

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

PENNINGTON SEED, INC. and)	
AGRESEARCH LIMITED,)	
)	
Plaintiffs,)	CASE NO. 04-4194-CV-C-SOW
vs.)	
)	
PRODUCE EXCHANGE NO. 299;)	
ALLIED SEED, L.L.C.;)	
GARY C. GEORGE, B. ALAN SUGG,)	
JOHN A. WHITE, and CHARLES P. WEST,)	
acting in their personal capacities and in their)	
official capacities as employees of The)	
University of Arkansas; and)	
FFR COOPERATIVE,)	
)	JURY TRIAL DEMANDED
Defendants.)	

FIRST AMENDED COMPLAINT FOR DAMAGES AND EQUITABLE RELIEF

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; 28 U.S.C. § 1338, granting district courts original jurisdiction over any civil action relating to patents; and the Fifth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983, preventing improper taking of personal property by a State and its actors. 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. Defendant Produce Exchange No. 299 is a corporation organized and existing under the laws of the State of Missouri with its principal place of business in Columbia,

Boone County, Missouri. The registered agent for Produce Exchange No. 299 is Missouri Farmers Association, Inc.

7. Defendant Allied Seed, L.L.C. is a limited liability corporation organized and existing under the laws of the State of Idaho with its principal place of business in Nampa, Canyon County, Idaho. The registered agent for Allied Seed, L.L.C. is David McWilliams.

8. Defendant Gary C. George, on information and belief, resides in Springdale, Washington County, Arkansas, and is the Chairman of the Board of Trustees of the University of Arkansas.

9. Defendant B. Alan Sugg, on information and belief, resides in Little Rock, Pulaski County, Arkansas, and is the President of the University of Arkansas.

10. Defendant John A. White, on information and belief, resides in Fayetteville, Washington County, Arkansas, and is the Chancellor of the University of Arkansas.

11. Defendant Charles P. West, on information and belief, resides in Fayetteville, Washington County, Arkansas, and is a Professor at the University of Arkansas.

12. Defendant FFR Cooperative is an agriculture cooperative organized and existing under the laws of the State of Indiana with its principal place of business in Lafayette, Tippecanoe County, Indiana.

FACTS

13. Plaintiffs are in the business of producing, marketing, licensing, and selling certain grasses known to benefit livestock. Plaintiffs use a variety of organizations including wholly owned subsidiaries, joint ventures, sales representatives, and independent dealers. In the course of its 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®.”

14. Prior to the introduction into the marketplace, and in order to protect their interest and investment in the product known as MaxQ®, AgResearch Limited applied to the United States Patent and Trademark Office for a patent.

15. On August 29, 2000, Patent Number 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 to the entity known as AgResearch Limited. A true and correct copy of the ‘170 Patent is attached as Exhibit A and is incorporated herein by reference.

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

17. By virtue of the issuance of the '170 Patent, 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.

18. Defendants are actively growing, marketing, offering for sale, promoting, and selling a product containing Plaintiffs' non-toxic endophytes, in violation of Plaintiffs' patent rights.

19. Defendants, through their agents, employees, and assigns, were placed on actual notice of Plaintiffs' patent rights.

20. Defendants acted, and continue to act, with full knowledge and with actual notice that such activities are/were in violation of Plaintiffs' patent rights.

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

COUNT I—INFRINGEMENT OF THE '170 PATENT

22. 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.

23. Defendants infringed and continue to 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.

24. 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. Further, Plaintiffs suffer irreparable harm and have no adequate remedy at law against future infringements. These injuries will continue unless and until the Defendants' infringing activities are forever enjoined by this Court.

COUNT II—DEPRIVATION OF FEDERAL RIGHTS

25. 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.

26. Defendants George, Sugg, White, and West, in their capacity as employees of the University of Arkansas, deprived and continue to deprive Plaintiffs of Plaintiffs' exclusive federal patent rights under the '170 patent by making, using, selling, and marketing the '170 patent without authorization.

27. The Arkansas State Claims Commission ("Claims Commission") has exclusive jurisdiction to hear all claims against the State of Arkansas and its institutions and employees thereof. However, the Claims Commission has no jurisdiction to hear patent cases under 28 U.S.C. § 1338, which grants federal district courts exclusive original jurisdiction over patent cases. Furthermore, the Claims Commission has no power to issue injunctive relief, which is a vital remedy against the employees of the University of Arkansas that will prevent further infringement. The Claims Commission does not have

the power to order a claim of more than \$10,000; the Arkansas Legislature must appropriate amounts exceeding \$10,000. Nor does the Claims Commission have the jurisdiction or authority to compel out-of-state defendants to comply with the discovery orders necessary to establish Plaintiffs' damages. Therefore, the Claims Commission remedies are wholly inadequate for a patent infringement action.

COUNT III—CONVERSION

28. 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.

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

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

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

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

JURY DEMAND

33. Plaintiffs demand a jury trial with regard to all issues of fact that may arise herein.

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 permanently enjoined from further infringement of the '170 Patent;
- C. 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;
- D. 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;
- E. 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


ELECTRONIC SIGNATURE

By: _____

Mark Murphey Henry
AR Bar No. 97170
mark@nolanhenry.com
Nolan Henry, PLLC
204 South East Avenue
Fayetteville, AR 72701
(479) 695-1330 Telephone
(479) 695-1332 Facsimile

CERTIFICATE OF SERVICE

I certify that on December 1, 2004, I served a copy of the foregoing instrument upon the attorney of record herein by operation of the Courts Electronic Filing System to the following:

Scott R. Brown
Hovey Williams LLP
2405 Grand Boulevard, Suite 400
Kansas City, MO 64108-2519
816-474-9050


ELECTRONIC SIGNATURE

Mark Murphey Henry