

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

THE NORTH CAROLINA FARMERS'  
ASSISTANCE FUND, INC.,  
*Plaintiff,*

v.

MONSANTO COMPANY; MONSANTO  
TECHNOLOGY, LLC; ASGROW SEEDS,  
INC.; PIONEER HI-BRED  
INTERNATIONAL, INC.; CROP  
PRODUCTION SERVICES, INC.; DELTA &  
PINE LAND COMPANY; and DOW  
AGROSCIENCES, LLC,  
*Defendants.*

**Civil Action No. 08cv409**

**COMPLAINT**

COMES NOW the Plaintiff, The North Carolina Farmers' Assistance Fund, Inc. ("NCFAF"), by and through its counsel, complaining of the Defendants and for its complaint alleging as follows:

**BACKGROUND**

1. U.S. law generally forbids most monopolistic activities. One exception to these rules is the Patent Act, codified as Title 35 of the United States Code, which confers upon a patentee the right to exclude others from making, using, and selling patented articles for a limited time. This amounts to a monopoly over a patented article.
2. The Patent Act also prohibits any person from marking a product with the number of a patent that does not cover that product, imposing upon that person a penalty of up to \$500

for every such offense. Under 35 U.S.C. § 292, any person may sue for the penalty in order to protect the rights of the public against false marking.

3. The Court of Appeals for the Federal Circuit has interpreted § 292 to require a product marked with multiple patent numbers to be covered by at least one claim of each patent indicated.

#### **NATURE OF THE CASE**

4. This is a *qui tam* action under the false marking provisions of the Patent Act of 1952, as amended, 35 U.S.C. § 292.

#### **PARTIES**

5. NCFAF is a nonprofit corporation organized and existing under the laws of the State of North Carolina, having its principal place of business in Charlotte, North Carolina. NCFAF is authorized to undertake nonprofit business in the State of North Carolina and is in good standing with the North Carolina Secretary of State.
6. NCFAF was formed for the purpose of “supporting small, independent, family farming operations in North Carolina.”
7. Upon information and belief, Monsanto Company (“Monsanto”) is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in St. Louis, Missouri. Monsanto does business extensively in the State of North Carolina and is presently availing itself of the courts of this State and District.
8. Upon information and belief, Monsanto Technology, LLC (“MTLLC”) is a limited liability company organized and existing under the laws of the State of Delaware, having its principal place of business in St. Louis, Missouri. MTLLC does business extensively

in the State of North Carolina and is presently availing itself of the courts of this State and District.

9. Upon information and belief, Asgrow Seeds, Inc. (“Asgrow”) is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in St. Louis, Missouri. Asgrow does business in and through multiple retail locations in this State and District.

10. Upon information and belief, Pioneer Hi-Bred International, Inc. (“Pioneer”) is a corporation organized and existing under the laws of Iowa, having its principal place of business in Des Moines, Iowa. Pioneer sells its products in and through multiple retail locations in this State and District.

11. Upon information and belief, Crop Production Services, Inc. (“CPS”) is a corporation organized and existing under the laws of Delaware, having its headquarters in Illinois. CPS sells its products in and through multiple retail locations in this State and District.

12. Upon information and belief, Delta & Pine Land Company (“Deltapine”) is a corporation organized and existing under the laws of Delaware, having its principal place of business in Scott, Mississippi. Deltapine sells its products in and through multiple retail locations in this State and District.

13. Upon information and belief, Dow Agrosiences, LLC, (“Dow”) is a limited liability company organized and existing under the laws of Delaware, having its principal place of business in Indianapolis, Indiana. Upon information and belief, Dow is registered to do business, and in fact does business, in this State and District.

## **JURISDICTION**

14. Subject matter jurisdiction in this case is proper under 28 U.S.C. §§ 1331 and 1338(a) in that this is a civil action arising under an Act of Congress relating to patents.
15. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b), in that each of the Defendants are subject to personal jurisdiction in this State and District and therefore reside in this District, and in that a substantial part of the events giving rise to the claim have occurred in this District.

## **GENERAL ALLEGATIONS**

16. Upon information and belief, Monsanto is in the business of, *inter alia*, producing and selling soybean seeds which have been genetically modified by the insertion of foreign genetic material.
17. Upon information and belief, each of the Defendants grows and sells seeds which contain genetic material not normally found in naturally occurring soybeans. These genes confer a tolerance of glyphosate upon the plants they produce. Glyphosate is a broad-spectrum herbicide used in farming.
18. Monsanto or its subsidiaries or licensees sell a line of glyphosate-containing herbicides under the brand name "Roundup." Genetically modified soybean seed carrying a gene that is expressed in mature plants as glyphosate tolerance is sold by Monsanto and its subsidiaries and affiliates, and by the other Defendants through a license from Monsanto, under the brand name "Roundup Ready," signifying that plants germinated from that seed are "ready" to be sprayed with a glyphosate-containing herbicide.

19. MTLLC is, upon information and belief, a wholly owned subsidiary of Monsanto and is the record owner of certain patent rights, including rights to U.S. Patent No. 5,352,605 (“the ‘605 patent”).
20. Upon information and belief, each of the other Defendants, including Monsanto itself, is a licensee of the ‘605 patent.
21. Upon information and belief, the license of the ‘605 patent to each of the Defendants purports to grant each of the Defendants the authority to sell and/or produce Roundup Ready soybean seed, and each of the Defendants does, in fact, sell and/or produce Roundup Ready soybean seed.
22. Upon information and belief, each such license requires the licensed Defendant to mark the packaging of the Roundup Ready soybean seed with “U.S. Patent No. 5,352,605.”
23. Monsanto claims that the Roundup Ready soybean seed sold in these packages is “a patented article” covered by the ‘605 patent.
24. Monsanto has brought numerous suits against farmers in which Monsanto asserts infringement of the ‘605 patent, alleging as the basis for the claim of infringement that such farmers saved from soybean seeds from a previous crop and planted them (or sold them for replanting, or obtained so-called “brown bag” saved seeds from an unauthorized source), rather than acquiring new seed from one of Monsanto’s licensees, including the Defendants.
25. Monsanto claims that farmers who obtain authorized soybean seed do so pursuant to its Monsanto Technology/Stewardship Agreement, under which soybean farmers purchasing authorized are informed of Monsanto’s licensing policy and its claim that the soybean seed being purchased is covered by the ‘605 patent.

26. Monsanto has aggressively pursued infringement suits, investigations, and other tactics to enforce compliance with its policy against saving seeds.
27. Monsanto's tactics are undertaken principally to maintain a continuing stream of license revenue, paid by farmers as part of the purchase price for authorized Roundup Ready soybean seeds.
28. This stream of license revenue depends upon Monsanto's ability to convince farmers, many of whom are unable to afford expert patent counsel to defend their interests, that they must purchase new Roundup Ready soybean seed each year because Roundup Ready soybean seed is covered by the '605 patent.
29. As a part of that effort to imbue farmers with fear of an infringement suit, Monsanto and the other Defendants mark the packaging of the Roundup Ready soybean seeds they sell, and numerous advertising articles used in conjunction with those sales, with the number of the '605 patent.
30. Upon information and belief, the Defendants collectively hold an approximately 90% share of the U.S. soybean market.

#### **FALSE MARKING**

31. Each and every allegation set forth in the above numbered paragraphs is hereby incorporated by reference and re-alleged, as if it were explicitly set forth herein.
32. Under 35 U.S.C. § 292, any product marked with a patent number must be covered by at least one claim of the patent said to cover the product.
33. Under 35 U.S.C. § 292, a party who "marks upon, or affixes to, or uses in advertising in connection with any unpatented article, the word 'patent' or any word or number

importing that the same is patented for the purpose of deceiving the public ... [s]hall be fined not more than \$500 for every such offense.”

34. The statute further provides that “[a]ny person may sue for the penalty, in which event one-half shall go to the person suing and the other half to the use of the United States.”

35. NCFAF is a “person” within the meaning of 35 U.S.C. § 292.

36. Upon information and belief, the contents of the bags of seeds sold commercially by the Defendants under the brand name “Roundup Ready” are not covered by any claim of the ‘605 patent.

37. Upon information and belief, the act of replanting seeds from a crop grown from seeds purchased from the Defendants does not create any plant or seed covered by the ‘605 patent.

38. Upon information and belief, each of the Defendants marks and has marked, or has instructed others to mark, bags of the above mentioned “Roundup Ready” soybean seeds with words and numbers importing that the contents of the bags are covered by the ‘605 patent.

39. Upon information and belief, each of the Defendants publishes brochures, agreements, websites, and other advertising materials which use words and numbers importing that the products being advertised or referred to are protected by the ‘605 patent.

40. Upon information and belief, each of the Defendants knows or should have known that the contents of the bags are not covered by any claim of the ‘605 patent.

41. Upon information and belief, each of the Defendants marks or has marked its bags for the purpose of deceiving the public, as part of Monsanto’s scheme to extract a continuing

stream of license revenue from farmers through the intimidatory threat of a patent infringement lawsuit.

42. As such, each of the Defendants has engaged in numerous acts of false marking, in violation of 35 U.S.C. § 292.

43. Upon information and belief, Monsanto has either sued or extracted or demanded settlements from hundreds of farmers, based in part upon its contention that the '605 patent gives Monsanto rights in plants and seeds grown from the Roundup Ready soybean seeds Monsanto and the other Defendants sell.

### **PRAYER FOR RELIEF**

WHEREFORE, the Plaintiff prays for judgment against each of the Defendants and that the Court:

1. Find that each of the Defendants has falsely marked Roundup Ready soybean seed packaging and related advertising materials with words or numbers importing that the seeds therein are covered by U.S. Patent No. 5,352,605, in violation of 35 U.S.C. § 292;
2. Order that each of the Defendants cease their false marking of Roundup Ready soybean seed packaging and related advertising materials;
3. Order that the Court impose upon each of the Defendants a fine of \$500 for each instance of false marking.
4. Order that one-half of the penalty go to NCFAP and that one-half go to the use of the United States.
5. Grant such other and further relief as the Court may deem appropriate.

A jury trial is demanded on all issues so triable.

Respectfully submitted this 17th day of June, 2008.

/s/ James M. Harrington

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