Transcript of Oral Argument in OSGATA et al. vs. Monsanto, January 10, 2013

at the United States Court of Appeals for the Federal Circuit

Featuring:

Judge Wm. C. Bryson

Judge Timothy B. Dyk

Judge Kimberly A. Moore

Attorney Daniel Ravicher, for Plaintiffs

Attorney Seth Waxman, for Monsanto

JUDGE DYK: The first case is number 2012-1298, Organic Seed versus Monsanto. Mr. Ravicher — is that how you pronounce it?

MR. RAVICHER: Yes, your honor. Thank you, and may it please the court. This case boils down to a simple question. If plaintiffs don't have standing now, when will they? Do they have to wait to be contaminated by defendant's seed and be exposed to liability risk? Do they have to wait until Monsanto directly threatens them, even though Monsanto has threatened other people…

JUDGE DYK: How about actually making the determination of which patent is involved in the seed that is likely to blow from the neighbor's field?

MR. RAVICHER: Well, we represent clients who are farmers from throughout the country and all different industries: cotton, canola, soy, sugar beet. We merely identify the patents that we believe we have a Rule 11 basis Monsanto could accuse them of infringing. Namely, the patents that they list on their own bags and in their own licensing agreements when they sell their seed to their customers. So that is where we got the identification of patents. If there are any individual patents that they want to covenant not to sue us, so we can help purge this case down to more manageable size, we are happy to let them do that.

JUDGE DYK: I don't see any allegation that there is a specific adjacent field which is growing crops covered by a particular patent that might blow onto one of the plaintiffs' fields. It seems to me that that specificity is missing both in the complaint and in the various declarations.

MR. RAVICHER: I think when we take into account the facts that are alleged, which are that Monsanto seed has over 90% market share in these affected crops – they have been very successful licensing their crops. When it comes to organic farmers, or simply non-GMO farmers, they are surrounded now by defendant's product. It's reasonable to assume that our allegations are true – that they will be contaminated (which is something even the district court said is inevitable) and that that contamination will come from Monsanto seed.

JUDGE MOORE: But doesn't Monsanto have an express policy that they won't pursue people who have de minimis amounts of seed and inadvertently, like in this situation…

MR. RAVICHER: Well I don't know if you can have an express policy anonymously. That is not signed, it is not enforceable, it is revocable at will, and we have actual evidence in our case that we have referenced where they…

JUDGE MOORE: Whether it is revocable or not, you have to prove that there is an actual controversy here. The fact that they have the only evidence of record is that we are not planning on suing people like you and we have never sued people like you. Why doesn't that show the absence of an actual controversy?

MR. RAVICHER: I would say we merely need to prove that our uncontroverted allegations prove that there is a controversy, not that the facts necessarily say that there is one. Our allegations include the allegations that Monsanto made against the Runyons, which has been well documented, publicized on national media where the Runyons were accused of patent infringement by Monsanto. Monsanto's representative was included in that CBS Evening News story and did not deny the truth of what the Runyons were saying. There is also the case that we allege in our complaint about the Nelsons and Roush and other farmers who, despite their express policy on an anonymous website statement, they have gone after because they were contaminated.

JUDGE DYK: Why wouldn't the representations that they have made here, to try to get us to hold lack of jurisdiction, why wouldn't those be binding as judicial issues?

MR. RAVICHER: I think they would have a Rule 11 basis that they aren't equitably estopped from changing their mind tomorrow and suing our clients. Now if this court wants to hold that what they have done so

far forecloses them from ever suing my clients for patent infringement, I will accept that decision of the court and agree with you there is no jurisdiction. But I don't think that what they have said provides my clients with the insurance policy that they are looking for. You know, the declaratory judgment act was created to…

JUDGE MOORE: But we are a court. It is not our job to issue insurance policies! Nor does Monsanto have to do that, nor would they have to, it seems to me, promise they are never going to sue you in any circumstance. For example, suppose you actually start using their seed, intentionally using their seed. To say that they need to right now promise never to sue you ever no matter what seems a bit outrageous as a standard.

MR. RAVICHER: We have never proposed that, your honor. I would agree that's…

JUDGE MOORE: You just said: "If they agree they'll never sue my clients no matter what."

MR. RAVICHER: I believe I heard your question which was: Why do they have to promise to never sue our clients if our clients change the representation that they are making about their intentions. My clients don't want a covenant not to sue which allows them to change their intentions. Covenant not to sue can be limited just like the Already v. Nike covenant was limited to only colorable imitations, not knock-offs. Our clients merely want a covenant not to sue so long as you don't intend to possess Monsanto seed we won't sue you. Now if you violate that condition of precedent the covenant not to sue explodes and we can come after you. My clients have no problem with Monsanto…

JUDGE MOORE: But what if you don't intend to, but lo and behold it turns out that an analysis of your crops over time is that 50% of the seed you are planting is their seed?

MR. RAVICHER: So would we have standing then? If we have been contaminated? Is that sufficient – now we have been contaminated, now we are exposed?

JUDGE MOORE: Have they created a controversy? Is there any evidence that they have sued someone in that situation? Is there any evidence that they have even threatened anyone in that situation?

MR. RAVICHER: Yes, your honor. We include that in our complaint, which the district court ignored. The Runyons are a perfect example of people who were contaminated and accused of patent infringement by Monsanto. Monsanto's representative was included in that story and did not deny the allegations, merely saying that "we have a policy not to do that". Well, your policy is not more binding that what you actually did. Put yourself for just 30 seconds in Chuck Noble's shoes, or Fedco's shoes. You are a farmer, you're not a lawyer. You are not an expert in patents. You don't know anything about patents. You are just trying to provide products to your customers. You know the well-documented history of Monsanto aggressively asserting its patents. Yes, against most farmers who were intentionally using their seed, but also against some farmers who were contaminated. What would you do? It is reasonable for you to then say: "Well, I have to adopt expensive genetic testing to make sure that I am not contaminated. I have to stop growing certain…"

JUDGE DYK: I don't see that there is a clear example of a situation where they have sued somebody where there were trace amounts in the crops. There is the Schmeiser case in Canada, on which you rely. That seems to be a situation in which, if I recall correctly, in which 60% of the seed was contaminated. But what is the example where they sued based on trace amounts?

MR. RAVICHER: That is part of the problem, your honor. We don't know when we have been contaminated by trace amounts. First of all, we don't know what the definition…

JUDGE DYK: No, no, no. What is the answer to my question? Is there an example of a suit that they have brought based on contamination by trace amounts?

MR. RAVICHER: We're not aware of them filing such a suit. But we don't believe such a suit is required. It is just like the same reason you don't have to be at risk of being sued – that's the reasonable apprehension of suit test. That you have to be in fear of being sued today. That is not the immediacy that is required for an injury. The immediacy that is required for injury is that you are suffering some economic harm today. You are under an *in terrorem* choice today. And even…

JUDGE MOORE: The standard is not that you are suffering economic harm today or every patient who wants a BRCA test would have had standing in *Myriad*. That is absolutely not the law.

MR. RAVICHER: I would respectfully say that I… I know that you

were on the panel… I would interpret…

JUDGE MOORE: The panel was unanimous on the issue of standing.

MR. RAVICHER: I would say that the standing there, although there was injury, what the AMP decision said was that there was no causation – not that there was no injury, but that there was no causation. I actually read AMP to say that the other plaintiffs did have injury. I prefer to do the standing analysis very structured. Element one – injury, look at just the plaintiffs. Element two – causation, look at just the defendants. Element three – redressability look at just the court. Injury in AMP was found. That is how I read it. Causation was not found for anyone other than Doctor Ostrer. Because there had been a threat made against him directly. But in that situation we didn't have the same evidence that we have here. We believe causation is found here under different facts where they have accused others who were contaminated, where they have more than 90% market share, where our clients are differently situated. In that case what is objectively reasonable to BRCA scientists and what is objectively reasonable to a farmer is different. What is it reasonable for a farmer to feel about their liability?

JUDGE DYK: If I understand the complaint here and the declarations there is no allegation of concern that there would be more than trace amounts of contamination. Is there? Am I missing something?

MR. RAVICHER: No, the concern is that trace leads to more than trace. First of all, like I say, we don't know what trace amounts mean. We don't know what that means. It could be the NOP standard. It could be 5%, 10%, we don't know. But beyond that, trace leads to more than trace. If you are a farmer and you are contaminated by their seed you

have no clue.

JUDGE DYK: Well that is what you say. Where do I find that in the declarations of the complaints?

MR. RAVICHER: Well, if you look for example at the declarations of Don Patterson in the record at A718 you would see in paragraph 3 on page 2: "If I were to try to grow organic alfalfa…"

JUDGE DYK: I'm sorry, what page is that?

MR. RAVICHER: I'm sorry, your honor. The specific page pin cite is A719.

JUDGE DYK: OK

MR. RAVICHER: In paragraph 3: "If I were to try to grow organic alfalfa" (which is one of the crops that has genetically modified seed) "I would be at risk of being accused of patent infringement by Monsanto. My crop would become contaminated." There is no indication that he says: "I would only be trace contaminated." He would be contaminated.

JUDGE DYK: There is also no allegation that it would be contaminated to a substantial amount, either.

MR. RAVICHER: If you read in paragraph 2 on the same page: "I would like to be able to grow organic alfalfa now but if I were to try to grow it in the current environment it is likely to be only a limited

number of years until all alfalfa everywhere, in the nation and in neighboring nations, is contaminated." We saw this with Liberty Link, which we mention in our complaint. They were only doing a trial of Liberty Link, just a trial. It wasn't even in consumer availability. And it contaminated vast stocks of other rice farmers' fields. If the precise wording in our declarations is not exactly what you are looking for, that is because these are legitimate declarations written by real farmers. These are people who are really affected. They are not lawyers and do not know exactly the right words to write. Trace is Monsanto's word, not ours. There is no rule that says that because we are contaminated by only trace amounts they couldn't sue us. If we have one seed, one seed, they could sue us. They haven't waived their right to do that! So again, like I started, what else needs to happen here? I see I am well into my rebuttal time. Unless you have a question I will stand down. Thank you.

JUDGE DYK: Thank you. Mr. Waxman?

MR. WAXMAN: May it please the court, the Supreme Court reaffirmed in *Medimmune* any declaratory judgment action has to involve two parties that are in substantial controversy that is both real and immediate. Not one of those three requisites is met here. The plaintiffs have alleged that they have no transgenic material, they have never been contacted by Monsanto, they oppose transgenic materials on principle, and they avoid having any contact with it. For its part…

JUDGE DYK: Suppose the allegations here were that there was a neighboring field that is growing corn that is covered by a particular Monsanto patent, and that corn is blowing onto their field and causing contamination and that within three years time, let's say, 50% of their corn seed will be contaminated and bear the genetic hallmarks that bring

it under the patent. Would that be sufficient for standing?

MR. WAXMAN: It would certainly not and we have nothing remotely like that here, as I think your honor's question intimates. But in that instance, one needs to focus on what the substantial legal dispute here is between the adverse parties. This isn't a case about, I don't know, trespass or something like that. This is a dispute about patent infringement.

JUDGE DYK: So why wouldn't they have standing in that circumstance?

MR. WAXMAN: Because they would have to show, under *Medimmune* that there is a substantial, real and immediate risk, real risk, of enforcement action by Monsanto in a context…

JUDGE MOORE: Counsel, your policy, as I understand it, is that as long as you have a de minimis amount we are not going to go after you. Inadvertent, de minimis amount. Under Judge Dyk's hypothetical it would no longer be de minimis. It would be 50%. Why doesn't that give them the standing? Given that you have set a policy that says we won't go after these types of people, once you are clearly not within that umbrella, why doesn't that create a very real…

MR. WAXMAN: Because, Judge Moore, it is the plaintiff's burden and the plaintiffs have to show…

JUDGE MOORE: Monsanto is incredibly litigious with regard to these patents.

MR. WAXMAN: That is not correct. There are, as the district court found as a matter of fact, over the 13 years at the time of trial that these products had been on the market, there had been 144 lawsuits filed. The court also found this…

JUDGE MOORE: Wait. So 144 lawsuits on 13 patents. You are talking about 10 lawsuits per patent. Let's see, how many patents a year are granted, Mr. Waxman.

MR. WAXMAN: I don't know, but in fact…

JUDGE MOORE: You have no idea?

MR. WAXMAN: I have no idea how many patents are granted. And not only that…

JUDGE MOORE: I think 200,000 a year. How many lawsuits are filed every year?

MR. WAXMAN: I don't know.

JUDGE MOORE: Let's say roughly 5000, 4000, 2000? Something like that? How many lawsuits per patent does that equate to?

MR. WAXMAN: I don't know, but I…

JUDGE MOORE: I think ten lawsuits per patent is pretty litigious!

MR. WAXMAN: Your honor, there are, as the court found, more than 2 million farms in the United States and as they allege, there are something like 90% of the farms that grow Monsanto RoundUp Ready crops and have in fact licensed them. What they have to demonstrate is… Monsanto has stated, and they don't dispute, that Monsanto had not heard of one of these 300,000 farmers or 4500 farms before they filed the lawsuit. They filed a lawsuit that said: "We just want to be left alone!" We have said: "We want to leave you alone!"

JUDGE DYK: What about the hypothetical where there is 50% contamination? They have never licensed the patent but it blows onto their field and within three years there is 50% contamination. They keep planting it. It that a situation in which Monsanto has said it won't sue?

MR. WAXMAN: They have alleged that they have no intention of making use of it and they don't want to make use of it. Monsanto has said…

JUDGE DYK: In my hypothetical, has Monsanto said that it won't sue?

MR. WAXMAN: Monsanto has said that it has never sued any farmer that did not wish to take affirmative advantage of its patented technology. It has told the plaintiffs in this case…

JUDGE DYK: That is not an answer to my question about the hypothetical. Would it sue in the hypothetical I gave you?

MR. WAXMAN: Well, the answer is no, and the reason is that Monsanto has said in response to their letter, that assuming the representations of their complaint are true, which is that they have no intention of making use of Monsanto's technology, they have nothing to fear and any fear that they have of patent infringement litigation is baseless. Among other things, that is because, as the district court found as a matter of fact reviewable for clear error, there is no instance in which Monsanto has ever brought a lawsuit against any farmer who was not making deliberate use of the technology without paying the license fee. Period. And in the absence of any contact by Monsanto against any of these plaintiffs, and the absence of any demonstration of any lawsuit in which there was anything less than an allegation of deliberate infringement, there is no basis to conclude, under *Medimmune* that there is a substantial patent law controversy that is both real and immediate. Period. Your honor mentioned that the Schmeiser case…

JUDGE DYK: Is your representation here about what Monsanto would do in the nature of bringing a suit binding if you win this case as judicial estoppel?

MR. WAXMAN: If the court writes an opinion that relies on the representations that I made in my letter in response to their letter then I think it would be binding as a matter of judicial estoppel. They haven't established, as the district court found, their complaint, and their amended complaint, does not establish a substantial real and immediate Article 3 controversy independent of the exchange of letters.

JUDGE MOORE: Mr. Waxman, would you address… opposing counsel cited, the Runyon case a couple of times. Would you address why you

think that isn't a case against similarly situated farmers.

MR. WAXMAN: Sure. First of all, there was never any case. The Runyons were not sued. They are relying on some CBS article in which the Runyons said that Monsanto had come to them and said: "We have reason to believe that you are saving RoundUp Ready seeds without paying us the technology fee and we would like to see your records." The Runyons denied it, refused to give them the records, and no lawsuit was ever filed. Even if Monsanto were an instance, and one would think that if Monsanto had a widespread policy of somehow counter-intuitively enforcing its patents against people who had no desire whatsoever to make use of the technology, that these 304,500 plaintiffs would be able to come up with evidence of in fact that widespread rabid enforcement policy. Even if Monsanto had sued the Runyons and said: "We know you are not trying to use this but we have just decided to sue you for patent infringement which is a strict liability tort." That wouldn't demonstrate, in the absence of any communication from Monsanto to any of these 304,000 entities, or anyone other than the Runyons, in that counter-factual hypothetical, that Monsanto had such a widespread policy of enforcement against inadvertent infringers that there was a real, immediate, and substantial threat of enforcement action by Monsanto. Period.

I mean, this is a case in which they have filed a lawsuit saying: "We just want to be left alone by Monsanto." Monsanto has said: "We just want to leave you alone. We have never heard of you people. And if the allegations of your complaint are true you have nothing to fear from us." And yet we can't seem to be left alone by this group of people who, although they have no intention or desire ever to make use of transgenic technology want 600 claims in 23 patents to be declared invalid under every possible ground – unenforceable, not infringed – I mean the ludicrousy of them bringing complaints saying: "We don't want to use

this technology, but every one of these claims fails the 'best mode' requirement of the patent law" demonstrates just how far this is from a lawsuit. This is not an Article 3 case or controversy. This is a dispute about the viability and wisdom of permitting transgenic agriculture and federal courts are not forums to adjudicate that policy.

JUDGE BRYSON: Can I return to Judge Dyk's hypothetical for a moment, which if I recall it correctly was the case of the non-intending, if I may use that term, infringer who nonetheless finds himself with 50% of his crop affected by the transgenic seeds. Is your policy based entirely on intent, or is it a combination of intent plus trace or other form of minimal affect – minimal concentration of your genes?

MR. WAXMAN: The difficulty I am going to have in answering your question is in identifying the policy, okay? If you are talking…

JUDGE BRYSON: That is why I asked, actually. I am unclear as to what exactly the policy is. So I'd appreciate the best you can do by way of explaining whether Monsanto's policy is based on one of those factors or both.

MR. WAXMAN: The statement on Monsanto's website is based on both and as Mr. Ravicher points out it that statement is not an enforceable commitment. But it is an attempt to assure farmers that if they don't intend to take advantage of Monsanto's patented technology they are not going to be sued. The reason it doesn't have only one rather than the other is, you know, intent always can be disputed. And Monsanto shouldn't be…

JUDGE BRYSON: That is one of the things that troubles Mr. Ravicher.

MR. WAXMAN: For example, his case in point is the Percy Schmeiser case in which Mr. Schmeiser, as I pointed out, said: "Well, I tested some of my field and it had 60% but I didn't mean to do it." Monsanto brought suit because, as the Canadian courts found as fact, the next year after he tested all one thousand acres of his fields tested between 95% and 98% positive for RoundUp Ready, which the court found was inconsistent with any policy of inadvertence. The reason that trace…

JUDGE BRYSON: Suppose, though, what happened is… Under the *SmithKline* case, as I understand it, windblown seed does create an infringement. So the farmer says: "Look, I don't care whether the things blowing onto my land is covered by a patent or not. I'm going to continue to harvest my crop and use the seed and if it turns out that 60% of it is Monsanto patent-covered I don't care. I'm going to continue to plant it." If it ends up that 60% of the seed, or 90% of the seed, is contaminated will you sue somebody under those circumstances?

MR. WAXMAN: Well, it is their burden to demonstrate that we are so likely to do so that…

JUDGE BRYSON: No, no. What is the answer? Will Monsanto sue under those circumstances?

MR. WAXMAN: Monsanto has said that it has no intention of bringing enforcement litigation against farmers that don't wish to take advantage of its patented technology.

JUDGE BRYSON: But, see, there is a vagueness about that. Does that mean if the guy says: "I don't care which kind of seed it is, I'm just going to keep replanting it. I know that some of this is transgenic seed, but so what?" Does that satisfy the intent requirement?

MR. WAXMAN: The intent requirement of what?

JUDGE BRYSON: The representation that you have made. Would Monsanto sue under those circumstances?

MR. WAXMAN: Monsanto has said in this case, and we are very far afield from this case, that based on Mr. Ravicher's written representations it has no intention to and will not sue these plaintiffs based on their representation. Now…

JUDGE DYK: the person knows that the seed is covered by the patent. He knows that his crop has become contaminated. He says: "Look, there is nothing I can do about it. I'm not going to go to the expense of separating out the patented seed from the other seed. I'm just going to keep planting. I never bought any of this stuff and I don't care whether it is transgenic seed or regular seed. I'm just going to keep doing it. Is that a situation in which Monsanto would sue or not?

MR. WAXMAN: That is exactly what Percy Schmeiser said and when Monsanto sued it was revealed that the very next year 98% of his thousand acres had RoundUp Ready seed. That is why I cannot give your honor a covenant that any time a farmer says: "Well I have a ton of it but I'm not making any use of it and I don't want it." Monsanto would foreswear ever bringing a suit. But this is a real lawsuit. This is a real

case. These people have said: "We don't have any of this, we don't want it, and we don't like your technology." Monsanto has said, and the district court has found as fact, that Monsanto has never brought a lawsuit in circumstances remotely like this. And Monsanto has gone further to say: "If your representations are true, we have no intention of suing." Why would a company whose sole customer base is farmers want to make a practice of trying to sue whatever it is, 95% to 98% of the farmers. And how could it if Monsanto doesn't know that whatever it is – 20%, 30%, 15%, 60% — of the field is RoundUp Ready, how could the farmer ever have a real, substantial, objective concern about imminent patent infringement litigation? It just doesn't make sense! We don't have an obligation to give a covenant absent a showing of a controversy between two parties.

JUDGE BRYSON: You have explained in the context of the Schmeiser case that Monsanto reached a conclusion that the Schmeisers were not candid about their intent, in effect, based on the percentages in the field and so forth. What is the question, under Monsanto's policy, what is the question exactly that Monsanto would ask in a situation such as Judge Dyk's hypothetical in which there is a substantial percentage of the transgenic gene but nonetheless the farmer is saying: "I have no interest in or desire to utilize this technology. It just happens to be in my field." What is the exact question that Monsanto would ask in deciding whether this is a Schmeiser-type farmer versus a farmer that they are not interested in pursuing?

MR. WAXMAN: In the real world, Judge Bryson, what we are talking about here is RoundUp Ready technology. That is technology that makes these plants impervious to the effects of the herbicide RoundUp. The cases that Monsanto brings are cases in which it has come to learn that the farmer is not purchasing any RoundUp Ready seed but is spraying

his fields with RoundUp on top and the plants are surviving. This is pretty straightforward. In the RoundUp Ready case, if the farmer were not spraying glyphosate over the top of his fields, by definition he wouldn't be taking advantage of Monsanto's technology. Monsanto wouldn't even know that there was "contamination", if there was any contamination. This is an imagined, to the extent there really is a fear by any of the plaintiffs, and as the district judge found as fact, there is no objective basis for concern by any of these people that Monsanto is going to sue them in the absence of, at a minimum, as she said – you know, I've read the federal circuit cases that say that at a minimum the patentee has to take some directed action against the declaratory judgment plaintiff, and even if that weren't the case, the plaintiff, in order to establish an Article 3 case for controversy, has to come up with real facts showing that there is a real and imminent fear of threatened patent infringement…

JUDGE MOORE: Has Monsanto ever sued an organic farmer of the type of the plaintiffs in this case?

MR. WAXMAN: No. Of course not. Now there are conventional farmers in this case as well. But there is no evidence whatsoever that Monsanto has ever sued a conventional farmer that wasn't taking advantage, deliberately taking advantage of this technology.

JUDGE DYK: So would it be fair to say in my hypothetical that Monsanto would not sue unless the farmer is using RoundUp on his crops?

MR. WAXMAN: I don't know whether it would be fair to say because I'm not at Monsanto, I'm not investigating all of these allegations. I can

tell you, as I represented below, and as the decided cases with publically filed complaints in all 144 of these cases reveal, that these were, in Monsanto's views, and to the extent that these cases have gone to judgment all of the courts have agreed, cases of deliberate use of Monsanto's patented technology without paying a license fee.

JUDGE MOORE: You focus so heavily on "deliberate," do you agree then that there really is no obligation on the part of the organic farm growers and the conventional farmers who are not deliberately using it to affirmatively test to ensure that they don't have a high concentration of transgenic seed? Because if they are not deliberately using it then they shouldn't be burdened with the expense of this testing, right?

MR. WAXMAN: If you look at the two affidavits that talk about testing, were instances in which you have, in the Fedco case it was a seed dealer that sells only, doesn't farm, it sells only organic and conventional seed. It warrants that the seed that it is selling farmers is not transgenic and it tests in order to safeguard its business model. It is not testing because it is afraid that… It would be happy never to test, it just doesn't want to be sued by Monsanto. And likewise, the farmer affiant who said that he tested says that he has a fundamental objection to the use of transgenic material. There is no allegation in there, nor would one be objectively justifiable, that the only reason he is testing is so that Monsanto won't immediately threaten enforcement action against him.

In *Medimmune* the Supreme Court made clear that the test here, whether it is a question of public enforcement or private patent enforcement, is whether there is threatened enforcement activity –- those are the exact words of the Supreme Court – in saying that there isn't a difference, the standing test is indifferent between threatened public enforcement activity and threatened private enforcement activity. It is

their burden to show that there is threatened enforcement activity against them based on the facts of what they do and they haven't shown a threat, they haven't shown enforcement, and they haven't shown any activity with respect to them or with respect to individuals or farms that are similarly situated. And that is dispositive of the Article 3 question in this case. I see that my extra time has almost expired. So thank you.

MR. RAVICHER: Thank you, your honors. What I hear Mr. Waxman arguing is that we should go back to the reasonable apprehension of suit test. That if you are not under a direct threat of being sued today you have no standing. We know that is not correct. This court's cases – *SanDisk, Sony, ABB* – all say there needs to be no direct threat. Even *Arris* says there needs to be no direct contact. Even going back to the days of the reasonable apprehension of suit test in Arrowhead there doesn't need to be any direct contact.

JUDGE MOORE: But his argument is that no similarly situated person has ever been sued. So I don't think that he is arguing 'no contact'. I think that he is arguing 'no basis'.

MR. RAVICHER: Whether or not you have to be sued or threatened in order to have standing, I would say it doesn't make a distinction. Whether you have been threatened or sued can have the same effect. Also, I would say if the court is so inclined to do here what it did in *Prasco* which is take our amended complaint, which was filed under Rule 15(a)(1), and transfer it into a supplemental complaint under 15(b), you can then add in all of the letters that we wrote back and forth. So his statement that they never heard of us before is no longer applicable once you take into account our amended complaint. If you are not willing to do that, then depending on how you…

JUDGE BRYSON: I'm sorry. Flesh that out a little bit more for me, because I'm not sure I understood it – what you are saying about the amended complaint.

MR. RAVICHER: Absolutely, your honor. So we filed the amended complaint within a certain number of days of the serving, which we are allowed to do, but if you were to read the precedent as I do, which says you can't rely on those facts…

JUDGE BRYSON: I understand.

MR. RAVICHER: But under *Prasco* this court, where the complaint had been filed as an amended complaint…

JUDGE BRYSON: I understood that part. What I am unclear about how the additional material, with specificity, how does the additional material change this case?

MR. RAVICHER: So what we add in the, if you were to call it a supplemental complaint, is the refusal to give a covenant not to sue, which this court has said, in *Prasco* as well, is informing so that can help. Have I answered your questions?

JUDGE BRYSON: Well, is that all that is in the supplemental materials?

MR. RAVICHER: Well, there is also the statement, the vague statement, they made on their website as well, after we filed this suit.

I would just like to also follow up on the footnote that this court had about the difference perhaps between the invalidity and unenforceability DJ and a non-infringement DJ The intellectual property law professors' amici brief I think teased that issue up quite well. There might be a difference for causation between a count for a DJ invalidity or a count for DJ unenforceability versus a DJ non-infringement, where more has to have materialized, there has to be more information. In that case they were only seeking a DJ of non-infringement and this court said that because the patent holder wasn't even aware of the DJ plaintiff's product there couldn't have been a real controversy yet, and footnoted…

JUDGE MOORE: How many plaintiffs are in your suit?

MR. RAVICHER: How many plaintiffs? Well, how many appellants or how many plaintiffs? Appellants we have I believe 74 specific appellants, but several of them, about 3 dozen, are agricultural organizations with several thousands of members that they are representing in the organizational standing capacity.

JUDGE MOORE: So when Mr. Waxman said 300,000 that is people who are asking for the DJ action to move forward.

MR. RAVICHER: Right. And one thing I heard very interesting that you tease out – and let me just say your hypothetical is not hypothetical. It is real. We have clients not involved in this case who have been contaminated to an extent that we believe is beyond trace.

JUDGE BRYSON: Since you make that representation, what is the highest number you have in terms of percentage?

MR. RAVICHER: I would prefer not to reveal any attorney-client privilege but I can say that it is beyond trace amounts, significantly.

JUDGE BRYSON: Well, what do you call trace? You yourself said trace is indefinable, or in the eye of the beholder. So what are you calling trace, for present purposes?

MR. RAVICHER: Well the best basis for trace amounts would be the NOP standards – the National Organic Program standards – which I believe set the level and 0.9%. So that is what a bunch of people who care about organic standards, and you can still stamp organic on your product, say you can have contamination up to that amount. So if we are going to ask other experts in the organic world what the trace amount is not, I would say that is probably our best source.

JUDGE BRYSON: So you are saying that you have cases of your clients who are contaminated to an extent greater than 1%?

MR. RAVICHER: Not in this case, no. But yes, we do have clients. Right. And that is because…

JUDGE DYK: They are not here.

MR. RAVICHER: Right, My only point in saying that was not to influence your decision in this case. My only point was it is not a hypothetical. It's reality for some people.

If there are no further questions, the last point I would like to say is my

clients do really hope the court does not underestimate how much they appreciate the time you have taken in consideration.

JUDGE DYK: Thank you. The case is submitted and we thank both counsels