

In The Matter Of:
*ORGANIC SEED GROWERS and TRADE
ASSOCIATION, v.
MONSANT COMPANY,*

January 31, 2012

*SOUTHERN DISTRICT REPORTERS
500 PEARL STREET
NEW YORK, NY 10007
212 805-0330*

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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
2 -----x

3 ORGANIC SEED GROWERS and TRADE
ASSOCIATION,
4
5 Plaintiffs,
6
7 v. 11 CV 2163 (NRB)
8 MONSANT COMPANY,
9
10 Defendant.
11 -----x

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

11 Before:
12 HON. NAOMI REICE BUCHWALD,
13 District Judge
14 APPEARANCES

15 PUBLIC PATENT FOUNDATION
Attorneys for Plaintiffs
16 BY: DANIEL B. RAVICHER
SABRINA HASSAN
17
18 WILMER, CUTLER, PICKERING, HALE & DORR, LLP
Attorneys for Defendant
19 BY: SETH P. WAXMAN
TODD C. ZUBLER
20
21
22
23
24
25

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1 MR. RAVICHER: Thank you, your Honor. Plaintiffs have
2 standing in this matter because they are foregoing full use of
3 their property and incurring significant costs to avoid being
4 accused of patent infringement by the defendants who have
5 undertaken the most systematic and sustained campaign of patent
6 enforcement in history. And because --
7 THE COURT: Is that an answer to the question that I
8 asked, or the opportunity I gave you, or is that what you were
9 going to start to say regardless?
10 MR. RAVICHER: Your Honor, the cases I would use to
11 respond to the reply brief come from outside the patent DJ
12 context, and I think these are appropriate because the
13 MedImmune case relies on criminal cases, cases where plaintiffs
14 brought pre-enforcement challenges to statutes when their
15 standing was questioned. And then later in Holder v.
16 Humanitarian Law Project, a decision from just a year and a
17 half ago, the Supreme Court in analyzing the standing of
18 plaintiffs to challenge the pre-enforcement criminal statute,
19 and that case which involves supporting named terrorist
20 organizations cited MedImmune to support the standing of those
21 plaintiffs.
22 Also, in MedImmune, Aetna itself which MedImmune
23 cites, involved a case where the insurance company sued their
24 insured before the insured had given any indication that they
25 were going to bring a suit against the insurance company.

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1 (In open court)
2 THE DEPUTY CLERK: Organic Seed Growers and Trade
3 Association v. Monsanto Company, 11 CV 2163.
4 Are plaintiffs present and ready to proceed?
5 MR. RAVICHER: Yes, your Honor.
6 THE COURT: State your name for the record, please.
7 MR. RAVICHER: Daniel Ravicher for the plaintiffs.
8 With me, I have Ms. Sabrina Hassan.
9 THE DEPUTY CLERK: Are defendants present and ready to
10 proceed?
11 MR. WAXMAN: Yes, your Honor. Seth Waxman and Todd
12 Zubler for the defendant.
13 THE COURT: It should come as no surprise to you, we
14 have read most of the papers, and, frankly, from my point of
15 view, the issues here are very legal in nature and involve
16 reading cases, something which we can do without assistance.
17 So I am not entirely sure how valuable oral argument
18 is in this context, but you asked for it, so I always grant it
19 when it's asked for. I have a few questions, but I also
20 thought that we might begin by giving the plaintiffs, in a
21 sense, a chance for surreply since the defendants had the last
22 word on paper.
23 So if there was something that the plaintiffs wanted
24 to respond to that was in the defendant's reply brief, this
25 would be the opportunity to do so.

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1 So now that we have seen that the Supreme Court thinks
2 criminal challenge statutes are relevant to the standing in
3 declaratory judgment patent cases, I would also just as a few
4 sample cases refer the Court to Doe v. Bolton, which was a
5 declaratory judgment challenge to an abortion statute where
6 there was absolutely no threat whatsoever against the doctors
7 there, and yet the Supreme Court found that there was standing
8 nonetheless.
9 Also in American Booksellers, regarding a First
10 Amendment challenge, the Supreme Court upheld the standing of
11 plaintiffs to bring a challenge to a pre-enforcement criminal
12 statute.
13 The last case I would refer the Court to is a Federal
14 Circuit case, although it doesn't involve a DJ for patent
15 invalidity or non-infringement, which is the Biotechnology
16 Industry Organization and the Pharmaceutical Research
17 Manufacturers Association v. the District of Columbia. This
18 case involved the District of Columbia statute which prohibited
19 excessive pricing.
20 Without any evidence whatsoever that the District of
21 Columbia what was going to enforce the statute against either
22 of those organizations or any of their members, the Federal
23 Circuit upheld standing of those organizations to challenge the
24 statute, and it said, "Because the presence alone of the
25 statute caused the plaintiffs to incur costs to avoid

<p>121vQorgC Page 5</p> <p>1 violating."</p> <p>2 Now, in the reply brief they don't respond whatsoever</p> <p>3 to the declarations we submitted in our opposition brief</p> <p>4 including a declaration by Chuck Noble, who has to incur</p> <p>5 significant costs to test the alfalfa seed he acquires to try</p> <p>6 to avoid contamination, which would then lead him to being</p> <p>7 subject to patent infringement cost.</p> <p>8 It doesn't deal with the injury caused to Bryce</p> <p>9 Stephens who can no longer grow corn or soy bean on his</p> <p>10 property because of the risk of being contaminated and</p> <p>11 threatened with a patent infringement suit.</p> <p>12 I thought their reply was brief was pretty inadequate</p> <p>13 in responding to the facts as later set forth in our</p> <p>14 declarations.</p> <p>15 The only last thing I will say, your Honor, because I</p> <p>16 want to keep it brief, and I appreciate your granting our</p> <p>17 opportunity for oral argument, is the first paragraph of their</p> <p>18 reply brief I think is quite misleading. What they have done</p> <p>19 is surgically taken two different parts of AMP and somehow</p> <p>20 stitched them together to give the impression that it's one</p> <p>21 quote.</p> <p>22 AMP has two distinct sections on this issue. It has a</p> <p>23 section where it describes the law, and it says, "the law of</p> <p>24 standing requires some affirmative acts related to enforcement</p> <p>25 of the patents."</p>	<p>121vQorgC Page 7</p> <p>1 harassed. They are the party who is harassing our clients</p> <p>2 through their campaign of patent enforcement.</p> <p>3 The last thing, your Honor, thank you again, is in</p> <p>4 MedImmune at 549 U.S. 129, it says: "We," the Supreme Court,</p> <p>5 "do not require plaintiffs bet the farm," and yet that's</p> <p>6 exactly what our plaintiffs have to do here. Thank you.</p> <p>7 THE COURT: Mr. Waxman, would you like to respond to</p> <p>8 what he just said?</p> <p>9 MR. WAXMAN: Sure. I guess I will take Mr. Ravicher's</p> <p>10 points in reverse chronological order. There is no doubt</p> <p>11 whatsoever in anyone's mind, and particularly Mr. Ravicher's</p> <p>12 mind, that under the AMP v. Myriad case there is no Article III</p> <p>13 standing in this case because the court in that case</p> <p>14 specifically held that for Article III standing for patent</p> <p>15 infringement there must be "affirmative acts by the patentee</p> <p>16 directed at specific plaintiffs."</p> <p>17 Now, Mr. Ravicher's papers before your Honor suggest</p> <p>18 that that somehow is not the rule of the Federal Circuit, but</p> <p>19 Mr. Ravicher has a pending petition in the Supreme Court on</p> <p>20 behalf of AMP in which he has asked the Supreme Court to take</p> <p>21 cert. in the case specifically because, as he has represented,</p> <p>22 the Federal Circuit has a bright line rule requiring just that.</p> <p>23 Now, that rule, for reasons that we've stated in our</p> <p>24 papers, and I don't want to burden the Court with an oral</p> <p>25 argument that might make me feel good but wouldn't be of any</p>
<p>121vQorgC Page 6</p> <p>1 Then later in the opinion, several pages later, when</p> <p>2 it's discussing the facts of that specific case where there was</p> <p>3 not a systematic campaign of enforcement, there had not been</p> <p>4 hundreds of lawsuits, there had not been hundreds of thousands</p> <p>5 of licenses, the Court said, under the facts of that case</p> <p>6 because there had been directed enforcement at Dr. Oster in</p> <p>7 AMP, "he clearly" -- that's the Federal Circuit language -- "he</p> <p>8 clearly had standing."</p> <p>9 So when they're talking about the law itself, there is</p> <p>10 no requirement for directed acts at the plaintiff. When</p> <p>11 they're talking about the specific facts of that case, they say</p> <p>12 here there is clearly standing because there were directed</p> <p>13 acts. I concede there is no case out there that is on all</p> <p>14 fours with this one where there has not been at least some</p> <p>15 communication.</p> <p>16 But even under the previous reasonable apprehension of</p> <p>17 suit test of Arrowhead -- and this is the more stringent</p> <p>18 test -- the Federal Circuit said that "any communications</p> <p>19 whatsoever are not required." I know you've read it a million</p> <p>20 times, but I just feel compelled to say it: The MedImmune test</p> <p>21 is to look at all the circumstances and keep in mind the</p> <p>22 purpose of Declaratory Judgment Act, which is the other thing</p> <p>23 missing from their reply brief. They don't say how denying</p> <p>24 plaintiffs their day in court furthers the purposes of</p> <p>25 Declaratory Judgment Act. It doesn't prevent them from being</p>	<p>121vQorgC Page 8</p> <p>1 use to the Court, that rule articulated in AMP v. Myriad is</p> <p>2 entirely consistent with a long line of Federal Circuit</p> <p>3 jurisprudence both before and after MedImmune and is also</p> <p>4 consistent with MedImmune.</p> <p>5 The cases that Mr. Ravicher now would like the Court</p> <p>6 to address; that is, cases involving challenges by regulated</p> <p>7 parties against the sovereign challenging the constitutionality</p> <p>8 of or legality of a rule or requirement by the sovereign that</p> <p>9 imposes criminal and other penalties are entirely</p> <p>10 distinguishable between private actions from one private party</p> <p>11 to another. The Court in MedImmune did say, we ought to</p> <p>12 acknowledge that we allow pre-enforcement challenges to the</p> <p>13 validity of a legislative enactment by somebody who doesn't --</p> <p>14 you are not required to go to jail first, but the notion that</p> <p>15 there is no Article III substantial, immediate and real</p> <p>16 controversy applies with force in litigation, and MedImmune</p> <p>17 didn't do anything to change that.</p> <p>18 Just look at the reality here. Monsanto has no idea,</p> <p>19 other than the allegations, had never heard of any of these</p> <p>20 plaintiffs before the complaint was filed. All they know is</p> <p>21 what's in the complaint. To the extent that they have</p> <p>22 responded here, the only action they've taken with respect to</p> <p>23 these plaintiffs is to assure them that it has no interest in</p> <p>24 suing them if their representations are true, and in the</p> <p>25 context of the civil litigation it's difficult to imagine a</p>

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1 less real, less substantial, less immediate case or
2 controversy.
3 Now, Mr. Ravicher says we have nothing to lose by not
4 being brought into court to defend our rights. The law has
5 never been that a patent holder who has not specifically
6 directed actions or led a defendant to believe that the
7 defendant is in some jeopardy with respect to patent
8 infringement has the ability to bring the patent holder into
9 court and force the patent holder to defend its patent rights,
10 among many other things.
11 If this case were to proceed, typically a declaratory
12 judgment action by an alleged infringer, or somebody who
13 believes that if the patent is valid he may be in legal
14 jeopardy, precipitates a counterclaim by the patent holder that
15 there is infringement. That's how these cases work, and that
16 represents the joinder of a legal issue. We would have no
17 basis whatsoever to bring such an action or make such a
18 counterclaim against any of these defendants because they have
19 represented to us that they are not infringing, they don't want
20 to use our products, and in fact they have a genuine
21 substantial public policy dispute with the United States
22 Government over the validity of transgenic agriculture --
23 whether it should be permitted, whether it should be regulated,
24 whether it should be encouraged.
25 They don't have a dispute with Monsanto over patent

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1 rights. We haven't sought or in any way led them to believe
2 that we would enforce our patent rights against them. The
3 company has never brought legal action against an
4 inadvertent -- against somebody who didn't want to make use of
5 the traits that are manifested in our transgenic products, and,
6 in fact, to this day the plaintiffs cannot articulate any
7 reason why Monsanto would want to proceed in an infringement
8 action against a farmer who has no desire to use Monsanto's
9 technology. I mean, it makes no legal sense. It makes no
10 economic sense.
11 In addition, a major difference between a challenge to
12 a public enactment and a challenge to the validity of a private
13 patent relates to the law of collateral estoppel. Again, this
14 flows from an immediate and direct controversy. If a private
15 party sues the sovereign and says this legislation is
16 unconstitutional or your action against us is inappropriate,
17 the Court makes a ruling, and that ruling binds the effective
18 world; that is, it binds the private party and it binds the
19 sovereign, the only one who can in fact enforce all these
20 rights.
21 In private civil litigation, including patent
22 litigation, if Monsanto can be sued by each and every one of
23 the plaintiffs in this case and many, many other people in the
24 country who would like to challenge Monsanto's patents, it has
25 to win every single time. Because of non-mutual offensive

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1 collateral estoppel, it will not have any ruling in its favor,
2 even a hundred rulings in its favor would not have preclusive
3 effect with respect to the 101st plaintiff.
4 That is a significant reason why the public
5 challenging enforcement are different than challenges by one
6 private party to the legal rights of another. It's why there
7 is a requirement that the case or controversy be, as the
8 Supreme Court reiterated in MedImmune, substantial, real and
9 immediate; and because, as I said here, Monsanto has taken no
10 action whatsoever to enforce or assert that it has any
11 enforceable patent rights with respect to any of these
12 plaintiffs, and in fact has only assured them in response to
13 Mr. Ravicher's letter informing Monsanto that unless it
14 provided some assurance, their clients would then be deemed to
15 have a real and immediate case or controversy -- and this is
16 Exhibit 4 to the complaint -- I actually wrote on behalf of
17 Monsanto to Mr. Ravicher to say, "This is to address the
18 unfounded concerns articulated in your letter. Monsanto is
19 unaware of any circumstances that would give rise to any claim
20 of patent infringement or any lawsuit against your clients.
21 Taking your representation as true, any fear of suit or other
22 action is unreasonable and any decision not to grow certain
23 crops unjustified."
24 THE COURT: All right. Is the letter that you were
25 responding to part of the record?

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1 MR. WAXMAN: Yes, the letter that Mr. Ravicher wrote.
2 THE COURT: Right.
3 MR. WAXMAN: Is Exhibit 3 to the complaint.
4 THE COURT: Good.
5 MR. WAXMAN: And in salient part, it says: "If we do
6 not receive a response from Monsanto, our clients will conclude
7 that Monsanto is now fully aware of their activities, and it
8 would then be reasonable for our clients to feel they would be
9 at risk of having Monsanto assert claims of patent infringement
10 against them should they ever be contaminated by transgenic
11 seed potentially covered by Monsanto's patents."
12 Now, we had no obligation under the law to respond to
13 that letter, but because we have no interest whatsoever in
14 asserting our patent rights, I did write and explain that if
15 the representations of the complaint are true, these plaintiffs
16 have nothing to fear from Monsanto.
17 You know, your Honor, another pretty good indication
18 of what this dispute is really about is that Mr. Ravicher
19 mentioned the declarations of a couple of the plaintiffs in
20 this case. It is perfectly obvious, it is pellucid that the
21 plaintiffs in this case have an objection to and a fear of
22 incursion into their property of transgenic seed. What they
23 haven't alleged and couldn't plausibly allege is that they
24 would do anything -- that there is anything that they have done
25 or haven't done that would be changed in any way by a

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1 declaration of patent rights.
 2 These people have chosen not to grow certain crops or
 3 not chosen to grow certain crops because they are organic
 4 farmers or conventional farmers and want to produce food
 5 products that are conventional or organic. They are not doing
 6 or refusing to do anything because of a fear of patent
 7 infringement. And, therefore, in addition to the fact that
 8 there is no substantial, real and immediate controversy within
 9 the meaning of Article III directly, there is also no injury,
 10 in fact, no fair traceability and no redressability under the
 11 Court's standing doctrine.
 12 The requested relief that all of Monsanto's patents be
 13 declared invalid is not going to make it less likely that the
 14 traditional processes of cross pollination and seed drift are
 15 not going to occur, and in fact if the patents are invalidated,
 16 there will be no private restraint against any farmer in the
 17 country with or without a license using transgenic seed.
 18 THE COURT: Actually, I never thought about that.
 19 Even if the patent was invalid, it doesn't outlaw the product.
 20 MR. RAVICHER: Yes, your Honor, but even Monsanto
 21 concedes that the National Organic Program standards don't
 22 prohibit contamination. So, just because our clients happen to
 23 get contaminated doesn't mean that they lose their organic
 24 certification. So, a lot of the reason why they want to avoid
 25 contamination isn't to lose their status as an organic farmer

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1 because the standards already provide for some contamination.
 2 It's to avoid this risk of being sued for patent infringement.
 3 THE COURT: But that would, I think, be a more
 4 persuasive argument if all that you had done was seek a
 5 declaratory judgment of non-infringement, but you went a big
 6 step further and you sought to invalidate the patent, which I
 7 think would seem to speak to your, I'm sure, sincerely held
 8 beliefs of your clients, that the Monsanto product is something
 9 that's undesirable.
 10 MR. RAVICHER: Well, I actually don't think it's
 11 proper to conflate those issues because in all the cases I
 12 cited to you earlier including specifically --
 13 THE COURT: Well, you don't want to use their product,
 14 so your concern is that, as you put it, they not sue you.
 15 Therefore, you could have limited your request to a declaration
 16 that if you do not intend to infringe and any use of the
 17 Monsanto product was purely accidental, that that would be a
 18 situation of non-infringement. But you didn't limit yourself
 19 that way.
 20 MR. RAVICHER: I think the bases for the declaratory
 21 judgment we seek can impact standing. I think that's correct.
 22 I don't think the fact that we've sought invalidity somehow
 23 decreases the injury that our clients are suffering immediately
 24 today.
 25 THE COURT: I think it's revelatory of the motivations

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1 of your clients in bringing the suit.
 2 MR. RAVICHER: There is no case that I've seen that
 3 actually says motivation of the plaintiffs is a circumstance to
 4 be considered under the MedImmune totality of circumstances.
 5 In fact, in, for example, the Biopharma v. District of
 6 Columbia case, the Federal Circuit discusses the reason why
 7 they brought that challenge was because they have a policy
 8 disagreement with the District of Columbia, and the Federal
 9 Circuit says that doesn't matter. It's irrelevant. We're
 10 going to look at the actual -- whether or not there's injury
 11 here that's immediate. Are they incurring costs to avoid the
 12 statute? We have that here. Is the incurrence of that cost
 13 fairly traceable to the actions of the declaratory judgment
 14 defendant? In that case, yes. In this case, yes.
 15 And redressability, I don't understand how we can even
 16 argue about redressability, because if you guarantee our
 17 clients they cannot be sued for patent infringement, they need
 18 not incur the additional costs that they are incurring or the
 19 foregoing use of their property out of this risk of being sued
 20 because you will have negated that risk entirely.
 21 THE COURT: You argued that since you could have
 22 obtained a license from Monsanto that you have standing. My
 23 question to you is there any limiting principle to that
 24 argument?
 25 MR. RAVICHER: I wouldn't say I made that aggressive

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1 of an argument, although maybe when I wrote that --
 2 THE COURT: So. Just a minute. I don't think I made
 3 it up.
 4 MR. RAVICHER: OK, I take your word, your Honor.
 5 THE COURT: No, just give me a second.
 6 MR. RAVICHER: Yes, your Honor. I think it's on page
 7 18 of our brief your Honor, the bottom paragraph starts "in
 8 addition." I think it continues on -- I'm sorry.
 9 THE COURT: OK. Just to read part of this. "In
 10 addition, a declaratory judgment plaintiff that has a license
 11 to a patent unquestionably has per se standing because that was
 12 precisely the issue in MedImmune. Here, each plaintiff could
 13 easily walk into any one of countless Monsanto licensee
 14 distributors throughout the country and enter into a Monsanto
 15 technology stewardship agreement that is presented to a
 16 customer before they are allowed to purchase any Monsanto seed.
 17 The agreement" -- skipping a few words -- "is in large part a
 18 patent license. Thus, if any plaintiff enters into such
 19 agreement, which Monsanto does not dispute could be done by any
 20 plaintiff at any time, then that plaintiff would unquestionably
 21 have standing under MedImmune."
 22 You go on: "The fact that a patent license is being
 23 offered but not accepted does not change the analysis."
 24 Let's see "Thus" -- skipping a line-- "Monsanto's
 25 offering of a license to the general public which includes each

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1 of the plaintiffs is yet more reason to deny Monsanto's motion
2 to dismiss."
3 I didn't think I mischaracterized the argument.
4 MR. RAVICHER: What I intended to say there, your
5 Honor, is what I just said at the last sentence, it's yet more
6 reason; it's another circumstance. There are some conditions,
7 I'll concede, are sufficient for standing. None are necessary.
8 MedImmune says a valid license, even if you're continuing to
9 pay your royalties, is a sufficient condition.
10 THE COURT: Right.
11 MR. RAVICHER: Mr. Waxman wants you to conclude that
12 they are now a necessary condition of direct communications,
13 and that there is no way for the injury our clients are
14 suffering to be fairly traceable to their affirmative acts
15 enforcing a patent without direct communications. I'm
16 suggesting that doesn't comport with MedImmune, it does not
17 comport with Federal Circuit cases, and it does not comport
18 with other Supreme Court law from other areas involving Article
19 III standing.
20 May I have a few minutes to respond to a couple
21 points?
22 THE COURT: Absolutely. Your time is my time.
23 MR. RAVICHER: Thank you, your Honor.
24 The argument that counsel has made for a completely
25 different set of parties on a petition for cert. I don't think

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1 is applicable to these parties.
2 My mom might not like that I sometimes argue the law
3 should be interpreted differently, but we represent completely
4 different people there, and those arguments that those parties
5 have made in AMP on cert. petition should not be imparted to
6 these clients here. The argument that the criminal challenge
7 statute cases are distinguishable just flies in the face of
8 both MedImmune itself and the Holder v. Humanitarian Law
9 Project which I cited to you.
10 Why would Monsanto want to sue our plaintiffs? I
11 think that's a great question. It's a question I had
12 originally.
13 Hear is the concern: When you're a farmer, and you've
14 been contaminated by genetically modified seed, you can't tell
15 that. It's not like your neighbor's tree fell on your property
16 which is open and notorious. The seed comes over because their
17 seeds haven't been modified to create different plants. Their
18 corn and our client's corn looks to the eyeball exactly the
19 same. It tastes the same. It feels the same. It is exactly
20 the same in all respects. The only difference is their version
21 resists herbicide known as glyphosate.
22 You don't know you've been contaminated until one of
23 two things happens: Either you or someone else tests your
24 field with a genetic test, which is a hand-held thing, so you
25 undergo that expensive testing, like Mr. Noble does and Fedco

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1 Seeds does, or you wait until you also suffer a second
2 contamination of glyphosate drift. Oftentimes, this glyphosate
3 is sprayed on fields by an airplane that flies very low over
4 the ground. Sometimes the guy with the switch isn't very
5 precise at respecting property borders. So if you have some
6 glyphosate drift on your property, what you will see is a
7 portion of your crops that have been suppressed. So most of
8 your crop is a certain height; the rest has been suppressed.
9 It hasn't been killed because the amount of glyphosate which is
10 laying on your property wasn't sufficient to kill your organic
11 or non-transgenic seed, but it's at least enough to suppress it
12 so that it's noticeable.
13 Within that suppressed portion of your property, there
14 will be some sprouts of plants that are just as tall as the
15 rest of your property. And the only way that's possible is if
16 those sprouts came from transgenic seed that had originally
17 contaminated your property. This is one of the problems we
18 have with our commitment using the words trace amounts. It's
19 very difficult for our plaintiffs to know if they've been
20 contaminated by a trace amount. Sometimes they won't know
21 until the amount of contamination they're suffering is an
22 extreme amount because of the burden of otherwise testing their
23 property.
24 So, what we're concerned about is when the day comes
25 that we get contaminated and we want to bring a property

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1 trespass or nuisance suit, and some of these have started to
2 occur, against my neighbor for causing me financial harm by
3 contaminating my property, that customer of Monsanto that is
4 the source of that contamination is going to call them up and
5 say, "Hey, I used your seed exactly the way you told me to. I
6 did everything I was supposed to. One day a wind storm came
7 by, and it blew my seed on to my neighbor's property. Now I'm
8 being sued and held liable."
9 THE COURT: Isn't this all in the future?
10 MR. RAVICHER: Well, no, the harm is immediate. See,
11 that's where they conflate -- the temporal aspect of standing
12 is not when could they be sued. In fact, there's replete case
13 law that says even an inability to sue today does not defeat
14 standing. Those were the facts in MedImmune. They could not
15 be sued today. They could only be sued in the future if they
16 breached.
17 The immediacy requirement is the injury prong of
18 standing, which requires that the injury being suffered be
19 today. Are people not fully enjoying their property the way
20 they wish because of this risk today? And the answer there is
21 yes. Are people incurring costs to avoid violating a law such
22 as the law in the D.C. case or the patent laws? Yes.
23 So, the injury is immediate. That's why the immediacy
24 requirement is satisfied here. It doesn't have to be that they
25 actually could sue us today. These clearly not the law.

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

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

18 Just lastly, I do want to point out that not all of
 19 our plaintiffs are organic. Some are what are known as
 20 biodynamic, which I call organic squared, where they have to
 21 have an entirely self-sustained farm; not just make sure that
 22 their inputs meet certain qualifications; but then some still,
 23 a large percentage of our plaintiffs, are neither organic nor
 24 biodynamic. They simply want to farm non-transgenic.
 25 So these concerns that, well, the reason why they have

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

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

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

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

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

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

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

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

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

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

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

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

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1 won't sue our clients, but yet I think our clients are
 2 reasonable in questioning "what do you mean by that?"
 3 THE COURT: Mr. Waxman, anything you'd like to state?
 4 MR. WAXMAN: Just a few points. As your Honor has
 5 already admonished us, it's obvious the Court can read the
 6 relevant decisions of the Supreme Court and the Federal
 7 Circuit, I just want to point out that --
 8 THE COURT: By the way, the plaintiffs argue that the
 9 Federal Circuit decision subsequent to MedImmune do not
 10 actually adhere to the Supreme Court's teaching in MedImmune.
 11 I assume you would to respond to the contrary?
 12 MR. WAXMAN: Yes, I think they're absolutely
 13 consistent. I think our opening brief which was presented to
 14 the Court before the Federal Circuit decide the AMP v. Myriad
 15 case shows a long line of consistent cases both before and
 16 after MedImmune, and I want to address their representation
 17 about the significance of the licensing MedImmune in a minute.
 18 They are unable to cite a single case, and we've cited
 19 to your Honor at least a half a dozen, probably a dozen cases
 20 in which subject matter jurisdiction for patent declaratory
 21 judgment actions depended on, as the Federal Circuit said in
 22 Myriad, "affirmative acts by the patentee directed at specific
 23 plaintiffs." That was true from the Arrowhead case in 1988
 24 where there were threatening letters sent by the patent holder
 25 to I think four of the manufacturer's customers who then

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1 received indemnification, and it's true -- you know, Creative
 2 Compounds, Innovative Therapies, SanDisk, they are not able to
 3 cite a single case in which the Court found an Article III case
 4 or controversy absent a specific act. It doesn't have to be a
 5 lawsuit or a threat of a lawsuit, but some specific conduct by
 6 the patent holder directed to the declaratory judgment
 7 plaintiff asserting its rights under its patent. There is no
 8 case to the contrary. So, there is nothing inconsistent before
 9 or after MedImmune.
 10 In any event, their contention that AMP and the other
 11 cases somehow are inconsistent with MedImmune, the basis on
 12 which certiorari is requested in the Myriad case, is -- I don't
 13 know how to put this delicately -- a very interesting question
 14 but irrelevant to everyone in this courtroom, which is this
 15 appeal will go to the Federal Circuit. The Federal Circuit has
 16 made very clear in an a fortiori case, a case which there were
 17 clinicians all over the country who had been administering the
 18 bracket one and bracket two test that was covered by Myriad's
 19 patent who sought to challenge the validity of that patent on
 20 the grounds that it was non-patentable subject matter.
 21 The Federal Circuit said there is one doctor, it's the
 22 doctor to whom Myriad had written a letter and who was at the
 23 same time fully prepared and interested in re-engaging in that
 24 clinical testing who has standing. With respect to all of the
 25 other similarly situated research institutions and physicians

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1 in the country who, unlike the plaintiffs in this case, did
 2 want to practice the technology, the gravamen was that they
 3 couldn't. As to all the rest of them, there is no standing.
 4 The Federal Circuit -- I don't know how it could be any
 5 clearer -- they said, "The district court" -- I'm quoting from
 6 I think the penultimate paragraph of the standing decision --
 7 "The district court failed to limit its jurisdictional holding
 8 to affirmative acts by the patentee directed at specific
 9 plaintiffs" -- citing the Federal Circuit's decision in SanDisk
 10 --"Erroneously holding that all plaintiffs had standing based
 11 on the widespread understanding that one may engage in bracket
 12 testing at the risk of being sued for infringement liability by
 13 Myriad. We disagree and, thus, reverse the district court's
 14 holding that the various plaintiffs have standing. Simply
 15 disagreeing with the existence of a patent or even suffering an
 16 attenuated non-proximate effect from the existence of a patent
 17 does not meet the Supreme Court's requirement for an adverse
 18 legal controversy of sufficient immediacy and reality to
 19 warrant issuance of a declaratory judgment."
 20 Now, with respect to a couple of discrete points that
 21 my colleague raised. The Bio case, Bio v. The District of
 22 Columbia, that, in fact, was our case in the Federal Circuit.
 23 That was a case in which the District of Columbia passed a law
 24 that said pharmaceuticals may not be sold in the District of
 25 Columbia by manufacturers -- they excluded resellers -- for any

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1 price that is greater than they are sold in any developed
 2 country of the world.
 3 The challenge was made by Bio and Pharma, the trade
 4 associations, that violated their patent rights, their right to
 5 exclude others and to set the price. There was a dispute
 6 between the regulated party and the sovereign over the
 7 constitutionality of the sovereign's law. It bears no
 8 resemblance whatsoever to a suit by a private party who wants
 9 to drag an unwilling defendant into court, a defendant who has
 10 never even heard of them before, and there is no track record
 11 of suing conventional farmers, organic farmers, biodynamic
 12 farmers who don't want to use the patented invention.
 13 The representation that MedImmune declared that a
 14 licensee per se has standing to challenge the validity of the
 15 patent or non-infringement gets the Supreme Court ruling in
 16 that case exactly backwards. The Supreme Court reversed
 17 Federal Circuit law that said if you have a license, you may
 18 never sue period because you have no imminent risk of an
 19 infringement action.
 20 What the Supreme Court said is, it is not a per se
 21 requirement. They certainly didn't say that just because you
 22 have a license, you have a per se right to sue. We've
 23 addressed all of the reasons why their license argument is
 24 wrong on page 4, footnote 6 of our reply brief.
 25 The salient point is this: You still have to show an

<p>121vQorgC Page 29</p> <p>1 immediate, substantial and real controversy, an injury in fact. 2 And the situation in MedImmune wasn't just that there was a 3 license. There was a dispute, a fully aired dispute between 4 the plaintiff who had a license to practice the patented 5 technology, and the patent holder over whether the license was 6 valid. They exchanged letters over this point, and there was 7 no question in that case that the licensee had built a plant, 8 was manufacturing this pharmaceutical, fully intended to 9 continue manufacturing the pharmaceutical, and the patent 10 holder in that case had sent them a letter saying your drug is 11 covered by our patent, and you owe us royalties or you will be 12 in violation of your license agreement. 13 Those underlying facts were what established a real, 14 immediate and substantial Article III case or controversy; not 15 the fact that there was a license. All the Supreme Court did 16 was eliminate the existence of the formalism of a license as a 17 preclusion from adjudicating their rights. 18 There has been a substantial comment, both in the 19 papers and here today, about Monsanto's public commitment. 20 That is a commitment that Monsanto makes to the public as way 21 of assuring its commitment to the coexistence of conventional, 22 organic, biodynamic and transgenic agriculture. It doesn't 23 purport to establish some legal test. And there would be no 24 point in the jurisprudence to transferring every piece of 25 litigation to collateral disputes about whether the amount was</p>	<p>121vQorgC Page 31</p> <p>1 even that has occurred -- that in that instance, if I have 2 Mr. Ravicher right, they would then sue their neighbor for, I 3 think it was trespass or nuisance, for having grown the seed 4 that drifted on to their fields, and that that neighbor would 5 then contact Monsanto, and say "I was growing your product. 6 Aren't you going to help me?" And that Monsanto would then 7 say, "Yes, I will help you" by doing something we have never 8 done, which is bring a patent infringement suit against an 9 inadvertent user of our technology. 10 Just to articulate, that transitive of argument is to 11 demonstrate just how far from any real, immediate or 12 substantial controversy there is, and certainly it is not a 13 controversy about patent rights. Every single thing that the 14 farmers in this case allege that they are doing or have to do, 15 and all of their fears depend on, turn on their concern about 16 transgenic agriculture. They don't want transgenic products in 17 their field. 18 It has nothing whatsoever to do with whether or not 19 they will be infringing because there is no -- if Monsanto gave 20 Mr. Ravicher the commitment that he wants, which is, look, we 21 don't know any of these plaintiffs. We don't know what they're 22 actually doing, and we don't know what they'll do next year, 23 and we certainly don't know who is going to fill out a form and 24 become a member of one of these 30 organizations. Even if we 25 said we'll never sue you, they are still going to do everything</p>
<p>121vQorgC Page 30</p> <p>1 or wasn't trace or whether it was or wasn't inadvertent. 2 The public commitment in this case is not what is 3 necessary to defeat Article III jurisdiction, nor are my 4 exchange of letters with Mr. Ravicher, although they 5 demonstrate just how far from any line this case is. They have 6 the burden of coming in and showing that they have a real, 7 substantial and immediate patent dispute with us because we 8 have taken steps to assert our patent rights against them, and 9 the opposite is true in this case. 10 Mr. Ravicher's discussion about immediacy that there 11 is standing in this case because maybe a farmer -- let me just 12 say this: Cross pollination and seed drift are not phenomena 13 of transgenic agriculture. They are phenomena of agriculture 14 in general as the National Science Foundation and the 15 Department of Agriculture materials that we attached to our 16 complaint demonstrate and as is discussed in our opening brief. 17 This has been a problem with respect to hybrid corn, popcorn 18 versus sweet corn and any number of other products where the 19 seed is either light enough to be carried by the wind or it's 20 carried by insects. It's not the transgenic nature of the 21 agriculture that makes it susceptible to seed drift or cross 22 pollination. 23 Their notion that if one of the plaintiffs discovers 24 that there has been some seed drift onto its field -- and, 25 significantly, there isn't a single plaintiff who said that</p>	<p>121vQorgC Page 32</p> <p>1 they can, including modifying whatever crops they grow to avoid 2 what they call contamination, but to have fields that are not 3 subject to cross pollination or seed drift. 4 That's what the issue in this case is. It's not about 5 patent rights or a fear of infringement litigation by a patent 6 holder who has never taken infringement action with respect to 7 any inadvertent use of its products, nor would it have any 8 commercial or policy reason to sue somebody who says "I hate 9 your technology. I don't want to use it." What would the 10 infringement action be? What would it be getting Monsanto? In 11 any event, I think those are the issues. 12 THE COURT: I'll give you the last word since you have 13 the biggest hurdle. 14 MR. RAVICHER: Thank you, your Honor. 15 I just want to walk through AMP quickly to tell you 16 our perspective of the case. 17 When it gets to the discussion at 653 F.3d 1342, it 18 actually sets out Roman Numeral I Declaratory Judgment 19 Jurisdiction. Then it has subpoint A. Then later on, it gets 20 to a point B. Point A is a discussion of the law. Point B is 21 an application of the law to the facts of that particular case. 22 So if you look in Section A, the discussion of the 23 law, at 653 F.3d 1343, the Federal Circuit says: "Following 24 MedImmune, this Court has held that to establish an injury in 25 fact traceable to the patentee, a declaratory judgment</p>

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1 plaintiff must allege both: (1) an affirmative act by the
 2 patentee related to the enforcement of his patent." And it
 3 cites Sands. In that recitation of the law, there is nothing
 4 about a requirement for a directed act at the DJ plaintiff.
 5 Now, in the Section B where they're applying the facts
 6 of AMP to the law --
 7 THE COURT: You're drawing a distinction between
 8 directed and affirmative?
 9 MR. RAVICHER: Yes, because it is possible to trace
 10 the intimidation effect of a patentee's assertion of its
 11 patents against others to cause you injury. That was precisely
 12 the holding in Arris from the Federal Circuit. It was
 13 precisely the statement from the Federal Circuit in Arrohead.
 14 If you look at HP v. Acceleron, it's not their subjective
 15 belief of whether they would sue our clients that's relevant.
 16 It's an objectively reasonable belief.
 17 THE COURT: It's not the subjective belief of your
 18 clients.
 19 MR. RAVICHER: No, it's not the subjective belief of
 20 the patentee. It's the objectively reasonable belief of my
 21 clients. It's no one's subjective belief. It's the
 22 objectively reasonable belief of the declaratory judgment
 23 plaintiff. So the facts that we --
 24 THE COURT: Is that objective?
 25 MR. RAVICHER: It doesn't matter if they have an

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1 intent to sue our clients or not. It doesn't matter what their
 2 specific intent is. It matters what would it be reasonable to
 3 infer their intent is from their conduct, and what facts to we
 4 have to help our plaintiffs determine what's reasonable to
 5 infer from their conduct. This is where we cite the numerous
 6 public reports of their aggressive patent assertion: The
 7 Vanity Fair article where they make false accusations against a
 8 store owner who had nothing to do with their seed, the CBS
 9 Evening News story where they made acquisitions against the
 10 Runyons, farmers who wanted nothing to do with their seed, the
 11 documentary, The Future of Food. There has been more
 12 documentation of their aggressive campaign of patent assertion
 13 even against those who don't want to do have anything to do
 14 with their seed than anybody else. That's why the
 15 apprehension, the risk that my clients feel which is causing
 16 them to incur these costs is reasonable.
 17 MR. WAXMAN: May I have one response to this last news
 18 article point? Monsanto's web site which they cite in their
 19 case will provide the Court with the judgments of the actual
 20 courts in the cases involving farmers that Monsanto sued who
 21 they now say were inadvertent, judgments of the court up and
 22 down the line saying that this was not inadvertent, number one.
 23 Number two, the notion that Monsanto's campaign, so to
 24 speak, against farmers -- which, by the way, by their count,
 25 over 15 years has amounted to 144 lawsuits brought, every

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1 single one of them against farmers who wanted, affirmatively
 2 were making use of the trade, and spraying herbicide over the
 3 tops of their crops without signing a license, without paying
 4 Monsanto the royalty for the use of its intellectual
 5 property -- the notion that that terrorizes people who have no
 6 desire to use it whatsoever is perhaps belied most
 7 significantly by Mr. Ravicher's inability to cite anything
 8 other than a movie called Food, Inc. or a CBS report to
 9 demonstrate what they can't demonstrate, which is if this were
 10 a ubiquitous threat, you would expect that there would be some
 11 plaintiff in this case who would say, "I am an inadvertent
 12 user. I have it and it's inadvertent. I have it in my fields
 13 and Monsanto has sent me a letter or Monsanto has called me and
 14 said, 'You are in patent jeopardy.'"
 15 There is not one plaintiff in this case, there is not
 16 one member of any of these organizations that has come forward
 17 to say that because it doesn't happen.
 18 Of course, subjective intent, subjective belief isn't
 19 the hallmark on either side. It's the objective reality, and
 20 the objective reality is this case is as far from an Article
 21 III case or controversy on patent rights as one can imagine.
 22 MR. RAVICHER: Just finally, your Honor, when
 23 reviewing all the circumstances, the Supreme Court has said
 24 time and time again, the important thing to keep in mind is the
 25 purpose of the Declaratory Judgment Act to alleviate the harm

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1 caused to people who are being coerced to either abandon
 2 activity that they have the right to pursue or incur the risk
 3 of being accused of patent infringement. That is precisely
 4 what is occurring in this case with our plaintiffs. Thank you.
 5 THE COURT: Thank you very much. You will have a
 6 decision as soon as we can write it. I will guarantee you by
 7 March 31.
 8 (Adjourned)
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