

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI**

<p>PIONEER HI-BRED INTERNATIONAL, INC., an Iowa corporation,</p> <p style="text-align: center;">Plaintiff,</p> <p>v.</p> <p>DEAN FISCHER, an individual,</p> <p style="text-align: center;">Defendant.</p>	<p>Case No. _____</p> <p style="text-align: center;">COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF</p>
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Plaintiff Pioneer Hi-Bred International, Inc. (hereinafter "Pioneer") for its Complaint against Dean Fischer, states and alleges as follows:

PARTIES

1. Pioneer is a corporation organized and existing under the laws of the State of Iowa, with its principal place of business in Polk County, Iowa. Pioneer is authorized to do and does business in the State of Missouri. Pioneer is in the business of among other things developing, manufacturing, licensing and selling agricultural products, including wheat seed.

2. Dean Fischer (hereinafter "Fischer"), on information and belief, is a resident and citizen of the State of Missouri, Bates County. Fischer, on information and belief, is in the business of among other things cleaning and/or selling wheat seed.

JURISDICTION AND VENUE

3. The claims alleged herein arise under the Patent Laws of the United States, 35 U.S.C. § 1, *et seq.*, the Plant Variety Protection Act ("PVPA"), 7 U.S.C. § 2321, *et seq.*, and the Trademark Act of 1946 ("Lanham Act"), 15 U.S.C. § 1051, *et seq.*

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1338(a), and 2201(a).

5. This Court has supplemental jurisdiction over the state law claim pursuant to 28 U.S.C. § 1367(a) because the claim is so related to the federal claims that it forms part of the same case or controversy and derives from a common nucleus of operative facts.

6. This Court has personal jurisdiction over Fischer based on his residence and citizenship.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c), and 1400(b).

FACTUAL BACKGROUND

8. On April 18, 2002, Certificate of Plant Variety Protection No. 200100280 (“the 25R78 PVP Certificate”), pertaining to Wheat Variety 25R78, was duly and legally issued by the United States Department of Agriculture. Pioneer is the owner of all right, title, and interest in the 25R78 PVP Certificate. A true and correct copy of the 25R78 PVP Certificate is attached as Exhibit A to this Complaint.

9. On November 30, 2004, United States Patent No. 6,825,404 (“the ‘404 Patent”), entitled “Wheat Variety 25R78,” was duly and legally issued by the United States Patent and Trademark Office. Pioneer is the owner by assignment of all right, title and interest to the ‘404 Patent. A true and correct copy of the ‘404 Patent is attached as Exhibit B to this Complaint.

10. Pioneer uses the trademark PIONEER to identify and distinguish its company’s seed products from other’s products.

11. The trademark PIONEER is registered on the United States Patent and Trademark Office's Principal Register, thereby giving Pioneer the exclusive right to use the trademark in commerce in connection with its company's seed products.

12. Authorized seed dealers are required to pay a license fee for each unit of Pioneer seed sold.

13. In 2005, Pioneer received reports indicating Fischer was suspected of cleaning patented Pioneer wheat seed (either from a previous purchase or a previous harvest) and (re)selling it as "brown bag" seed.

14. Pioneer investigated the reports, and, eventually, it hired a private investigator to determine whether Fischer was unlawfully cleaning and/or (re)selling protected Pioneer wheat seed varieties.

15. The investigator telephoned Fischer regarding the purchase of wheat seed on Thursday, October 6, 2005.

16. During that phone call, Fischer represented that the wheat seed he was offering for sale was Pioneer wheat seed.

17. Fischer agreed to sell the investigator 100 bushels of Pioneer wheat seed during the course of the October 6, 2005 call.

18. On Saturday, October 8, 2005, the investigator purchased approximately 100 bushels of wheat seed from Fischer at Fischer's farm near Butler, Missouri.

19. At the time of the purchase, Fischer and/or Fischer's representative stated that the wheat seed was Pioneer Wheat Variety 25R78.

20. The seed purchased from Fischer was transported and stored by the investigator for sampling by a representative from the Missouri Crop Improvement Association, Inc. ("MCIA"), who took samples from the wheat seed purchased from Fischer.

21. Pioneer arranged for a wheat seed sample taken by the MCIA representative to be sent to the South Dakota State University Seed Testing Laboratory ("SDSU Laboratory"). The SDSU Laboratory received the sample from MCIA in good order and analyzed the sample and other samples supplied by Pioneer. The results of the analysis confirmed that the seed sold by Fischer to the investigator was, in fact, Pioneer Wheat Variety 25R78, as represented by Fischer and/or his representative to the investigator.

22. The wheat seed Fischer sold and delivered to the investigator on October 8, 2005, was Pioneer Wheat Variety 25R78.

COUNT I: PATENT INFRINGEMENT – PATENT NO. 6,825,404

23. 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.

24. Fischer has infringed, and is believed to be infringing, the '404 Patent in violation of 35 U.S.C. § 271, by making, using, selling, and/or offering for sale in the United States, without authority, seed that falls within the scope of the claims of the '404 Patent. Fischer was not authorized to and did not have a license allowing him to engage in the infringing conduct.

25. On information and belief, Fischer's infringement of the '404 Patent has taken place and is continuing to take place with knowledge of the '404 Patent and is willful and deliberate.

26. Pioneer has given notice to the public that its Wheat Variety 25R78 seed is patented by, *inter alia*, marking its Wheat Variety 25R78 seed bags with language indicating the variety is protected by a patent, thereby complying with 35 U.S.C. § 287(a).

27. As a result of Fischer's infringing activities, Pioneer has been damaged and will be irreparably injured unless and until such infringing activities are enjoined by this Court.

28. Pursuant to 35 U.S.C. § 283, Pioneer is entitled to injunctive relief in accordance with the principles of equity to prevent the future infringement of rights secured by the '404 Patent.

29. Pursuant to 35 U.S.C. § 284, Pioneer is entitled to damages adequate to compensate it for the infringement by Fischer, but in no event less than a reasonable royalty for the use made of Wheat Variety 25R78 by Fischer, together with interest and costs as fixed by the Court. Pioneer is entitled to treble damages under 35 U.S.C. § 284 based on the nature of the wrongful conduct of Fischer as described herein.

30. Pursuant to 35 U.S.C. § 285, Pioneer is entitled to recover its attorneys' fees, along with related expenses and costs.

WHEREFORE, Pioneer respectfully requests this Court:

- A. To find and enter judgment that Fischer has infringed the '404 Patent;
- B. To enter an order enjoining Fischer, and his agents, servants, privies, and employees, and all persons in active concert or participation with any of them, from infringing the '404 Patent;
- C. To award Pioneer its damages in an amount sufficient to compensate it for Fischer's infringement of the '404 Patent, but in no event less than a reasonable royalty for the use made of Wheat Variety 25R78 by Fischer, together with pre-judgment and post-judgment interest and costs and treble damages under 35 U.S.C. § 284;

- D. To declare this case to be “exceptional” under 35 U.S.C. § 285, and to award Pioneer its attorneys’ fees, along with related expenses and costs incurred in this action; and
- E. To award Pioneer such other and further relief as this Court deems just and proper.

COUNT II: VIOLATION OF PVPA - CERTIFICATE NO. 200100208

31. 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.

32. Fischer has violated, and is believed to be violating, Pioneer’s rights under the 25R78 PVP Certificate, in violation of 7 U.S.C. §§ 2402, 2483, and 2541, by conditioning, stocking, offering for sale, exposing for sale, marketing, selling, dispensing, delivering, and transferring Wheat Variety 25R78 as described herein, and/or by instigating or actively inducing such conduct. Fischer was not authorized to and did not have a license allowing him to engage in this wrongful infringing conduct. This infringing conduct was not undertaken by Fischer for the purpose of plant breeding or bona fide research.

33. On information and belief, Fischer’s violation of Pioneer’s rights under the 25R78 PVP Certificate has taken place and is continuing to take place with knowledge of Pioneer’s rights under the 25R78 PVP Certificate and is willful and deliberate.

34. Pioneer has given notice to the public that its Wheat Variety 25R78 seed is protected under the PVPA by, *inter alia*, marking its Wheat Variety 25R78 seed bags with language indicating that the variety is protected, thereby complying with 7 U.S.C. § 2567.

35. As a result of Fischer’s wrongful conduct as described herein, Pioneer has been damaged and will be irreparably injured unless and until such conduct is enjoined by this Court.

36. Because Fischer conditioned, stocked, offered, exposed, marketed, sold, dispensed, delivered, and transferred the seed at issue under the name "25R78" (which is shown in the 25R78 PVP Certificate), it is presumed that the seed is Pioneer Wheat Variety 25R78 under 7 U.S.C. § 2561.

37. Pursuant to 7 U.S.C. § 2563, Pioneer is entitled to injunctive relief in accordance with the principles of equity to prevent future infringement of Pioneer's rights under the 25R78 PVP Certificate.

38. Pursuant to 7 U.S.C. § 2564, Pioneer is entitled to damages adequate to compensate for the infringement by Fischer, but in no event less than a reasonable royalty for the use made of Wheat Variety 25R78 by Fischer, together with interest and costs as fixed by the Court. Pioneer is entitled to treble damages under 7 U.S.C. § 2564(b) based on the nature of the wrongful conduct of Fischer as described herein.

39. Pursuant to 7 U.S.C. § 2526, Pioneer is entitled to recover its attorneys' fees, along with related expenses and costs.

WHEREFORE, Pioneer respectfully requests this Court:

- A. To find and enter judgment that Fischer has violated Pioneer's rights under the 25R78 PVP Certificate;
- B. To enter an order enjoining Fischer, and his agents, servants, privies, and employees, and all persons in active concert or participation with any of them, from violating Pioneer's rights under the 25R78 PVP Certificate;
- C. To award Pioneer its damages in an amount sufficient to compensate it for Fischer's violation of Pioneer's rights under the 25R78 PVP Certificate, but in no event less than a reasonable royalty for the use made of Wheat Variety 25R78 by Fischer, together with pre-judgment and post-judgment interest and costs and treble damages under 7 U.S.C. § 2564(b);

- D. To declare this case to be "exceptional" under 7 U.S.C. § 2565, and to award Pioneer its attorneys' fees, along with related expenses and costs incurred in this action; and
- E. To award Pioneer such other and further relief as this Court deems just and proper.

COUNT III - INFRINGEMENT OF LANHAM ACT

40. 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.

41. Fischer is illegally selling and marketing seed using the federally registered trademark PIONEER, owned by Pioneer, and is falsely designating Pioneer Wheat Variety 25R78 as his own.

42. By falsely designating the origin of the wheat and by making false and misleading representations of fact in the selling and marketing of the wheat, as described herein, Fischer has violated 15 U.S.C. § 1125.

43. Fischer's use of Pioneer's PIONEER trademark, Fischer's false designation of Pioneer Wheat Variety 25R78 as his own wheat, and Fischer's false and misleading description of fact in the selling of the wheat is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Fischer with Pioneer, or as to the origin of the wheat or as to the sponsorship or approval of Fischer's goods, services, or other commercial activities by Pioneer.

44. Further, Fischer's false designations and misleading descriptions misrepresent the nature, characteristics, qualities, or geographical origin of the wheat at issue.

45. Pioneer has not granted Fischer permission to use its PIONEER trademark in connection with the sale or marketing of Pioneer seed products.

46. Pursuant to 15 U.S.C. § 1117, Pioneer is entitled to damages equal to the value of Fischer's profits, any damages sustained by Pioneer, and costs of the action. Further, in light of the exceptional circumstances of this case, Pioneer is entitled to a sum above the amount found as actual damages, not exceeding three times such amount, as well as an award of reasonable attorneys' fees.

47. Pursuant to 15 U.S.C. § 1116, Pioneer is entitled to a permanent injunction, according to the principles of equity and upon such terms as the Court may deem reasonable, to prevent Fischer's continued unauthorized use of its PIONEER trademark. Without such injunction, Pioneer will suffer immediate and irreparable harm not otherwise quantifiable in money damages.

WHEREFORE, Pioneer respectfully requests this Court:

- A. To find and enter judgment that Fischer has violated 15 U.S.C. § 1125;
- B. To enter an order permanently enjoining Fischer and his agents, servants, privies, and employees, and all persons in active concert or participation with any of them, from continued or future acts constituting infringement of Pioneer's rights concerning use of its trademark in connection with unauthorized sale of wheat seed;
- C. To award damages in an amount equal to Fischer's profits, any damages sustained by Pioneer, and costs of the action for Fischer's infringement of Pioneer's trademark;
- D. To grant trebling of damages awarded for trademark infringement, together with reasonable attorneys' fees; and
- E. To award Pioneer such other and further relief as this Court deems just and proper.

COUNT IV - CONVERSION

48. 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.

49. Fischer intentionally obtained and, upon information and belief, illegally propagated Pioneer Wheat Variety 25R78, and is selling the variety as his own wheat, exercising unauthorized dominion and control over Pioneer's wheat variety and/or technology.

50. Pioneer Wheat Variety 25R78 is the property of Pioneer, as evidenced by the 25R78 PVP Certificate, which is attached to this Complaint as Exhibit A.

51. Fischer has converted Pioneer Wheat Variety 25R78 to his own use without permission, thereby depriving Pioneer of its property rights.

52. As a result of Fischer's actions, Pioneer has been damaged.

WHEREFORE, Pioneer respectfully requests this Court:

- A. To find and enter judgment that Fischer has converted Pioneer Wheat Variety 25R78 to his own use without permission;
- B. To award damages sufficient to compensate Pioneer for Fischer's conversion of Pioneer's property rights, together with interest, costs, and reasonable attorneys' fees as permitted by law; and
- C. To award such other relief to which Pioneer may be entitled as the Court may deem appropriate.

Date: November _____, 2005

**KLEND, MITCHELL, AUSTERMAN &
ZUERCHER, LLC**

/s/ Eldon L. Boisseau

Eldon L. Boisseau

E-mail: *eboisseau@kmazlaw.com*

7300 W. 110th St., 7th Floor

Overland Park, KS 66210

Telephone: (913) 383-8124

Facsimile: (913) 317-1505

Of Counsel:

FAEGRE & BENSON, LLP

Ross W. Johnson

E-mail: *rwjohnson@faegre.com*

Jacob D. Bylund

E-mail: *jbylund@faegre.com*

801 Grand Avenue, Suite 3100

Des Moines, IA 50309-8002

Telephone: (515) 248-9000

Facsimile: (515) 248-9010

**ATTORNEYS FOR PLAINTIFF,
PIONEER HI-BRED INTERNATIONAL, INC.**

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