson.

8. On information and belief, Defendant Leona Anderson Trust is controlled by Leona Anderson, Freddie Anderson's mother, who is a citizen of the State of Missouri and resides at 444 SE 400<sup>th</sup> Road, Clinton, Henry County, Missouri 64735..

9. Defendants John Does 1-10 are persons acting in concert with Defendant to perform the illegal acts alleged herein. Plaintiffs shall amend this *Complaint* to name John Does 1-10 when the identities of such persons become known with specificity.

### FACTS

10. Plaintiffs are in the business of producing, marketing, licensing, and selling certain grasses known to benefit livestock. Plaintiffs market their grasses through a variety of organizations including wholly owned subsidiaries, joint ventures, sales representatives, and independent dealers.

11. In the course of business, and only after the investment of substantial research, time, and expense, AgResearch Limited developed products incorporating endophytes that form stable synthetic combinations with tall fescue, including the non-toxic endophyte known and identified in the United States marketplace as "MaxQ®."

12. In order to protect its interest and investment in the product known as MaxQ®, AgResearch applied to the United States Patent and Trademark Office for a patent prior to the introduction of MaxQ® into the marketplace.

13. On August 29, 2000, U.S. Patent No. 6,111,170 (“the ‘170 patent”) entitled “Tall Fescue Endophytes” was duly and legally issued to the inventors named therein, who have assigned their rights in such patent to the entity known as AgResearch Limited. A true and correct copy of the ‘170 patent is attached hereto as Exhibit A.

14. By and through agreement, AgResearch Limited licensed technology as protected by the ‘170 patent to Pennington Seed, Inc., such that both parties are proper litigants to this action.

15. In connection with substantially all sales of MaxQ®, Plaintiffs conspicuously mark the MaxQ® products with a notice of patent rights under the ‘170 patent. Further, Plaintiffs make MaxQ® available only under a limited license that grants the user the right to plant the seed for forage purposes, only. Users are expressly forbidden from saving, selling, and/or otherwise transferring or disposing of any seed produced when MaxQ® is planted and grown.

16. By virtue of the issuance of the ‘170 patent and the limited license granted to end users of the MaxQ® product, the tall fescue products containing the non-toxic endophyte known as MaxQ® can be grown, marketed, licensed, and sold only by or with Plaintiffs’ permission, in accordance with the Patent Laws found at 35 U.S.C. §§ 1-376.

17. Acting upon an informational tip, an investigator traveled to Henry County, Missouri, during the week of June 27<sup>th</sup> to investigate the possible illegal saving,

replanting, and resale of Plaintiffs' patented MaxQ® fescue seed. *See Narrative Affidavit of Jason Jouett*, attached hereto as Exhibit B. During such visit, the investigator located all fields belonging to Defendants known to exist in Henry County by searching public court deed filings.

18. Eric Hankins, an individual having personal knowledge of the Defendants' farming operations, drove the investigator to the land associated with the real estate records evidencing Defendants' fields. *Id.* Hankins identified, through personal knowledge, all field he assisted Defendants in planting following Hankins' sale of MaxQ® fescue seed to Defendant Anderson three years ago. *Id.*

19. The investigator traveled to additional fields that, on information and belief, were planted with MaxQ® fescue seed using illegally harvested seed from a field planted with legally obtained MaxQ® fescue seed. *Id.* On information and belief, Defendants illegally planted the illegal harvest of MaxQ® fescue seed on not less than two additional fields owned and operated by Defendants. *Id.*

20. The investigator took photographs of these two additional fields and documented all real estate parcels owned by Defendants or their farming operations. Together, the two fields appeared to be planted in approximately 430 acres of illegal MaxQ® fescue. A first field is owned by Defendant Freddie Anderson Trust, and the second field is owned by Leona Anderson Trust. The first field appeared to have been recently harvested and had a red combine parked in the corner of the field. As the

MaxQ® license only permits use of the fescue seed as forage and not for seed multiplication, the fact that a red combine was used on a MaxQ® field is strong evidence that the MaxQ® was harvested in contravention to the license agreement.

21. On July 11, 2006, Justin Burns of the Missouri Division of Pennington Seed, Inc., traveled to the Clinton, Missouri area to further investigate the illegal use of MaxQ® by Defendants. *See Exhibit C, Affidavit of Justin Burns.* Burns spoke with various individuals having personal knowledge of Defendants' farming operations, and such individuals confirmed that MaxQ® had been planted on and harvested from not less than two fields beyond the original two fields that Hankins helped plant. Using a harvest rate of 700 pounds per acre as provided by one of these individuals, these two fields are capable of producing 301,000 pounds of illegal MAQ® fescue seed, which is a sufficient amount to plant 15,050 acres.

22. It is a violation of the limited license for Defendant Anderson to harvest fields planted with MaxQ® and replant and/or sell the proceeds of the harvest. On information and belief, Defendants are actively growing, marketing, offering for sale, promoting, saving, and selling a product containing Plaintiff's non-toxic endophytes, all in violation of Plaintiffs' patent rights.

23. Defendants, individually and through their agents, employees, and assigns, were placed on actual notice of Plaintiff's patent rights.

24. Defendants acted, and continue to act, with full knowledge and with actual notice that their infringing activities are in violation of Plaintiffs' patent rights.

25. Plaintiffs have not granted permission to the Defendants to grow, market, or sell these infringing products.

#### **COUNT I—INFRINGEMENT OF THE '170 PATENT**

26. 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.

27. Defendants willfully infringed and continue to willfully infringe; have induced and continue to induce others to infringe; and/or they have committed and continue to commit acts of contributory infringement of one or more of the claims of the '170 patent, under theory of literal infringement and/or infringement by doctrine of equivalents.

28. As a consequence of the Defendants' infringing activities in contravention of the Patent Laws, Plaintiffs have suffered monetary damages in an amount not yet determined. However, pursuant to the Patent Laws, Plaintiffs are entitled to damages adequate to compensate for the infringement but in no event less than a reasonable royalty.

29. Further, Plaintiffs will suffer irreparable harm if Defendants are allowed to release 301,000 pounds of Plaintiffs' patented MaxQ® product without restriction. No adequate remedy at law exists against future infringements resulting from such a

release, and the injuries to Plaintiff will continue unless and until this Court preliminarily and permanently enjoins the Defendants' infringing activities.

30. Fescue seed is fungible commodity, and the Defendants' harvested MaxQ® seed is critical evidence in this case. Plaintiffs are likely to suffer irreparable harm if the Court does not enter a temporary restraining order preventing Defendants from disposing of or otherwise transferring the harvested MaxQ® fescue seed until such time as Plaintiffs can ascertain the amount of illegally harvested MaxQ® seed.

31. Existing fields planted with MaxQ® will continue to generate seed that is capable of constituting future infringement.

32. Existing fields can be easily damaged and/or destroyed, such as by burning or tilling, which may comprise evidence before Plaintiffs have had an opportunity to sample Defendants' fields.

### **COUNT II—CONVERSION**

33. 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.

34. Defendants are exercising dominion and control over patented technology.

35. Defendants have converted the patented technology to their own use without permission.



36. As a result of Defendants' actions, Plaintiffs are entitled to recover compensatory damages.

37. As Defendants' conversion of the Plaintiffs' intellectual property was done willfully and maliciously, with reckless disregard for Plaintiffs' rights, Plaintiffs are entitled to an award of punitive damages.

### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs respectfully request this Court to grant the following relief:

- A.** That the Defendants be declared to have infringed, induced others to infringe, and/or committed acts of contributory infringement with respect to the claims of the '170 patent;
- B.** That the Defendants, their officers, agents, servants, employees, parents, subsidiaries, affiliates, successors, and all others in active concert or participation with them or acting on their behalf be preliminarily and permanently enjoined from further infringement of the '170 patent;
- C.** That the Defendants, their officers, agents, servants, employees, parents, subsidiaries, affiliates, successors, and all others in active concert or participation with them or acting on their behalf be temporarily restrained from destroying, selling, or otherwise transferring or disposing of grass and grass seed currently in their possession;
- D.** That the Defendants be ordered to account for and pay to Plaintiffs all damages caused to Plaintiffs in an amount adequate to compensate Plaintiffs for the infringement of the '170 patent, but in no event less than a reasonable royalty;
- E.** That Plaintiffs be granted pre-judgment and post-judgment interest on the damages caused to it by reason of Defendants' infringement of the '170 patent;

- F. That this be declared an “exceptional case” pursuant to 35 U.S.C. § 285 and that Defendants be ordered to pay Plaintiffs’ attorneys’ fees and costs;
- F. That this Court treble the damages awarded for the infringement, together with reasonable attorneys’ fees;
- G. That this Court award damages sufficient to compensate Plaintiffs for Defendants’ conversion of Plaintiffs’ intellectual property rights, together with interest and costs;
- H. That this Court award punitive damages for Defendants’ willful and malicious acts of conversion; and
- I. That this Court award such other relief to which Plaintiffs may be entitled and as the Court may deem appropriate.

Pennington Seed, Inc.  
AgResearch Limited

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