

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ORGANIC SEED GROWERS AND TRADE  
ASSOCIATION, et al.,

Plaintiffs,

v.

MONSANTO COMPANY and MONSANTO  
TECHNOLOGY LLC,

Defendants.

ECF CASE

No. 11-cv-2163-NRB

Jury Demanded

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO**  
**DEFENDANTS' MOTION TO DISMISS**  
**FOR LACK OF SUBJECT-MATTER JURISDICTION**

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## **INTRODUCTION**

This case is about real farmers and real seed businesses who wish to use and distribute organic and conventional seed, but who are at substantial immediate risk of being contaminated by Monsanto's transgenic seed and then sued by Monsanto for patent infringement. It is no mere policy disagreement seeking an advisory opinion on hypothetical facts. Monsanto has undertaken one of the most aggressive patent assertion campaigns in history, including asserting its patents on transgenic seed against parties who, like Plaintiffs, never wanted to use or distribute such seed. As a result, each of the Plaintiffs is under constant fear of being contaminated by Monsanto's transgenic seed and then sued by Monsanto for patent infringement. This fear is so severe for some of the Plaintiffs that they are completely forgoing growing certain crops that they easily could grow and would like to grow.

Plaintiffs brought the instant action to clarify the legal rights between themselves and Monsanto regarding Monsanto's patents. In its motion to dismiss this action, Monsanto argues that Plaintiffs have conjured a dispute to voice a political objection to transgenic seed. But as the facts show, Plaintiffs have made significant investments and sacrifices in their attempts to avoid infringing Monsanto's patents because the threat of being accused of infringement is real.

Viewing all the circumstances in this case in the light of the purpose of the Declaratory Judgment Act shows that Plaintiffs indeed have standing and that Defendants' 12(b)(1) motion lacks merit. Monsanto could easily make this case disappear by providing Plaintiffs a simple covenant not to sue. It would take no more than a single sentence on a single piece of paper and a single stroke of the pen. Monsanto's failure to do so speaks louder than any stack of papers ever could. As such, Plaintiffs respectfully request that Monsanto's motion be denied.

## BACKGROUND

### **A. Plaintiff Farms and Farmers**

Thirty-three family farms and individual farmers from throughout the United States are plaintiffs in this action.<sup>1</sup> Am. Compl. ¶¶ 63-95. Each strives to farm without the use of transgenic seed, but is nonetheless fearful that they could become contaminated by Monsanto's transgenic seed and then accused by Monsanto of patent infringement. Am. Compl. ¶ 96. This fear arises from the highly contaminating nature of Monsanto's transgenic seed and Monsanto's well known aggressive patent assertion tactics. *Id.* This fear is so strong that it causes some plaintiffs to forgo growing crops that they otherwise have the capacity and desire to grow. *Id.*

For example, plaintiff Bryce Stephens is a farmer in northwest Kansas. Am. Compl. ¶ 88; D. Stephens ¶ 1. On Bryce's 1,000-acre farm, he grows a variety of certified organic crops. D. Stephens ¶ 2. He used to grow corn and soybeans, but he had to stop after Monsanto introduced transgenic seed for those crops because he is certain that if he continued to do so, he would become contaminated by Monsanto's seed and, as a result, then be accused by Monsanto accusing of patent infringement. Am. Compl. ¶ 88; D. Stephens ¶ 5.

As another example, plaintiff Frederick Kirschenmann is a third-generation farmer in Windsor, North Dakota. Am. Compl. ¶ 70; D. Kirschenmann ¶¶ 1, 6. His German grandfather farmed the Volga River area in Russia before immigrating to Lincoln, Nebraska in the late 1800s. *Id.* at ¶ 6. Fred's family has been farming at the current location in North Dakota since 1930. *Id.*

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<sup>1</sup> Plaintiffs do not wish to over burden the court with specific discussion and supporting declarations from each of them. Therefore, only representative examples are discussed herein and have submitted supporting declarations. Information about each of the other Plaintiffs can be found in the Amended Complaint or can be provided if the Court so desires.

Today, Kirschenmann Family Farms is a 3,500-acre certified organic farm. *Id.* at ¶ 1. In the past, the Kirschenmanns grew canola on their farm, but the introduction of transgenic canola by Monsanto eventually forced them to stop because the risk of having their organic canola contaminated by Monsanto's transgenic canola was too high. *Id.* at ¶¶ 9-10. The decision to stop growing canola was made in no small part because of the threat that being contaminated would expose the Kirschenmann farm to allegations of patent infringement by Monsanto, whose aggressive patent assertion tactics are well known to Fred. *Id.* ¶¶ 12-13.

Being prevented from growing canola causes significant hardship to the Kirschenmann Family Farm. First, it represents an annual loss of income of \$25,000 - \$50,000. *Id.* ¶ 11. It also leaves the farm with a significant gap in its organic crop rotation pattern, making it harder for the farm to maintain weed and pest control without herbicides and pesticides. *Id.* Fred wishes he could begin growing canola on his farm again, but the risk of being contaminated and then sued for patent infringement is just too high.

Bryce Stephens and Kirschenmann Family Farms are only two of the farmer plaintiffs in this case. The others are also committed to using only non-transgenic seed, susceptible to contamination, and afraid of being sued for patent infringement by Monsanto upon contamination. Am. Compl. ¶ 96; D. Patterson ¶ 3.

**B. Plaintiff Seed Businesses**

Fourteen seed businesses that wish to and attempt to deal only with non-transgenic seed are also plaintiffs. Am. Compl. ¶¶ 48-61. Each is at immediate risk of having its seed supply contaminated by Monsanto's transgenic seed and, as a result, being accused of patent infringement by Monsanto. *Id.* at 62. This risk is not subjective hyperbole. Rather, it is based

on direct knowledge of the risk of contamination and Monsanto's aggressive patent assertion tactics. *Id.*

For example, plaintiff Fedco Seeds is a cooperative seed company in Maine. Am. Compl. ¶ 48; D. Lawn ¶ 1. Fedco sells only conventional and organic seed and offers hundreds of varieties of crops, including corn, soybeans and alfalfa. D. Lawn. ¶ 1. Fedco doesn't grow the seed it sells itself, but instead contracts with others to grow seed for it. *Id.* While Fedco does not knowingly purchase any transgenic or genetically modified seed, Fedco believes that its seed supply may nonetheless become contaminated. D. Lawn. ¶ 2. This belief is based on their knowledge of the general risk of contamination, including the fact that transgenic seed contamination effectively destroyed all organic canola, and on their personal instances of near contamination. D. Lawn. ¶¶ 3-4. As a result, Fedco has to regularly test the seed it is provided by suppliers for contamination, at considerable expense. D. Lawn. ¶ 4.

In each of 2005, 2008, 2009 and 2010, Fedco received positive contamination test results for seed it received from various suppliers. *Id.* In each case, Fedco rejected or returned the contaminated seed. *Id.* However, Fedco does not have the resources to test every shipment of seed it receives from all of its suppliers. D. Lawn. ¶ 5. Thus, as C.R. Lawn, Fedco's founder and co-owner, explains it, “there is a real risk that some day soon we may unintentionally and unknowingly redistribute transgenic seed to customers.” *Id.* Because of this risk, and because of Fedco's awareness of Monsanto's lawsuits alleging patent infringement against other seed businesses, Fedco is very concerned that if it does unknowingly sell seed contaminated by Monsanto's transgenic seed, Monsanto will accuse it of patent infringement. D. Lawn. ¶¶ 6-7. This concern is heightened by the fact that Fedco is a direct competitor to Monsanto and has



staked its reputation on having zero tolerance for transgenic seed contamination. D. Lawn. ¶ 7.

Fedco is just one of the seed businesses that are plaintiffs in this case. Each of the others is similarly at immediate risk of contamination and being accused of infringing Monsanto's patents. Am. Compl. ¶ 62.

### **C. Plaintiff Agriculture Membership Organizations**

In addition to the farmer and seed business plaintiffs, thirty-six agricultural membership organizations are plaintiffs. Am. Compl. ¶¶ 12-47. An organization has standing to bring this action under the “doctrine of associational standing” if: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *United Food & Commer. Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 552, 553 (1996) (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, (1977)). Each of the plaintiff membership organizations satisfy these requirements.

For example, plaintiff Organic Seed Growers and Trade Association (OSGATA) is “a not-for-profit agricultural organization that develops, protects and promotes the organic seed trade and its growers.” Am. Compl. ¶ 12; D. Stephens ¶ 13. “OSGATA's membership is comprised of organic farmers who produce seed crops, organic seed breeders, organic seed companies, and affiliate organizations,” and OSGATA has joined this action, “on behalf of its forty members, some of whom are at risk of being contaminated by Defendants' transgenic seed and consequently being sued by Defendants for patent infringement.” Am. Compl. ¶ 12; D. Stephens ¶¶ 14-15.

Bryce Stephens, discussed above, is both a member of OSGATA and its Vice President.

D. Stephens ¶ 3. As a result of (a) Bryce having standing to bring this action in his own right (discussed *infra*), (b) the interests OSGATA is seeking to protect in this suit – e.g. protecting its organic farmer members from being accused of patent infringement if contaminated by transgenic seed – being germane to OSGATA's mission of protecting and promoting the organic seed trade and its growers, and (c) the claim and relief being sought here – i.e. a declaratory judgment – not requiring the participation of individual OSGATA members, OSGATA satisfies the doctrine of associational standing. Am. Compl. ¶ 12; D. Stephens ¶¶ 13-15.

The other thirty-five organizational plaintiffs similarly satisfy the doctrine of associational standing. Am. Compl. ¶¶ 13-47.

#### **D. Monsanto's Campaign of Aggressive Patent Assertion**

Beginning in the 1980s, Monsanto sought to use genetic engineering in agriculture by creating transgenic seeds. Am. Compl. ¶ 101. Transgenic seeds are genetically engineered through the introduction of foreign genes and regulatory sequences into the seeds' genome. Simply put, the genes of one species are put into the DNA of another. The process of incorporating exogenous DNA into a cell is called “transformation.” *Id.* ¶ 102. Transformation permanently alters plant DNA. During the life cycle of a transgenic plant, human-engineered genetic material is replicated and transferred through natural life cycle processes. Thus the transformed genes persist in all of the seeds that crop bears. The transformed genetic material also spreads through natural pollination to other transgenic crops, non-transgenic crops, and even native plants. *Id.* ¶ 103.

Monsanto widely markets transgenic seed to the public under the trade name “Roundup

Ready.” *Id.* ¶¶ 104, 151, 152. Monsanto dominates the market for transgenic seeds and traits. *Id.* It currently holds the largest percentage of the global proprietary seed market of any company. *Id.* In the United States, over 85-90% of all soybeans, corn, cotton, sugar beets and canola grown in the U.S. contains Monsanto's patented genes. *Id.*

Because Monsanto's transgenic seed is grown outdoors where it is exposed to wind, insects and birds, it is impossible to limit the migration of transgenic material to new locations. *Id.* ¶ 111. Because seed is self-replicating, it can colonize after it migrates. *Id.* ¶ 103. As a result, non-transgenic crops are vulnerable to contamination. *Id.* ¶ 111. They can be tainted at almost every step of the production process: before seed is purchased; through seed drift or scatter; through cross-pollination; through commingling via tainted equipment during or after harvest; during processing; during transportation; and during storage. *Id.*

The difficulty of avoiding contamination is illustrated by historical example. Liberty Link 601 was a genetically engineered variety of rice that was field tested at a small number of sites between 1999 and 2001. *Id.* ¶ 110. In 2006, before Liberty Link 601 was approved for human consumption, inspectors discovered extensive contamination of the commercial rice supply. *Id.* As a result, multiple countries banned the import of U.S. rice. The worldwide economic loss due to the Liberty Link 601 contamination is estimated at up to \$1.285 billion. *Id.*

Monsanto uses aggressive legal tactics to further its financial interest in Roundup Ready products. First, it patents the technology used in Roundup Ready products; twenty-three such patents are at issue here. *Id.* ¶ 126. Next, it demands licenses from farmers who purchase its seed. *Id.* ¶ 127. In addition, Monsanto has eliminated most of its competition. Between 2005 and 2010 alone, Monsanto acquired over 30 independent seed companies. *Id.* ¶ 152. Finally,

Monsanto zealously enforces its transgenic seed patents. It investigates roughly 500 farmers per year for patent infringement and between 1997 and April 2010, it filed 144 lawsuits against farmers in 27 different states for infringement of or breach of license to its transgenic seed patents. *Id.* ¶ 129.

Monsanto has even investigated and accused parties who did not wish to possess transgenic seed of patent infringement, including Dawn and David Runyon, Mo Parr, and Roger, Rodney and Greg Nelson. *Id.* ¶¶ 131-133. These tactics have been well document by the media, including by the CBS Evening News. *Id.* Monsanto has never legally committed not to sue for patent infringement any party who intends to use or distribute only non-transgenic seed if they should become contaminated. While it has made certain public statements about its supposed intent regarding asserting its patents against such parties, upon inspection those statements are ambiguous and unreliable in any legal sense. *See infra.*

Lastly, Monsanto spends much of its brief trying to defend the social utility of transgenic seed. As described in the Amended Complaint, Monsanto's transgenic seed is no more useful for society than some of its past products, like Agent Orange, DDT, PCB's and other toxins, all of which Monsanto said were safe at the time, but were later proven not to be. Plaintiffs will indeed prove that transgenic seed lacks social utility, but that issue is irrelevant to this motion.

### ARGUMENT

#### **I. MONSANTO'S ACTS OF WIDESPREAD PATENT ASSERTION AND PLAINTIFFS EVER GROWING RISK OF CONTAMINATION CREATE A REAL, IMMEDIATE AND SUBSTANTIAL DISPUTE BETWEEN THEM**

The Supreme Court in *MedImmune* expressly abrogated the Federal Circuit's “reasonable apprehension of suit” test for determining whether subject matter jurisdiction exists in patent DJ

cases, declaring instead that the correct analysis focuses on “all the circumstances,” under which, “the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *MedImmune v. Genentech, Inc.*, 549 U.S. 118, 127, 132 n.11 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941)). Prior to that decision, the Federal Circuit's two-pronged “reasonable apprehension of suit” test required a DJ plaintiff to establish that (1) the patent holder had acted in a way that created an objectively “reasonable apprehension” on the part of the plaintiff that it would be sued if it continued or began allegedly infringing activity and (2) the plaintiff had actually undertaken or was prepared to undertake that activity. See *Sony Elecs., Inc. v. Guardian Media Techs., Ltd.*, 497 F.3d 1271, 1283 (Fed. Cir. 2007).

*MedImmune* made it clear that bright line rules and steadfast requirements have no place in a DJ jurisdiction analysis. *Ass'n for Molecular Pathology v. United States PTO*, 2011 U.S. App. LEXIS 15649, at 28 (Fed. Cir. Jul. 29, 2011) (“AMP”) (“no bright-line rule exists for determining whether a declaratory judgment action satisfies Article III's case-or-controversy requirement”); *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1336 (Fed. Cir. 2008) (“As the Supreme Court has recently reiterated, however, there is no bright-line rule for determining whether an action satisfies the case or controversy requirement”) (citing *MedImmune*). Rather, each case must be evaluated on its own facts and circumstances. As the Federal Circuit has recognized, the *MedImmune* analysis is “more lenient” than the previous “reasonable apprehension of suit” test and has resulted in a greater “ease of achieving declaratory judgment jurisdiction.” *Micron Tech., Inc. v. Mosaid Techs., Inc.*, 518 F.3d 897, 902 (Fed. Cir. 2008).

Despite this legal development, Monsanto suggests that after *MedImmune* there remain certain requirements that must be satisfied for DJ jurisdiction to exist. Monsanto Mem. 12. Specifically, Monsanto argues that, “subject-matter jurisdiction requires at least: (1) an affirmative act by the patentee directed toward the declaratory judgment plaintiff; *and* (2) current activity by the declaratory-judgment plaintiff that could constitute infringement or significant, concrete steps toward conducting infringing activity.” *Id.* (emphasis in original). Thus, while paying lip service to the fact that the “reasonable apprehension of suit” test was abrogated, Monsanto nonetheless asks this Court to adopt requirements virtually identical to those that existed under that now-abrogated test. This ill-fated request should be rejected.

Plaintiffs acknowledge that the Federal Circuit recently said, “this court has held that, to establish injury in fact traceable to the patentee, a declaratory judgment plaintiff must allege both (1) an affirmative act by the patentee related to the enforcement of his patent rights[], and (2) meaningful preparation to conduct potentially infringing activity.” *AMP*, 2011 U.S. App. LEXIS 15649 at 31-32. However, that language awkwardly contradicts another earlier portion of the same opinion that said, “no bright-line rule exists for determining whether a declaratory judgment action satisfies Article III's case-or-controversy requirement.” *Id.* at 28. Further, the two cases cited as support for the two allegations that supposedly “must” be made, *San Disk* and *Cat Tech*, discussed *infra*, do not actually stand for the purported proposition.

Regardless, the overwhelming majority of Federal Circuit cases state that the analysis of DJ subject matter jurisdiction in patent cases is not amenable to conclusory soundbites snipped from dicta. Rather, in each case all the facts must be analyzed. *Cat Tech LLC v. TubeMaster, Inc.*, 528 F.3d 871, 879 (Fed. Cir. 2008) (“There is no facile, all purpose standard to police the

line between DJ actions which satisfy the case or controversy requirement and those that do not. ... The analysis must be calibrated to the particular facts of each case.”); *Revolution Eyewear, Inc. v. Aspex Eyewear, Inc.*, 556 F.3d 1294, 1297 (Fed. Cir. 2009) (“The [Supreme] Court [in *MedImmune*] held that all of the circumstances must be considered for each particular case.”); *Caraco Pharm. Labs., Ltd. v. Forest Labs., Ltd.*, 527 F.3d 1278, 1291 (Fed. Cir. 2008) (“Following *MedImmune*, proving a reasonable apprehension of suit is only one of many ways a patentee can satisfy the Supreme Court's more general all-the-circumstances test to establish that an action presents a justiciable Article III controversy.”); *Sony Elecs.*, 497 F.3d 1271, 1284 (“[O]ur post-*MedImmune* decisions, while not attempting to define the outer boundaries of declaratory judgment jurisdiction, have made clear that a declaratory judgment plaintiff does not need to establish a reasonable apprehension of a lawsuit in order to establish that there is an actual controversy between the parties. *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1380-81 (Fed. Cir. 2007); *Teva*, 482 F.3d at 1339.”); *Teva Pharm. USA, Inc. v. Novartis Pharm. Corp.*, 482 F.3d 1330, 1339 (Fed. Cir. 2007) (“[W]e follow *MedImmune*'s teaching to look at 'all the circumstances'”).

Lastly, and perhaps most importantly, the Supreme Court has instructed that all decisions regarding DJ subject matter jurisdiction should be made in light of the purpose of the Declaratory Judgment Act, i.e. to ameliorate the dilemma created when one is put to the choice between abandoning activity they believe they have the right to pursue or risking prosecution. *MedImmune*, 549 U.S. at 118 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967)). Even the Federal Circuit has said that “[a] district court, when deciding whether to exercise its discretion, should decide whether hearing the case would 'serve the objectives for which the

Declaratory Judgment Act was created,” and that the purpose of DJ Act is to avoid forcing parties to make “an *in terrorem* choice between the incurrence of a growing potential liability for patent infringement and abandonment of their enterprises.” *Micron Tech.*, 518 F.3d at 902 (citing *Elects. for Imaging, Inc. v. Coyle*, 394 F.3d 1341, 1346 (Fed. Cir. 2005) (quoting *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 735 (Fed. Cir. 1988)). “When these objectives are served, dismissal is rarely proper. *Id.*” *Id.* at 902; *see also Cat Tech*, 528 F.3d 871.

Thus, a court should always keep in mind as it performs an “all the circumstances” analysis that the purpose of the Declaratory Judgment Act is to prevent parties from being forced to make *in terrorem* choices. Here, Plaintiffs are faced with precisely such *in terrorem* choices. For example, Bryce Stephens is not planting corn and soybeans on his farm in Kansas because of his fear of being vulnerable to a patent infringement suit by Monsanto. D. Stephens ¶¶ 10-11. Similarly, Fred Kirschenmann has abandoned growing canola on his family's farm in North Dakota because of the risk doing such would subject him to patent infringement liability. D. Kirschenmann ¶¶ 13-14. Don Patterson is also foregoing farming alfalfa in Virginia due to his conviction that he would become contaminated and then accused of patent infringement by Monsanto. D. Patterson ¶ 3. These farmers are restrained in their ability to farm as they wish by the risk that doing such would subject them to growing potential liability for patent infringement. This is precisely the harm the Declaratory Judgment Act was meant to ameliorate.

Viewing all the circumstances in this case – including all the facts underlying Monsanto's affirmative acts of asserting the patents in suit and all the facts underlying the susceptibility of the Plaintiffs to undertaking potentially infringing activity (upon being contaminated by Monsanto's seed) – while keeping in mind the purpose of the DJ Act leads to the conclusion that



DJ jurisdiction exists in this case and that Monsanto's motion to dismiss should be denied. See *Makarova v. United States*, 201 F.3d 110, 113 (2nd Cir. 2000) (stating that in resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court may refer to evidence outside the pleadings).

**A. Any Affirmative Acts Enforcing Patents Support A Finding Of Jurisdiction And None Need Be “Directed Toward” Declaratory Judgment Plaintiffs**

Monsanto's argument that there must have been, “an affirmative act by the patentee *directed toward* the declaratory-judgment plaintiff,” is misplaced. Monsanto Mem. 12 (emphasis added). In reality, any act by the patentee relating to either the patents in suit or the plaintiffs can support DJ jurisdiction. *SanDisk*, 480 F.3d at 1381; *Prasco*, 537 F.3d at 1341. For example, the fact that a patentee “pursues a systematic licensing and litigation strategy” supports a finding of an actual controversy. *Micron Tech.*, 518 F.3d at 899, 901.

Monsanto cites *SanDisk* to support the proposition that some affirmative act by Monsanto against the Plaintiffs themselves is required for DJ standing. However, *SanDisk* itself said it was not setting forth the limits of DJ standing. 480 F.3d at 1381 (“We need not define the outer boundaries of declaratory judgment jurisdiction, which will depend on the application of the principles of declaratory judgment jurisdiction to the facts and circumstances of each case.”) Further, the quote Monsanto includes in its brief itself completely belies Monsanto's contention that an affirmative act by Monsanto against the Plaintiffs themselves is an absolute requirement for DJ jurisdiction. The quote says DJ jurisdiction “generally will not arise” based “merely” on learning of the existence of a patent “without some affirmative act by the patentee.” The term “generally” comports with a flexible approach to application of DJ standing law, while the word “merely” simply stands for the proposition that circumstances above and beyond just learning of

the existence of a patent are needed to support DJ jurisdiction. In cases where there are facts and circumstances beyond “merely learning of a patent” that support a finding of an actual controversy (such as those discussed more fully below in this case), an affirmative act by the patentee against the plaintiff is not necessary. Further, the quote from *SanDisk* cited by Monsanto does not say the affirmative act must be “directed toward” the Plaintiff specifically.

To put the *SanDisk* quote cited by Monsanto in better context, the immediately following sentence says, “Article III jurisdiction may be met where the patentee takes a position that puts the declaratory judgment plaintiff in the position of either pursuing arguably illegal behavior or abandoning that which he claims a right to do.” 480 F.3d at 1380-81. Thus, it is the resulting effect of the patentees' acts that matters, not the acts themselves. If a patentee acts in a way that forces others to make the *in terrorem* choice between risking infringement liability and abandoning activity, then it creates DJ jurisdiction. To be sure, as the Federal Circuit later summarized, “In *SanDisk*, we held that a district court had jurisdiction over a suit requesting a declaration that a patent was invalid and not infringed even though the patentee had not threatened the declaratory judgment plaintiff with an infringement suit.” *Sony Elecs.*, 497 F.3d at 1285. Thus, the case Monsanto cites itself does not support Monsanto's argument that there is an absolute requirement for affirmative acts by a patentee specifically against a DJ plaintiff for there to be jurisdiction.

Monsanto also cites *Prasco* to support its position. But, Monsanto fails to disclose what the Federal Circuit said in *Prasco* regarding the difference between a DJ for non-infringement and a DJ for invalidity. Specifically, footnote 12 of the *Prasco* opinion says, “Prasco had sued only for a declaratory judgment of non-infringement. We thus have no opportunity to consider

whether similar facts would be sufficient to establish jurisdiction if, instead, Prasco had conceded infringement and was only arguing invalidity.” 537 F.3d at 1342. Thus, *Prasco* is immediately distinguishable from this case, because here Plaintiffs do indeed seek a DJ of invalidity.

Monsanto then cites *Creative Compounds* and *Innovative Therapies* as supporting a “requirement” of specific actions by the patentee “directed toward” the DJ plaintiff. However, those cases state no such rule. Jurisdiction was denied in *Creative Compounds* because the DJ plaintiffs' legal right to make and use its own technology was not implicated by the patentee's infringement accusations against the DJ plaintiff's purported customers, leaving the DJ plaintiff in that case with at most an economic interest, not a legal one, in a declaratory judgment against the patentee. *Creative Compounds, LLC v. Starmark Labs.*, 2011 U.S. Dist. LEXIS App. 12723, at 30 (Fed. Cir. June 24, 2011). Jurisdiction was denied in *Innovative Therapies* because the DJ plaintiff wanted to make and sell its own product, which the patentee had never seen and on which it thus had no opinion on infringement. *Innovative Therapies, Inc. v. Kinetic Concepts, Inc.*, 599 F.3d 1377, 1382 (Fed. Cir. 2010). Neither of those scenarios exist here. First, Plaintiffs in this case have an adverse legal interest because they are similarly situated to others Monsanto has accused of patent infringement in the past. Am. Compl. ¶ 133. Second, unlike the situation in *Innovative Therapies*, the seed at issue here that Plaintiffs may use or distribute is Monsanto's seed that contaminates them, not some seed independently developed by the Plaintiffs. Thus, both *Creative Compounds* and *Innovative Therapies* are factually distinguishable.

Further, another recent Federal Circuit case somehow missing from Monsanto's brief expressly stated the exact opposite of what Monsanto suggests. *Arris Group, Inc. v. British Telecom. PLC*, 639 F.3d 1368, 1378 (Fed. Cir. 2011) (“[I]f the circumstances warrant, an actual

controversy 'may be found in the absence of any communication from the defendant to the plaintiff.'”) (quoting *Arrowhead Indus.*, 846 F.2d at 736). To be sure, holding that there is an absolute steadfast requirement of acts by a patentee directed towards a DJ plaintiff regardless of any other acts of the patentee that put the DJ plaintiff into an *in terrorem* choice would conflict with *MedImmune's* mandate that “all the circumstances” be considered and risk returning to the days of the “reasonable apprehension of suit” test that was resoundingly rejected therein.

Plaintiffs recognize that the recent *AMP* decision is quite confused on this issue. 2011 U.S. App. LEXIS 15649. In one portion of the opinion, the Federal Circuit says “no bright-line rule exists.” *Id* at 28. Then, later it says a DJ plaintiff must allege, “an affirmative act by the patentee related to the enforcement of his patent rights.” *Id* at 31-32. Notably, this quotation does not require that the patentee's acts be “directed towards” the DJ plaintiffs. However, later still the opinion states, “[T]he district court failed to limit its jurisdictional holding to affirmative acts by the patentee directed at specific Plaintiffs.” *Id.* at 45 (citing *San Disk*). That final statement cites *San Disk* for support, but as discussed *supra*, *San Disk* does not stand for the proposition that a patentee must direct acts at the DJ plaintiff and even *San Disk* itself said it was *not* setting forth the limits of DJ jurisdiction. 480 F.3d at 1381. Thus, *AMP* is not helpful guidance on this issue, as it is internally inconsistent, potentially violates *MedImmune* by expressing requirements akin to those that existed under the Federal Circuit's “reasonable apprehension of suit” test, and is contradictory to several other Federal Circuit cases about DJ jurisdiction, including specifically *Arris*.

**B. Monsanto's Enforcement Of Its Patents Has Been Broad And Sustained**

As discussed above, under “all the circumstances,” any act by the patentee relating to

either the patents in suit or the plaintiffs can support DJ jurisdiction. *SanDisk*, 480 F.3d at 1381. For one, the fact that a patentee “pursues a systematic licensing and litigation strategy” supports a finding of an actual controversy. *Micron Tech.*, 518 F.3d at 899, 901. “Prior litigious conduct [against third parties] is one circumstance to be considered in assessing whether the totality of circumstances creates an actual controversy.” *Prasco*, 537 F.3d at 1341.

Monsanto has not only pursued a campaign of systematic patent licensing and litigation; it has engaged in perhaps one of the largest such campaigns in history. Monsanto has sued well over a hundred farmers and seed businesses regarding their patents. Am. Compl. ¶¶ 127-133 (“Between 1997 and April 2010, Monsanto filed 144 lawsuits against farmers in at least 27 different states for alleged infringement of its transgenic seed patents and/or breach of its license to those patents .”) Monsanto has also licensed their patents broadly throughout the country. Monsanto's Vice President for Industry Affairs concedes in his supporting declaration for this motion to dismiss that Monsanto has issued “[o]ver 275,000” licenses to its patents. D. Tobin (Dkt. 22) ¶ 10. Thus, Monsanto's pursuit of a systematic patent litigation and licensing campaign unquestionably weighs in favor of finding jurisdiction.

Further, “asserting [] patent rights against other similarly situated parties [is] a fact to be considered in assessing the existence of an actual controversy under the totality of circumstances.” *AMP*, 2011 U.S. App. LEXIS 15649 at 35 (citing *Micron Tech.*, 518 F.3d at 901 ). As part of its general patent licensing and litigation campaign, Monsanto has specifically asserted its patents against others who, like Plaintiffs, did not want to possess or use Monsanto's seed. Am. Compl. ¶ 133. This is another factor strongly supporting jurisdiction, as an affirmative desire to not use Monsanto's seed has not prevented others from being accused by

Monsanto of patent infringement.

Beyond demonstrating what it will do to parties it suspects of using its technology, Monsanto's acts have created the high probability that transgenic seed will land in Plaintiffs' property and cause them to make, use or sell that seed. Over the past 30 years, Monsanto has extinguished the majority of independent seed companies in the course of growing its transgenic seed business. Complaint ¶¶ 151-152. Monsanto didn't just patent transgenic seed; it embarked on a mission to destroy non-transgenic agriculture. Because of its restrictive licensing, aggressive litigation, and old-fashioned bullying, Monsanto is *en route* to dominating every American field devoted to farming. Complaint ¶¶ 129-133. The release of transgenic seed that is self-propagating results in its patented seed being virtually everywhere, spreading like a virus without containment, disregarding the property lines and personal wishes of farmers and seed businesses who wish to avoid its harmful effects. At least two plaintiffs have already had come within an inch of being infected. *See* D. Lawn; D. Noble. Monsanto is solely responsible for the spread of its seed, and, as such, its acts of seed distribution further support jurisdiction here.

In addition, a DJ plaintiff that has a license to a patent unquestionably has *per se* standing, as that was precisely the issue in *MedImmune*. Here, each Plaintiff could easily walk into any one of countless Monsanto licensed seed distributors throughout the country and enter into a "Monsanto Technology/Stewardship Agreement" that is presented to a customer before they are allowed to purchase any Monsanto seed. Am. Compl. ¶¶ 127, 128, Ex. 1 "2010 Monsanto Technology/Stewardship Agreement." The Agreement is in large part a patent license. Thus, if any plaintiff enters such Agreement, which Monsanto does not dispute could be done by

any plaintiff at any time, then that plaintiff would unquestionably have standing under *MedImmune*.

The fact that a patent license is being offered, but not accepted, does not change the analysis, as that was precisely the scenario in many of the Federal Circuit cases discussed above, and in particular *AMP*, where both the Southern District of New York and the Federal Circuit upheld jurisdiction when the DJ plaintiff was offered a license but refused to accept it. 2011 U.S. App. LEXIS 15649. Thus, Monsanto's offering of a license to the general public, which includes each of the Plaintiffs, is yet more reason to deny Monsanto's motion to dismiss. *Id.*

Further, there have indeed been direct affirmative acts by Monsanto towards the Plaintiffs in this case. First, as detailed in the Amended Complaint, Monsanto has used misleading and ambiguous language on its website to implicitly threaten all farmers and seed businesses who are not its customers, professing a policy not to sue when someone possess “trace amounts” of Monsanto's' patented seed through “inadvertent means.” Am. Compl. ¶ 134. Such undefined restrictions on patent enforcement threaten by omission. On the date of filing of the initial complaint in this matter, Monsanto publicly reiterated and expanded its threat specifically against Plaintiffs. Am. Compl. ¶¶ 136-138. Then, in response to an inquiry from Plaintiffs seeking assurances that Monsanto would not assert its patents against them, Monsanto denied Plaintiffs' request and chose instead to once again make the same veiled threat made twice before. Am. Compl. ¶¶ 139-143. These facts support Plaintiffs' standing in this case, as the Federal Circuit has recognized that, “a patentee's refusal to give assurances that it will not enforce its patent is relevant to the [DJ jurisdiction] determination.” *Prasco*, 537 F.3d at 1341 (*quoting BP Chems. v. Union Carbide Corp.*, 4 F.3d 975, 980 (Fed. Cir. 1993)).

Even Monsanto itself agrees that its language on this issue is vague. On July 19, 2011, one week *after* filing its motion to dismiss this case, Monsanto filed responses to requests for admission made by a defendant Monsanto is suing for patent infringement in the Eastern District of Missouri. In response to the accused infringer's request to "Admit that it is not Plaintiffs' policy to exercise its patent rights where trace amounts of its patented traits are present in a farmer's field as a result of inadvertent means," Monsanto replied, "Monsanto objects to this request as vague, overbroad and not likely to lead to the discovery of relevant evidence." Ex. A to Ravicher Decl., *Plaintiffs Monsanto Company's and Monsanto Technology LLC's Response to Defendant Boggs Farm Center Inc.'s First Set of Requests for Admissions*, 5 (*Monsanto Company et al. v. Boggs Farm Center, Inc., et al.*, 4:10-cv-00286 (E.D.M.O.) (July 19, 2011)). Similarly, in response to the accused infringer's request to "Admit that Plaintiffs' will not enact a policy in the future to exercise its patent rights where trace amounts of its patented traits are present in a farmer's field as a result of inadvertent means," Monsanto again objected claiming the request was "vague." *Id.* Thus, Monsanto asserts in this case that its commitment not to exercise patents is clear and a basis supporting dismissal (Monsanto Mem. 1), while asserting barely seven days later in another case that the exact same language is vague. This transparent legal gamesmanship should not be condoned. It is clear that Monsanto's language about whether it would ever assert its patents against those contaminated by its seed is intentionally ambiguous so that it can have it both ways, arguing in some contexts it is definite and in other contexts it is vague. Plaintiffs fully agree with the latter, the language is legally unreliable.

To be sure, if a patentee provides a DJ plaintiff with a blanket unrestricted covenant-not-to-sue, that voids the court of jurisdiction. *Dow Jones & Co. v. Abilene Ltd.*, 606 F.3d 1338



(Fed. Cir. 2010). In this case, however, despite being asked to do so, and despite having the opportunity to do so at any moment, Monsanto has still not provided Plaintiffs with a blanket covenant-not-to-sue sufficient to defeat DJ jurisdiction. Am. Compl. ¶¶ 139-143; D. Stephens ¶ 12, 16; D. Kirschenmann ¶ 13; D. Lawn ¶ 8; D. Noble ¶ 9.

Lastly, it is irrelevant whether Monsanto subjectively has an intent to assert the patents-in-suit against the Plaintiffs, as the inquiry is an objective one:

[I]t is irrelevant whether [the patentee] had conducted an adequate investigation or whether it subjectively believed [the DJ plaintiff] was infringing. "The test [for declaratory judgment jurisdiction in patent cases], however stated, is *objective* . . . ." *Arrowhead*, 846 F.2d at 736 (emphasis added). "Indeed, it is the objective words and actions of the patentee that are controlling." *BP Chems. v. Union Carbide Corp.*, 4 F.3d 975, 979 (Fed. Cir. 1993). Thus, conduct that can be reasonably inferred as demonstrating intent to enforce a patent can create declaratory judgment jurisdiction.

*Hewlett-Packard Co. v. Acceleron LLC*, 587 F.3d 1358, 1363 (Fed. Cir. 2009). Thus, it is not what Monsanto subjectively believes about its patents and the Plaintiffs here that matters, but instead what is objectively reasonable to infer it believes from its conduct. The facts alleged in the Amended Complaint and set forth in the declarations submitted herewith provide an objectively reasonable basis for Plaintiffs to fear being sued for patent infringement by Monsanto if they become contaminated by Monsanto's transgenic seed. That fear is real, substantial and immediate. Ameliorating it is the purpose of the Declaratory Judgment Act.

**C. Plaintiffs Are Immediately At Risk Of Potentially Infringing Monsanto's Patents Due To The Constantly Increasing Threat Of Seed Contamination**

Defendants second suggested "requirement" for DJ jurisdiction is that Plaintiffs must have taken some "significant, concrete steps toward conducting infringing activity." Monsanto Mem. ¶ 12. Again, as discussed above, there are no "requirements" for DJ jurisdiction after

*MedImmune*. Regardless, Monsanto's argument in this context ignores the fact that an organic or conventional farmer need take no steps at all to become contaminated by Monsanto's transgenic seed and then sued for patent infringement. This is because contamination does not require active participation by Plaintiffs; it can happen even if Plaintiffs try as hard as they might to prevent it. If one owns land, has neighbors using Monsanto's seed, and then a strong wind blows, *Voila!*, they are now contaminated and growing Monsanto seed on their land, which constitutes use of that seed that potentially infringes Monsanto's patents.

While Defendants are correct that Plaintiffs do not wish to make, use or sell Defendants' transgenic seed, Plaintiffs' organic and conventional seed is nonetheless extremely vulnerable to contamination despite Plaintiffs' using their best efforts to prevent it. Am. Compl. ¶¶ 111-112. Once Plaintiffs' seed is contaminated by Defendants' transgenic seed, Defendants could sue Plaintiffs for patent infringement. Thus, the only thing that has not yet happened in this case is actual contamination, although threat of contamination grows every day as Defendants' distribution of their transgenic seed increases.

For example, plaintiff Fedco Seed has repeatedly been sent contaminated seed by its suppliers. D. Lawn ¶ 4. Fortunately, in each case, Fedco performed testing and determined the seed was contaminated before redistributing it to Fedco's customers. *Id.* But, Fedco does not have the financial capability to test all seed it receives from suppliers, and thus may unknowingly redistribute contaminated seed despite using all its best efforts to avoid doing so. *Id.* ¶ 5.

As another example, plaintiff Chuck Noble operates a farm in South Dakota on which he grows conventional alfalfa. D. Noble ¶¶ 1, 2. Chuck intentionally does not use transgenic seed and he does everything he can to avoid having any contact with Monsanto's transgenic alfalfa

seed. D. Noble ¶ 3. Some of the seed Chuck plants on his farm he grows himself, but he also purchases seed from others. D. Noble ¶ 4. Because there is a high risk of contamination from transgenic seed, Chuck has to test the seed he purchases to make sure it is non-transgenic. *Id.* As Chuck states in his declaration, “Unfortunately, but not surprisingly, the seed I have considered to purchase has at times tested positive for [transgenic seed] contamination.” D. Noble ¶ 5. These actual instances of Chuck nearly purchasing contaminated seed for planting on his farm highlight the severity and reality of Plaintiffs' risk of contamination.

To argue, as Monsanto does, that Plaintiffs must take some other “significant, concrete steps” defies common sense. Plaintiffs need not wait for the travesty of actually suffering seed contamination before being able to bring this declaratory judgment action. *Cat Tech*, 528 F.3d at 881 (Fed. Cir. 2008) (“[A] party need not have engaged in the actual manufacture or sale of a potentially infringing product to obtain a declaratory judgment.”). Rather, “a showing of ‘meaningful preparation’” to undertake potentially infringing activity is sufficient. *Id.* (quoting *Arrowhead Indus.*, 846 F.2d at 736). Each of the Plaintiffs here has taken more than sufficient steps to satisfy the “meaningful preparation” standard, as they either are already using or distributing seed that is at high risk of being contaminated (e.g. Chuck Noble, Fedco Seeds), or have the complete capacity to do so, but are forgoing undertaking their desired farming or seed distribution activities due to the fear that such would subject them to an allegation of patent infringement by Monsanto (e.g. Bryce Stephens, Fred Kirschenmann, Don Patterson).

Monsanto does not dispute that each of the Plaintiffs is at risk of becoming contaminated by its transgenic seed. It concedes as much when it argues that the standards for organic

certification would not be violated by such contamination.<sup>2</sup> Monsanto Mem. 8. In fact, one of the documents submitted by Monsanto in support of its motion from the National Academies states it quite correctly, “gene flow of approved GE traits into non-GE crops remains a serious concern.” Ex. B to Chachkin Decl. (Dkt. 21), *The Impact of Genetically Engineered Crops on Farm Sustainability in the United States* (2010), 2.

Monsanto, in fact, seems to believe that it is actually Plaintiffs' duty to provide a “buffer zone” on their own property to protect from contamination. Ex. M to Chachkin Decl., *Letter from U.S. Dep't of Agriculture Under Secretary Bill Hawks to Gus Douglas*, 2 (“In order to become a certified organic producer, a producer must submit [a plan that] must include, among other things, evidence that sufficient buffer zones have been incorporated into the operation to ensure the integrity of the organic crop operation.”). But even if a farmer uses his own land to provide a “buffer zone,” he can still be contaminated. *Id.* (“even when all precautions have been taken, and an approved buffer zone fails to provide the protection that both the operator and the certifying agent reasonably expected, ...”).

This is exactly what happened to Fred Kirschenmann. At first, when transgenic canola was introduced, he set up buffer zones on his farm. D. Kirschenmann ¶ 10. But, as Fred states in his declaration, “eventually, however, the use of transgenic canola became so widespread that I could no longer find any of my land that was safe from contamination.” *Id.* Thus, the threat of contamination by transgenic seed – and the corresponding risk of being accused of patent infringement once contaminated – is so great that it actually forces organic and conventional farmers to stop growing crops that they have the capability and desire to grow. Bryce Stephens

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<sup>2</sup> Plaintiffs note that they are not exclusively organic. Many are conventional, which means they do not use transgenic seed. Other still have both organic and conventional activities.

and Don Patterson are other examples of this. D. Stephens ¶¶ 10-11; D. Patterson ¶ 3.

In the few cases where the Federal Circuit has not found an actual controversy post-*MedImmune* based on circumstances related to the DJ plaintiff, (i) the DJ plaintiff only sued for a DJ of non-infringement, not invalidity (*Prasco*, 537 F.3d at 1342, n.12); (ii) the DJ plaintiff could not undertake the potentially infringing activity for at least 6 to 8 years from when the complaint was filed (*Benitec Australia, Ltd. v. Nucleonics, Inc.*, 495 F.3d 1340, 1346 (Fed. Cir. 2007)); or, (iii) the DJ plaintiff conceded that at the time the district court granted the motion to dismiss, another patent not in the suit prevented it from undertaking potentially infringing activities for at least another 8 months (*Janssen Pharm., N.V. v. Apotex, Inc.*, 540 F.3d 1353, 1357, 1360 (2008)). None of these circumstances exists here. Plaintiffs have indeed sued for a DJ of invalidity of defendants' patent claims, not only non-infringement, and each Plaintiff is at risk of being contaminated by Monsanto's seed today and, thus, undertaking potentially infringing activity by using or distributing that seed, as knowledge of contamination is not required for infringement. Thus, each of those cases is distinguishable.

## **II. IF ONE PLAINTIFF HAS STANDING, THE COURT NEED NOT DECIDE IF ALL PLAINTIFFS HAVE STANDING**

Even though the Plaintiffs each separately have standing to bring this case, so long as one plaintiff in a declaratory judgment action has standing, that is sufficient for all of the plaintiffs. *AMP*, 2011 U.S. App. LEXIS 15649 at 45 (citing *Horne v. Flores*, 129 S. Ct. 2579, 2592-93 (2009)). Thus, so long as the court has subject-matter jurisdiction over one of the Plaintiffs' claims, that is sufficient to deny Defendants' motion to dismiss with respect to all Plaintiffs.

**CONCLUSION**

For all these reasons, Monsanto's motion to dismiss for lack of subject-matter jurisdiction should be denied.

Respectfully submitted,

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August 11, 2011

**CERTIFICATE OF SERVICE**

This is to certify that all known counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on August 11, 2011.

s/ Daniel B. Ravicher

Daniel B. Ravicher (DR 1498)