In The Matter Of:

ORGANIC SEED GROWERS and TRADE ASSOCIATION, v. MONSANT COMPANY,

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January 31, 2012

SOUTHERN DISTRICT REPORTERS
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ORGANIC SEED GROWERS and TRADE ASSOCIATION,

Plaintiffs,

v. 11 CV 2163 (NRB)

MONSANT COMPANY,

Defendant.

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New York, N.Y.
January 31, 2012
10:00 a.m.

Before:

HON. NAOMI REICE BUCHWALD,

District Judge

APPEARANCES

PUBLIC PATENT FOUNDATION
Attorneys for Plaintiffs
BY: DANIEL B. RAVICHER
SABRINA HASSAN

WILMER, CUTLER, PICKERING, HALE & DORR, LLP
Attorneys for Defendant
BY: SETH P. WAXMAN
TODD C. ZUBLER

(In open court)

THE DEPUTY CLERK: Organic Seed Growers and Trade Association v. Monsanto Company, 11 CV 2163.

Are plaintiffs present and ready to proceed?

MR. RAVICHER: Yes, your Honor.

THE COURT: State your name for the record, please.

MR. RAVICHER: Daniel Ravicher for the plaintiffs. With me, I have Ms. Sabrina Hassan.

THE DEPUTY CLERK: Are defendants present and ready to proceed?

MR. WAXMAN: Yes, your Honor. Seth Waxman and Todd Zubler for the defendant.

THE COURT: It should come as no surprise to you, we have read most of the papers, and, frankly, from my point of view, the issues here are very legal in nature and involve reading cases, something which we can do without assistance.

So I am not entirely sure how valuable oral argument is in this context, but you asked for it, so I always grant it when it's asked for. I have a few questions, but I also thought that we might begin by giving the plaintiffs, in a sense, a chance for surreply since the defendants had the last word on paper.

So if there was something that the plaintiffs wanted to respond to that was in the defendant's reply brief, this would be the opportunity to do so.

MR. RAVICHER: Thank you, your Honor. Plaintiffs have standing in this matter because they are foregoing full use of their property and incurring significant costs to avoid being accused of patent infringement by the defendants who have undertaken the most systematic and sustained campaign of patent enforcement in history. And because --

THE COURT: Is that an answer to the question that I asked, or the opportunity I gave you, or is that what you were going to start to say regardless?

MR. RAVICHER: Your Honor, the cases I would use to respond to the reply brief come from outside the patent DJ context, and I think these are appropriate because the MedImmune case relies on criminal cases, cases where plaintiffs brought pre-enforcement challenges to statutes when their standing was questioned. And then later in Holder v. Humanitarian Law Project, a decision from just a year and a half ago, the Supreme Court in analyzing the standing of plaintiffs to challenge the pre-enforcement criminal statute, and that case which involves supporting named terrorist organizations cited MedImmune to support the standing of those plaintiffs.

Also, in MedImmune, Aetna itself which MedImmune cites, involved a case where the insurance company sued their insured before the insured had given any indication that they were going to bring a suit against the insurance company.

So now that we have seen that the Supreme Court thinks criminal challenge statutes are relevant to the standing in declaratory judgment patent cases, I would also just as a few sample cases refer the Court to Doe v. Bolton, which was a declaratory judgment challenge to an abortion statute where there was absolutely no threat whatsoever against the doctors there, and yet the Supreme Court found that there was standing nonetheless.

Also in American Booksellers, regarding a First Amendment challenge, the Supreme Court upheld the standing of plaintiffs to bring a challenge to a pre-enforcement criminal statute.

The last case I would refer the Court to is a Federal Circuit case, although it doesn't involve a DJ for patent invalidity or non-infringement, which is the Biotechnology Industry Organization and the Pharmaceutical Research Manufacturers Association v. the District of Columbia. This case involved the District of Columbia statute which prohibited excessive pricing.

Without any evidence whatsoever that the District of Columbia what was going to enforce the statute against either of those organizations or any of their members, the Federal Circuit upheld standing of those organizations to challenge the statute, and it said, "Because the presence alone of the statute caused the plaintiffs to incur costs to avoid

violating."

Now, in the reply brief they don't respond whatsoever to the declarations we submitted in our opposition brief including a declaration by Chuck Noble, who has to incur significant costs to test the alfalfa seed he acquires to try to avoid contamination, which would then lead him to being subject to patent infringement cost.

It doesn't deal with the injury caused to Bryce Stephens who can no longer grow corn or soy bean on his property because of the risk of being contaminated and threatened with a patent infringement suit.

I thought their reply was brief was pretty inadequate in responding to the facts as later set forth in our declarations.

The only last thing I will say, your Honor, because I want to keep it brief, and I appreciate your granting our opportunity for oral argument, is the first paragraph of their reply brief I think is quite misleading. What they have done is surgically taken two different parts of AMP and somehow stitched them together to give the impression that it's one quote.

AMP has two distinct sections on this issue. It has a section where it describes the law, and it says, "the law of standing requires some affirmative acts related to enforcement of the patents."

Then later in the opinion, several pages later, when it's discussing the facts of that specific case where there was not a systematic campaign of enforcement, there had not been hundreds of lawsuits, there had not been hundreds of thousands of licenses, the Court said, under the facts of that case because there had been directed enforcement at Dr. Oster in AMP, "he clearly" -- that's the Federal Circuit language -- "he clearly had standing."

So when they're talking about the law itself, there is no requirement for directed acts at the plaintiff. When they're talking about the specific facts of that case, they say here there is clearly standing because there were directed acts. I concede there is no case out there that is on all fours with this one where there has not been at least some communication.

But even under the previous reasonable apprehension of suit test of Arrowhead -- and this is the more stringent test -- the Federal Circuit said that "any communications whatsoever are not required." I know you've read it a million times, but I just feel compelled to say it: The MedImmune test is to look at all the circumstances and keep in mind the purpose of Declaratory Judgment Act, which is the other thing missing from their reply brief. They don't say how denying plaintiffs their day in court furthers the purposes of Declaratory Judgment Act. It doesn't prevent them from being

harassed. They are the party who is harassing our clients through their campaign of patent enforcement.

The last thing, your Honor, thank you again, is in MedImmune at 549 U.S. 129, it says: "We," the Supreme Court, "do not require plaintiffs bet the farm," and yet that's exactly what our plaintiffs have to do here. Thank you.

THE COURT: Mr. Waxman, would you like to respond to what he just said?

MR. WAXMAN: Sure. I guess I will take Mr. Ravicher's points in reverse chronological order. There is no doubt whatsoever in anyone's mind, and particularly Mr. Ravicher's mind, that under the AMP v. Myriad case there is no Article III standing in this case because the court in that case specifically held that for Article III standing for patent infringement there must be "affirmative acts by the patentee directed at specific plaintiffs."

Now, Mr. Ravicher's papers before your Honor suggest that that somehow is not the rule of the Federal Circuit, but Mr. Ravicher has a pending petition in the Supreme Court on behalf of AMP in which he has asked the Supreme Court to take cert. in the case specifically because, as he has represented, the Federal Circuit has a bright line rule requiring just that.

Now, that rule, for reasons that we've stated in our papers, and I don't want to burden the Court with an oral argument that might make me feel good but wouldn't be of any

use to the Court, that rule articulated in AMP v. Myriad is entirely consistent with a long line of Federal Circuit jurisprudence both before and after MedImmune and is also consistent with MedImmune.

The cases that Mr. Ravicher now would like the Court to address; that is, cases involving challenges by regulated parties against the sovereign challenging the constitutionality of or legality of a rule or requirement by the sovereign that imposes criminal and other penalties are entirely distinguishable between private actions from one private party to another. The Court in MedImmune did say, we ought to acknowledge that we allow pre-enforcement challenges to the validity of a legislative enactment by somebody who doesn't -- you are not required to go to jail first, but the notion that there is no Article III substantial, immediate and real controversy applies with force in litigation, and MedImmune didn't do anything to change that.

Just look at the reality here. Monsanto has no idea, other than the allegations, had never heard of any of these plaintiffs before the complaint was filed. All they know is what's in the complaint. To the extent that they have responded here, the only action they've taken with respect to these plaintiffs is to assure them that it has no interest in suing them if their representations are true, and in the context of the civil litigation it's difficult to imagine a

less real, less substantial, less immediate case or controversy.

Now, Mr. Ravicher says we have nothing to lose by not being brought into court to defend our rights. The law has never been that a patent holder who has not specifically directed actions or led a defendant to believe that the defendant is in some jeopardy with respect to patent infringement has the ability to bring the patent holder into court and force the patent holder to defend its patent rights, among many other things.

If this case were to proceed, typically a declaratory judgment action by an alleged infringer, or somebody who believes that if the patent is valid he may be in legal jeopardy, precipitates a counterclaim by the patent holder that there is infringement. That's how these cases work, and that represents the joinder of a legal issue. We would have no basis whatsoever to bring such an action or make such a counterclaim against any of these defendants because they have represented to us that they are not infringing, they don't want to use our products, and in fact they have a genuine substantial public policy dispute with the United States Government over the validity of transgenic agriculture -- whether it should be permitted, whether it should be regulated, whether it should be encouraged.

They don't have a dispute with Monsanto over patent

rights. We haven't sought or in any way led them to believe that we would enforce our patent rights against them. The company has never brought legal action against an inadvertent -- against somebody who didn't want to make use of the traits that are manifested in our transgenic products, and, in fact, to this day the plaintiffs cannot articulate any reason why Monsanto would want to proceed in an infringement action against a farmer who has no desire to use Monsanto's technology. I mean, it makes no legal sense. It makes no economic sense.

In addition, a major difference between a challenge to a public enactment and a challenge to the validity of a private patent relates to the law of collateral estoppel. Again, this flows from an immediate and direct controversy. If a private party sues the sovereign and says this legislation is unconstitutional or your action against us is inappropriate, the Court makes a ruling, and that ruling binds the effective world; that is, it binds the private party and it binds the sovereign, the only one who can in fact enforce all these rights.

In private civil litigation, including patent litigation, if Monsanto can be sued by each and every one of the plaintiffs in this case and many, many other people in the country who would like to challenge Monsanto's patents, it has to win every single time. Because of non-mutual offensive

collateral estoppel, it will not have any ruling in its favor, even a hundred rulings in its favor would not have preclusive effect with respect to the 101st plaintiff.

That is a significant reason why the public challenging enforcement are different than challenges by one private party to the legal rights of another. It's why there is a requirement that the case or controversy be, as the Supreme Court reiterated in MedImmune, substantial, real and immediate; and because, as I said here, Monsanto has taken no action whatsoever to enforce or assert that it has any enforceable patent rights with respect to any of these plaintiffs, and in fact has only assured them in response to Mr. Ravicher's letter informing Monsanto that unless it provided some assurance, their clients would then be deemed to have a real and immediate case or controversy -- and this is Exhibit 4 to the complaint -- I actually wrote on behalf of Monsanto to Mr. Ravicher to say, "This is to address the unfounded concerns articulated in your letter. Monsanto is unaware of any circumstances that would give rise to any claim of patent infringement or any lawsuit against your clients. Taking your representation as true, any fear of suit or other action is unreasonable and any decision not to grow certain crops unjustified."

THE COURT: All right. Is the letter that you were responding to part of the record?

MR. WAXMAN: Yes, the letter that Mr. Ravicher wrote.

THE COURT: Right.

MR. WAXMAN: Is Exhibit 3 to the complaint.

THE COURT: Good.

MR. WAXMAN: And in salient part, it says: "If we do not receive a response from Monsanto, our clients will conclude that Monsanto is now fully aware of their activities, and it would then be reasonable for our clients to feel they would be at risk of having Monsanto assert claims of patent infringement against them should they ever be contaminated by transgenic seed potentially covered by Monsanto's patents."

Now, we had no obligation under the law to respond to that letter, but because we have no interest whatsoever in asserting our patent rights, I did write and explain that if the representations of the complaint are true, these plaintiffs have nothing to fear from Monsanto.

You know, your Honor, another pretty good indication of what this dispute is really about is that Mr. Ravicher mentioned the declarations of a couple of the plaintiffs in this case. It is perfectly obvious, it is pellucid that the plaintiffs in this case have an objection to and a fear of incursion into their property of transgenic seed. What they haven't alleged and couldn't plausibly allege is that they would do anything -- that there is anything that they have done or haven't done that would be changed in any way by a

declaration of patent rights.

These people have chosen not to grow certain crops or not chosen to grow certain crops because they are organic farmers or conventional farmers and want to produce food products that are conventional or organic. They are not doing or refusing to do anything because of a fear of patent infringement. And, therefore, in addition to the fact that there is no substantial, real and immediate controversy within the meaning of Article III directly, there is also no injury, in fact, no fair traceability and no redressability under the Court's standing doctrine.

The requested relief that all of Monsanto's patents be declared invalid is not going to make it less likely that the traditional processes of cross pollination and seed drift are not going to occur, and in fact if the patents are invalidated, there will be no private restraint against any farmer in the country with or without a license using transgenic seed.

THE COURT: Actually, I never thought about that. Even if the patent was invalid, it doesn't outlaw the product.

MR. RAVICHER: Yes, your Honor, but even Monsanto concedes that the National Organic Program standards don't prohibit contamination. So, just because our clients happen to get contaminated doesn't mean that they lose their organic certification. So, a lot of the reason why they want to avoid contamination isn't to lose their status as an organic farmer

because the standards already provide for some contamination. It's to avoid this risk of being sued for patent infringement.

THE COURT: But that would, I think, be a more persuasive argument if all that you had done was seek a declaratory judgment of non-infringement, but you went a big step further and you sought to invalidate the patent, which I think would seem to speak to your, I'm sure, sincerely held beliefs of your clients, that the Monsanto product is something that's undesirable.

MR. RAVICHER: Well, I actually don't think it's proper to conflate those issues because in all the cases I cited to you earlier including specifically --

THE COURT: Well, you don't want to use their product, so your concern is that, as you put it, they not sue you. Therefore, you could have limited your request to a declaration that if you do not intend to infringe and any use of the Monsanto product was purely accidental, that that would be a situation of non-infringement. But you didn't limit yourself that way.

MR. RAVICHER: I think the bases for the declaratory judgment we seek can impact standing. I think that's correct. I don't think the fact that we've sought invalidity somehow decreases the injury that our clients are suffering immediately today.

THE COURT: I think it's revelatory of the motivations

of your clients in bringing the suit.

MR. RAVICHER: There is no case that I've seen that actually says motivation of the plaintiffs is a circumstance to be considered under the MedImmune totality of circumstances.

In fact, in, for example, the Biopharma v. District of Columbia case, the Federal Circuit discusses the reason why they brought that challenge was because they have a policy disagreement with the District of Columbia, and the Federal Circuit says that doesn't matter. It's irrelevant. We're going to look at the actual -- whether or not there's injury here that's immediate. Are they incurring costs to avoid the statute? We have that here. Is the incurrence of that cost fairly traceable to the actions of the declaratory judgment defendant? In that case, yes. In this case, yes.

And redressability, I don't understand how we can even argue about redressability, because if you guarantee our clients they cannot be sued for patent infringement, they need not incur the additional costs that they are incurring or the foregoing use of their property out of this risk of being sued because you will have negated that risk entirely.

THE COURT: You argued that since you could have obtained a license from Monsanto that you have standing. My question to you is there any limiting principle to that argument?

MR. RAVICHER: I wouldn't say I made that aggressive

of an argument, although maybe when I wrote that --

THE COURT: So. Just a minute. I don't think I made it up.

MR. RAVICHER: OK, I take your word, your Honor.

THE COURT: No, just give me a second.

MR. RAVICHER: Yes, your Honor. I think it's on page 18 of our brief your Honor, the bottom paragraph starts "in addition." I think it continues on -- I'm sorry.

THE COURT: OK. Just to read part of this. "In addition, a declaratory judgment plaintiff that has a license to a patent unquestionably has per se standing because that was precisely the issue in MedImmune. Here, each plaintiff could easily walk into any one of countless Monsanto licensee distributors throughout the country and enter into a Monsanto technology stewardship agreement that is presented to a customer before they are allowed to purchase any Monsanto seed. The agreement" -- skipping a few words -- "is in large part a patent license. Thus, if any plaintiff enters into such agreement, which Monsanto does not dispute could be done by any plaintiff at any time, then that plaintiff would unquestionably have standing under MedImmune."

You go on: "The fact that a patent license is being offered but not accepted does not change the analysis."

Let's see "Thus" -- skipping a line--"Monsanto's offering of a license to the general public which includes each

of the plaintiffs is yet more reason to deny Monsanto's motion to dismiss."

I didn't think I mischaracterized the argument.

MR. RAVICHER: What I intended to say there, your Honor, is what I just said at the last sentence, it's yet more reason; it's another circumstance. There are some conditions, I'll concede, are sufficient for standing. None are necessary. MedImmune says a valid license, even if you're continuing to pay your royalties, is a sufficient condition.

THE COURT: Right.

MR. RAVICHER: Mr. Waxman wants you to conclude that they are now a necessary condition of direct communications, and that there is no way for the injury our clients are suffering to be fairly traceable to their affirmative acts enforcing a patent without direct communications. I'm suggesting that doesn't comport with MedImmune, it does not comport with Federal Circuit cases, and it does not comport with other Supreme Court law from other areas involving Article III standing.

May I have a few minutes to respond to a couple points?

THE COURT: Absolutely. Your time is my time.

MR. RAVICHER: Thank you, your Honor.

The argument that counsel has made for a completely different set of parties on a petition for cert. I don't think

is applicable to these parties.

My mom might not like that I sometimes argue the law should be interpreted differently, but we represent completely different people there, and those arguments that those parties have made in AMP on cert. petition should not be imparted to these clients here. The argument that the criminal challenge statute cases are distinguishable just flies in the face of both MedImmune itself and the Holder v. Humanitarian Law Project which I cited to you.

Why would Monsanto want to sue our plaintiffs? I think that's a great question. It's a question I had originally.

Hear is the concern: When you're a farmer, and you've been contaminated by genetically modified seed, you can't tell that. It's not like your neighbor's tree fell on your property which is open and notorious. The seed comes over because their seeds haven't been modified to create different plants. Their corn and our client's corn looks to the eyeball exactly the same. It tastes the same. It feels the same. It is exactly the same in all respects. The only difference is their version resists herbicide known as glyphosate.

You don't know you've been contaminated until one of two things happens: Either you or someone else tests your field with a genetic test, which is a hand-held thing, so you undergo that expensive testing, like Mr. Noble does and Fedco

Seeds does, or you wait until you also suffer a second contamination of glyphosate drift. Oftentimes, this glyphosate is sprayed on fields by an airplane that flies very low over the ground. Sometimes the guy with the switch isn't very precise at respecting property borders. So if you have some glyphosate drift on your property, what you will see is a portion of your crops that have been suppressed. So most of your crop is a certain height; the rest has been suppressed. It hasn't been killed because the amount of glyphosate which is laying on your property wasn't sufficient to kill your organic or non-transgenic seed, but it's at least enough to suppress it so that it's noticeable.

Within that suppressed portion of your property, there will be some sprouts of plants that are just as tall as the rest of your property. And the only way that's possible is if those sprouts came from transgenic seed that had originally contaminated your property. This is one of the problems we have with our commitment using the words trace amounts. It's very difficult for our plaintiffs to know if they've been contaminated by a trace amount. Sometimes they won't know until the amount of contamination they're suffering is an extreme amount because of the burden of otherwise testing their property.

So, what we're concerned about is when the day comes that we get contaminated and we want to bring a property

trespass or nuisance suit, and some of these have started to occur, against my neighbor for causing me financial harm by contaminating my property, that customer of Monsanto that is the source of that contamination is going to call them up and say, "Hey, I used your seed exactly the way you told me to. I did everything I was supposed to. One day a wind storm came by, and it blew my seed on to my neighbor's property. Now I'm being sued and held liable."

THE COURT: Isn't this all in the future?

MR. RAVICHER: Well, no, the harm is immediate. See, that's where they conflate -- the temporal aspect of standing is not when could they be sued. In fact, there's replete case law that says even an inability to sue today does not defeat standing. Those were the facts in MedImmune. They could not be sued today. They could only be sued in the future if they breached.

The immediacy requirement is the injury prong of standing, which requires that the injury being suffered be today. Are people not fully enjoying their property the way they wish because of this risk today? And the answer there is yes. Are people incurring costs to avoid violating a law such as the law in the D.C. case or the patent laws? Yes.

So, the injury is immediate. That's why the immediacy requirement is satisfied here. It doesn't have to be that they actually could sue us today. These clearly not the law.

So, the concern is once their customers contact them and say we're being sued for injuring our neighbor, what are you going to do about it? In their toolbox to defend their customer is the threat of patent infringement against the contaminated non-transgenic seed landowner because now they can say, "Aha, you're conceding you have our seed; you're conceding it's on your property; you're conceding you're making and using our seed. We have these patents. We think you're now infringing.:

Now, whether or not that would be infringement is a question of statutory interpretation because to date the statute 271 has not been interpreted to require any knowledge or intent. To date it's been interpreted that any making or use of strict liability could constitute infringement. So that's a severe risk that my plaintiffs face today, and they're incurring costs to ameliorate that risk, and the issuance of declaratory judgment by you would fully redress that injury.

Just lastly, I do want to point out that not all of our plaintiffs are organic. Some are what are known as biodynamic, which I call organic squared, where they have to have an entirely self-sustained farm; not just make sure that their inputs meet certain qualifications; but then some still, a large percentage of our plaintiffs, are neither organic nor biodynamic. They simply want to farm non-transgenic.

So these concerns that, well, the reason why they have

to incur these burdens is because they don't want to lose organic status is not only false with respect to our organic farmers because they can be contaminated and still be organic; it's absolutely inapplicable to our plaintiffs who are not organic and don't seek organic certification.

So the only reason that injury is occurring to them is because of the risk of being contaminated unknowingly, and then once they're outside this ambiguous ambit, which they even admit in their RFAs that we included in our opposition, their language is vague when it says we won't assert our patents against those who have come to possess--

THE COURT: What you want, do you not, is an absolute blanket covenant not to sue without any limitation whatsoever. That's what your letter asked for.

MR. RAVICHER: I don't think so, your Honor. I think we asked for a covenant that says anyone who does not purposefully come to possess or use --

THE COURT: No. You write: "If we do not receive a response from Monsanto within a reasonable amount of time, our clients will conclude that Monsanto is now fully aware of their activities and has affirmatively chosen to not waive any potential claim of patent infringement it may ever have against them." That's pretty broad language.

MR. RAVICHER: That any claim, yes, your Honor. But the definition of client I set forth in the second paragraph on

the first page which says, "None of our clients intend to possess, use or sell any transgenic seed." So although all claims of patent infringement we do expect to be waived our clients are those who "do not intend to possess use or sell seed."

THE COURT: And Mr. Waxman's letter back to you said, "You represent that none of your clients intend to possess, use or sell any transgenic seed including any transgenic seed potentially covered by Monsanto's patents. Taking your representation as true, any fear of suit or other action is unreasonable, and any decision not to grow certain crops unjustified. As it is previously publicly stated and restates here, Monsanto policy never has been nor will be to exercise its patent rights where trace amounts of its patented seed or traits are present in a farmer's field as a result of inadvertent means".

MR. RAVICHER: So I have two problems with that. Trace amounts, which we've already talked about our farmers may not know it's been contaminated until it's more than trace. We don't know what they mean by trace. If Mr. Waxman wants to call me up after my letter and say, "Mr. Ravicher, I appreciate -- let's negotiate the company not to sue." I would have been pleased as punch. I would have been happy to negotiate the language. They categorically refused the invitation.

The other problem I have is the word inadvertent means. What does it mean to be contaminated by inadvertent means? I think you and I might have some normal definition that we believe that word means, but in their papers they submitted documents that said it's the burden of organic farmers to use their own land to set up a buffer zone. And the declaration we submitted from Fred Kirschenmann, he tried to set up buffer zones on his own property which they say is the requirement. And that didn't work for him. He had to end up stop growing all the canola that he used to grow which now cost him $25- to $50,000 a year in income.

What happens if the contaminated party in our circumstance decides they don't want to have to use a significant portion of their property for buffer zones? In some instances this can require up to 660 feet on all your edges of a buffer zone. That's a significant amount of land. It's a significant amount of money. What if they don't want to set up a buffer zone and then they get contaminated? Well, Monsanto argued, then it's not inadvertent because you purposely continued to grow your crop as close to the border as our transgenic customer as possible, so when you were contaminated, that wasn't inadvertent; you're outside the scope of our waiver.

Those are our two problems with their ambiguous, vague language that they try to use there to make you think that they

won't sue our clients, but yet I think our clients are reasonable in questioning "what do you mean by that?"

THE COURT: Mr. Waxman, anything you'd like to state?

MR. WAXMAN: Just a few points. As your Honor has already admonished us, it's obvious the Court can read the relevant decisions of the Supreme Court and the Federal Circuit, I just want to point out that --

THE COURT: By the way, the plaintiffs argue that the Federal Circuit decision subsequent to MedImmune do not actually adhere to the Supreme Court's teaching in MedImmune. I assume you would to respond to the contrary?

MR. WAXMAN: Yes, I think they're absolutely consistent. I think our opening brief which was presented to the Court before the Federal Circuit decide the AMP v. Myriad case shows a long line of consistent cases both before and after MedImmune, and I want to address their representation about the significance of the licensing MedImmune in a minute.

They are unable to cite a single case, and we've cited to your Honor at least a half a dozen, probably a dozen cases in which subject matter jurisdiction for patent declaratory judgment actions depended on, as the Federal Circuit said in Myriad, "affirmative acts by the patentee directed at specific plaintiffs." That was true from the Arrowhead case in 1988 where there were threatening letters sent by the patent holder to I think four of the manufacturer's customers who then

received indemnification, and it's true -- you know, Creative Compounds, Innovative Therapies, SanDisk, they are not able to cite a single case in which the Court found an Article III case or controversy absent a specific act. It doesn't have to be a lawsuit or a threat of a lawsuit, but some specific conduct by the patent holder directed to the declaratory judgment plaintiff asserting its rights under its patent. There is no case to the contrary. So, there is nothing inconsistent before or after MedImmune.

In any event, their contention that AMP and the other cases somehow are inconsistent with MedImmune, the basis on which certiorari is requested in the Myriad case, is -- I don't know how to put this delicately -- a very interesting question but irrelevant to everyone in this courtroom, which is this appeal will go to the Federal Circuit. The Federal Circuit has made very clear in an a fortiori case, a case which there were clinicians all over the country who had been administering the bracket one and bracket two test that was covered by Myriad's patent who sought to challenge the validity of that patent on the grounds that it was non-patentable subject matter.

The Federal Circuit said there is one doctor, it's the doctor to whom Myriad had written a letter and who was at the same time fully prepared and interested in re-engaging in that clinical testing who has standing. With respect to all of the other similarly situated research institutions and physicians

in the country who, unlike the plaintiffs in this case, did want to practice the technology, the gravamen was that they couldn't. As to all the rest of them, there is no standing. The Federal Circuit -- I don't know how it could be any clearer -- they said, "The district court" -- I'm quoting from I think the penultimate paragraph of the standing decision -- "The district court failed to limit its jurisdictional holding to affirmative acts by the patentee directed at specific plaintiffs" -- citing the Federal Circuit's decision in SanDisk --"Erroneously holding that all plaintiffs had standing based on the widespread understanding that one may engage in bracket testing at the risk of being sued for infringement liability by Myriad. We disagree and, thus, reverse the district court's holding that the various plaintiffs have standing. Simply disagreeing with the existence of a patent or even suffering an attenuated non-proximate effect from the existence of a patent does not meet the Supreme Court's requirement for an adverse legal controversy of sufficient immediacy and reality to warrant issuance of a declaratory judgment."

Now, with respect to a couple of discrete points that my colleague raised. The Bio case, Bio v. The District of Columbia, that, in fact, was our case in the Federal Circuit. That was a case in which the District of Columbia passed a law that said pharmaceuticals may not be sold in the District of Columbia by manufacturers -- they excluded resellers -- for any

price that is greater than they are sold in any developed country of the world.

The challenge was made by Bio and Pharma, the trade associations, that violated their patent rights, their right to exclude others and to set the price. There was a dispute between the regulated party and the sovereign over the constitutionality of the sovereign's law. It bears no resemblance whatsoever to a suit by a private party who wants to drag an unwilling defendant into court, a defendant who has never even heard of them before, and there is no track record of suing conventional farmers, organic farmers, biodynamic farmers who don't want to use the patented invention.

The representation that MedImmune declared that a licensee per se has standing to challenge the validity of the patent or non-infringement gets the Supreme Court ruling in that case exactly backwards. The Supreme Court reversed Federal Circuit law that said if you have a license, you may never sue period because you have no imminent risk of an infringement action.

What the Supreme Court said is, it is not a per se requirement. They certainly didn't say that just because you have a license, you have a per se right to sue. We've addressed all of the reasons why their license argument is wrong on page 4, footnote 6 of our reply brief.

The salient point is this: You still have to show an

immediate, substantial and real controversy, an injury in fact. And the situation in MedImmune wasn't just that there was a license. There was a dispute, a fully aired dispute between the plaintiff who had a license to practice the patented technology, and the patent holder over whether the license was valid. They exchanged letters over this point, and there was no question in that case that the licensee had built a plant, was manufacturing this pharmaceutical, fully intended to continue manufacturing the pharmaceutical, and the patent holder in that case had sent them a letter saying your drug is covered by our patent, and you owe us royalties or you will be in violation of your license agreement.

Those underlying facts were what established a real, immediate and substantial Article III case or controversy; not the fact that there was a license. All the Supreme Court did was eliminate the existence of the formalism of a license as a preclusion from adjudicating their rights.

There has been a substantial comment, both in the papers and here today, about Monsanto's public commitment. That is a commitment that Monsanto makes to the public as way of assuring its commitment to the coexistence of conventional, organic, biodynamic and transgenic agriculture. It doesn't purport to establish some legal test. And there would be no point in the jurisprudence to transferring every piece of litigation to collateral disputes about whether the amount was

or wasn't trace or whether it was or wasn't inadvertent.

The public commitment in this case is not what is necessary to defeat Article III jurisdiction, nor are my exchange of letters with Mr. Ravicher, although they demonstrate just how far from any line this case is. They have the burden of coming in and showing that they have a real, substantial and immediate patent dispute with us because we have taken steps to assert our patent rights against them, and the opposite is true in this case.

Mr. Ravicher's discussion about immediacy that there is standing in this case because maybe a farmer -- let me just say this: Cross pollination and seed drift are not phenomena of transgenic agriculture. They are phenomena of agriculture in general as the National Science Foundation and the Department of Agriculture materials that we attached to our complaint demonstrate and as is discussed in our opening brief. This has been a problem with respect to hybrid corn, popcorn versus sweet corn and any number of other products where the seed is either light enough to be carried by the wind or it's carried by insects. It's not the transgenic nature of the agriculture that makes it susceptible to seed drift or cross pollination.

Their notion that if one of the plaintiffs discovers that there has been some seed drift onto its field -- and, significantly, there isn't a single plaintiff who said that

even that has occurred -- that in that instance, if I have Mr. Ravicher right, they would then sue their neighbor for, I think it was trespass or nuisance, for having grown the seed that drifted on to their fields, and that that neighbor would then contact Monsanto, and say "I was growing your product. Aren't you going to help me?" And that Monsanto would then say, "Yes, I will help you" by doing something we have never done, which is bring a patent infringement suit against an inadvertent user of our technology.

Just to articulate, that transitive of argument is to demonstrate just how far from any real, immediate or substantial controversy there is, and certainly it is not a controversy about patent rights. Every single thing that the farmers in this case allege that they are doing or have to do, and all of their fears depend on, turn on their concern about transgenic agriculture. They don't want transgenic products in their field.

It has nothing whatsoever to do with whether or not they will be infringing because there is no -- if Monsanto gave Mr. Ravicher the commitment that he wants, which is, look, we don't know any of these plaintiffs. We don't know what they're actually doing, and we don't know what they'll do next year, and we certainly don't know who is going to fill out a form and become a member of one of these 30 organizations. Even if we said we'll never sue you, they are still going to do everything

they can, including modifying whatever crops they grow to avoid what they call contamination, but to have fields that are not subject to cross pollination or seed drift.

That's what the issue in this case is. It's not about patent rights or a fear of infringement litigation by a patent holder who has never taken infringement action with respect to any inadvertent use of its products, nor would it have any commercial or policy reason to sue somebody who says "I hate your technology. I don't want to use it." What would the infringement action be? What would it be getting Monsanto? In any event, I think those are the issues.

THE COURT: I'll give you the last word since you have the biggest hurdle.

MR. RAVICHER: Thank you, your Honor.

I just want to walk through AMP quickly to tell you our perspective of the case.

When it gets to the discussion at 653 F.3d 1342, it actually sets out Roman Numeral I Declaratory Judgment Jurisdiction. Then it has subpoint A. Then later on, it gets to a point B. Point A is a discussion of the law. Point B is an application of the law to the facts of that particular case.

So if you look in Section A, the discussion of the law, at 653 F.3d 1343, the Federal Circuit says: "Following MedImmune, this Court has held that to establish an injury in fact traceable to the patentee, a declaratory judgment

plaintiff must allege both: (1) an affirmative act by the patentee related to the enforcement of his patent." And it cites Sands. In that recitation of the law, there is nothing about a requirement for a directed act at the DJ plaintiff.

Now, in the Section B where they're applying the facts of AMP to the law --

THE COURT: You're drawing a distinction between directed and affirmative?

MR. RAVICHER: Yes, because it is possible to trace the intimidation effect of a patentee's assertion of its patents against others to cause you injury. That was precisely the holding in Arris from the Federal Circuit. It was precisely the statement from the Federal Circuit in Arrohead. If you look at HP v. Acceleron, it's not their subjective belief of whether they would sue our clients that's relevant. It's an objectively reasonable belief.

THE COURT: It's not the subjective belief of your clients.

MR. RAVICHER: No, its's not the subjective belief of the patentee. It's the objectively reasonable belief of my clients. It's no one's subjective belief. It's the objectively reasonable belief of the declaratory judgment plaintiff. So the facts that we --

THE COURT: Is that objective?

MR. RAVICHER: It doesn't matter if they have an

intent to sue our clients or not. It doesn't matter what their specific intent is. It matters what would it be reasonable to infer their intent is from their conduct, and what facts to we have to help our plaintiffs determine what's reasonable to infer from their conduct. This is where we cite the numerous public reports of their aggressive patent assertion: The Vanity Fair article where they make false accusations against a store owner who had nothing to do with their seed, the CBS Evening News story where they made acquisitions against the Runyons, farmers who wanted nothing to do with their seed, the documentary, The Future of Food. There has been more documentation of their aggressive campaign of patent assertion even against those who don't want to do have anything to do with their seed than anybody else. That's why the apprehension, the risk that my clients feel which is causing them to incur these costs is reasonable.

MR. WAXMAN: May I have one response to this last news article point? Monsanto's web site which they cite in their case will provide the Court with the judgments of the actual courts in the cases involving farmers that Monsanto sued who they now say were inadvertent, judgments of the court up and down the line saying that this was not inadvertent, number one.

Number two, the notion that Monsanto's campaign, so to speak, against farmers -- which, by the way, by their count, over 15 years has amounted to 144 lawsuits brought, every

single one of them against farmers who wanted, affirmatively were making use of the trade, and spraying herbicide over the tops of their crops without signing a license, without paying Monsanto the royalty for the use of its intellectual property -- the notion that that terrorizes people who have no desire to use it whatsoever is perhaps belied most significantly by Mr. Ravicher's inability to cite anything other than a movie called Food, Inc. or a CBS report to demonstrate what they can't demonstrate, which is if this were a ubiquitous threat, you would expect that there would be some plaintiff in this case who would say, "I am an inadvertent user. I have it and it's inadvertent. I have it in my fields and Monsanto has sent me a letter or Monsanto has called me and said, 'You are in patent jeopardy.'"

There is not one plaintiff in this case, there is not one member of any of these organizations that has come forward to say that because it doesn't happen.

Of course, subjective intent, subjective belief isn't the hallmark on either side. It's the objective reality, and the objective reality is this case is as far from an Article III case or controversy on patent rights as one can imagine.

MR. RAVICHER: Just finally, your Honor, when reviewing all the circumstances, the Supreme Court has said time and time again, the important thing to keep in mind is the purpose of the Declaratory Judgment Act to alleviate the harm

caused to people who are being coerced to either abandon activity that they have the right to pursue or incur the risk of being accused of patent infringement. That is precisely what is occurring in this case with our plaintiffs. Thank you.

THE COURT: Thank you very much. You will have a decision as soon as we can write it. I will guarantee you by March 31.

(Adjourned)

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