

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
No. 5:07-cv-00108-F**

ETIGRA, LLC	)
(Delaware Limited Liability Company), and	)
GRO-PRO, LLC dba ETIGRA	)
(Florida Limited Liability Company),	)
	)
Plaintiffs,	)
	)
v.	)
	)
BAYER CROPSCIENCE LP	)
(Delaware Limited Partnership),	)
BAYER CROPSCIENCE AKTIENGESELLSCHAFT	)
(German corporation),	)
	)
Defendants.	)
	)

**FIRST AMENDED COMPLAINT**

Plaintiffs, Etigra, LLC and Gro-Pro, LLC dba ETIGRA, by way of their First Amended Complaint against defendants, Bayer Cropscience LP and Bayer Cropscience Aktiengesellschaft, bring this action for a declaratory judgment of no patent infringement regarding U.S. Patent No. 5,783,203, for unfair competition at common law and pursuant to the Lanham Act, tortious interference with contract, tortious interference with prospective business opportunity, and unfair and deceptive trade practices under the laws of the state of North Carolina.

**THE PARTIES**

1. Plaintiff Etigra, LLC is a limited liability company organized and existing under the laws of the State of Delaware, Plaintiff Gro-Pro, LLC, dba Etigra is a limited liability company organized and existing under the laws of the State of Florida, and both have a place of

business at 501 Cascade Pointe Lane, Suite 103, Cary, NC 27513. Etigra, LLC and Gro-Pro, LLC, dba Etigra are collectively referred to hereafter as “ETIGRA.”

2. Upon information and belief, defendant Bayer Cropscience LP is a limited partnership organized under the laws of the State of Delaware, (hereafter referred to as “BCS LP” or “Defendants”) with a place of business at 2 T.W. Alexander Drive, Research Triangle Park, NC 27709.
3. Upon information and belief, defendant Bayer Cropscience Aktiengesellschaft (hereafter referred to as “BCS AG” or “Defendants”) is a corporate entity organized under the laws of the Federal Republic of Germany with its principal place of business at Alfred-Nobel-Str. 50, D-40789 Monheim am Rhein, Germany.

#### **JURISDICTION AND VENUE**

4. This is an action for a declaratory judgment seeking a determination that ETIGRA does not infringe a patent owned and/or licensed to one or more of Defendants under the patent laws of the United States, Title 35 of the United States Code. Jurisdiction is conferred pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1338(a) and (b) (patent infringement and unfair competition); 28 U.S.C. § 1367 (supplemental jurisdiction); 28 U.S.C. § 2201 and 28 U.S.C. § 2202 (declaratory judgment); 15 U.S.C. § 1125(a) (false and misleading representations of fact); 15 U.S.C. § 1221 (original jurisdiction of federal courts); NC Gen. Stat. 75-1.1 (tortious interference with prospective business opportunity, tortious interference with contract); and the common law torts of unfair competition, interference with prospective business opportunity and interference with contract.
5. This Court has supplemental jurisdiction over ETIGRA's state law claims.

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and 28 U.S.C. § 1400(b) because Defendants do business in this district, are subject to personal jurisdiction here, and a substantial part of the events or omissions giving rise to the claims occurred here.

**BACKGROUND FACTS COMMON TO ALL COUNTS**

7. On or about October 2006, the U.S. Environmental Protection Agency granted ETIGRA a registration for a new product that included both a plant fertilizer and a systemic plant insecticide, “imidacloprid.” This new product was offered for license to fertilizer formulators and was greeted with enthusiasm by the market.
8. Etigra’s product represents an improvement over the market-dominating insecticidal fertilizer product sold by BCS LP. The method for making the BCS LP product involves the application of insecticidal powder to the surface of a wetted fertilizer granule. This process necessarily involves the handling of unhealthy dust and presents the potential for human exposure to airborne dust during manufacture, loading, unloading, and maintenance of process equipment.
9. Etigra’s process uses a proprietary, nonvolatile solvent to dissolve the imidacloprid and form an insecticidal solution. This solution can then be contacted with the fertilizer granules by a number of conventional contact methods. Workers avoid dust exposure issues, and the licensed manufacturers will have a liquid-based system that is both highly effective and easier to apply than a dust-based insecticide.
10. In a March 3, 2006 letter from a Joshua Weeks, BCS LP (Exhibit 1) represented that Bayer AG was the current owner of US Patent No. 5,783,203 (Exhibit 2). Speaking with apparent authority of Bayer AG, Mr. Weeks expressed concern that others not infringe “any valid

patents of Bayer AG” and requested that Ms. Kay’s company take whatever steps were necessary to ensure that it does not infringe any claims of the ‘203 patent.

11. Janelle Kay is not an officer or employee of Etigra.
12. Pyxis Regulatory Consulting, Inc. is an independent entity whose services are retained from time to time by Etigra under a contractual relationship.
13. Etigra does not own or control the services provided by Ms. Janelle Kay or Pyxis Regulatory Consulting, Inc.
14. By late in 2006, ETIGRA had made substantial progress in business relations with two potential licensees for the ETIGRA product. Material information, pricing and volume estimates had been exchanged. This information was the subject of mutual understanding and assent among the parties that would culminate in a written agreement of substantial economic value to Etigra.
15. As news of the Etigra license offer spread through the industry, BCS LP sent a letter to those in the market. One such letter is dated December 12, 2006 in which BCS LP assured the recipients that it would “aggressively defend” its market share for fertilizer products containing the imidacloprid insecticide sold under the name MERIT. (Exhibit 3)
16. On December 19, 2006 Etigra submitted an application for sub-registration to the U.S. Environmental Protection Agency on behalf of its potential licensee Helena Chemical Company for approval to make and sell the imidacloprid-containing fertilizer product that would be licensed from Etigra. The submission of this application represents the maturing evolution of a substantial business opportunity between Etigra and its potential licensee.
17. On information and belief, on December 20, 2006 BCS LP contacted Helena Chemical Company (Helena) and threatened to sue Helena and any customer to whom Helena sold the

licensed product if Helena proceeded in further business relations with Etigra for imidacloprid-containing fertilizer products.

18. Shortly after receiving this communication, Helena terminated any further business developments with Etigra in connection with the Etigra imidacloprid-containing fertilizer product.
19. When Etigra asked why Helena had stopped the project, Helena cited a threat of, and desire to avoid, involvement in meritless patent infringement litigation from BCS LP. Helena also disclosed that BCS LP had threatened to reduce the amount of product purchase rebates for unrelated products if Helena continued to discuss imidacloprid-containing fertilizer products with Etigra.
20. The termination of the opportunity to license Helena represented substantial economic harm to Etigra.
21. By November 2006, Etigra had also made substantial progress with other potential licensees, United Agri-Products (UAP) and Loveland Products Inc. (LPI) for licensing Etigra's technology for imidacloprid-containing fertilizer. By the early months of 2007, Etigra and UAP/LPI had exchanged material information, and had reached agreement on pricing and initial sales volume. This information was the subject of mutual understanding and assent among the parties that would culminate in a written agreement.
22. The opportunity to license UAP and LPI represented a substantial economic opportunity for Etigra.
23. On information and belief, by February 23, 2007, BCS LP contacted UAP and LPI to dissuade them from proceeding further with Etigra. On information and belief, UAP and LPI had each been threatened with becoming named as a defendant in a meritless patent infringement

lawsuit along with any customer who might purchase the licensed imidacloprid/fertilizer product.

24. On information and belief, UAP and LPI were also threatened that substantial product purchase rebates owed by BCS LP to UAP and LPI on unrelated products would not be paid if UAP and LPI continued to develop an imidacloprid-containing fertilizer product with Etigra.
25. Despite pressure from BCS LP, LPI submitted an application to the US Environmental Protection Agency for approval to sell the imidacloprid-containing fertilizer product developed by Etigra. That registration was granted on April 23, 2007.
26. On May 14, 2007 Etigra was informed by LPI that the coercion from BCS LP was more than LPI could stand and that it would have to suspend all further sales, discussions or developments with Etigra as to imidacloprid-containing fertilizer products. This decision, as the result of unlawful coercion and interference by BCS LP, has caused and continues to cause, substantial economic harm to Etigra.
27. Etigra has been harmed and continues to suffer harm to its business in its new insecticidal fertilizer product for so long as the allegations made by BCS LP remain unresolved.
28. Without a declaration by this Court that establishes the scope of the parties' rights as they pertain to the patent allegedly at issue and Etigra's insecticidal fertilizer product, Etigra will continue to be harmed without an adequate remedy at law or equity.

**COUNT I – DECLARATORY JUDGMENT OF  
NO PATENT INFRINGEMENT**

29. Etigra hereby incorporates by reference and re-alleges the subject matter in paragraphs 1-28.
30. US Patent No. 5,783,203 is entitled "Insecticidal Fertilizer Mixtures" and was issued on July 21, 1998 to BCS AG, not to BCS LP. A Copy of U.S. Patent No. 5,783,203 ("the '203 patent") is attached hereto as Exhibit 3.

31. The claims of a patent measure and circumscribe the property right granted by the patent. In the present case, each of the '203 patent claims requires the formation of a "mixture" of a specific class of insecticides (which includes imidacloprid), a fertilizer, and "an adhesive." Thus, a formulation that is not a "mixture" or which does not include an "adhesive" would not infringe any claim of the '203 patent.
32. The '203 patent describes the term "mixture" in terms that one with an ordinary level of skill in the art would understand to refer to a homogeneous mixture of ingredients that is used to form tablets, sticks, or granules of the materials.
33. Etigra's insecticidal fertilizer product is not a mixture of insecticide, fertilizer and an adhesive as those terms are used in the '203 patent.
34. The '203 patent describes the term "adhesive" in terms that one with an ordinary level of skill in the art would understand to refer to either (a) an organic polymer with tacky, or sticky, characteristics or inorganic adhesives such as gypsum or cement that will stick the insecticidal dust to the fertilizer solids. Adhesives, according to the '203 patent, "are present in the mixture in concentrations of from 1 to 30% by weight." See, Exhibit 3, col. 6 at lines 49-57.
35. Etigra's product does not use an adhesive in its composition. The insecticide is dissolved in a solvent that is sprayed onto the fertilizer solids. The applied solution is either absorbed into the fertilizer solids or forms a coating on the surface of the fertilizer solids.
36. None of the properly interpreted claims in the '203 patent is sufficient to encompass the insecticidal fertilizer product that would be made or sold by a licensee of Etigra.
37. None of the properly interpreted claims in the '203 patent is sufficient to encompass the insecticidal fertilizer product that would be used by a customer of a licensee of Etigra.

38. There is a substantial and continuing justiciable controversy between Etigra and defendants as to the scope of the '203 patent.
39. By virtue of BCS LP's willful disregard for the limited scope of the '203 patent rights and wanton efforts to assert an unlawfully justified scope of rights thereunder, this is an "exceptional case" within the meaning of 35 U.S.C. §285 so as to award Etigra its attorney fees in this matter and also warrants an award of treble damages to Etigra pursuant to 35 U.S.C. §284.

### **COUNT II – DECLARATORY JUDGMENT OF INVALIDITY**

40. Etigra hereby incorporates by reference and re-alleges the subject matter in paragraphs 1-39.
41. The claims of the '203 patent are invalid under 35 U.S.C. §§ 101 (inoperative), 112 (failure to disclose best mode, failure to provide adequate and enabling written description, indefinite claims), 102 (lack of novelty) and/or 103 (obviousness).
42. An invalid patent claim cannot be infringed, so none of the '203 patent claims is legally sufficient to prevent Etigra from making, using, licensing or selling its imidacloprid-containing fertilizer technology.
43. There is a substantial and continuing justiciable controversy between Etigra and defendants as to the validity of the '203 patent.
44. By virtue of defendants' willful disregard for the invalid nature of the '203 patent rights and wanton efforts to assert rights thereunder, this is an "exceptional case" within the meaning of 35 U.S.C. §285 so as to award Etigra its attorney fees in this matter and also warrants an award of treble damages to Etigra pursuant to 35 U.S.C. §284.

### **COUNT III – TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE**

45. Etigra hereby incorporates by reference and re-alleges the subject matter in paragraphs 1- 44.



46. Etigra had a business relationship and expectancy of securing future contracts with Helena Chemical, UAP and LPI for the licensing of Etigra's imidacloprid/fertilizer product.
47. On information and belief, BCS LP acting alone or in active concert with BCS AG intentionally induced Etigra's potential licensees to rescind and refuse to continue doing business with Etigra with wrongful threats of intentional infliction of economic harm to their business by (a) involvement in unwarranted patent infringement litigation, (b) unwarranted patent infringement litigation against any customers who might buy an imidacloprid-containing fertilizer product that was licensed from Etigra, and/or (c) the unjustified threat of withholding or reduction in annual rebate payments for unrelated products that were owed to Helena Chemical, UAP and/or LPI.
48. Defendants' actions were not justified by any legitimate business interest.
49. But for defendants' interference, one or more written contracts would have been executed for Etigra's imidacloprid/fertilizer product.
50. Defendants' action constitute interference with prospective economic advantage.
51. As a direct and proximate result of such assertions of fact and threats to potential licensees and customers of involvement in a suit for patent infringement by BCS LP, Etigra has been harmed and continues to suffer pecuniary and nonpecuniary forms of harm that is compensable by suitable award of damages by this Court.

#### **COUNT IV – TORTIOUS INTERFERENCE WITH CONTRACT**

52. Etigra hereby incorporates by reference and re-alleges the subject matter in paragraphs 1- 51.
53. Etigra had a valid contract with Helena Chemical, UAP and LPI for the licensing of Etigra's imidacloprid/fertilizer product.
54. On information and belief, defendants had knowledge of these contracts.

55. On information and belief, BCS LP acting alone or in active concert with BCS AG intentionally induced Helena, UAP and/or LPI to rescind their contracts and refuse to continue doing business with Etigra with wrongful threats of intentional infliction of economic harm to their business by (a) involvement in unwarranted patent infringement litigation, (b) unwarranted patent infringement litigation against any customers who might buy an imidacloprid-containing fertilizer product that was licensed from Etigra, and/or (c) the unjustified threat of withholding or reduction in annual rebate payments for unrelated products that were owed to Helena Chemical, UAP and/or LPI.
56. Defendants' actions were not and are not justified by any legitimate business interest.
57. As a direct and proximate result of such assertions of fact and threats to potential licensees and customers of involvement in a suit for patent infringement by BCS LP, Etigra has been harmed and continues to suffer pecuniary and nonpecuniary forms of harm that is compensable by a suitable award of damages from this Court.

**COUNT V – UNFAIR AND DECEPTIVE TRADE PRACTICES**

58. Etigra hereby incorporates by reference and re-alleges the subject matter in paragraphs 1- 57.
59. On information and belief, BCS LP did not have standing to sue for infringement of the '203 patent when it threatened Helena Chemical, UAP and/or LPI and their respective customers with suit for patent infringement.
60. On information and belief, the threats of suit for patent infringement by BCS LP were made, therefore, without a *bona fide* basis in law or fact.
61. On information and belief, the threats of suit for patent infringement by BCS LP were known to be untrue when made.

62. On information and belief, the threats of suit for patent infringement were made by BCS LP wrongfully and without a good faith belief in the accuracy of their representations or of BCS LP' standing to file suit against others for patent infringement.
63. On information and belief, the threats of suit for patent infringement were made by BCS LP wrongfully and with the intent to hinder and restrain the market from licensing, making and selling the insecticidal fertilizer developed by Etigra in violation of N.C. Gen. Stat. § 75-1.1.
64. On information and belief, the threats of suit for patent infringement were made by BCS LP wrongfully and with the intent to harm Etigra and its business in violation of N.C. Gen. Stat. § 75-1.1.
65. On information and belief, BCS AG was aware of, condoned, and actively participated in the wrongful assertions and representations of fact made by BCS LP to potential licensees, distributors and/or customers of Etigra in violation of N.C. Gen. Stat. § 75-1.1.
66. The threats of suit for patent infringement made by BCS LP, as well as the other acts set forth in counts III and IV herein, were unfair and/or deceptive acts or practices in or effecting commerce in violation of N.C. Gen. Stat. § 75-1.1.
67. As a direct and proximate result of Defendants' wrongful, unfair, and/or deceptive acts or practices, Etigra has been harmed and continues to suffer pecuniary and non-pecuniary forms of harm.

**COUNT VI – UNFAIR AND DECEPTIVE TRADE PRACTICES UNDER FEDERAL LAW**

68. ETIGRA hereby incorporates by reference and re-alleges the subject matter in paragraphs 1-67.

69. On information and belief, the assertions of fact and threats of suit for patent infringement were made by BCS LP wrongfully with the intent to harm ETIGRA and its business in violation of the Lanham Act, Section 43(a) [15 U.S.C. §1125(a)].
70. On information and belief, BCS AG was aware of, condoned, and actively participated in the wrongful assertions and representations of fact made by BCS LP to potential licensees, distributors and/or customers of ETIGRA in violation of The Lanham Act, Section 43(a) [15 U.S.C. §1125(a)].

**COUNT VII – UNFAIR COMPETITION UNDER FEDERAL LAW**

71. ETIGRA hereby incorporates by reference and re-alleges the subject matter in paragraphs 1-70.
72. On information and belief, the factual assertions and threats of suit for patent infringement were made by BCS LP wrongfully and with the intent to harm ETIGRA and its business in violation of common law principles of unfair competition.
73. On information and belief, BCS AG was aware of, condoned, and actively participated in the wrongful assertions and representations of fact made by BCS LP to potential licensees, distributors and/or customers of Etigra in violation of common law principles of unfair competition.

WHEREFORE, Plaintiff Etigra prays for the following relief:

- A. A declaration that Etigra's insecticidal fertilizer product does not infringe any valid claim of US Patent No. 5,783,203;
- B. A declaration that the claims of US Patent No. 5,783,203 are invalid;
- C. Preliminary and permanent injunctions enjoining BCS AG and BCS LP, including their officers, directors, agents and employees and all those in active concert or participation with

either who receive actual notice of the judgment by personal service or otherwise, from asserting that the ETIGRA insecticidal fertilizer solids infringe any claim of US Patent No. 5,783,203;

D. An award of compensatory and punitive damages, including, but not limited to loss of profits and/or royalties, to Etigra by reason of the wrongs committed by BCS LP and BCS AG;

E. An award of interest, including pre- and post-judgment interest, and costs of this action;

F. A declaration that this case is exceptional under 35 U.S.C. §285 and an award of Etigra's attorney fees and untaxable costs associated with this case;

G. A trebling of any damages pursuant to N.C. Gen. Stat. § 75-16, together with an award of ETIGRA's attorneys' fees pursuant to N.C. Gen. Stat. § 75-16.1; and

H. Such other and further relief as this Court deems just and proper.

Respectfully submitted this 27th day of June, 2007.

/s/Lance G. Johnson

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **FIRST AMENDED COMPLAINT** was electronically filed on this day with the Clerk of Court using the CM/ECF system, which will transmit notice of such filing, constituting service thereof, to the following:

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*Counsel for BAYER CROPSCIENCE LP, BAYER CROPSCIENCE LLC, BAYER CROPSCIENCE HOLDINGS INC. and BAYER AKTIENGESELLSCHAFT*

This the 27th day of June, 2007

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