

2012-1298

In The
United States Court of Appeals
For The Federal Circuit

ORGANIC SEED GROWERS AND TRADE ASSOCIATION, ORGANIC CROP IMPROVEMENT ASSOCIATION INTERNATIONAL, INC., THE CORNUCOPIA INSTITUTE, DEMETER ASSOCIATION, INC., CENTER FOR FOOD SAFETY, BEYOND PESTICIDES, NAVDANYA INTERNATIONAL, MAINE ORGANIC FARMERS AND GARDENERS ASSOCIATION, NORTHEAST ORGANIC FARMING ASSOCIATION OF NEW YORK, NORTHEAST ORGANIC FARMING ASSOCIATION/ MASSACHUSETTS CHAPTER, INC., NORTHEAST ORGANIC FARMING ASSOCIATION OF NEW HAMPSHIRE, NORTHEAST ORGANIC FARMING ASSOCIATION OF RHODE ISLAND, CT NOFA, NORTHEAST ORGANIC FARMING ASSOCIATION OF VERMONT, RURAL VERMONT, OHIO ECOLOGICAL FOOD & FARM ASSOCIATION, FLORIDA CERTIFIED ORGANIC GROWERS AND CONSUMERS, INC., SOUTHEAST IOWA ORGANIC ASSOCIATION, MENDOCINO ORGANIC NETWORK, NORTHEAST ORGANIC DAIRY PRODUCERS ALLIANCE, MIDWEST ORGANIC DAIRY PRODUCERS ALLIANCE, WESTERN ORGANIC DAIRY PRODUCERS ALLIANCE, CANADIAN ORGANIC GROWERS, PEACE RIVER ORGANIC PRODUCERS ASSOCIATION, FAMILY FARMER SEED COOPERATIVE, SUSTAINABLE LIVING SYSTEMS, GLOBAL ORGANIC ALLIANCE, FOOD DEMOCRACY NOW!, FARM-TO-CONSUMER LEGAL DEFENSE FUND, WESTON A. PRICE FOUNDATION, MICHAEL FIELDS AGRICULTURAL INSTITUTE, FEDCO SEEDS INC., ADAPTIVE SEEDS, LLC, SOW TRUE SEED, SOUTHERN EXPOSURE SEED EXCHANGE, MUMM'S SPROUTING SEEDS, BAKER CREEK HEIRLOOM SEED CO., LLC. COMSTOCK, FERRE & CO., LLC, SEEDKEEPERS, LLC, SISKIYOU SEEDS, COUNTRYSIDE ORGANICS, WILD GARDEN SEED, CUATRO PUERTAS, SEED WE NEED, ALBA RANCH, WILD PLUM FARM, GRATITUDE GARDENS, RICHARD EVERETT FARM, LLC, PHILADELPHIA COMMUNITY FARM, INC., GENESIS FARM, CHISPAS FARMS, LLC, MIDHEAVEN FARM, LLC, KOSKAN FARMS, CALIFORNIA CLOVERLEAF FARMS, NORTH OUTBACK FARM, TAYLOR FARMS, INC., COMMON GOOD FARM, LLC, AMERICAN BUFFLAO COMPANY, RADIANCE DAIRY, QUINELLA RANCH, NATURE'S WAY FARM LTD., LEVKE AND PETER EGGERS FARM, PREY VINEYARDS, LTD., BRYCE STEPHENS, CHUCK NOBLE, LARHEA PEPPER, PAUL ROMERO, BRIAN WICKERT, BRUCE DRINKMAN, MURRAY BAST, and DONALD WRIGHT PATTERSON, JR.,

Plaintiffs-Appellants,

and

OCIA RESEARCH AND EDUCATION INC., NORTHERN PLAINS SUSTAINABLE AGRICULTURE SOCIETY, MANITOBA ORGANIC ALLIANCE, UNION PAYSANNE, FAMILY FARM DEFENDERS, INC., INTERLAKE FORAGE SEEDS LTD., KIRSCHENMANN FAMILY FARMS, INC. and JARDIN DEL ALMA,

Plaintiffs,

v.

MONSANTO COMPANY and MONSANTO TECHNOLOGY, LLC,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York

In case No. 11-CV-2163, Judge Naomi Reice Buchwald.

BRIEF OF AMICI CURIAE

FARM AND RANCH FREEDOM ALLIANCE, BIODYNAMIC FARMING AND GARDENING ASSOCIATION, CAROLINA FARM STEWARDSHIP ASSOCIATION, FOOD AND WATER WATCH, INTERNATIONAL ORGANIC INSPECTORS ASSOCIATION, MAINE ALTERNATIVE AGRICULTURE ASSOCIATION, MICHIGAN LAND TRUSTEES, NATURAL ENVIRONMENTAL ECOLOGICAL MANAGEMENT, NEBRASKA SUSTAINABLE AGRICULTURE SOCIETY, ORGANIC CONSUMERS ASSOCIATION, SLOW FOOD USA, VIRGINIA ASSOCIATION FOR BIOLOGICAL FARMING, VIRGINIA INDEPENDENT CONSUMERS AND FARMERS ASSOCIATION, AND THE WISCONSIN NATURAL FOOD ASSOCIATES

IN SUPPORT OF PLAINTIFFS-APPELLANTS

IN SUPPORT OF REVERSAL

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Dated: July 11, 2012

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CERTIFICATE OF INTEREST

Counsel for the amici curiae certify the following:

1. The name of every party or amicus represented by me is:

Farm and Ranch Freedom Alliance, Biodynamic Farming and Gardening Association, Carolina Farm Stewardship Association, Food and Water Watch, International Organic Inspectors Association, Maine Alternative Agriculture Association, Michigan Land Trustees, Natural Environmental Ecological Management, Nebraska Sustainable Agriculture Society, Organic Consumers Association, Slow Food USA, Virginia Association for Biological Farming, Virginia Independent Consumers and Farmers Association, and Wisconsin Natural Food Associates.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

NONE

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the amicus represented by me are:

NONE

4. The names of all law firms and the partners or associates that appeared for the amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Michael A. Spiegel
Judith McGeary, Langley & McGeary

Date: July 11, 2012

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RULE 29 STATEMENT

Pursuant to Fed. R. App. P. 29(a), the *Amici Curiae* certify that all parties have consented to the filing of this brief.

Pursuant to Fed. R. App. P. 29(c)(5), the *Amici Curiae* further certify that:

- (a) this brief was not authored by a party's counsel in whole or in part;
- (b) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief;
- (c) no person other than *Amici*, their members, and their counsel contributed money that was intended to fund preparing or submitting the brief.

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IDENTITY OF AMICI CURIAE AND THEIR INTERESTS

Amici organizations include members who feed grain to livestock and poultry, who certify organic production of crops, who use grains or cotton as raw ingredients for other products, and who consume or use products made from these crops. All of these individuals have an interest in having the scope and enforceability of the Defendants' patents determined through a declaratory judgment, both because of the direct issue of their own liability and because of the indirect impact the decision will have on the availability of these crops.

The Farm and Ranch Freedom Alliance (FARFA) is a national non-profit organization that supports independent family farmers and protects a healthy and productive food supply for American consumers. FARFA promotes common sense policies for local, diversified agricultural systems, including access to non-transgenic crops and foods for farmers and consumers.

The Biodynamic Farming and Gardening Association (BDA) is a non-profit membership association of individuals and organizations in North America who are committed to the transformation of the whole food system, from farm to table. The BDA's membership includes biodynamic farmers and seed growers who are at risk of being contaminated by genetically modified seed, as well as farmers who feed such crops to their livestock and make other uses of such crops.

Carolina Farm Stewardship Association (CFSA) is a non-profit whose mission is to promote local and organic agriculture in the Carolinas by inspiring, educating and organizing farmers and consumers. CFSA is deeply committed to advancing the interests of organic producers in the Carolinas and strenuously opposes any corporate action that would unfairly threaten, hinder, limit, or otherwise impose additional costs on organic agriculture operations.

Food and Water Watch (FWW) is national non-profit public interest consumer organization, based in Washington, D.C., that works on behalf of its members and the public at large to ensure the food, water and fish we consume is safe, accessible and sustainably produced. FWW's Food Program works to promote the practices and policies that will result in sustainable and secure food systems that provide healthy food for consumers and an economically viable living for family farmers and rural communities.

The International Organic Inspectors Association (IOIA) is a nonprofit, professional association of organic farm, livestock, and processing inspectors that provides comprehensive organic inspector training worldwide. IOIA promotes consistency and integrity in the certification process, and addresses issues and concerns relevant to organic inspectors, including promoting public confidence in organic agriculture and products.

The Maine Alternative Agriculture Association is a non-profit that serves as a research and organizing body for Maine farmers interested in chemical-free agriculture and that nurtures the organization of an agricultural marketing entity to develop a brand name and marketing strategy for Maine-grown, chemical-free agricultural products.

Michigan Land Trustees (MLT) is a non-profit that promotes sustainable land management and organic agriculture. MLT helps educate small-scale homesteaders and beginning farmers, while also supporting the development of local and organic-based food systems by providing start up grants to a variety of organizations and projects. Its diverse membership favors the preservation of biodiversity—especially of non-transgenic crop seeds—as a key element of the social and ecological resilience that is needed to address the challenges of peak oil and climate change.

Natural Environmental and Ecological Management (NEEM) is a non-profit with methods of operation that have the purpose of affecting public and private sector policies that impact human health, the environment, and community. NEEM promotes urban farming, education in sustainable and Agroecological concepts with effective, natural alternatives to chemical inputs, the farm as the fulcrum to sustainable community development.

The Nebraska Sustainable Agriculture Society (NSAS) is a non-profit whose mission is to promote agriculture and food systems that build healthy land, people,

communities and quality of life, for present and future generations. NSAS has a diverse membership that includes farmers and ranchers, rural and urban consumers, market gardeners, educators, families and restaurateurs.

The Organic Consumers Association (OCA) is a non-profit public interest organization campaigning for health, justice, and sustainability. The OCA deals with crucial issues of food safety, industrial agriculture, genetic engineering, and other key topics.

Slow Food USA is a national non-profit that believes in protecting the diversity of life, including seeds. Slow Food represents a network of both farmers and consumers who are concerned that patents on seed violate several basic truths and who support the rights of farmers to control their own farms.

Wisconsin Natural Food Associates (WFNA) is a non-profit educational organization that works to inform people of the importance of the relationship between soil conservation, clean air, pure water, and human health. WNFA provides information about the availability of products free of harmful chemicals, pesticides, and unnatural substances.

SUMMARY OF THE ARGUMENT

The Plaintiff and *Amici* organizations, farmers, and seed businesses have suffered significant harm due to the threat of patent infringement suits by Defendants Monsanto Company and Monsanto Technology, LLC. Defendants manufacture patented “transgenic” seeds that are genetically altered to be resistant to Defendants’ herbicide or to produce their own pesticide. The pollen naturally and inevitably migrates to neighboring lands, creating transgenic contamination throughout the seed supply and resulting in unlicensed use. Plaintiffs and *Amici* do not wish to use these products, or to be sued for patent infringement. To prevent this, they have incurred costs in testing their crops and seed supplies for transgenic contamination; they have expended time and energy to research options for testing and sourcing seeds; and they have been deprived of their property rights because of the need to leave large buffer zones unplanted or forgo planting the crops they would otherwise raise.

Under the doctrine of strict liability for patent infringement, Plaintiffs and *Amici* face the difficult choice of either abandoning their rights to raise certain crops and make legal use of their land, or face ever-increasing levels of liability. Rather than acknowledging these injuries, the district court used the Plaintiffs’ own good faith actions against them, finding that the threat of suit was not imminent because Plaintiffs are taking affirmative, costly steps to try to avoid contamination.

Although Defendants characterized themselves as non-litigious, in the years preceding this case, they have on average sued a farmer or seed business each month, month after month, year after year, filing 144 lawsuits between 1997 and April 2010. In addition, Defendants have settled approximately 700 more cases and investigated an unknown number of additional farmers and seed businesses. In dismissing the case, the district court erred by relying heavily on the Defendants' unenforceable and vague "pledge" not to sue for "trace" levels of "inadvertent" contamination, despite the lack of competent evidence to support such claims. The district court also erred by relying on Defendants' own characterization of the suits they have brought, without allowing Plaintiffs the opportunity to conduct discovery, even though the facts lie solely within Defendants' own files.

Defendants have chosen to patent products that, by their very nature, will inevitably end up on the private property of people who have no desire to use them. Plaintiffs' uncontroverted allegations show that, for the first time in history, they can be sued for something as natural as pollen drift, while simultaneously being forced to take expensive and burdensome steps in order to continue their normal businesses. The quandary of this type of liability is precisely the sort of situation that the Declaratory Judgment Act was intended to address.

The district court erred in dismissing the case. *Amici* urge this Court to reverse the district court's dismissal and remand for further proceedings. At a minimum, the

district court's decision should be reversed and the case remanded for limited discovery on the factual issues related to standing.

ARGUMENT

I. On a 12(b)(1) motion, the Court accepts Plaintiffs' allegations as true and draws inferences in the Plaintiffs' favor under an "all the circumstances" test.

This Court reviews a district court's dismissal for lack of subject matter jurisdiction *de novo*. *Folden v. United States*, 379 F.3d 1344, 1354 (Fed. Cir. 2004). "For the purpose of determining a court's jurisdiction we accept the allegations in the complaint or petition as true, making reasonable factual assumptions and drawing plausible inferences in favor of the petitioner. Disputed facts, unless without color of plausible basis, are resolved in favor of the petitioner for jurisdictional purposes." *Ephraim v. Brown*, 82 F.3d 399, 401 (Fed. Cir. 1996).

Whether subject matter jurisdiction exists depends on "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 S.Ct. 764, 771, 166 L.Ed.2d 604 (2007). Since *MedImmune*, this Court has acknowledged that the inquiry in patent cases is not limited by its earlier two-prong test, although the elements are still relevant. The new test is a "more lenient legal standard" that "facilitates or enhances the availability of declaratory

judgment jurisdiction in patent cases.” *Micron Tech, Inc. v. Mosaid Techs., Inc.*, 518 F.3d 897, 902 (Fed. Cir. 2008).

II. The uncontroverted facts show that Plaintiffs have standing to bring suit under the Declaratory Judgment Act.

A. The Declaratory Judgment Act is intended to protect individuals from having to choose between incurring growing liability and abandonment of their enterprises.

“Article III jurisdiction may be met where the patentee takes a position that puts the declaratory judgment plaintiff in the position of either pursuing arguably illegal behavior or abandoning that which he claims a right to do.” *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1381 (Fed. Cir. 2007). Particularly in the context of patent law, the Declaratory Judgment Act means that people should no longer have to choose “between incurrence of a growing potential liability for patent infringement and abandonment of their enterprises.” *Teva Pharmaceuticals USA, Inc. v. Novartis Pharmaceuticals Corp.*, 482 F.3d 1330, 1336 n.2 (Fed. Cir. 2007).

This Court has repeatedly referred back to the 1988 statement by Judge Markey on:

...the sad and saddening scenario that led to enactment of the Declaratory Judgment Act. In the patent version of that scenario, a patent owner engages in a *danse macabre*, brandishing a Damoclean threat with a sheathed sword. Guerrilla-like, the patent owner attempts extra-judicial patent enforcement with scare-the-customer-and-run tactics that infect the competitive environment of the business community with uncertainty and insecurity. Before the Act, competitors victimized by that tactic were rendered helpless and immobile so long as the patent owner refused to grasp the nettle and sue. After the Act, those competitors were no

longer restricted to an in terrorem choice between the incurrence of a growing potential liability for patent infringement and abandonment of their enterprises; they could clear the air by suing for a judgment that would settle the conflict of interests.

Arrowhead Indus. Water, Inc. v. Ecolochem, Inc., 846 F.2d 731, 734-35 (Fed.Cir.1988) (internal citations omitted).

The Supreme Court has stated that the plaintiff “need not ‘bet the farm.’” *See MedImmune*, 127 S.Ct. at 775. Yet in this case, that is precisely what the district court effectively required Plaintiffs to do in order to get their day in court – continue farming the disputed crops until they are unquestionably liable to Defendants for potentially crippling levels of damages before being able to seek a declaratory judgment as to their rights.

B. Plaintiffs submitted uncontroverted evidence that they have been injured through incurring significant costs and abandoning otherwise legal enterprises because of the risk of using Defendants’ patented products and incurring liability.

The district court noted that “unlicensed – and unintended – use of transgenic seeds is inevitable,” (A4), but then failed to address the fact that such unlicensed use is actionable and places Plaintiffs at risk of enforcement actions by Defendants. *See Monsanto Co. v. Scruggs*, 459 F.3d 1328 (Fed. Cir. 2006). Plaintiffs provided evidence that they have already suffered injuries in their attempts to avoid contamination and the resulting liabilities.

The Plaintiffs submitted affidavits showing that several have stopped growing certain crops in order to avoid contamination. (A706, A711-712.) One Plaintiff, Fred Kirschenmann, has lost between \$25,000 and \$50,000 annually because of the need to stop growing canola. (A712.) The loss of canola, which is one of the few broad-leaf cool season crops that will grow in that region, caused additional, unquantifiable harm to the system of rotational crops that is central to organic production. (A712.)

Other Plaintiffs are continuing their enterprises, but incurring significant costs due to their attempts to avoid patent liability through buffer zones and testing. For instance, prior to abandoning their right to grow canola, Plaintiff Kirschenmann's family farm implemented a buffer "on its own land of 2 to 3 miles in order to protect its organic canola from contamination." (A712.) Plaintiff Lawn, co-owner of Fedco Seeds, spends \$2,000 each year testing their seed to avoid purchasing contaminated seed, and has had to reject several loads. (A715.) Plaintiff Chuck Noble has spent many hours and hundreds of dollars in testing, and he has had to reject about one-third of the seed batches he has tested because of contamination. (A721-722.) Such actions have specifically resulted from Defendants' patents and its aggressive enforcement of the same. For these Plaintiffs and others similarly situated, including *Amici*, their attempts to avoid using Defendants' patented products has imposed

significant costs in time, labor, and lost opportunities, as well as depriving Plaintiffs of their right to plant their crops and ply their trades as they see fit.

The district court dismissed this evidence by stating that no proof had been offered that the patented traits were Defendants'. But given that Plaintiffs alleged, and Defendants did not contest, that Defendants' patented traits are present in approximately 90% of all corn, soy, and canola grown in this country, it is at the very least more likely than not that some of Plaintiffs' seeds and crops carry Defendants' patented materials. This fact alone should have defeated Defendants' motion for dismissal. *See Makarova v. United States*, 201F.3d 110, 113 (2d Cir. 2000) (the standard for proving subject matter jurisdiction is preponderance of the evidence).

The district court failed to acknowledge that Plaintiffs were taking all of these steps *before* this suit was filed. The Plaintiffs' attorney's letter discussed in the district court's decision did not create the controversy. (A7-A8.) Rather, it was an offer of compromise after the suit was filed, and Monsanto's words in rejecting the offer merely served to reinforce the uncontroverted fact that Plaintiffs face the choice between abandoning certain rights and being held liable for patent infringement.

C. Plaintiffs' injuries are fairly traceable to Defendants' conduct and would be redressed by a favorable decision.

Given the realities of farming, it is all but impossible to farm soy, canola, corn, or cotton in this country without being contaminated at some level with patented transgenic seeds plants. Under the strict liability provisions of patent law,

contamination equals infringement, absent intent or even knowledge. Defendants are well aware of the law, and when it was expedient for them to do so, they have argued that it be strictly enforced. *See e.g., Monsanto v. Roman*, 2004 WL 1107671, *9 (N.D. Tex., May 17, 2004) (“Monsanto contends that neither knowledge nor intent is an element in a claim for patent infringement.”).

Defendants unnecessarily touted their products to the district court as having “numerous advantages.” (A237-A238.) These claims are not only disputed, they are irrelevant. A motion to dismiss is no place for a sales pitch. Whatever their reasons, Plaintiffs and *Amici* do not wish to use or to be in any way associated with any of Defendants’ products. Nevertheless, they cannot avoid it due to naturally occurring contamination and are subject to potential patent infringement liability as a result.

As a hypothetical to illustrate Plaintiffs’ current plight, let us assume Farmer Smith buys soybean, corn, canola, or cotton seed from a local seed dealer. Even if the seed is not labeled as transgenic, there is a very high probability that it is already contaminated to some degree. As another district court found:

Monsanto’s domination of the soybean seed market, combined with the regeneration of the Roundup Ready® trait and the lack of any restriction against the mixing of soybeans harvested from a Roundup Ready® crop from those that are harvested from a crop that was not grown from Roundup Ready® seed, has resulted in the commodity soybeans sold by grain dealers *necessarily carrying the patented trait* ...

Monsanto Co. v. Bowman, 686 F. Supp. 2d 834, 836 (S.D. Ind. 2009) (emphasis added). (See also A630-651 & A652-661 (providing studies on the scope of contamination).)

Farmer Smith plants the seed in a 20-acre field without a significant buffer zone because he cannot afford the lost income from leaving a large section of his land fallow. His neighbor plants a transgenic variety of the same crop, and cross-pollination causes additional levels of contamination. (Cf. A662-A66 (research has indicated that a buffer of 660 ft is needed to limit cross-pollination of corn to 1% or less).)¹

Farmer Smith decides to save seed for next year. The seed cleaner does not perfectly clean his machinery in between fields and has some transgenic grains from a previous field caught in his machinery, adding yet more contamination. If Farmer Smith sells some of the seed, additional contamination can occur due to the transport vehicles and storage facilities.

If Farmer Smith tests his seed and finds out that he has contamination, he faces a dilemma: he must choose between planting the contaminated seed (and risking a patent infringement lawsuit by Monsanto, with potentially treble damages for willful infringement since he now knows of the contamination), or disposing of all the seed,

¹ A 20 acre-field is 934' x 934', so the buffer zone needed to limit contamination to 1% of less for corn would encompass the entire field. Smaller buffer zones would require the farmer to destroy several rows of his own crops. (A664-665.)

at a significant loss, and seeking out uncontaminated seed at significant trouble and expense.

The dilemma is inescapable because there is no effective way for a farmer to save seed only from the non-transgenic portion of his field because the plants intermingle. There are two ways to detect transgenic contamination. The first is to test a sample of the grain, which will tell the farmer whether or not there is transgenic contamination, but will *not* enable the farmer to segregate the transgenic portion from the non-transgenic portion. This is because in order to be representative sample, it must include grains gathered randomly from multiple plants from throughout the field. The second way to determine transgenic contamination is to spray Roundup® on the field, killing everything *except* the transgenic Roundup-Ready® plants and leaving the farmer with no non-transgenic grain or seed. Thus, Defendants' threatened enforcement of its patent rights places the burden on the farmer to not only test the seed, but to then either risk a patent infringement suit or bear significant burdens to find non-contaminated seed.

By patenting a self-replicating product, one virulent in its spread, Defendants have created a situation in which infringement is a certainty and occurs at ever-increasing levels. A product that, by its very nature, creates inevitable infringement is a case of first impression, and Plaintiffs have a concrete, tangible, and immediate

need to know the scope of their legal rights, such that they can plan their business activities and utilize their land accordingly.

D. Conclusion

To the extent that Plaintiffs may be able to avoid a patent infringement action brought by Defendant, it is only at significant expense and an abandonment of their rights, whether it is their right to grow certain crops or their right to use their entire property by sacrificing large portions of it to a buffer zone. This is analogous to a plaintiff who manages to avoid a patent infringement suit by paying royalties to the patent holder. *See SanDisk.*, 480 F.3d at 1380.

“A district court, when deciding whether to exercise its discretion, should decide whether hearing the case would serve the objectives for which the Declaratory Judgment Act was created. When these objectives are served, dismissal is rarely proper.” *Micron Technology*, 518 F.3d at 902 (internal citations omitted). In this case, the objectives of the Declaratory Judgment Act will be served by a reversal of the dismissal, and a remand to the district court to continue with pre-trial proceedings.

III. The district court erred in accepting the Defendants’ unsubstantiated claims about its enforcement of its patents

Defendants filed 144 lawsuits between 1997 and April 2010, asserting their patent rights at issue in this case. (A6.) This means that Defendants have, on average, filed a lawsuit against a farmer or seed businesses every month, month after month,

year after year, in the years preceding this suit. Defendants have also previously admitted that they have settled approximately 700 disputes prior to filing suit, which would mean Defendants have threatened lawsuits against four **more** farmers or seed businesses on average each and every month in that time period. (A548 (quoting E. Freeman, *Settling the Matter - Part 5*, MONSANTO, Nov. 11, 2008, <http://www.monsanto.com/newsviews/Pages/Settling-the-Matter-Part-5.aspx> (website as of Aug. 1, 2011; page appears to have been removed from Defendants' website since)).) These numerous settlement agreements are relevant to the issue of whether the patent owner is "brandishing a Damoclean threat with a sheathed sword," yet the district court ignored them. *Arrowhead Indus. Water*, 846 F.2d at 735. This case is the epitome of the situation in which the patent owner "infects the competitive environment of the business community with uncertainty and insecurity," as described by this Court in *Arrowhead v. Ecolochem*.

Without considering the 700 settlement agreements or untold number of investigations the district court characterized the 144 filed lawsuits as "hardly significant" based on Defendants' statement that there are approximately two million farmers. (A4 & A250.) While the court can look to matters outside the pleadings when reviewing a 12(b)(1) motion to dismiss, it still must assume facts in favor of the Plaintiff, and evidence outside of the pleadings is generally required to meet the standards for summary judgment. *See Kamen v. American Telephone & Telegraph*

Co., 791 F.2d 1006 (2nd Cir. 1986). The evidence presented by Defendants and accepted by the Court was misleading given the issues to be decided in this case, and serves as an example of the error created by making assumptions in Defendants' favor.

The fact is that Defendants' summary of American agriculture was deliberately selective. In truth, only a handful of crops have been approved by USDA for commercial plantings with Defendants' patented traits, primarily row crops such soy, corn, canola, and cotton. The majority of farmers included in the "two million" number quoted by Defendants' attorney do **not** raise these crops, but instead raise cattle, sheep, goats, pigs, poultry, exotic livestock, orchards, vineyards, nuts, melons, berries, vegetables, and more. Fewer than 350,000 farmers actually raise row crops that are likely to contain Defendants' patented traits. *See* U.S. DEPARTMENT OF AGRICULTURE NATIONAL AGRICULTURAL STATISTICAL SERVICES, 2007 Census of Agriculture, Table 62 (Market Value of Agricultural Products Sold; Grains, oilseeds, dry beans and dry peas, number of farms). When one considers the actual pool of potential patent infringers – the 350,000 row crop farmers – the 144 suits brought by Defendants are a much more significant number, particularly when viewed in combination with the 700 settlements and the unknown number of investigations. The district court erred in accepting Defendants' characterization of both their own lawsuits and the potential pool of targets.

In rejecting the evidence that Defendants have taken steps to create an environment of uncertainty and insecurity among farmers, the district court relied heavily on the Defendants' "pledge" not to sue for "trace" amounts of "inadvertent contamination." Defendants' main evidence that the pledge somehow protects farmers like the Plaintiffs and *Amici* was Defendants' attorneys' statements about the nature of their cases. Specifically, the district court noted that "[Monsanto's attorney] stated at oral argument that they have never sued a party who did not 'want to make use of the traits that are manifested in [Defendants'] transgenic products.'" While the district court found this persuasive, statements by attorneys are not evidence. *See Laitram Corp. v. Cambridge Wire Cloth Co.*, 919 F.2d 1579, 1583 (Fed. Cir. 1990) (criticizing parties' "reliance on attorney argument and counsel's unsworn fact statements as 'evidence'"). Even taken as true, this argument is contrary to *SanDisk v. STMicroelectronics*, in which this Court held that a plaintiff had standing even though the defendant had stated that it had "absolutely no plan whatsoever to sue." *SanDisk*, 480 F.3d at 1382-83. Defendants' pledge in this case is equally unenforceable and provides even less reassurance because of its vagueness.

The district court further erred by assuming that a small handful of published decisions accurately reflected the hundreds of cases and allegations pursued by Defendants. Out of 144 cases, the court cited decisions in three in which courts had found that the farmer had intentionally made use of the patented productions. (A15.)

From that, the district court assumed that the other 141 cases, 700 settlements, and unknown number of investigations were similar. But only Defendants know whether or not those hundreds or thousands of investigations and settlements are consistent with Defendants' pledge not to sue.

In the event this Court deems Defendants' unsubstantiated claims about their patent enforcement to be relevant to the issue of subject matter jurisdiction, in spite of its prior holdings in *Laitram* and *SanDisk*, then Plaintiffs should at least be afforded the opportunity to conduct Rule 56 limited discovery of Defendants' investigation and non-privileged litigation files, since the "facts are peculiarly within the knowledge of the opposing party." See *Kamen v. American Telephone & Telegraph Co.*, 791 F.2d 1006 (2nd Cir. 1986).²

² In its decision, the district court cited *Hunter v. Colonial Park*, 409 F. App'x 411 (2d Cir. 2011), in support of its consideration of facts outside the pleadings. (A3.) The district court erred, however, by not holding such outside evidence to the standard required in such cases:

While a 12(b)(1) motion cannot be converted into a Rule 56 motion, Rule 56 is relevant to the jurisdictional challenge in that the body of decisions under Rule 56 offers guidelines in considering evidence submitted outside the pleadings. Moreover, in resolving claims that they lack jurisdiction, courts have acted in a fashion suggestive of 56(f): they have required that the party asserting jurisdiction be permitted discovery of facts demonstrating jurisdiction, at least where the facts are peculiarly within the knowledge of the opposing party. *Kamen*, 791 F.2d at 1011 (citations omitted).

IV. The district court erred in finding that Plaintiffs' action did not meet the necessary standard for meaningful preparation to conduct potentially infringing activity

Under the second prong of the Federal Circuit's jurisprudence, the declaratory judgment plaintiff must have undertaken some "meaningful preparation" for making or using the patented product. *Cat Tech LLC v. Tubemaster, Inc.*, 528 F.3d 871, 881 (Fed. Cir. 2008). This is separate and distinct from the question of when a patent holder might choose to try to bring an enforcement action because it focuses on Plaintiffs' actions and circumstances.

Several of the Plaintiffs are more likely than not already contaminated with transgenic crops patented by Defendants, such that should Defendants decide to sue, Plaintiffs would be liable for patent infringement.

Amici presented the district court with a few of the numerous studies that support the conclusion that, even with extensive precautions, transgenic contamination of crops cannot be avoided. For example, gene flow from a transgenic bentgrass patented by Scotts was observed to have spread as far as 13 miles away from the experimental plantings in the direction of prevailing winds. (A667-A673.) In Canada, testing of canola seeds from "certified seedlots" revealed transgenic contamination in all but one seedlot, with approximately 10% of the seedlots showing "very high levels" of contamination, namely greater than 2.0%. (A638-39.) Notably, the seed samples in the Canadian study were taken in 2002, when only 40%

of the Canadian canola was estimated to be transgenic, and the pedigreed crops were required to have extensive isolation distances to try to minimize contamination. (A632 & A640.) In contrast, 94% of all soybeans, 90% of all cotton, and 88% of all corn planted in the U.S. is currently genetically modified, vastly increasing the probable extent and levels of contamination. (A554.) Facts such as these lead to the conclusion, acknowledged by the district court, that unlicensed use is “inevitable.” (A4.)

In this case then, it must be taken as true that the Plaintiff farmers have taken substantial steps towards potentially infringing activity simply by farming crops that are susceptible to transgenic contamination, particularly soy, corn, canola, or cotton. The level of contamination in these crops is so widespread that it is certain that some, if not all, of the Plaintiffs are *already* infringing. Plaintiffs presented evidence to support this. Consider, for example, Plaintiff Noble’s testimony that one third of all seed he tested was positive for containing transgenic patented material. (A722.) Since the Plaintiffs cannot afford to test every single batch of seed they use, it is more likely than not that sufficient discovery would reveal that Plaintiffs have planted or sold at least some batches of seed with Defendants’ transgenic materials.

This meets the preponderance standard before the court. Nevertheless, the district court essentially stated that, unless Plaintiffs allege that they knowingly grew or sold patented seed, they did not meet the standard for preparatory conduct.

However, since intent is not an element of infringement, the district court erred in focusing on Plaintiffs' statements that they try to avoid contamination. *See Monsanto Co. v. Roman*, 2004 WL 1107671 (N.D. Tex. 2004) (noting that "Monsanto contends that neither knowledge nor intent is an element in a claim for patent infringement;" and citing *Hilton Davis Chemical Co. v. Warner-Jenkinson Co., Inc.*, 62 F.3d 1512, 1519 (Fed.Cir. 1995) (*en banc*), rev'd on other grounds, 520 U.S. 17, 117 S.Ct. 1040, 137 L.Ed.2d 146 (1997) for the premise that willful infringement is relevant solely to the issue of damages). As even the district court found, unlicensed use is inevitable (A4.) The facts show that contamination has more likely than not already occurred and continues to occur no matter what efforts Plaintiffs make.

The biological reality is that a farmer who raises corn, cotton, soybeans, or canola cannot reliably avoid infringing on Defendants' patents under current patent law. As time goes on and more transgenic crops dominate the market, crops such as sugar beets and alfalfa will pose the same unavoidable problem. The farmer is left with a choice: risk infringement or refrain from raising these crops at all. That is precisely the type of dilemma that the Declaratory Judgment Act is meant to address. *See MedImmune*, 127 S.Ct. at 773, 549 U.S. at 130.

CONCLUSION

The *Amici* urge this Court to reverse the district court's decision and hold that Plaintiffs have standing to bring this Declaratory Judgment Act. At a minimum, the district court's decision should be reversed and the case remanded for limited discovery on the factual issues related to standing.

Dated: July 11, 2012

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I hereby certify that, on this 11th day of July, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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