

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS**

**MONSANTO COMPANY and
MONSANTO TECHNOLOGY L.L.C.**

PLAINTIFFS

VERSUS

CASE NO.: 2-04-cv-208 JMM

**JOE KYLE, a/k/a JOEY KYLE,
BILLY KYLE a/k/a BROTHER KYLE
a/k/a BROTHER BILLY KYLE
JOE-CO; J & B AG, INC.; and
J & C AG, INC.**

DEFENDANTS

FOURTH AMENDED COMPLAINT AND JURY DEMAND

COMES NOW the Plaintiffs, Monsanto Company and Monsanto Technology, LLC (hereinafter referred to collectively as “Monsanto”), through undersigned counsel, and for their Fourth Amended Complaint against Joe Kyle a/k/a Joey Kyle, Billy Kyle a/k/a Brother Kyle, a/k/a Brother Billy Kyle, Joe-Co, J & B AG, Inc. and J & C AG, Inc. (hereinafter “Kyle” or “Defendants”) make the following allegations:

THE PLAINTIFFS

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

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.

THE DEFENDANTS

3. Defendant Joe Kyle, also known as Joey Kyle, is an individual who has attained the age of majority and is a resident and domiciliary of Woodruff County, Arkansas.

4. Defendant Billy Kyle, also known as Brother Kyle also known as Brother Billy Kyle, is an individual who has attained the age of majority and is a resident and domiciliary of Woodruff County, Arkansas.

5. Joe-Co is a partnership existing under the laws of the State of Arkansas with its principal place of business in Woodruff County, Arkansas.

6. Defendant J & B AG, Inc. is a business entity organized and existing under the laws of the State of Arkansas with its principal place of business in Woodruff County, Arkansas.

7. Defendant J & C AG, Inc. is a business entity organized and existing under the laws of the State of Arkansas with its principal place of business in Woodruff County, Arkansas.

JURISDICTION AND VENUE

8. Subject matter jurisdiction is conferred upon this court pursuant to 28 U.S.C. § 1331, in that one or more of Monsanto's 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.

9. Venue is proper in this district pursuant to 28 U.S.C. § 1400 as the defendants reside in this judicial district and a substantial number of the events giving rise to Monsanto's claims of patent infringement occurred within this judicial district.

GENERAL ALLEGATIONS

10. Monsanto is in the business of developing, manufacturing, licensing, and selling agricultural biotechnology, agricultural chemicals, and agricultural products. After the investment of substantial time, expense, and expertise, Monsanto developed a plant biotechnology that involves the transfer of a gene into crop seed that causes the plant to be resistant to glyphosate-based herbicides such as Roundup Ultra^{®1}, Roundup UltraMAX^{®2}, Roundup WeatherMAX^{®3}, and Touchdown^{®4}.

11. This new biotechnology has been utilized by Monsanto in soybeans. The genetically improved soybeans are marketed by Monsanto as Roundup Ready^{®5} soybeans.

12. The Roundup[®] family of herbicides are non-selective, glyphosate-based herbicides manufactured by Monsanto, which will cause severe injury or death to soybean varieties that do not contain the Roundup Ready[®] technology.

¹ Roundup Ultra[®] is a registered trademark of Monsanto Company.

² Roundup UltraMAX[®] is a registered trademark of Monsanto Company.

³ Roundup WeatherMAX[®] is a registered trademark of Monsanto Company.

⁴ Touchdown[®] is a registered trademark of Syngenta.

⁵ Roundup Ready[®] is a registered trademark of Monsanto Company.

13. In addition to the development of the Roundup Ready® gene found in Roundup Ready® soybeans, Monsanto also developed a biotechnology involving the transfer of a man-made gene in the crops that allows the plants to express insect resistance. This biotechnology enables the plant to produce an insecticidal protein called *Bacillus thuringiensis* (B.t.). A plant which contains this gene is able to produce the B.t. protein and thereby protect itself from certain insects. This unique biotechnology has been utilized by Monsanto in corn and is marketed as the YieldGard® trait.

14. Monsanto's Roundup Ready® and YieldGard® seed technologies are protected under United States Patent Number 5,352,605, which is attached hereto as Exhibit "A". The 5,352,605 patent was issued and assigned to Monsanto prior to the events giving rise to this action.

15. Monsanto has labeled all bags of Roundup Ready® soybeans and YieldGard® corn seed sold in the United States with the required statutory notice that those traits were patented. In particular, each bag of Roundup Ready® soybean seed sold in the United States has been marked with notice of United States Patent Number 5,352,605. Each bag of YieldGard® corn seed has also been marked with notice of United States Patent Number 5,352,605.

16. Monsanto licenses the use of Roundup Ready® and YieldGard® seed technology to growers at the retail marketing level through a limited use license commonly referred to as a Technology Agreement.

17. Among other things, the express terms of the limited use license prohibits licensees from saving harvested Roundup Ready® soybeans for planting purposes, or

from selling, transferring or supplying saved Roundup Ready® soybeans to others for planting. The use of the seed is limited to the production of a single commercial crop.

18. The limited use license also permits Monsanto to terminate a Grower's authorization to purchase and plant seed containing the licensed seed traits. When Monsanto terminates the Grower's rights under the agreement, the Grower no longer has a right to purchase seed containing Monsanto's technologies.

19. Monsanto does not authorize the planting of saved (commonly referred to as bin run and/or brown bag) Roundup Ready® soybeans.

20. Defendants, individually and/or on behalf of one another, farm land in Woodruff County, Arkansas, upon which they produce soybeans.

21. Defendant, Joe Kyle, signed a Monsanto Technology Agreement dated January 19, 1998 (a copy of which is attached hereto as Exhibit "B.")

22. Defendants, individually and/or on behalf of one another, planted Roundup Ready® soybeans in the 2004 growing season.

23. In late summer of 2004, Monsanto requested information from Joe Kyle about defendants' 2004 soybean farming operations, and particularly concerning their use of Roundup Ready® soybeans. The information sought included the number of acres planted, the source of the soybean seed planted, and the defendants' permission to inspect their 2004 soybean fields.

24. The purpose of asking defendants for this information was to determine the extent of their use of Roundup Ready® soybeans and to ascertain whether they had

planted saved Roundup Ready® soybeans. This information can only be obtained from the grower and by an inspection and sampling of the growers' fields.

25. Joe Kyle admitted that he had planted Roundup Ready® soybeans, but he refused to provide any information to Monsanto about defendants' 2004 soybean farming operations.

26. Upon information and belief, the defendants have planted and used saved Roundup Ready® soybean seed during 2004 in contravention of Monsanto's patent rights.

27. Upon information and belief, the defendants have knowingly, willfully and intentionally planted and used saved Roundup Ready® soybeans without authorization from Monsanto in violation of Monsanto's patent rights.

COUNT ONE - PATENT INFRINGEMENT - Patent No. 5,352,605

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

29. On October 4, 1994, United States Patent Number 5,352,605 was duly and legally issued to Monsanto for an invention in Chimeric Genes for Transforming Plant Cells Using Viral Promoters, and since that date, Monsanto has been the owner of this patent. This invention is in the fields of genetic engineering and plant biology.

30. Monsanto placed the required statutory notice that its Roundup Ready® technology was protected by United States Patent Number 5,352,605 on the labeling of all bags containing Roundup Ready® soybean seed in compliance with 35 U.S.C. § 287.

31. Defendants' conduct, as set forth above, constitutes the unauthorized use of a patented invention within the United States during the term of Patent Number 5,352,605, all in violation of 35 U.S.C. § 271. Accordingly, Monsanto has a right of civil action against the defendants pursuant to 35 U.S.C. § 281.

32. Upon information and belief, the defendants have and may be continuing to infringe Monsanto's patent by making, using, offering for sale, selling, or otherwise transferring Roundup Ready® soybean seed embodying the patented invention without authorization from Monsanto, and will continue to do so unless enjoined by this court.

33. 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.

34. 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 interest and costs to be taxed to the infringer. Further, damages should be trebled pursuant to 35 U.S.C. § 284 in light of the defendants' knowing, willful, conscious, and deliberate infringement of the patent rights at issue.

35. The infringing activity of the defendants brings this cause within the ambit of the exceptional case contemplated by 35 U.S.C. § 285, thus Monsanto requests the award of reasonable attorneys fees and costs.

COUNT TWO - PATENT INFRINGEMENT - Patent No. 5,352,605

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

37. On October 4, 1994, United States Patent Number 5,352,605 was duly and legally issued to Monsanto for Chimeric Genes for Transforming Plant Cells Using Viral Promoters, and since that date, Monsanto has been the owner of this patent. This invention is in the fields of genetic engineering and plant biology.

38. Monsanto placed the required statutory notice that its YieldGard® technology was protected by United States Patent Number 5,352,605 on the labeling of all bags containing YieldGard® corn seed in compliance with 35 U.S.C. § 287.

39. On or about February of 2005, the defendants, and their counsel were provided with express written notice that any and all licenses under which they claimed to have authority to purchase crop seed containing Monsanto's patented traits were revoked (a copy of these notices is attached hereto as Exhibit "C"). In particular, the notice indicated that the defendants were not authorized to use crop seed containing the YieldGard® trait.

40. On or about March of 2007, the defendants purchased DeKalb brand YieldGard® corn seed from a retail seed dealership known as Jimmy Sanders, and planted that seed shortly thereafter.

41. Defendants' conduct, as set forth above, constitutes the unauthorized use of a patented invention within the United States during the term of Patent Number 5,352,605, all in violation of 35 U.S.C. § 271. Accordingly, Monsanto has a right of civil action against the defendants pursuant to 35 U.S.C. § 281.

42. The defendants have and may be continuing to infringe Monsanto's patent by making and using YieldGard® corn seed embodying the patented invention

without authorization from Monsanto, and will continue to do so unless enjoined by this court.

43. 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.

44. 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 interest and costs to be taxed to the infringer. Further, damages should be trebled pursuant to 35 U.S.C. § 284 in light of the defendants' knowing, willful, conscious, and deliberate infringement of the patent rights at issue.

45. The infringing activity of the defendants brings this cause within the ambit of the exceptional case contemplated by 35 U.S.C. § 285, thus Monsanto requests the award of reasonable attorneys fees and costs.

COUNT THREE - BREACH OF CONTRACT

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

47. The Monsanto Technology Agreement executed by Defendant Joe Kyle, provided that growers were prohibited from saving and replanting saved Roundup Ready® seed, and that a limited-use license was extended to Kyle, allowing him to plant Roundup Ready® crop seed for only one growing season. In addition, the agreement provided that, upon the termination of the Agreement, the Grower would be prohibited from purchasing seed containing Monsanto's technologies.

48. Defendants were provided with express written notification of the revocation of their rights to purchase seed containing Monsanto's patented technologies under this agreement.

49. Defendants breached their obligations under the Monsanto Technology Agreement by saving and replanting Roundup Ready® soybean seed in the 2004 growing season, and by purchasing and planting DeKalb brand YieldGard® corn seed in the 2007 growing season.

50. Monsanto is entitled to damages for defendants' breaches under the Monsanto Technology Agreement.

51. Monsanto is also entitled to recover its attorney's fees and costs in enforcing the Monsanto Technology Agreement.

COUNT FOUR - PIERCING THE CORPORATE VEIL

52. 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.

53. Upon information and belief, J & B AG, INC. and J & C AG, INC. are mere alter egos of Joe Kyle and/or Billy Kyle.

54. Upon information and belief, Joe Kyle and/or Billy Kyle exercise complete domination and control over J & B AG, INC. and J & C AG, INC. to the point that those corporations have no mind, will, or existence separate and apart from Joe Kyle and/or Billy Kyle.

55. Upon information and belief, Joe Kyle and/or Billy Kyle have failed to provide sufficient capitalization for J & B AG, INC. and J & C AG, INC. As a result of this undercapitalization, the assets of J & B AG, INC. and J & C AG, INC. are inadequate to respond to Monsanto's demands arising from its claims of patent infringement.

56. Joe Kyle, Billy Kyle, Joe-Co, J & B AG, INC. and J & C AG, INC. are jointly and severally liable to Monsanto for their infringement of U.S. Patent No. 5,352,605.

57. Monsanto demands trial by jury.

WHEREFORE, Monsanto Company prays that process and due form of law issue to defendants, Joe Kyle a/k/a Joey Kyle, Billy Kyle a/k/a Brother Kyle, a/k/a Brother Billy Kyle, Joe-Co, J & B AG, INC. and J & C AG, INC., requiring them to appear and answer, all and singular, the allegations of this complaint, and that after due proceedings are had, there be judgment in favor of Monsanto Company and against the defendants, providing the following remedies to Monsanto:

1. Entry of judgment for damages, together with interest and costs, to compensate Monsanto for the defendants' patent infringement;
2. Trebling of damages awarded for the infringement of patents together with reasonable attorney's fees;
3. Entry of an order prohibiting the defendants from planting, transferring, or selling the infringing articles to a third party;
4. Entry of a permanent injunction against the defendants to prevent the defendants from using, saving, cleaning, or planting any of Monsanto's proprietary seed technologies, without express written permission from Monsanto;

5. Entry of judgment for damages to compensate Monsanto for the defendants breaches of Monsanto's Technology Agreement;
6. Entry of judgment for all legal costs, including attorneys fees, expenses, court costs, and other costs incurred by Monsanto in the enforcement of the Monsanto Technology Agreement;
7. Entry of judgment for costs, expenses, and reasonable attorney's fees incurred by Monsanto; and
8. Such other relief as the Court may deem appropriate.

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CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to the following:

- **John C. Everett** *john@everettfirm.com,thresha@everettfirm.com*

/s/ John K. Baker