

In the
Supreme Court of the United States

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ORGANIC SEED GROWERS AND
TRADE ASSOCIATION, *ET AL.*,
Petitioners,

v.

MONSANTO COMPANY AND
MONSANTO TECHNOLOGY LLC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Monsanto makes two principal arguments in opposition. First, it argues that regardless of whether contamination of Petitioners' property would be imminent without Petitioners' precautionary measures, accusations of infringement are not reasonably likely. Opp. 23. Second, it argues that Petitioners' injuries, the coerced restrictions on use of their own property, are not fairly traceable to the threat of infringement allegations and thus are not redressable by the requested relief. Opp. 24. Both of these arguments are unfounded.

I. THE THREAT OF INFRINGEMENT ALLEGATIONS IS SUFFICIENTLY REAL AND IMMEDIATE

Monsanto feigns innocently that there is no litigation threat sufficient to warrant declaratory judgment standing in this case. But the combination of the patented products' infectious nature, Monsanto's exceeding vehemence in asserting its patents against similarly situated parties, and Monsanto's behavior throughout this case confirm that the threat is indeed real. That is why the court below acknowledged the reality of the threat in its opinion.

If the Federal Circuit had found that contamination was not imminent or that, regardless of contamination, there was insufficient evidence that Monsanto would sue the Petitioners when they were contaminated, it could have rested its affirmance on those findings. It did no such thing. Instead, the court of appeals acknowledged the district court's finding that some contamination was

“inevitable” and this Court's recognition of “gene flow” from modified crops in *Geertson*. App. 15a-16a (citing App. 33a); *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010). Circuit Judge Moore also remarked at oral argument that, “Monsanto is incredibly litigious with regard to these patents.” See C.A. Oral Arg. Recording, 13:50-13:53, available at <http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2012-1298.mp3>. And the court noted in its opinion the 700 non-litigated settlements that Monsanto pursued in addition to the 144 infringement lawsuits it filed between 1997 and 2010. App. 6a. The court further found, “There is [] a substantial risk that at least some of the appellants could be liable for infringement if they harvested and replanted or sold contaminating seed.” App. 13a.

Monsanto scoffs at the idea that Petitioners dared to seek a legally binding covenant not to sue them for infringement, which is what the Federal Circuit effectively granted. Monsanto claims its refusal was reasonable because the covenant Petitioners requested was too broad. Opp. 17, n.4. Of course Monsanto could have offered a covenant that applied only to non-users of glyphosate. But lest there be doubt that Monsanto did not do so simply because it did not consider that option, Monsanto clarified at oral argument, and the court below noted, that Monsanto's definition of “inadvertent infringer” in its anonymous website “policy” statement excludes those who knowingly farm modified seeds after unintended contamination even without taking advantage of the seeds' glyphosate resistance. App. 18a-19a. Monsanto repeats to this Court in its opposition that it has never sued a party that it believed did not wish to make use of

glyphosate tolerance (Opp. 18), but Monsanto pointedly has not promised that it never will. And Monsanto's claims of limitations on the parties against whom it has brought legal action, even if true, say nothing about the hundreds of other parties from whom it has extracted settlements. Thus Monsanto's refusal to grant any covenant whatsoever-- even one with strict limitations to ensure that it only covers genuine non-GM farmers and seed distributors-- evidently resulted from its desire to maintain the option of asserting its patents under any and all potential future circumstances.¹

It is because the court of appeals found the likelihood of contamination and resulting infringement accusations sufficiently threatening that it issued a uniquely qualified opinion. The court of appeals premised its opinion of no standing explicitly on its own *sua sponte* declaration that Monsanto was legally bound not to sue Petitioners for contamination of up to one percent. "If we rely on Monsanto's representations to defeat the appellants' declaratory judgment claims (as we do), those representations are binding as a matter of judicial estoppel." App. 19a. Had the court of appeals found no threat of infringement accusations, it would not have needed to make Monsanto's non-legal "commitment" binding.

¹Monsanto's suggestion that the amount of damages it could collect from contaminated Petitioners wouldn't warrant the cost of litigation is as hollow as its rationale for not granting a covenant; it has been paying top dollar for the former Solicitor General and his colleagues at Wilmer Hale to litigate this case since early 2011 in favor of granting a covenant at a relatively miniscule expense.

The Federal Circuit did not find, as Monsanto claims, “no justiciable case or controversy” between the parties. Opp. 14. Instead, the Federal Circuit mooted the existing justiciable case by binding Monsanto to a limited interpretation of its previously non-binding statements. App. 19a. Thus the issue being appealed is not whether the threat of infringement accusations exists. Until the Federal Circuit ruled, that threat existed even for contamination of less than one percent. The question that remains is whether Petitioners may sue given the reality that they will suffer contamination of over one percent.

II. PETITIONERS' INJURIES ARE FAIRLY TRACEABLE TO THE THREAT OF INFRINGEMENT ALLEGATIONS

Monsanto argues that the threat of infringement accusations is not the cause of Petitioners' injuries-- restricted use of their land and property-- and that the requested declarations of patent invalidity or unenforceability would thus not redress their grievances. Opp. 23-24. Monsanto's rationale is that, because Petitioners seek to avoid use of transgenic seeds for additional reasons independent of the threat of being found infringers, the threat of infringement no longer applies as a cause of their injuries in fact for Article III purposes.

The cases Monsanto cites to support its proposition-- *MedImmune*, *Clapper* and *Already* (Opp. 15)-- merely support the proposition that self-avoidance of illegal action satisfies the Article III injury requirement when it is coerced by threatened enforcement action. *MedImmune v. Genentech, Inc.*, 549 U.S. 118 (2007); *Clapper v. Amnesty Int'l USA*,

133 S. Ct. 1138 (2013); *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721 (2013). The Court's precedent does not say that the injury requirement is unsatisfied if self-avoidance results from both threatened enforcement action and something else. None of the cited cases even involved plaintiffs whose alleged injuries had multiple independent causes.

Monsanto's argument that there can never be standing if a plaintiff may have other reasons for avoiding behavior that subjects it to legal liability contradicts the purpose of the Declaratory Judgment. For example, the Federal Circuit has found declaratory judgment standing in situations where the injury caused by the threat of one patent was sufficient to confer standing even though there were other causes of that injury.

In patent litigation between brand name pharmaceutical companies and potential generic competitors, where multiple patents (listed in what is called the FDA's Orange Book) potentially barred a generic's entry into the market, the Federal Circuit has repeatedly held that as long as there remained the possibility of otherwise addressing the patents not in suit, a declaratory judgment plaintiff had standing to challenge the subset of Orange Book patents that it had included in the suit. The Federal Circuit summarily dismissed arguments made by a pharmaceutical patentee to the contrary:

Under Sunovion's logic, if the Orange Book patents were divided between two declaratory judgment actions, then each case would preclude a finding of jurisdiction in the other. But the only reason there are two

cases here is that Sunovion declined to sue Dey on all the Orange Book patents, and there is no reason to deny jurisdiction over the second action until the initial litigation has been resolved. . . . [S]imply eliminating one barrier is sufficient for declaratory jurisdiction, so long as litigation is also pending that could eliminate the other barriers.

Dey Pharma, LP v. Sunovion Pharms. Inc., 677 F.3d 1158, 1164 (Fed. Cir. 2012) (distinguishing from *Janssen Pharmaceutic, N.V. v. Apotex, Inc.*, 540 F.3d 1353 (Fed. Cir. 2008), in which litigation on a separate patent was no longer pending because the generic company had stipulated to validity, infringement, and enforceability of a market entry-barring patent not in suit); *see also Caraco Pharm. Labs., Ltd. v. Forest Labs., Inc.*, 527 F.3d 1278, 1294 (Fed. Cir. 2008) (finding redressability under circumstances similar to *Sunovion* and stating, “If Caraco obtains a favorable judgment that the drug described in its [abbreviated new drug application for approval of a generic version of the patentee's drug] does not infringe Forest's '941 patent, then it will only need a judgment of invalidity of noninfringement on Forest's '712 patent in order to [] obtain FDA approval as swiftly as possible.”)

Like the declaratory judgment plaintiffs in the above cases, Petitioners here are indeed injured by multiple independent causes. In order to reclaim the unburdened use of their property that they seek, they will have to not only invalidate Monsanto's patents to avoid the risk of being

accused infringers; they will also have to address the source of contamination (also ultimately Monsanto) in a different way to stop the contamination. But until the patents are no longer a threat, calling attention to any contamination is equivalent to making oneself a target for patent infringement. Thus like Dey and Caraco, Petitioners face multiple barriers to redressing their injuries, and like those plaintiffs, Petitioners must be allowed to eliminate them in turn. The fact that Monsanto's infectious invention has harmed Petitioners in multiple ways is no reason not to let them address the most economically crippling consequence of contamination in this suit.

Indeed, one of the principal reasons Petitioners have brought this suit is to enable themselves to bring actions for trespass or nuisance when they are contaminated by Monsanto's GM seed, something no one disputes will happen. Petitioners today would hesitate to bring such actions because doing so would require that they admit possession of Monsanto's GM seed, an admission that would immediately subject them to being counter sued for patent infringement.

CONCLUSION

For all these reasons, Petitioners respectfully ask that the petition be granted.

Respectfully submitted,

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