

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MONSANTO COMPANY and
MONSANTO TECHNOLOGY, LLC,
Plaintiffs,

VS.

LARRY H. LYTLE,
Defendant.

Case No. 4:09-cv-01626 DDN

FIRST AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

Plaintiffs, Monsanto Company, and Monsanto Technology, LLC (sometimes referred to collectively as “Monsanto”), for their Complaint against Larry H. Lytle (sometimes referred to as “Defendant”) make the following allegations:

THE PLAINTIFFS

Monsanto Company

1. Monsanto Company 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 Missouri and this judicial district.

2. Monsanto Company 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 Company developed plant biotechnology with gene transfer that results in plants having resistance to glyphosate-based herbicides (such as Roundup Ultra®, Roundup UltraMAX®, Roundup WeatherMAX®, and Touchdown®) as well as separate biotechnology that results in plants which produce Bacillus

thuringiensis (Bt) insecticidal proteins that control some insect species (including budworms, bollworms, and armyworms).

3. This biotechnology has been utilized by Monsanto Company in cotton. The genetically improved cotton is marketed by Monsanto Company under multiple trade names, including Roundup Ready® cotton, Bollgard II® cotton, Roundup Ready® Flex cotton, and Roundup Ready® Flex with Bollgard II® cotton.

4. Monsanto's Roundup Ready® and Roundup Ready® Flex biotechnology is protected under United States Patent Number RE 39,247 which is attached hereto as Exhibit "A". The RE 39,247 patent, which is commonly referred to as the '247 patent, issued prior to the events giving rise to this action.

5. Monsanto's Bollgard II® biotechnology is protected under United States Patent Numbers 5,352,605 (the '605 patent), 5,880,275 (the '275 patent), and 6,489,542 (the '542 patent), which are attached hereto as Exhibits "B", "C" and "D" respectively. The '605, '275 and '542 patents were issued prior to the events giving rise to this action.

6. Monsanto Company is and has been the exclusive licensee of the '247, '605, '275, and '542 patents from Monsanto Technology, LLC.

Monsanto Technology LLC

7. 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.

8. Monsanto Technology, LLC is and has been the owner of the '247, '605, '275, and '542 patents prior to the events giving rise to this action.

THE DEFENDANT

9. Defendant Larry H. Lytle, is an individual who resides at 3066 U.S. Highway 277 South, Anson, Texas 79501.

10. Defendant is engaged in a farming business that involves the planting of crops, including cotton. Upon information and belief, the Defendant farms land in Anson, Texas.

JURISDICTION AND VENUE

11. This is an action for patent infringement arising under the patent laws of the United States of America, 35 U.S.C. § 1, et. seq., including 35 U.S.C. § 271. This Court has subject matter jurisdiction 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. Additionally, this Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over all of Monsanto's non-federal question claims, such that they form part of the same case or controversy.

12. This Court has personal jurisdiction over the Defendant and venue is proper in this judicial district because the parties entered into a Monsanto Technology Agreement containing a forum selection clause. In the Agreement, both parties consented to the exclusive jurisdiction of the U.S. District Court for the Eastern District of Missouri.

GENERAL ALLEGATIONS

13. Roundup® is a non-selective herbicide manufactured by Monsanto, which causes severe injury or crop destruction to cotton varieties that are not Roundup Ready® or Roundup Ready® Flex. Cotton displays a unique and identifiable symptomatology after having been sprayed with Roundup® or other herbicides containing glyphosate, unless said cotton is Roundup Ready® cotton or Roundup Ready® Flex cotton.

14. Monsanto's Roundup Ready® and Roundup Ready® Flex technology is protected under the '247 patent. This patent was issued and assigned to Monsanto prior to the events giving rise to this action.

15. Monsanto's Bollgard II® technology is protected under the '605, '275, and '542 patents. These patents were issued and assigned to Monsanto prior to the events giving rise to this action.

16. Monsanto licenses the use of Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and Roundup Ready® Flex with Bollgard II® seed technologies to farmers at the retail marketing level through a limited use license commonly referred to as a Technology Agreement.

17. Among others things, the express terms of the limited use license prohibits licensees from saving harvested Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and Roundup Ready® Flex with Bollgard II® cotton seed for planting purposes, or from selling, transferring or supplying saved Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and Roundup Ready® Flex with Bollgard II® cotton seed to others for planting. The use of the seed is limited to the production of a single commercial crop.

18. Authorized purchasers of Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and Roundup Ready® Flex with Bollgard II® seed are required to pay an established royalty (once referred to as a "technology fee") for each commercial unit of seed in addition to the price of the base germplasm.

19. Monsanto places the required statutory notice that its Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and Roundup Ready® Flex with Bollgard II® technologies are patented on the labeling of all bags containing Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and Roundup Ready® Flex with Bollgard II® seed. In particular, each bag of Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and Roundup Ready® Flex with Bollgard II® seed is marked with notice of at least U.S. Patent Nos. RE 39,247; 5,352,605; 5,880,275; and 6,489,542.

20. Monsanto does not authorize the planting of saved Roundup Ready®, Roundup Ready® Flex, Bollgard II®, or Roundup Ready® Flex with Bollgard II® cotton seed. The planting of saved Roundup Ready®, Roundup Ready® Flex, Bollgard II®, or Roundup Ready® Flex with Bollgard II® cotton seed is a direct infringement of Monsanto's patent rights, including the '247, '605, '275, and '542 patents.

21. In at least 2008, the Defendant knowingly, intentionally, and willfully planted and used saved Roundup Ready®, Roundup Ready® Flex, Bollgard II®, Roundup Ready® Flex with Bollgard II® cotton seed, or combinations thereof (produced from Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and/or Roundup Ready® Flex with Bollgard II® cotton seed planted in 2007, or earlier) without authorization from Monsanto, in violation of Monsanto's patent rights.

22. Monsanto requested information from Defendant about Defendant's 2008 cotton farming operations, and particularly concerning his use of Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and Roundup Ready® Flex with Bollgard II® cotton. The information sought included the number of acres planted and the source of the cotton seed planted.

23. According to Farm Service Agency records, Defendant planted over 2,800 acres of cotton during the 2008 growing season.

24. A sampling of Defendant's fields demonstrates that Defendant's acreage was planted with seed containing the Roundup Ready®, Roundup Ready® Flex, Bollgard II®, Roundup Ready® Flex with Bollgard II® traits, or combinations thereof.

25. Defendant is unable to demonstrate sufficient Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and Roundup Ready® Flex with Bollgard II® cotton seed purchase receipts for his acreage planted with seed containing Monsanto's patented crop traits.

26. Defendant harvested the cotton that survived the 2008 growing season.

COUNT I
PATENT INFRINGEMENT-Patent No. RE 39,247

27. 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.

28. On August 22, 2006, United States Patent Number 5,633,435 was duly and legally reissued to Monsanto as U.S. Patent No. RE 39,247. U.S. Patent No. 5,633,435 was initially issued on May 27, 1997. The '247 patent is for an invention of Glyphosate-Tolerant 5-Enolpyruvylshikimate-3-Phosphate Synthases. This invention is in the fields of genetic engineering and plant biology.

29. Monsanto is the owner by assignment of all rights, title and interest in and to the '247 Patent.

30. The Defendant infringed the '247 patent by making, using, offering for sale or selling cotton seed having the Roundup Ready® and/or Roundup Ready® Flex trait embodying or using the patented invention without authorization from Monsanto, and will continue to do so unless enjoined by this Court.

31. Defendant's infringing activities were conducted with full knowledge and with notice that the Defendant was in violation of Monsanto's patent rights.

32. Defendant's actions have damaged Monsanto and will continue to injure Monsanto, unless and until such infringement is 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, on information and belief,

damages should be trebled pursuant to 35 U.S.C. § 284 in light of the Defendant's knowing, willful, conscious, and deliberate infringement of the patent rights at issue.

35. The infringing activity of the Defendant 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 II
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, the '605 Patent was duly and legally issued to Monsanto for an invention in Chimeric Genes for Transforming Plant Cells Using Viral Promoters.

38. Monsanto is the owner by assignment of all rights, title and interest in and to the '605 Patent.

39. Defendant has infringed the '605 Patent by making, using, offering for sale or selling cotton seed having the Bollgard II® trait embodying the patented invention without authorization from Monsanto, and will continue to do so unless enjoined by this Court.

40. Defendant's infringing activities were conducted with full knowledge and with notice that the Defendant was in violation of Monsanto's patent rights.

41. Defendant's actions have damaged Monsanto and will continue to injure Monsanto, unless and until such infringement is enjoined by this Court.

42. 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.

43. 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, on information and belief, damages should be trebled pursuant to 35 U.S.C. § 284 in light of the Defendant's knowing, willful, conscious, and deliberate infringement of the patent rights at issue.

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

COUNT III
PATENT INFRINGEMENT-Patent No. 5,880,275

45. 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.

46. On March 9, 1999, the '275 Patent was duly and legally issued to Monsanto for an invention in synthetic plant genes from *Bt kurstaki* and method for preparation.

47. Monsanto is the owner by assignment of all rights, title and interest in and to the '275 Patent.

48. The Defendant has infringed the '275 patent by making, using, offering for sale or selling cotton seed having the Bollgard II® trait embodying the patented invention without authorization from Monsanto.

49. Defendant's infringing activities were conducted with full knowledge and with notice that the Defendant was in violation of Monsanto's patent rights.

50. Defendant's actions have damaged Monsanto.

51. 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, on information and belief, damages should be trebled pursuant to 35 U.S.C. § 284 in light of the Defendant's knowing, willful, conscious, and deliberate infringement of the patent rights at issue.

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

COUNT IV
PATENT INFRINGEMENT-Patent No. 6,489,542

53. 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.

54. On December 3, 2002, the '542 Patent was duly and legally issued to Monsanto for an invention in methods for transforming plants to express Cry2Ab endotoxins targeted to the plastids.

55. Monsanto is the owner by assignment of all rights, title and interest in and to the '542 Patent.

56. The Defendant has infringed the '542 Patent by making, using, offering for sale or selling cotton seed having the Bollgard II® trait embodying the patented invention without authorization from Monsanto, and will continue to do so unless enjoined by this Court.

57. Defendant's infringing activities were conducted with full knowledge and with notice that the Defendant was in violation of Monsanto's patent rights.

58. Defendant's actions have damaged Monsanto and will continue to injure Monsanto, unless and until such infringement is enjoined by this Court.

59. 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.

60. 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, on information and belief,

damages should be trebled pursuant to 35 U.S.C. § 284 in light of the Defendant's knowing, willful, conscious, and deliberate infringement of the patent rights at issue.

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

COUNT V - CONVERSION

62. 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.

63. By making, using, offering to sell or selling Roundup Ready® cotton, Bollgard II® cotton, Roundup Ready® Flex cotton, and Roundup Ready® Flex with Bollgard II® cotton seed without authority, the Defendant intentionally and wrongfully exercised dominion, ownership and control over Monsanto's patented seed technologies which were the property of Monsanto under the terms of the '247, '605, '275, and '542 patents and which are only legitimately available to third parties through a license agreement with Monsanto.

64. As a result, Monsanto is entitled, at a minimum, to damages equal to the value of the Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and Roundup Ready® Flex with Bollgard II® seed at the time of the conversion; which is an amount equal to the applicable technology fee and the purchase price which the Defendant would otherwise have been required to pay.

65. Defendant's conversion of Monsanto's property rights was malicious and willful, entitling Monsanto to punitive damages.

COUNT VI - UNJUST ENRICHMENT

66. 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.

67. The Defendant's conduct has resulted in a benefit being conferred upon the Defendant, and the Defendant has appreciated the benefit in that he illegally made, used, sold and/or offered to sell, or otherwise used transferred unlicensed Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and Roundup Ready® Flex with Bollgard II® cotton seed, in at least 2008, in contravention of Monsanto's patent rights and in violation of the license agreement system.

68. As a result, the Defendant has been unjustly enriched and obtained benefits and profits that in equity and good conscience belong to Monsanto.

69. Defendant's acceptance and retention of this benefit under the circumstances renders the Defendant's retention of these benefits inequitable.

70. As a result, Monsanto is entitled to damages.

COUNT VII - BREACH OF CONTRACT

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

72. On February 21, 1998, Defendant entered into the Monsanto Technology Agreement attached as Exhibit "E". The Agreement was signed by Defendant Larry Lytle. In 2001, Defendant entered into the Monsanto Technology Agreement attached as Exhibit "F". This agreement was also signed by Defendant Larry Lytle.

73. These Agreements gave Defendant the opportunity to purchase and plant seed containing Monsanto's Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and Roundup Ready® Flex with Bollgard II® technology. The Agreements also placed Defendant on notice of the limitations on Defendant's use of seed containing Monsanto's Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and Roundup Ready® Flex with Bollgard II® technologies.

74. The conduct of Defendant, as set forth above, is a breach of these Agreements, which, among other provisions, prohibit the saving, planting and/or transfer or sale of saved Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and Roundup Ready® Flex with Bollgard II® cotton seed or use of any portion of seed grown from newly purchased Roundup Ready®, Roundup Ready® Flex, Bollgard II®, and Roundup Ready® Flex with Bollgard II® cotton seed for anything other than marketing the crop derived therefrom into a terminal market as a commodity.

75. As a direct and proximate result of this breach, Monsanto has been damaged and is entitled to damages for breach of the Agreements, as well as reasonable attorneys' fees under the Agreements.

PRAYER FOR RELIEF

WHEREFORE, Monsanto prays that process and due form of law issue to the Defendant requiring him to appear and answer the allegations of this complaint, and that after due proceedings are had, there be judgment in favor of Plaintiffs and against the Defendant, providing the following remedies to Plaintiffs:

- A. Entry of judgment that the Defendant is infringing and has infringed the '247, '605, '275, and '542 patents, and that such infringement has been willful and deliberate;
- B. Entry of judgment for damages, together with interest and costs, to compensate Monsanto for the Defendant's patent infringement;
- C. Find this case exception under 35 U.S.C. § 285, thereby trebling of damages awarded for the infringement of patents together with reasonable attorney's fees;
- D. Entry of judgment for damages, together with interest and costs, to compensate Monsanto for the Defendant's conversion of Plaintiffs' property rights;

- E. Entry of a punitive damages award against the Defendant for his willful and malicious conversion of Monsanto's property;
- F. Entry of judgment for damages, together with interest and costs to compensate Monsanto for Defendant's unjust enrichment and the profits obtained that in equity and good conscience belong to Monsanto;
- G. Entry of a permanent injunction against the Defendant to prevent him from making, using, saving, cleaning, planting, selling, offering to sell or otherwise transferring, any of Monsanto's proprietary seed technologies, without express written permission from Monsanto;
- H. Entry of judgment for breach of contract;
- I. Entry of judgment for costs, expenses, and reasonable attorney's fees incurred by Monsanto; and
- J. Such other relief as the Court may deem appropriate.

Respectfully submitted,

THOMPSON COBURN LLP

By /s/ Daniel C. Cox

Raymond L. Massey, Mo. E.D. Bar # 3764
Daniel C. Cox, Mo. E.D. Bar # 57781
Jeffrey A. Masson, Mo. E.D. Bar # 5239927
One US Bank Plaza
St. Louis, Missouri 63101
314-552-6000
FAX 314-552-7000

*Attorneys for Plaintiffs Monsanto Company and
Monsanto Technology, LLC*