

In The
United States Court Of Appeals
For The Federal Circuit

ORGANIC SEED GROWERS AND TRADE ASSOCIATION, ORGANIC CROP IMPROVEMENT ASSOCIATION INTERNATIONAL, INC., THE CORNUCOPIA INSTITUTE, DEMETER ASSOCIATION, INC., CENTER FOR FOOD SAFETY, BEYOND PESTICIDES, NAVDANYA INTERNATIONAL, MAINE ORGANIC FARMERS AND GARDENERS ASSOCIATION, NORTHEAST ORGANIC FARMING ASSOCIATION OF NEW YORK, NORTHEAST ORGANIC FARMING ASSOCIATION/MASSACHUSETTS CHAPTER, INC., NORTHEAST ORGANIC FARMING ASSOCIATION OF NEW HAMPSHIRE, NORTHEAST ORGANIC FARMING ASSOCIATION OF RHODE ISLAND, CT NOFA, NORTHEAST ORGANIC FARMING ASSOCIATION OF VERMONT, RURAL VERMONT, OHIO ECOLOGICAL FOOD & FARM ASSOCIATION, FLORIDA CERTIFIED ORGANIC GROWERS AND CONSUMERS INC., SOUTHEAST IOWA ORGANIC ASSOCIATION, MENDOCINO ORGANIC NETWORK, NORTHEAST ORGANIC DAIRY PRODUCERS ALLIANCE, MIDWEST ORGANIC DAIRY PRODUCERS ALLIANCE, WESTERN ORGANIC DAIRY PRODUCERS ALLIANCE, CANADIAN ORGANIC GROWERS, PEACE RIVER ORGANIC PRODUCERS ASSOCIATION, FAMILY FARMER SEED COOPERATIVE, SUSTAINABLE LIVING SYSTEMS, GLOBAL ORGANIC ALLIANCE, FOOD DEMOCRACY NOW!, FARM-TO-CONSUMER LEGAL DEFENSE FUND, WESTON A. PRICE FOUNDATION, MICHAEL FIELDS AGRICULTURAL INSTITUTE, FEDCO SEEDS INC., ADAPTIVE SEEDS, LLC, SOW TRUE SEED, SOUTHERN EXPOSURE SEED EXCHANGE, MUMM'S SPROUTING SEEDS, BAKER CREEK HEIRLOOM SEED CO., LLC, COMSTOCK, FERRE & CO., LLC, SEEDKEEPERS, LLC, SISKIYOU SEEDS, COUNTRYSIDE ORGANICS, WILD GARDEN SEED, CUATRO PUERTAS, SEED WE NEED, ALBA RANCH, WILD PLUM FARM, GRATITUDE GARDENS, RICHARD EVERETT FARM, LLC, PHILADELPHIA COMMUNITY FARM, INC, GENESIS FARM, CHISPAS FARMS LLC, MIDHEAVEN FARMS, KOSKAN FARMS, CALIFORNIA CLOVERLEAF FARMS, NORTH OUTBACK FARM, TAYLOR FARMS, INC., RON GARGASZ ORGANIC FARMS, ABUNDANT ACRES, T & D WILLEY FARMS, FULL MOON FARM, INC., COMMON GOOD FARM, LLC, AMERICAN BUFFALO COMPANY, RADIANCE DAIRY, QUINELLA RANCH, NATURE'S WAY FARM LTD., LEVKE AND PETER EGGERS FARM, FREY VINEYARDS, LTD., BRYCE STEPHENS, CHUCK NOBLE, LARHEA PEPPER, PAUL ROMERO, BRIAN WICKERT, BRUCE DRINKMAN, MURRAY BAST, and DONALD WRIGHT PATTERSON, JR.,

Plaintiffs-Appellants,

and

OCIA RESEARCH AND EDUCATION INC., NORTHERN PLAINS SUSTAINABLE AGRICULTURE SOCIETY, MANITOBA ORGANIC ALLIANCE, UNION PAYSANNE, FAMILY FARM DEFENDERS INC., INTERLAKE FORAGE SEEDS LTD., KIRSCHENMANN FAMILY FARMS INC., and JARDIN DEL ALMA,

Plaintiffs,

v.

MONSANTO COMPANY and MONSANTO TECHNOLOGY LLC,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York in case no. 11-CV-2163, Judge Naomi Reice Buchwald.

BRIEF OF APPELLANTS

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Dated: July 5, 2012

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CERTIFICATE OF INTEREST

Counsel for the plaintiffs-appellants certifies the following:

1. The full name of every party or amicus represented by me is:

Organic Seed Growers and Trade Association, Organic Crop Improvement Association International, Inc., The Cornucopia Institute, Demeter Association, Inc., Center for Food Safety, Beyond Pesticides, Navdanya International, Maine Organic Farmers and Gardeners Association, Northeast Organic Farming Association of New York, Northeast Organic Farming Association/Massachusetts Chapter, Inc., Northeast Organic Farming Association of New Hampshire, Northeast Organic Farming Association of Rhode Island, CT NOFA, Northeast Organic Farming Association of Vermont, Rural Vermont, Ohio Ecological Food & Farm Association, Florida Certified Organic Growers and Consumers Inc., Southeast Iowa Organic Association, Mendocino Organic Network, Northeast Organic Dairy Producers Alliance, Midwest Organic Dairy Producers Alliance, Western Organic Dairy Producers Alliance, Canadian Organic Growers, Peace River Organic Producers Association, Family Farmer Seed Cooperative, Sustainable Living Systems, Global Organic Alliance, Food Democracy Now!, Farm-to-Consumer Legal Defense Fund, Weston A. Price Foundation, Michael Fields Agricultural Institute, Fedco Seeds Inc., Adaptive Seeds, LLC, Sow True Seed, Southern Exposure Seed Exchange, Mumm's Sprouting Seeds, Baker Creek Heirloom Seed co., LLC, Comstock, Ferre & Co., LLC, Seedkeepers, LLC, Siskiyou Seeds, Countryside Organics, Wild Garden Seed, Cuatro Puertas, Seed We Need, Alba Ranch, Wild Plum Farm, Gratitude Gardens, Richard Everett Farm, LLC, Philadelphia Community Farm, Inc, Genesis Farm, Chispas Farms LLC, Midheaven Farms, Koskan Farms, California Cloverleaf Farms, North Outback Farm, Taylor Farms, Inc., Ron Gargas Organic Farms, Abundant Acres, T & D Willey Farms, Full Moon Farm, Inc., Common Good Farm, LLC, American Buffalo Company, Radiance Dairy, Quinella Ranch, Nature's Way Farm Ltd., Levke and Peter Eggers Farm, Frey Vineyards, Ltd., Bryce Stephens, Chuck Noble, LaRhea Pepper, Paul Romero, Brian Wickert, Bruce Drinkman, Murray Bast, and Donald Wright Patterson, Jr.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

NONE

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

NONE

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Daniel B. Ravicher, Sabrina Hassan, Public Patent Foundation

July 5, 2012
Date

/s/ Daniel B. Ravicher
Daniel B. Ravicher

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, counsel for Appellants provide as follows:

(a) There have been no previous appeals in this case.

(b) We are aware of no other case that will be directly affected by the Court's decision in this case.

STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 28 U.S.C. §§ 1331 and 1338(a). This is an appeal from its final judgment entered February 27, 2012. Plaintiffs timely appealed on March 28, 2012 (Fed. R. App. P. 4(a)(1)(A)). This Court has appellate jurisdiction under 28 U.S.C. § 1295(a)(1).

STATEMENT OF THE ISSUE

Do farmers and seed selling businesses who are forgoing full use of their property and incurring significant burden to avoid being contaminated by a patent holder's transgenic seed and then accused of patent infringement by the patent holder who has asserted its patents against others that, like Plaintiffs, want nothing to do with the patent holder's seed, have standing to seek a declaratory judgment to redress their injuries?

STATEMENT OF THE CASE

Plaintiffs-Appellants are thirty-one farms or farmers, thirteen seed selling businesses, and thirty-one agricultural organizations representing more than 300,000 individuals and 4,500 farms or farmers, all of whom wish to avoid using or dealing in transgenic seed, *i.e.* seed that has had DNA of foreign organisms inserted into its DNA through human-engineered processes. (A112-141, A858-859.) Plaintiffs use and sell non-transgenic seed, more commonly referred to as heirloom, organic, or conventional seed. (*Id.*)

Defendants-Appellees Monsanto Company and Monsanto Technology LLC (collectively “Monsanto”) are a chemical and agricultural firm that has engineered and patented numerous transgenic seed varieties, including the ones at issue in this case, which have had their DNA altered so as to be resistant to a particular herbicide, glyphosate. (A142-143.) Monsanto has a well known history of zealously asserting its patents on that seed, through marking, licensing, private investigations, threatening legal action and initiating litigation, including against those who did not intend to possess or use it. (A154.)

The non-transgenic seed used and sold by Plaintiffs is susceptible to contamination by Monsanto’s transgenic seed through natural processes such as seed scatter and cross-pollination. (A146.) Thus, Plaintiffs can be contaminated by Monsanto’s transgenic seed without undertaking any act of their own. Due to the substantial prevalence of Monsanto’s transgenic seed throughout American agriculture today, contamination of Plaintiffs’ property is inevitable. (A146, A163.)

It is impossible for Plaintiffs to know when they have been contaminated because their conventional seed and Monsanto’s transgenic seed, and the plants they produce, are indistinguishable to the human eye. (A146.) The only way Plaintiffs can know they have been contaminated by Monsanto’s transgenic seed is to perform an expensive genetic test on their seeds or plants or to observe the presence of some surviving, non-stunted plants in their field after it was somehow exposed to

glyphosate, because those surviving plants intermingled amongst the non-surviving plants must be of Monsanto's glyphosate-resistant transgenic variety. (A146, A143.) Plaintiffs would never purposefully apply glyphosate to their crops, because that would be expected to destroy or stunt them. (A143.) Thus, the only way Plaintiffs can proactively monitor their property for contamination is through burdensome testing. (A146, A722.) Plaintiffs here have repeatedly discovered that organic or conventional seed they considered buying was contaminated with Monsanto's transgenic seed. (A715, 722.) Had they not tested the seed, they would have purchased and used it or sold it to others without knowing it was contaminated. Such acts would have provided Monsanto a basis to accuse them of patent infringement.

Due to the self-replicating nature of seed, contamination is not reversible. (A103.) Contaminated farmers who do not wish to grow transgenic seed once they know they have been contaminated have only one option: they must abandon their field for years before resuming growth of organic or conventional crops. (A146.) Such a draconian measure is not required to maintain organic certification, however, as the USDA-administered National Organic Program standards recognize the inevitability of contamination and permit it to occur. National Organic Program, 65 Fed. Reg. 80548, 80556 (Dec. 21, 2000); *Id.* at 80632 (“[T]hese regulations do not establish a 'zero tolerance' standard” for the presence of transgenic seed contamination). Thus, if organic farmers are contaminated, they

need not destroy their crops in order to maintain their status. They must, though, take such a draconian step if they want to avoid being at risk of being accused of patent infringement by Monsanto for continuing to use and make transgenic seed as they grow their crops and save seed to either sell to others or replant the following season.

Monsanto's patent assertion against those who did not want to have anything to do with its transgenic seed has been the subject of national television news coverage, feature-length documentaries and countless other media reports. (A154.) As a result of the risk that Monsanto will accuse them of patent infringement once they are contaminated by Monsanto's seed, some Plaintiffs have had to completely abandon growing certain crops they had grown for years and could continue growing today. (A706, A707.) Others undertake burdensome genetic testing to do all they can to avoid being unknowingly contaminated by Monsanto's seed. (A715, A722.)

Because they are forgoing full use and enjoyment of their property and undertaking expensive genetic testing to avoid being accused of patent infringement, Plaintiffs brought this suit against Monsanto seeking a declaration that they can not be held liable for patent infringement when they become contaminated by Monsanto's transgenic seed. (A169.) Upon receipt of the desired judgment, Plaintiffs can go back to growing the crops they would like to grow and cease spending time and money on expensive genetic tests of their seed supply.

STATEMENT OF FACTS

Monsanto develops, manufactures, licenses, and sells agricultural biotechnology. (A237.) For the past two decades, the company has acquired and asserted numerous patents on its commercially successful glyphosate-resistant transgenic seed. (A161.) Twenty-three of those patents are at issue in this litigation. (A151-152, A163-164.) Monsanto investigates roughly 500 farmers per year for patent infringement and has filed over 140 patent infringement lawsuits against farmers that it alleged were purposefully using its seed. (A154.)

While many of the accused farmers intended to use Monsanto's seed (proven by the fact that they used glyphosate on their fields in tandem to take advantage of the transgenic seed's glyphosate-resistant trait), Monsanto has also asserted its patents against parties who did not want to use its transgenic seeds. (A154.) For example, Monsanto sent investigators unannounced to the home Mr. and Mrs. David and Dawn Runyon, farmers who never intended to use transgenic seed. (A155.) Monsanto demanded years of farming records and threatened to sue the Runyons for patent infringement. (*Id.*) Monsanto also investigated and sued other farmers who did not intend to use transgenic seed, including Roger, Rodney and Greg Nelson, and Troy Roush. (*Id.*) Plaintiffs are aware of Monsanto's history of patent assertion against those who did not want to use Monsanto's transgenic seed because it has been widely publicized by the media. (A154.)

Farmers who do not wish to use transgenic seed are at grave risk of doing so unintentionally, because organic and conventional crops are vulnerable to contamination by transgenic seed 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 harvest or post-harvest activities; during processing; during transportation; and during storage. (A146.)

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. (A145.) In 2006, before Liberty Link 601 was approved for human consumption, inspectors discovered extensive contamination of the commercial rice supply. (*Id.*) Thus, widespread contamination is possible even when there are only limited places from which the transgenic seed can originate.

Contamination is not only self-propagating; it is also difficult and expensive to detect. (A146.) Once a field is contaminated, to purge the contamination, the infected crop must be completely destroyed and the land owner will be unable to use that field to grow non-transgenic crops for several years in order to ensure the transgenic seed is completely eradicated from the soil. (*Id.*) Even after that process, the risk of contamination persists, threatening to make it impossible to ever farm without coming to possess transgenic seed.

Plaintiffs, like other parties Monsanto has investigated and accused of infringement in the past, do not want to use transgenic seed. (*See, e.g.*, A706, A714, A719.) They also do not want Monsanto to threaten or sue them for patent infringement. Accordingly, several of the Plaintiffs have forgone growing certain crops that they have the capacity and desire to grow because of the likelihood that Monsanto will accuse them of infringement once they are contaminated.

For example, Bryce Stephens is an organic farmer in northwest Kansas. (A705.) He stopped growing corn and soybeans on his farm in order to avoid being accused of patent infringement upon being contaminated, which is inevitable given the widespread adoption of Monsanto's transgenic seed by his neighbors. (A706.) Mr. Stephens has the immediate desire and capability to resume growing corn and soybeans, but as he described in his Declaration submitted to the district court in opposition to Monsanto's motion to dismiss:

I am, to this day, still afraid that if I resume production of corn and soybeans on my farm, something I used to do and am capable of doing again, my crops will become contaminated by Monsanto's transgenic seed and, as a result, I will be vulnerable to a patent infringement lawsuit.

My fear of contamination by transgenic corn and soybeans and the resulting risk of being accused of patent infringement prevent me from growing corn and soybeans on my farm. There is no other reason why I do not grow those crops and I would very much like to do so.

A707. Mr. Stephens is also a member of the Organic Seed Growers and Trade Association (“OSGATA”), whose mission is to develop, protect and promote the organic seed trade and its growers, and who joined this suit to protect the interests of its members. (A707-08.) Don Patterson, another Plaintiff, is forgoing farming alfalfa in Virginia due to his conviction that he would become contaminated by Monsanto’s transgenic alfalfa seed and then accused of patent infringement by Monsanto. (A720.)

In addition to the plaintiffs that are forgoing full use of their land, other plaintiffs now undertake expensive and time-consuming precautions to try to minimize the risk that they will unknowingly come to possess Monsanto’s patented transgenic seed. For example, both Chuck Noble, a farmer in South Dakota, and Fedco Seeds, a cooperative seed company in Maine, regularly test the seed being offered to them by others in order to avoid infringing Monsanto’s patents. (A722, A715.) Highlighting the risk Plaintiffs face of being contaminated, both Mr. Noble and Fedco Seeds have discovered transgenic contamination in the seed they have tested in the past: one third of the seed Mr. Noble tested in 2010 was contaminated and rejected for purchase; and, Fedco Seeds discovered contamination in corn seed it tested (and subsequently rejected for purchase) in 2005, 2008, 2009, and 2010. (*Id.*)

Plaintiffs filed their initial Complaint against Monsanto on March 29, 2011 seeking a declaratory judgment that the twenty-three patents in suit were invalid, not infringed, and unenforceable, and that Monsanto would not be entitled to any

remedy against Plaintiffs when they are contaminated by its seed. (A54, A97-99.) After filing the initial Complaint, but before serving it, Plaintiffs asked Monsanto to provide a covenant not to sue, assuring them in a legally binding way that they need not take these onerous precautions to avoid the risk of being accused of patent infringement. (A180.)

Monsanto refused to provide such assurances, instead referring Plaintiffs to an ambiguous and legally unreliable “commitment” that, “Monsanto’s policy never has been, nor will be, to exercise its patent rights where trace amounts of its patented seed or traits are present in a farmer’s fields as a result of inadvertent means.” (A183.) While a novice reader may mistakenly take comfort from the “commitment,” its use of the ambiguous terms “trace amounts” and “inadvertent means” combined with the fact that Monsanto can change its “policy” whenever it would like only served to solidify Plaintiffs’ belief that Monsanto will accuse them of patent infringement when they are contaminated by Monsanto’s transgenic seed.

Plaintiffs filed an Amended Complaint on June 1, 2011, including these additional facts regarding these communications with Monsanto. (A108-170.) After serving the Amended Complaint, Monsanto moved to dismiss the case for lack of subject-matter jurisdiction on July 12, 2011. (A230.) The district court granted the motion (A1) and Plaintiffs timely appealed (A857).

SUMMARY OF ARGUMENT

Plaintiffs have standing because they have suffered an injury in fact fairly traceable to Monsanto's actions that will be redressed by the issuance of the declaratory judgments they seek. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs' injury in fact is the restriction on use of their land and businesses through the abstention from growing certain crops and the adoption of burdensome genetic testing. Plaintiffs' injury is fairly traceable to Monsanto's affirmative acts in asserting its patents against those who, like Plaintiffs, do not wish to use Monsanto's transgenic seed. A declaratory judgment that Plaintiffs may use their property as they wish despite and after eventual contamination by Monsanto's transgenic seed would fully alleviate Plaintiffs' injury by eliminating the legal liability coercing their injury. In short, "declaratory judgment jurisdiction is met," because Monsanto has put Plaintiffs "in the position of either pursuing arguably illegal behavior or abandoning that which he claims a right to do." *Revolution Eyewear, Inc. v. Aspex Eyewear, Inc.*, 556 F.3d 1294, 1298 (Fed. Cir. 2009) (citing *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1381 (Fed. Cir. 2007)).

Three crucial errors led the district court to make the legally incorrect decision to dismiss Plaintiffs' case. It (i) failed to accept as fact two sets of Plaintiffs' most important uncontroverted allegations and instead heavily relied on unsworn attorney argument made by Monsanto's counsel; (ii) erroneously required

Plaintiffs have an immediate concern of potential infringement in order to have standing; and, (iii) ignored binding precedent that supports standing without any enforcement by the declaratory judgment defendant against the declaratory judgment plaintiff.

First, the court failed to accept as fact and construe in a light most favorable to Plaintiffs their uncontroverted allegations that Monsanto has threatened to sue and sued multiple parties who, like Plaintiffs, did not want to possess or use transgenic seed. Instead, the district court accepted as fact unsupported statements made by Monsanto's counsel at oral argument. Another set of Plaintiffs' uncontroverted factual allegations that the district court disregarded relates to the repeated instances of transgenic contamination in seed supplied to Plaintiffs in the course of their normal business operations. These factual findings were clear error and led the district court to mistakenly conclude Plaintiffs lacked standing.

Second, the district court erroneously required Plaintiffs be immediately at risk of being sued for patent infringement by Monsanto in order to have standing, when it is the immediacy of the injury being suffered by Plaintiffs that matters, not the immediacy with which a suit could be brought against them. Plaintiffs here are already suffering actual concrete injury in the abridgment of their right to use their property as they see fit without risking accusations of patent infringement by Monsanto. That injury could not be more immediate, as it is current and ongoing.

The fact that Plaintiffs can not be sued by Monsanto is not dispositive and, in fact, was the precise scenario in *MedImmune* itself, where the declaratory judgment plaintiff had not yet breached its license agreement, and therefore could not possibly be sued by the patent holder. *MedImmune v. Genentech, Inc.*, 549 U.S. 118 (2007); *see also Dey Pharma, LP v. Sunovion Pharms. Inc.*, 677 F.3d 1158 (Fed. Cir. 2012) (upholding standing even when declaratory judgment defendant had granted declaratory judgment plaintiff a covenant not to sue).

Third, the district court ignored Supreme Court and Federal Circuit precedent from outside the patent context despite the fact that such cases are binding on courts determining declaratory judgment jurisdiction to challenge patents. As the Supreme Court said in *MedImmune*, “Article III does not favor litigants challenging threatened *government* enforcement action over litigants challenging threatened *private* enforcement action. Indeed, the latter is perhaps the easier category of cases” 549 U.S. at 134 n.12 (emphasis original). Ignoring this precedent led the district court to erroneously require more from Plaintiffs to challenge Monsanto’s patents than is required of those challenging statutes who do not have to show that the challenged statute has been enforced against them at all. *See, e.g., Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383 (1988); *Doe v. Bolton*, 410 U.S. 179 (1973).

This Court has similarly said, in the statute-challenge context, that private parties have standing to bring declaratory judgment actions before any enforcement of the statute has begun. *Biotech. Indus. Org. v. Dist. Of Columbia*, 496 F.3d 1362 (Fed. Cir. 2007). While mere knowledge of patents that one objects to is not sufficient to confer standing to bring a declaratory judgment action challenging them, if their existence is causing a declaratory judgment plaintiff concrete injury, as Monsanto's patents are causing Plaintiffs here, there is standing regardless of whether Monsanto has affirmatively enforced them against Plaintiffs or not.

Each of these mistakes led the district court to make its legally erroneous decision to dismiss Plaintiffs' case. The combination of errors reinforces the appropriateness of reversal. A correct review of the factual record and applicable law shows Plaintiffs have standing to pursue the declaratory judgment they seek.

ARGUMENT

STANDARD OF REVIEW

This appeal is from a grant of a motion to dismiss on the ground of subject matter jurisdiction. The Court reviews a grant or denial of a motion to dismiss for lack of subject matter jurisdiction *de novo*. *SanDisk*, 480 F.3d at 1377. It reviews underlying factual findings for clear error. *Id.*

DISCUSSION OF THE ISSUES

I. PLAINTIFFS HAVE STANDING AND ISSUANCE OF A DECLARATORY JUDGMENT IS WARRANTED

“[T]he irreducible constitutional minimum of standing contains three elements.” *Lujan*, 504 U.S. at 560. “First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Id.* (internal citations and quotations omitted). “Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant’” *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). “Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

“Basically, 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*, 549 U.S. at 127, 132 n.11 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

Here, each of the *Lujan* elements is met and the issuance of a declaratory judgment is warranted under *MedImmune's* “all the circumstances” “basic[] question.” First, Plaintiffs’ injury in fact is the restriction on use of their land and businesses through the abstention from growing certain crops and the adoption of burdensome genetic testing. The right to use and enjoy one’s property is legally protected. *See, e.g., Adler v. Fenton*, 65 U.S. 407, 411 (1861). The injury could not be more “concrete” and “actual.”

Second, while Monsanto has not yet directly threatened any Plaintiffs with a patent infringement claim (nor could they, as none of the Plaintiffs have or are yet making, using or selling Monsanto’s transgenic seed), Plaintiffs’ injury is “fairly traceable” to Monsanto due to its affirmative acts asserting its patents against those who, like Plaintiffs, do not wish to use Monsanto’s transgenic seed. But for Monsanto’s history of patent assertion and the certainty with which Plaintiffs will become contaminated by Monsanto’s transgenic seed, Plaintiffs would not be suffering from the heightened level of legal liability risk that has coerced them into abandoning full use and enjoyment of their land and adopting expensive genetic testing procedures to mitigate or eliminate that risk.

Third, the declaratory judgment Plaintiffs seek would allow them to use their property as they wish even after being contaminated by Monsanto’s transgenic seed without fear of being sued by Monsanto for patent infringement, thus fully

alleviating Plaintiffs' injury by eliminating the legal liability risk currently coercing them to abandon full use of their land and incorporate burdensome genetic testing into their business operations.

Having satisfied the *Lujan* elements of standing, the analysis then turns to answering *MedImmune's* "basic[] question" whether the issuance of a declaratory judgment is warranted. "In deciding whether to entertain a declaratory judgment request, a court must determine whether resolving the case serves the objectives for which the Declaratory Judgment Act was created." *Cat Tech LLC v. TubeMaster, Inc.*, 528 F.3d 871, 883 (Fed. Cir. 2008). The Declaratory Judgment Act exists to prevent parties from having to make "an *in terrorem* choice between the incurrence of a growing potential liability for patent infringement and abandonment of their enterprises." *Micron Tech., Inc. v. Mosaid Techs., Inc.*, 518 F.3d 897, 902 (Fed. Cir. 2008) (citing *Elecs. 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.*" *Micron Tech.*, 518 F.3d at 902 (citing *Capo, Inc. v. Dioptics Med. Prods., Inc.*, 387 F.3d 1352, 1355 (Fed. Cir. 2004) (quoting *EMC Corp. v. Norand Corp.*, 89 F.3d 807, 814 (Fed. Cir. 1996))). A plaintiff need not "bet the farm, or ... risk treble damages ... before seeking a declaration of its actively contested legal rights."

MedImmune, 549 U.S. at 134. “Merely the desire to avoid the threat of a ‘scarecrow’ patent, in Learned Hand’s phrase, may therefore be sufficient to establish jurisdiction under the Declaratory Judgment Act.” *Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83, 96 (1993) (citing *Bresnick v. United States Vitamin Corp.*, 139 F.2d 239, 242 (2d Cir. 1943) (L. Hand, J.)).

Here, Plaintiffs are faced with precisely such an *in terrorem* choice. Bryce Stephens is not planting corn and soybeans on his farm in Kansas because of his vulnerability to contamination and a patent infringement suit by Monsanto. (A707.) Don Patterson is also forgoing farming alfalfa in Virginia due to the likelihood that he would become contaminated and then accused of patent infringement by Monsanto. (A719.) Chuck Noble and Fedco Seeds have had to implement burdensome genetic testing into their business processes in an attempt to minimize the risk they will be contaminated and then accused of patent infringement. (A722, A715.) Plaintiffs are being forced to undertake these measures because the potential liability for patent infringement is significant given Monsanto’s history of patent assertion against people who, like them, do not want to have anything to do with Monsanto’s seed.

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. Plaintiffs do not seek an advisory opinion on hypothetical facts and have not brought this case because they are aware of Monsanto's patents and merely object to them.

Plaintiffs have brought this case because they are in a no-win situation; they must either abandon growing certain crops or adopt burdensome genetic testing on the one hand, or put themselves at risk of being contaminated by Monsanto's transgenic seed and then accused of patent infringement as a result on the other. Those who, like the district court, think Plaintiffs' injuries are "of plaintiffs' own making" (A21) should put themselves in Bryce Stephens or Chuck Noble's shoes and ask themselves what they would do in the same situation. Would they really have no concern that they won't be like the Runyons, accused of patent infringement after coming to unknowingly possess Monsanto's transgenic seed? If so, would they be willing to offer to defend and indemnify Plaintiffs from such claims? Plaintiffs would happily purchase such insurance if it were available. Regardless, as the Supreme Court held in *MedImmune*, simply because "[p]etitioner's own acts, in other words, eliminate the imminent threat of harm," does not defeat standing to pursue a declaratory judgment claim. 549 U.S. at 128.

Viewing all the circumstances in this case while keeping in mind the purpose of the Declaratory Judgment Act leads to the conclusion that standing exists under *Lujan* and is warranted under *MedImmune*. Specifically, each of Bryce Stephens, Don Patterson, Chuck Noble and Fedco Seed have been shown to have standing, as has OSGATA under the “doctrine of associational standing” in that “(a) its members [including Bryce Stephens] 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)). The rest of the Plaintiffs have standing as a result of at least one Plaintiff having standing. *Ass’n for Molecular Pathology v. United States PTO*, 653 F.3d 1329, 1348 (Fed. Cir. 2011) (citing *Horne v. Flores*, 129 S. Ct. 2579, 2592-93 (2009)).

II. THE DISTRICT COURT FAILED TO ADOPT PLAINTIFFS’ UNCONTROVERTED ALLEGATIONS

When a motion to dismiss for lack of subject matter jurisdiction challenges the sufficiency of the pleadings but does not deny or controvert the pleader’s allegations of jurisdiction, the court must accept such allegations as true and construe them in a light most favorable to the complainant. *Cedars-Sinai Med. Ctr.*

v. Watkins, 11 F.3d 1573, 1584 (Fed. Cir. 1993); *see also Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1355 (Fed. Cir. 2011). Only controverted allegations are in dispute and subject to fact finding by the district court. *Id.* Thus, if a declaratory judgment defendant does not dispute allegations in its 12(b)(1) motion to dismiss, it concedes those allegations for purposes of the motion.

The district court here committed clear error by failing to accept several of Plaintiffs' most critical allegations that were not disputed by Monsanto. First, the district court failed to adopt Plaintiffs' uncontroverted allegations that Monsanto has threatened and sued farmers who did not want to possess or use transgenic seed. Second, the district court failed to adopt Plaintiffs' uncontroverted allegations that show Monsanto's transgenic seed will contaminate Plaintiffs even though they do not want to use or possess it. These failures by the district court led it to make its legally erroneous decision that Plaintiffs lacked standing.

A. Monsanto Has Threatened And Sued Farmers Who Did Not Want To Possess Or Use Transgenic Seed

Plaintiffs allege in their complaint that Monsanto has made patent infringement accusations against those who never wished to possess its transgenic seed. (A154.) Monsanto acknowledged these accusations in support of its motion, even quoting Plaintiffs' allegation that Monsanto has engaged in "investigation, accusation and litigation of patent infringement claims against other farmers who did not want to be contaminated by transgenic seed." (A244.) But it did not deny or

controvert said allegations. Instead, Monsanto inserted the words “alleged” and “allegedly” without availing itself of the plain opportunity to dispute the record. *Id.* Accordingly, these accusations should have been treated as fact.

But the district court did not accept as fact the specifically identified threats of Monsanto patent assertion against farmers who did not want to use their transgenic seed. To the contrary, the court stated, “plaintiffs allege *without specification* that defendants have accused certain non-intentional users of Monsanto’s seed of patent infringement and threatened them with litigation,” failing to recognize the specific parties Plaintiffs identified. (A6 (emphasis added).) The lower court later referred to these allegations as “unsubstantiated claims.” (A15-16.) To support these conclusions, the district court cited the facts that “Monsanto alleged” years ago that the Nelsons intentionally infringed Monsanto’s patents and that a media report “described” Mr. Roush’s case as one involving intentional infringement. (*Id.*) But, off-record allegations and third party media descriptions are not facts and, therefore, can not discredit Plaintiffs’ allegations that the Nelsons and Mr. Roush were indeed the subject of Monsanto’s accusations after being unintentionally contaminated by Monsanto’s seed. Monsanto did not controvert the allegations in support of its motion to dismiss. Thus, those allegations were to be adopted as fact. *Cedars-Sinai*, 11 F.3d at 1584.

Further, the district court did not even mention in its opinion Plaintiffs' uncontroverted allegations regarding the Runyons, who were falsely accused by Monsanto of patent infringement after being contaminated. (A155.) Those facts also should have been adopted by the district court.

Rather than adopt these uncontroverted allegations by Plaintiffs, the district court instead heavily relied in its recitation of the facts on the unsworn statement of Monsanto's counsel at oral argument that Monsanto had never sued a party who "did not want to make use of the traits that are manifested in [defendants'] transgenic products." (A6.) Such unsupported argument must not be acknowledged as a part of the evidentiary record, much less found to dispute any facts alleged in Plaintiffs' complaint. *See Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d 1371, 1380 (Fed. Cir. 2009) ("unsworn attorney argument ... is not evidence").

While Monsanto introduced in support of its motion to dismiss a declaration by Monsanto's Vice President for Industry Affairs, James P. Tobin, (A509) in which Mr. Tobin said, "Monsanto has never filed a patent-infringement lawsuit against a USDA-certified organic farm or handling operation," (A513), that statement is both much narrower than the unsupported attorney argument adopted by the district court and also still insufficient to dispute Plaintiffs' allegations for two reasons. First, Monsanto did not say it has never filed a patent infringement

lawsuit against a conventional (but not USDA-certified organic) farmer, which many of the Plaintiffs are. Second, even without filing a lawsuit, Monsanto did not say it has never threatened a USDA-certified organic farmer with patent infringement allegations.

The “commitment” described by Mr. Tobin is also ambiguous and legally unreliable. (A512-13.) It provides Plaintiffs absolutely no legal assurances that they are not at risk of being sued in the future. For one, it relies on the ambiguous terms “trace amounts” and “inadvertent means.” Regarding “trace amounts,” because contamination is undetectable, it is possible for Plaintiffs to possess a significant amount of Monsanto’s transgenic seed before they even know they have been contaminated. Regarding, “inadvertent means,” it could be interpreted by Monsanto to exclude Plaintiffs who do not use burdensome genetic testing or set up buffer zones on their own property to protect themselves from contamination. The “commitment” can also be retracted by Monsanto at its whim.

The district court’s finding that Monsanto’s “commitment” should provide comfort to Plaintiffs that they need not be worried about ever being sued for patent infringement if they are contaminated (A16) fails to recognize that sophisticated parties will carefully draft seemingly innocuous language to avoid making specific threats and that the use of apparently non-threatening language does not defeat declaratory judgment standing. *Hewlett-Packard Co. v. Acceleron LLC*, 587 F.3d

1358, 1362 (Fed. Cir. 2009) (“The purpose of a declaratory judgment action cannot be defeated simply by the stratagem of a correspondence that avoids the magic words such as 'litigation' or 'infringement.'”).

Monsanto itself concedes its “commitment” language 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. (A727.) 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.” (A731.) 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 claimed the request was “vague.” *Id.*

Thus, it was clear error for the district court to rely on the “commitment” and its professed “policy” as a basis to dismiss Plaintiffs’ allegations regarding Monsanto’s actual behavior.

B. Monsanto's Patented Seed Will Contaminate Plaintiffs Even Though They Do Not Want To Use Or Possess It

Two plaintiffs submitted sworn declarations evidencing the threat of unwanted transgenic seed contamination. (A715, A722.) The district court acknowledged the four years in which Plaintiff Fedco Seeds received shipments contaminated with transgenic seed and the transgenic contamination in seed that plaintiff Chuck Noble considered purchasing, but it nonetheless chose to qualify the sworn "claims" by stating, "Neither plaintiff asserts that the offending seeds were covered by defendants' patents." (A4-5.) Plaintiffs alleged in their complaint, however, that, "[i]n the United States, Monsanto's control of the seed market is so high that over 85-90% of all soybeans, corn, cotton, sugar beets and canola grown in the U.S. Contains Monsanto's patented genes." (A143.) Monsanto did not dispute that fact.

Given Fedco's contamination experience with corn seed in four separate years and Mr. Noble's contamination experience with one third of all the seed he tested in 2010, a construction of the facts in a light most favorable to the complainant warrants an inference that the "offending seeds" were in fact within the scope of Monsanto's patents. Instead of just acknowledging that two plaintiffs made "claims" regarding their unwanted encounters with transgenic seed, the district court should have accepted as fact that Monsanto's patented seeds were within a breath of infiltrating Plaintiffs' businesses.

III. THE DISTRICT COURT ERRONEOUSLY REQUIRED A SHOWING THAT “POTENTIAL INFRINGEMENT IS A MATTER OF IMMEDIATE CONCERN”

In *MedImmune*, the Supreme Court reiterated a flexible standard in deciding the ultimate question of “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.” 549 U.S. at 127. The district court here, however, disregarded *MedImmune*’s caution against drawing bright lines and fabricated a rigid “potential infringement is a matter of immediate concern” requirement that does not comport with Supreme Court or Federal Circuit precedent. (A20.)

The potential transgenic contamination that two of the plaintiffs detected (*see* discussion of Chuck Noble and Fedco Seeds *supra*) demonstrates that Plaintiffs are already on the brink of being contaminated. Because transgenic contamination occurs despite non-transgenic farmers’ desire and efforts to avoid it, such farmers need take no further action to make, use, or sell the patented seed. (A20.) The nature of the seed is itself closing the gap between Plaintiffs’ organic and conventional farming activities and unintentional farming of Monsanto’s patented seed.

The district court cited but seemed not to accept as true the invasive nature of the patented technology, stating, “Plaintiffs have not alleged that any of them have actually grown or sold contaminated seed, and they have in fact professed a

desire to specifically avoid any such use.” (A20.) This statement exhibits the court’s failure to recognize that the spreading seed is indifferent to the farmers' will. The district court further responded, “Regardless of whether plaintiffs need to demonstrate affirmative action on their part beyond their usual agricultural activities, *they must show that potential infringement is a matter of immediate concern.*” (A20 (emphasis added).) The court cited no authority for this proposition. It then equated immediacy with certainty: “Here, even if plaintiffs [who have stopped farming certain crops for fear of infringement accusations] resumed farming their crops, contamination—and thus potential infringement—is not certain.” (A21, n.8.)

Not only is this finding unsupported by the uncontroverted factual allegations discussed above regarding the inevitability of contamination, the immediacy standard proffered by the district court is also legally incorrect. In citing this Court’s *Creative Compounds* decision, the district court said, “there must be 'an underlying legal cause of action that the declaratory defendant could have brought or threatened to bring, if not for the fact that the declaratory plaintiff had preempted it.’” (A10-11 (*citing Creative Compounds, LLC v. Starmark Labs.*, 651 F.3d 1303, 1316 (Fed. Cir. 2011)).) However, that is a mistakenly narrow reading of *Creative Compounds*, which said the existence of such a possible suit is merely one way, not the only way, to show the injury being suffered relates to a

legal interest and not a purely an economic interest. 651 F.3d at 1316 (“The concept of adverse legal interests requires that there be a dispute as to a legal right, *such as* an underlying cause of action that the declaratory defendant could have brought or threatened to bring, if not for the fact that the declaratory plaintiff had preempted it.” (emphasis added)).

The Supreme Court and this Court have repeatedly confirmed that “sufficient immediacy” exists when the declaratory judgment plaintiff has the capacity to engage in allegedly infringing activity and professes a wish to utilize that capacity.¹ *See, e.g., MedImmune*, 549 U.S. 118 (holding that petitioner was not required to potentially infringe by breaking its license agreement and exposing itself to legal liability before seeking a declaratory judgment on the underlying patent); *Cat Tech*, 528 F.3d 871 (stating that a party need not have engaged in the actual manufacture or sale of a potentially infringing product to seek a declaratory judgment). These cases contradict the district court’s holding that Plaintiffs must wait to be contaminated by transgenic seed and susceptible to a patent infringement suit before they can adjudicate their legal rights vis-a-vis Monsanto’s patents.

¹ For Plaintiffs here, that capacity is farming and distributing seed susceptible to transgenic contamination, not farming with or distributing transgenic seed *per se*. As discussed throughout, the inevitability of contamination makes it impossible to do the former without high risk of unknowingly doing the latter.

The district court quoted *AMP* for the proposition that Plaintiffs' concerns of infringement "without any specification of when the some day will be" do not satisfy the immediacy requirement. (A20-21 (*citing Ass'n for Molecular Pathology v. U.S. Patent and Trademark Office*, 653 F.3d 1329 (Fed. Cir. 2011)).) What the court failed to mention was that the plaintiffs this Court referred to in the quoted portion of its *AMP* opinion had only alleged that they would "consider" resuming the allegedly infringing activity if the disputed patents were found invalid or unenforceable. 653 F.3d at 1346. They were thus unlike the Plaintiffs here who either currently engage in potentially infringing activity under risk of becoming legally liable for patent infringement to Monsanto, taking whatever painstaking precautions they can to postpone contamination and its attendant legal liability risk (A715, A722), or have sworn that they would engage in said activity if the patent infringement liability risk was redressed (A707).

The plaintiff in *AMP* found by this Court to allege "an actual and imminent injury for purposes of standing" had done so by stating "unequivocally" that he would immediately begin the allegedly infringing testing upon a declaration of his right to do so. 653 F.3d at 1346. Having sworn his readiness and intent to resume the patented testing, that plaintiff in *AMP* was not required to pinpoint the date on which he would resume testing or otherwise "show that potential infringement [was] a matter of immediate concern," as the district court required of Plaintiffs here.

Further illustration of the error in the district court's "immediate concern" requirement lies in an even more recent decision by this Court in which jurisdiction lay on a mere possibility, not a certainty, of injury, not infringement. In *Dey Pharma*, a generic pharmaceutical company had standing to pursue its invalidity action against a brand name drug company even though (i) the brand had granted the generic a covenant not to sue over the challenged patent (thus eliminating any possibility of potential infringement) and (ii) the generic's injury was not "certain" because it depended on the future inaction of a third party. 677 F.3d at 1161, 1164. *Dey Pharma* thus demonstrates certainty is not required to satisfy *MedImmune's* "sufficient immediacy", and especially not certainty of potential infringement.

In the instant case, it was wrong for the district court to require plaintiffs who are abstaining from growing certain crops be "certain" they will be immediately contaminated if they resumed doing so, or that plaintiffs who continue to work with susceptible crops be "certain" of the date on which they will be contaminated. In light of Monsanto's patent enforcement against similarly situated parties, it is Plaintiffs' injury in attempting to avoid and minimize the risk of being contaminated and then accused of patent infringement that is "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune*, 549 U.S. at 127.

IV. PRECEDENT THAT FINDS STANDING WITHOUT ANY ENFORCEMENT IS NOT “WHOLLY INAPPOSITE”

In addressing Plaintiffs’ argument, the district court dismissed as “wholly inapposite” binding Supreme Court and Federal Circuit precedent that dealt with standing to challenge statutes before any enforcement of those statutes against the plaintiffs began. (A21, n.9.) But that precedent itself declares its relevance to standing to challenge patents and, when considered, further supports Plaintiffs’ standing here.

A. The Same Body Of Law Controls Standing To Challenge Statutes And Patents

In *MedImmune*, the Supreme Court’s analysis of standing to bring a declaratory judgment challenge to a patent started with:

Our analysis must begin with the recognition that, where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat-- for example, the constitutionality of a law threatened to be enforced. The plaintiff’s own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.

549 U.S. at 128-129 (emphasis original). The Supreme Court then proceeded to discuss two non-patent cases in which plaintiffs were allowed to bring challenges to statutes before there was any hint whatsoever that the government would seek to enforce those laws against them (or anyone at all). *Id*; see *Steffel v. Thompson*, 415 U.S. 452 (1974); *Terrace v. Thompson*, 263 U.S. 197 (1923). In the course of

determining that the patent challenger in *MedImmune* was similarly not required to expose itself to liability to obtain standing, Justice Scalia writing for the Supreme Court noted, in response to Justice Thomas' lone dissent:

The dissent objects to our supposed "extension of *Steffel* [*v. Thompson*] ... to apply to voluntarily accepted contractual obligations between private parties." *Post*, at 781. The criticism is misdirected in several respects. The coercion principle upon which we rely today did not originate with *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974), see *supra*, at 772-773, and we have no opportunity to extend it to private litigation, because *Altvater v. Freeman*, 319 U.S. 359, 63 S. Ct. 1115, 87 L. Ed. 1450 (1943), already did so, see *supra*, at 773. Moreover, even if today's decision could be described as an "extension of *Steffel*" to private litigation, the dissent identifies no principled reason why that extension is not appropriate. Article III does not favor litigants challenging threatened *government* enforcement action over litigants challenging threatened *private* enforcement action. Indeed, the latter is perhaps the easier category of cases, for it presents none of the difficult issues of federalism and comity with which we wrestled in *Steffel*. See 415 U.S., at 460-475, 94 S. Ct. 1209.

The dissent accuses the Court of misapplying *Steffel*'s rationale. *Post*, at 782. It contends that *Steffel* would apply here only if respondents had threatened petitioner with a patent infringement suit *in the absence of a license agreement*, because only then would petitioner be put to the choice of selling its product or facing suit. *Post*, at 782. Here, the dissent argues, the license payments are "voluntarily made." *Ibid*. If one uses the word "voluntarily" so loosely, it could be applied with equal justification (or lack thereof) to the *Steffel* plaintiff's "voluntary" refusal to distribute handbills. We find the threat of treble damages and loss of 80 percent of petitioner's business every bit as coercive as the modest penalties for misdemeanor trespass threatened in *Steffel*. Only by ignoring the consequences of the threatened action in this case can the dissent claim that today's opinion "contains no limiting principle whatsoever," *post*, at 782.

549 U.S. at 134 n.12 (2007) (emphasis original). *MedImmune* thus explicitly drew cases involving challenges to statutes to guide the determination of declaratory judgment jurisdiction in a case challenging a patent. To say the former body of law was “wholly inapposite” to whether Plaintiffs have standing here, as the district court did, is thus clearly incorrect.

MedImmune is not the only Supreme Court precedent linking the analysis of standing to challenge patents and standing to challenge statutes. In *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010), a case involving a challenge to a criminal statute, the Supreme Court cited *MedImmune* to support its finding that plaintiffs there presented a justiciable case or controversy under Article III. The citation of *MedImmune* in *Holder* confirms that cases addressing standing to challenge patents are not “wholly inapposite” to cases addressing standing to challenge statutes.

Similarly, in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, the Supreme Court again cited *MedImmune* when addressing the standing of a plaintiff to challenge a law’s validity (“We normally do not require plaintiffs to ‘bet the farm ... by taking the violative action’ before ‘testing the validity of the law,’ *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129”). 130 S. Ct. 3138, 3143 (2010). Again the Supreme Court linked standing to challenge statutes to standing to challenge patents.

In fact, if there are any differences between standing to challenge statutes and standing to challenge patents, the Supreme Court has said, “Article III does not favor litigants challenging threatened *government* enforcement action over litigants challenging threatened *private* enforcement action. Indeed, the latter is perhaps the easier category of cases.” *MedImmune*, 549 U.S., at 134 n.12.

All of the non-patent cases Plaintiffs’ counsel cited that were dismissed out of hand by the district court, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383 (1988), *Doe v. Bolton*, 410 U.S. 179 (1973), *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937); *Biotech. Indus. Org. v. Dist. of Columbia*, 496 F.3d 1362 (Fed. Cir. 2007); along with *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3143 (2010), bear directly on the appropriate standard for finding whether Plaintiffs here have alleged a case or controversy that warrants declaratory judgment jurisdiction.

The district court cited this Court’s decision in *Arris Grp., Inc. v. British Telecomms. PLC*, 639 F.3d 1368, 1374 (Fed. Cir. 2011), to support its contention that standing to challenge statutes is to be treated differently than standing to challenge patents. (A21, n.9.) But *Arris* merely stands for the proposition that economic injury does not confer standing in patent declaratory judgment cases as it may in cases challenging government action. 639 F.3d at 1374. The injury

claimed by Plaintiffs here is the right to conduct certain agricultural activities without the burden of precautions that minimize risk of uncontrollable contamination. That injury being suffered by Plaintiffs is not merely economic, as it relates to their legal rights and responsibilities; *Arris* thus does not apply. Regardless, *Arris* should not be read to conflict with the Supreme Court precedent discussed above.

B. Direct Patent Enforcement By Monsanto Against Plaintiffs Is Not Required

The district court's failure to consider standing precedent from outside the patent context led it to make a significant legal error, requiring for Plaintiffs here to have standing that Monsanto must have taken affirmative action to enforce its patents against them directly. (A12.) In *MedImmune*, the Supreme Court held that this Court's prior standing rules requiring a reasonable apprehension of suit were contrary to *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239 (1937), "where jurisdiction obtained even though the very reason the insurer sought declaratory relief was that the insured had given no indication that he would file suit." 549 U.S. at 132 n.11. This holding was consistent with many other decisions from that court. *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (finding that physicians have standing "despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes"); *Virginia v. Am. Booksellers Ass'n, Inc.*,

484 U.S. 383, 393 (1988) (“We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them.”).

This Court has similarly upheld standing for a pre-enforcement challenge to a statute. *Biotech. Indus. Org. v. Dist. of Columbia*, 496 F.3d 1362, 1370 (Fed. Cir. 2007). In that case, this Court said:

The injury need not have been already manifested. “A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement. But one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (internal citations and quotations omitted).

496 F.3d at 1370. Although plaintiffs here are challenging a patent, not a statute, the same rule applies. The *Lujan* elements required for Article III standing do not differ based on the public or private nature of the defendant, as a plaintiff can suffer injury from the existence of an invalid patent even if it is not being enforced against them just like they can suffer injury from the existence of an invalid statute. The district court’s requirement that Monsanto be directly enforcing its patents against Plaintiffs before they can seek redress of the injury being caused to them by those patents is contrary to the law. All of the cases discussed above support a

plaintiff's challenge to legal restrictions even if the enforcer has not, as Monsanto *has* here, enforced that restriction against similarly situated parties.² Thus, they support finding an Article III controversy exists in this case.

CONCLUSION

The judgment of the district court should be reversed.

Dated: July 5, 2012

/s/ Daniel B. Ravicher

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² The Supreme Court recently granted *certiorari* to consider whether a party seeking a declaratory judgment of invalidity of a trademark has standing to do so even if the trademark holder has provided that party a broad covenant not to sue and there is absolutely no current risk to the declaratory judgment plaintiff at all that the mark may be enforced against it. *Already, LLC v. Nike, Inc.*, 2012 U.S. LEXIS 4718 (June 25, 2012).

ADDENDUM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ORGANIC SEED GROWERS AND TRADE
ASSOCIATION; ORGANIC CROP IMPROVEMENT
ASSOCIATION INTERNATIONAL, INC.; OCIA
RESEARCH AND EDUCATION INC.; THE
CORNUCOPIA INSTITUTE; DEMETER
ASSOCIATION, INC.; CENTER FOR FOOD
SAFETY; BEYOND PESTICIDES; NAVDANYA
INTERNATIONAL; MAINE ORGANIC FARMERS AND
GARDENERS ASSOCIATION; NORTHEAST ORGANIC
FARMING ASSOCIATION OF NEW YORK;
NORTHEAST ORGANIC FARMING
ASSOCIATION/MASSACHUSETTS CHAPTER, INC.;
NORTHEAST ORGANIC FARMING ASSOCIATION OF
NEW HAMPSHIRE; NORTHEAST ORGANIC FARMING
ASSOCIATION OF RHODE ISLAND; CT NOFA;
NORTHEAST ORGANIC FARMING ASSOCIATION OF
VERMONT; RURAL VERMONT; OHIO ECOLOGICAL
FOOD & FARM ASSOCIATION; FLORIDA
CERTIFIED ORGANIC GROWERS AND CONSUMERS
INC.; SOUTHEAST IOWA ORGANIC ASSOCIATION;
NORTHERN PLAINS SUSTAINABLE AGRICULTURE
SOCIETY; MENDOCINO ORGANIC NETWORK;
NORTHEAST ORGANIC DAIRY PRODUCERS
ALLIANCE; MIDWEST ORGANIC DAIRY PRODUCERS
ALLIANCE; WESTERN ORGANIC DAIRY PRODUCERS
ALLIANCE; CANADIAN ORGANIC GROWERS;
MANITOBA ORGANIC ALLIANCE; PEACE RIVER
ORGANIC PRODUCERS ASSOCIATION; UNION
PAYSANNE; FAMILY FARMER SEED COOPERATIVE;
SUSTAINABLE LIVING SYSTEMS; GLOBAL
ORGANIC ALLIANCE; FOOD DEMOCRACY NOW!;
FAMILY FARM DEFENDERS INC.; FARM-TO-
CONSUMER LEGAL DEFENSE FUND; WESTON A.
PRICE FOUNDATION; MICHAEL FIELDS
AGRICULTURAL INSTITUTE; FEDCO SEEDS INC.;
ADAPTIVE SEEDS, LLC; SOW TRUE SEED;
SOUTHERN EXPOSURE SEED EXCHANGE; MUMM'S
SPROUTING SEEDS; BAKER CREEK HEIRLOOM
SEED CO., LLC; COMSTOCK, FERRE & CO.,
LLC; SEEDKEEPERS, LLC; SISKIYOU SEEDS;
COUNTRYSIDE ORGANICS; WILD GARDEN SEED;
CUATRO PUERTAS; SEED WE NEED; INTERLAKE
FORAGE SEEDS LTD.; ALBA RANCH; WILD PLUM
FARM; GRATITUDE GARDENS; RICHARD EVERETT

MEMORANDUM AND ORDER

11 Civ. 2163 (NRB)

FARM, LLC; PHILADELPHIA COMMUNITY FARM, INC.; GENESIS FARM; CHISPAS FARMS LLC; KIRSCHENMANN FAMILY FARMS INC.; MIDHEAVEN FARMS; KOSKAN FARMS; CALIFORNIA CLOVERLEAF FARMS; NORTH OUTBACK FARM; TAYLOR FARMS, INC.; JARDIN DEL ALMA; RON GARGASZ ORGANIC FARMS; ABUNDANT ACRES; T & D WILLEY FARMS; FULL MOON FARM, INC.; COMMON GOOD FARM, LLC; AMERICAN BUFFALO COMPANY; RADIANCE DAIRY; QUINELLA RANCH; NATURE'S WAY FARM LTD.; LEVKE AND PETER EGGERS FARM; FREY VINEYARDS, LTD.; BRYCE STEPHENS; CHUCK NOBLE; LARHEA PEPPER; PAUL ROMERO; BRIAN WICKERT; BRUCE DRINKMAN; MURRAY BAST; and DONALD WRIGHT PATTERSON, JR.,

Plaintiffs,

- against -

MONSANTO COMPANY and MONSANTO TECHNOLOGY LLC,

Defendants.

-----X
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiffs bring this lawsuit against defendants Monsanto Company and Monsanto Technology LLC (together "defendants" or "Monsanto"), seeking declaratory judgments that plaintiffs are not infringing various of defendants' patents, that those patents are invalid and unenforceable, and that, regardless, defendants would be entitled to no remedies against plaintiffs. Presently before us is defendants' motion to dismiss for lack of subject matter jurisdiction.

For the reasons set forth herein, defendants' motion is granted.

BACKGROUND¹

I. Pre-Suit Facts

The relevant facts are largely uncontested. Plaintiffs are farmers and seed businesses, both organic and non-organic, as well as related membership organizations. Plaintiffs do not want to use, grow crops raised from, or sell transgenic seed, which is seed that has had genetic code of another species introduced to it. Defendants develop, manufacture, license, and sell chemicals and agricultural biotechnology, including transgenic seed.

Defendants produce, in particular, transgenic seed known as "Roundup Ready," which is resistant to the herbicide glyphosate, the active ingredient in defendants' product "Roundup." This resistance trait and related technologies are covered by a variety of patents held by defendants.²

¹ These facts are drawn from the First Amended Complaint (the "FAC") and the numerous declarations submitted in connection with the Memorandum of Law in Support of Monsanto Company and Monsanto Technology LLC's Motion to Dismiss for Lack of Subject-Matter Jurisdiction ("Defs.' Mem."), Plaintiffs' Memorandum of Law in Opposition to Defs.' Mem. ("Pls.' Mem."), and the Reply Memorandum in Support of Monsanto's Motion to Dismiss for Lack of Subject-Matter Jurisdiction. In assessing subject matter jurisdiction, we are permitted to look beyond the pleadings. See Hunter v. Colonial Park, 409 F. App'x 411, 412 (2d Cir. 2011).

² The patents at issue in this action are U.S. Patent Nos. 5,322,938, 3,532,605, 5,362,865, 5,378,619, 5,424,412, 5,463,175, 5,530,196, 5,554,798, 5,593,874, 5,641,876, 5,659,122, 5,717,084, 5,728,925, 5,750,871, 5,859,347, 6,025,545, 6,040,497, 6,051,753, 6,083,878, 6,753,463, and 6,825,400, and U.S. Reissue Patent Nos. RE38825 and RE39247.

Growers who wish to use defendants' seeds must obtain limited-use licenses to do so. Because subsequent generations of plants grown from these seeds will also contain the glyphosate-tolerance trait, these licenses authorize growers to use the seed only to grow a single crop; growers are not authorized to harvest and plant the second-generation seed produced from the original planting, or to sell seeds containing the patented trait outside authorized channels of distribution.

Despite these restrictions, some unlicensed -- and unintended -- use of transgenic seeds is inevitable. Like any other seeds, transgenic seeds may contaminate non-transgenic crops through a variety of means, including seed drift or scatter, crosspollination, and commingling via tainted equipment during harvest or post-harvest activities, processing, transportation, and storage. Seed businesses and farmers may, at some expense, test their seeds and crops to ensure that no contamination has occurred, and non-transgenic farmers may establish buffer zones between themselves and farmers using transgenic seed in order to reduce the risk of cross-transmission.

No plaintiffs claim that contamination has yet occurred in any crops they have grown or seed they have sold. However, one plaintiff farmer claims that seed he considered purchasing in 2010 was contaminated with genetically engineered seed, (Decl.

of Chuck Noble in Supp. of Pls.' Mem. ¶ 5), and one plaintiff seed distributor claims that it received shipments contaminated with genetically modified seed in each of 2005, 2008, 2009, and 2010, (Decl. of C.R. Lawn in Supp. of Pls.' Mem. ¶ 4). Neither plaintiff asserts that the offending seeds were covered by defendants' patents.

Contamination can theoretically affect non-transgenic farmers by lowering the price for which their crops may be sold and potentially resulting in rejected shipments. While there is no evidence in the record that any farmer has ever been decertified as organic by the U.S. Department of Agriculture National Organic Program (the "NOP") because of seed contamination, we do not foreclose that hypothetical possibility. According to the NOP, however, "[o]rganic certification is process based." (Decl. of Carolyn Jacobs Chachkin in Supp. of Defs.' Mem. ("Chachkin Decl."), Ex. L, Policy Memo 11-13 (Apr. 15, 2011).) As a result, "[i]f all aspects of the organic production or handling process were followed correctly, then the presence of a detectable residue from a genetically modified organism alone does not constitute a violation of this regulation." (Id.)³

³ We also note, parenthetically, that organic certification is only of concern to certain plaintiffs; other plaintiffs eschew use of transgenic seed but are not organic farmers or seed businesses.

Additionally, inadvertent growth of crops with patented traits may potentially subject a farmer to liability for patent infringement. While defendants investigate hundreds of possible patent infringers each year, between 1997 and April 2010 they filed just 144 lawsuits to enforce their patent rights against farmers. Defendants, moreover, have never filed a patent-infringement suit against a certified organic farm or handling operation over the presence of patented traits in its operations, and they stated at oral argument that they have never sued a party who did not "want to make use of the traits that are manifested in [defendants'] transgenic products." (Oral Arg. Tr. at 10:2-9; see also id. at 34:23-35:14.) Indeed, defendants have expressly declared that it is not their policy "to exercise [their] patent rights where trace amounts of our seed or traits are present in [a] farmer's fields as a result of inadvertent means." (Chachkin Decl., Ex. O, Monsanto's Commitment: Farmers and Patents.) Nevertheless, plaintiffs allege without specification that defendants have accused certain non-intentional users of Monsanto's seed of patent infringement and threatened them with litigation. No plaintiffs claim to have been so threatened.

II. Post-Suit Facts

On March 29, 2011, plaintiffs filed a complaint seeking declaratory judgments that twenty-three of defendants' patents

are invalid, unenforceable, and not infringed by plaintiffs, and that, regardless, defendants would be entitled to no remedy against plaintiffs. That same day, defendants republished on their blog their commitment not to exercise their patent rights over inadvertently acquired trace amounts of patented seed or traits. (FAC, Ex. 2, MonsantoCo, "PUBPAT Allegations Are False, Misleading and Deceptive" (Mar. 29, 2011).)

Shortly thereafter, plaintiffs wrote to defendants and emphasized a point asserted in their filing: "none of [the plaintiffs] intend[s] to possess, use or sell any transgenic seed, including any transgenic seed potentially covered by Monsanto's patents." (FAC, Ex. 3, Letter from Daniel B. Ravicher, Public Patent Found., to Todd Zubler, Esq., WilmerHale (Apr. 18, 2011).) Nonetheless, the letter professes a fear of being sued by defendants for patent infringement and "request[s] that Monsanto expressly waive any claim for patent infringement it may ever have against [plaintiffs] and memorialize that waiver by providing a written covenant not to sue." (Id.) Plaintiffs asserted that defendants' failure to respond to the letter would make it "reasonable for [plaintiffs] to feel they would be at risk of having Monsanto assert claims of patent infringement against them should they ever become contaminated by transgenic seed potentially covered by Monsanto's patents." (Id.)

In response to plaintiffs' letter, defendants reiterated that it is not their policy to exercise their patent rights against farmers whose fields inadvertently contain trace amounts of patented seeds or traits. In particular, the reply letter referenced plaintiffs' claim that they do not have any intention of using any transgenic seed and noted that, "[t]aking [that] representation as true, any fear of suit or other action is unreasonable, and any decision not to grow certain crops unjustified." (FAC, Ex. 4, Letter from Seth P. Waxman, WilmerHale, to Ravicher (Apr. 28, 2011).)

Plaintiffs filed the FAC on June 1, 2011, seeking the same declaratory judgment relief as in the original complaint while adding a number of new plaintiffs and including a description of the events that transpired after the original complaint was filed. Defendants made this motion the following month, moving to dismiss the FAC for lack of subject matter jurisdiction.

DISCUSSION

I. Legal Standards

The Declaratory Judgment Act provides, "In a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The jurisdiction of courts to issue judgments is

limited by the justiciability of "cases" or "controversies" under Article III of the Constitution. See Prasco, LLC v. Medicis Pharm. Corp., 537 F.3d 1329, 1335 (Fed. Cir. 2008). Thus a district court has no jurisdiction over a declaratory judgment action if the suit does not meet Article III's case or controversy requirement.

Although "there is no bright-line rule for determining whether an action satisfies the case or controversy requirement," id. at 1336, and "the analysis must be calibrated to the particular facts of each case," Cat Tech LLC v. TubeMaster, Inc., 528 F.3d 871, 879 (Fed. Cir. 2008), the Supreme Court has articulated a basic test that every dispute must satisfy. A declaratory judgment plaintiff must demonstrate that "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." Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office ("AMP"), 653 F.3d 1329, 1342-43 (Fed. Cir. 2011) (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007)). The Federal Circuit has further refined this test⁴ to require "an injury in

⁴ "Whether an actual case or controversy exists so that a district court may entertain an action for a declaratory judgment of non-infringement and/or invalidity is governed by Federal Circuit law." MedImmune, Inc. v. Centocor, Inc., 409 F.3d 1376, 1378 (Fed. Cir. 2005), overruled on other grounds by MedImmune, 549 U.S. at 130-31.

fact traceable to the patentee," which only exists if plaintiffs have alleged "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."⁵ Id. at 1343 (citing SanDisk Corp. v. STMicroelectronics, Inc., 480 F.3d 1372, 1380-81 (Fed. Cir. 2007); Cat Tech, 528 F.3d at 880).

The first element is intended to ensure that the parties have adverse legal interests, which may be established "where a patentee asserts rights under a patent based on certain identified ongoing or planned activity of another party, and where that party contends that it has the right to engage in the accused activity without license." SanDisk, 480 F.3d at 1381. Such circumstances, however, are not "the outer boundaries of declaratory judgment jurisdiction," id., and it is possible that the first prong of the test may be satisfied upon some lesser showing. Nevertheless, there must be "an underlying legal cause

⁵ Despite placing heavy emphasis on the Federal Circuit's holding that there can be "no bright-line rule . . . for determining whether a declaratory judgment action satisfies Article III's case-or-controversy requirement," AMP, 653 F.3d at 1342; (Pls.' Mem. 9-11), plaintiffs attempt to circumvent this test first by arguing that MedImmune confers per se standing on any plaintiff who has purchased a license to a patent. (Pls.' Mem. 18.) The argument evinces a lack of understanding of MedImmune's holding, which was that purchasing a patent license does not preclude jurisdiction where the purchase has been coerced. See 549 U.S. at 129-31. Plaintiffs, relying on their misreading of MedImmune, next endeavor to extend the argument and contend that standing should be conferred on all parties who are able to purchase a license, whether or not they have done so. (Pls.' Mem. 19.) Accepting this suggestion would functionally eliminate the case or controversy requirement and should thus be rejected out of hand.

of action that the declaratory defendant could have brought or threatened to bring, if not for the fact that the declaratory plaintiff had preempted it," because otherwise "any adverse economic interest that the declaratory plaintiff may have against the declaratory defendant is not a legally cognizable interest sufficient to confer declaratory judgment jurisdiction." Creative Compounds, LLC v. Starmark Labs., 651 F.3d 1303, 1316 (Fed. Cir. 2011) (internal quotation marks omitted). Indeed, "[t]he mere existence of a potentially adverse patent does not cause an injury [or] create an imminent risk of an injury; absent action by the patentee, a potential [infringer] is legally free to market its product in the face of an adversely-held patent." Prasco, 537 F.3d at 1338 (internal quotation marks and alteration omitted).

With respect to the second element, "[i]f a declaratory judgment plaintiff has not taken significant, concrete steps to conduct infringing activity, the dispute is neither 'immediate' nor 'real' and the requirements for justiciability have not been met." Cat Tech, 528 F.3d at 880. Significantly, "the greater the length of time before potentially infringing activity is expected to occur, the more likely the case lacks the requisite immediacy," id. at 881 (internal quotation marks omitted), and if it is "uncertain when, if ever, the declaratory plaintiff would engage in potentially infringing activity, the dispute

[will] not present a case or controversy of sufficient immediacy to support a declaratory judgment," id.

II. Declaratory Judgment Jurisdiction

A. Defendants' Affirmative Acts

Plaintiffs do not allege that defendants have ever demanded royalty payments from plaintiffs, identified any of plaintiffs' conduct as potentially infringing, or even initiated any contact with plaintiffs whatsoever. Instead, plaintiffs posit the existence of an actual case or controversy based on: (1) defendants' pattern of enforcing their patent rights against non-plaintiff farmers through litigation or threats of litigation; (2) plaintiffs' assertion of the "implicit threat" in defendants' statement that it is not their policy to enforce their patent rights against farmers whose crops inadvertently acquire trace amounts of patented seeds or traits; and (3) defendants' refusal to provide plaintiffs with a blanket covenant not to sue.

1. Defendants' Patent Suits Against Non-Plaintiffs

In the absence of other conduct by the patentee indicative of adverse legal interests, the patentee must have asserted its rights against the declaratory judgment plaintiff. See AMP, 653 F.3d at 1348 ("The district court failed to limit its jurisdictional holding to affirmative acts by the patentee directed at specific Plaintiffs . . . and thus we reverse the

district court's holding that the various plaintiffs other than [one from whom defendant demanded royalty payments] have standing to maintain this declaratory judgment action."); Innovative Therapies, Inc. v. Kinetic Concepts, Inc., 599 F.3d 1377, 1382 (Fed. Cir.) ("[T]he fact that [the declaratory judgment defendant] had filed infringement suits against other parties for other products does not, in the absence of any act directed toward [the declaratory judgment plaintiff], meet the minimum standard discussed in MedImmune."), cert. denied, 131 S. Ct. 424 (2010).

In connection with other activities supporting an inference of adverse legal interests, suits brought by the patentee against parties other than the declaratory judgment plaintiffs may suffice to establish a case or controversy, but only if those suits are sufficiently similar to the one the patentee may potentially bring against the declaratory judgment plaintiffs. See AMP, 653 F.3d at 1345 ("[A]s [plaintiff] was aware, [defendant] was asserting its patent rights against other similarly situated parties, a fact to be considered in assessing the existence of an actual controversy under the totality of circumstances." (emphasis added)); Prasco, 537 F.3d at 1341 ("Prior litigious conduct is one circumstance to be considered in assessing whether the totality of circumstances creates an actual controversy. However, one prior suit concerning different

products covered by unrelated patents is not the type of pattern of prior conduct that makes reasonable an assumption that [the defendant] will also take action against [the plaintiff] regarding its new product."). This is because "a fear of future harm that is only subjective is not an injury or threat of injury caused by the defendant that can be the basis of an Article III case or controversy." Prasco, 537 F.3d at 1338. It is instead "the reality of the threat of injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." Id. at 1338-39 (internal quotation marks and alteration omitted); see also Hewlett-Packard Co. v. Acceleron LLC, 587 F.3d 1358, 1363 (Fed. Cir. 2009) ("[I]t is the objective words and actions of the patentee that are controlling." (internal quotation marks omitted)).

Plaintiffs argue that defendants' 144 patent-infringement lawsuits filed against farmers between 1997 and April 2010 create a reality of the threat of injury. Plaintiffs, however, overstate the magnitude of defendants' patent enforcement. This average of roughly thirteen lawsuits per year is hardly significant when compared to the number of farms in the United States, approximately two million. (Chachkin Decl., Ex. N, U.S. E.P.A., Demographics.)

Moreover, there is no suggestion that these suits were brought against "similarly situated parties." AMP, 653 F.3d at

1345. While plaintiffs have alleged that defendants have pursued patent litigation "against other farmers who did not want to be contaminated by transgenic seed," (FAC ¶ 133; see also id. ¶ 132), that claim is belied by the decisions in the suits against the referenced individuals. See Monsanto Co. v. Parr, 545 F. Supp. 2d 836, 842-44 (N.D. Ind. 2008) (defendant intentionally induced others to infringe Monsanto's patents); Monsanto Co. v. Nelson, No. 4:00-CV-1636, 2001 U.S. Dist. LEXIS 25132, at *2 (E.D. Mo. Sept. 10, 2001) (Monsanto alleged that defendants had intentionally saved and replanted second-generation seed with patented traits in violation of their licensing agreement); Monsanto Can. Inc. v. Schmeiser, 2001 FCT 256 [120] (Can.) (finding that the defendant saved and planted seed "he knew or ought to have known was Roundup tolerant"); see also Farmer Fighting Lawsuit Over Seed Planting, Associated Press, July 8, 2001 (describing Monsanto's lawsuit against Troy Roush as one involving saved seeds in violation of licensing agreements).

Thus there is no evidence that defendants have commenced litigation against anyone standing in similar stead to plaintiffs. The suits against dissimilar defendants are insufficient on their own to satisfy the affirmative acts element, and, at best, are only minimal evidence of any objective threat of injury to plaintiffs. Plaintiffs'

alternative allegations that defendants have threatened, though not sued, inadvertent users of patented seed, are equally lame. These unsubstantiated claims do not carry significant weight, given that not one single plaintiff claims to have been so threatened.⁶

2. Defendants' "Implicit Threat"

Plaintiffs contend that the ambiguous language in defendants' statement regarding unintentional use of patented seeds "implicitly threaten[s] all farmers and seed businesses who are not [defendants'] customers." (Pls.' Mem. 19.) In its entirety, the purportedly threatening language reads: "It has never been, nor will it be[,] Monsanto policy to exercise its patent rights where trace amounts of our patented seeds or traits are present in [a] farmer's fields as a result of inadvertent means." (Chachkin Decl., Ex. 0.) It is objectively unreasonable for plaintiffs to read this language as a threat.

Plaintiffs expressly allege that they "do not want to use or sell transgenic seeds." (FAC ¶ 2.) They specifically communicated the same to defendants. (Id., Ex. 3, Letter to

⁶ Plaintiffs have essentially already conceded that their fear of suit was not reasonable at the time the original complaint was filed. Their letter to defendants of April 18, 2011 -- after the original complaint was filed -- notes that, "[i]f we do not receive a response from Monsanto within a reasonable amount of time, . . . then [it would] be reasonable for our clients to feel they would be at risk of having Monsanto assert claims of patent infringement against them should they ever become contaminated by transgenic seed potentially covered by Monsanto's patents." (FAC, Ex. 3, Letter from Ravicher to Zubler (Apr. 18, 2011) (emphasis added).) The letter is an implicit recognition that any anticipated risk of suit was not objectively reasonable when the case was filed.

Zubler from Ravicher (“[N]one of [the plaintiffs] intend[s] to possess, use or sell any transgenic seed, including any transgenic seed potentially covered by Monsanto’s patents.”).) Assuming the truth of these representations, the presence of patented traits in plaintiffs’ seeds could only be inadvertent. And, while we grant that the phrase “trace amounts” is susceptible of differing interpretations, the notion that plaintiffs, who are actively attempting to avoid the use of transgenic seed, may nevertheless find themselves unknowingly utilizing it in significant quantities strains credulity.

Regardless, the negative inference plaintiffs wish to draw from defendants’ statement is unwarranted. The statement is an expression of defendants’ intention not to pursue their patent rights against certain farmers. Yet plaintiffs want the Court to read the statement not as a limitation on whom defendants will sue, but rather as a positive indication of whom defendants will bring suit against. No such inference is permissible. The plain meaning of defendants’ statement is clear, and we cannot adopt plaintiffs’ deliberate misreading.

Plaintiffs further contend that defendants’ reiteration of their statement in response to the filing of the original complaint and again in their reply letter to plaintiffs is additional cause to worry. Plaintiffs, however, should hardly be surprised and cannot reasonably feel threatened by defendants’

repetition of language Monsanto had previously utilized to respond to individual concerns about accidental contamination.

Indeed, plaintiffs' letter to defendants seems to have been nothing more than an attempt to create a controversy where none exists. This effort to convert a statement that defendants have no intention of bringing suit into grounds for maintaining a case, if accepted, would disincentivize patentees from ever attempting to provide comfort to those whom they do not intend to sue, behavior which should be countenanced and encouraged. In contrast, plaintiffs' argument is baseless and their tactics not to be tolerated.⁷

3. Defendants' Refusal to Sign a Covenant Not to Sue

In their April 18, 2011 letter to defendants, plaintiffs asked defendants to "expressly waive any claim for patent infringement [they] may ever have against [plaintiffs] and memorialize that waiver by providing a written covenant not to sue." (FAC, Ex. 3.) Defendants, rather unsurprisingly, declined

⁷ Plaintiffs' allegations with respect to defendants' repetition of their statement pertain only to conduct after the filing of the initial complaint and, as such, do not bear on our decision, which must be an "evaluat[ion] [of] whether a controversy existed at the time the original complaint was filed." Innovative Therapies, 599 F.3d at 1384; see also id. (holding that, "unless there was jurisdiction at the filing of the original complaint, jurisdiction [cannot] be carried back to the date of the original pleading" by allegations in an amended complaint). To hold otherwise "would invite a declaratory judgment plaintiff in a patent case to file suit at the earliest moment it conceives of any potential benefit to doing so" in an attempt to "draw an infringement suit in response (thereby retroactively establishing jurisdiction over their first-filed declaratory judgment suit)." Id. (internal quotation marks omitted). Plaintiffs here have acted similarly, a further reason to discount their argument.

to provide plaintiffs with the requested "blanket" waiver. (Pls.' Mem. 21.) Rather, they represented that they were "unaware of any circumstances that would give rise to any claim for patent infringement or any lawsuit against [plaintiffs]" and that they had "no intention of asserting patent-infringement claims against [plaintiffs]." (Id., Ex. 4.)

This exchange occurred in the same post-filing letters discussed above, and, as before, plaintiffs' argument is groundless and their tactics unacceptable. The fact that defendants declined to provide plaintiffs with a written covenant not to bring any claims they might ever have does not meaningfully add to plaintiffs' case. As the Federal Circuit has noted, "though a defendant's failure to sign a covenant not to sue is one circumstance to consider in evaluating the totality of the circumstances, it is not sufficient to create an actual controversy" Prasco, 537 F.3d at 1341. This notion is particularly apt in this case. Here, plaintiffs are asking defendants to accept as wholly accurate the complaint's description of plaintiffs' activities and intentions. Moreover, the proffered waiver was so broadly framed as to preclude any realistic chance of defendants' acceptance. In short, plaintiffs' letter was clearly intended to be used as a prop in this litigation, and the failure to sign a covenant not to sue borders on the wholly irrelevant.

B. Plaintiffs' Preparatory Conduct

Plaintiffs contend that they need not undertake any further actions in order to have "meaningful[ly] prepar[ed] to conduct potentially infringing activity," AMP, 653 F.3d at 1343, because defendants' patented seeds will spread with no action on plaintiffs' part and are self-replicating.

To the extent the test considers plaintiffs' conduct, it is useful because it focuses the analysis on the immediacy and reality of the dispute. See Cat Tech, 528 F.3d at 880; cf. Prasco, 537 F.3d at 1341. Regardless of whether plaintiffs need to demonstrate affirmative action on their part beyond their usual agricultural activities, they must show that potential infringement is a matter of immediate concern. Plaintiffs have not done that.

Plaintiffs have not alleged that any of them have actually grown or sold contaminated seed, and they have in fact professed a desire to specifically avoid any such use. At most they allege that they "could . . . be accused of patent infringement in the near future if and when they become contaminated by Monsanto's transgenic seed." (FAC ¶ 3.) This is the same sort of intangible worry, unanchored in time, that the Federal Circuit has found "insufficient to support an 'actual or imminent' injury for standing without any specification of when the some day will

be.”⁸ AMP, 653 F.3d at 1346 (internal quotation marks and alteration omitted). The cases are clear that if it is “uncertain when, if ever, the declaratory plaintiff would engage in potentially infringing activity, the dispute [does] not present a case or controversy of sufficient immediacy to support a declaratory judgment.” Cat Tech, 528 F.3d at 881. That is precisely the state of affairs in the instant case, creating a significant barrier to plaintiffs obtaining a declaratory judgment.⁹

⁸ Plaintiffs contend that they are facing immediate injury because some of them have stopped farming certain crops for fear of patent infringement suits brought by defendants. (See, e.g., Oral Arg. Tr. at 20:10-25; Decl. of Bryce Stephens in Supp. of Pls.’ Mem. ¶ 11; Decl. of Frederick Kirschenmann in Supp. of Pls.’ Mem. ¶ 13.) That “injury” is of plaintiffs’ own making and, as discussed above, is not reasonable based on “the objective words and actions of the patentee.” Hewlett-Packard, 587 F.3d at 1363.

Moreover, as AMP makes clear, the relevant concern is of infringement, not simply altered behavior. See 653 F.3d at 1345-46 (finding that certain plaintiffs, who had ceased their activity out of fear of suit, had not suffered “actual or imminent” injury because they would only “consider” resuming the activity rather than “stat[ing] unequivocally that [they would] immediately” resume). The plaintiffs without standing in AMP were in no danger of invading the space occupied by the defendant’s patents because it was not certain that they would resume the infringing activity. Here, even if plaintiffs resumed farming their crops, contamination -- and thus potential infringement -- is not certain. See also Cat Tech, 528 F.3d at 881.

⁹ At oral argument, plaintiffs asked the Court to consider a number of cases not dealing with declaratory judgments in the patent context when evaluating whether the controversy at bar is sufficiently immediate to support subject matter jurisdiction. (Oral Arg. Tr. at 3:10-5:1.) Those cases, however, are wholly inapposite because they dealt with plaintiffs seeking pre-enforcement review of criminal statutes, not private parties engaged in civil litigation. See Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2717 (2010); Virginia v. Am. Booksellers Ass’n, 484 U.S. 383, 392 (1988); Doe v. Bolton, 410 U.S. 179, 188 (1973); Biotech. Indus. Org. v. Dist. of Columbia, 496 F.3d 1362, 1370-71 (Fed. Cir. 2007); see also Arris Grp., Inc. v. British Telecomms. PLC, 639 F.3d 1368, 1374 (Fed. Cir. 2011) (noting that cases challenging government action are treated differently than patent cases seeking declaratory judgment).

Plaintiffs also drew our attention to Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937). In that case, an insurance company was allowed to seek a declaratory judgment before the insured had provided any indication

C. "All the Circumstances"

"[U]nder all the circumstances" outlined above, the plaintiffs have not "show[n] 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." AMP, 653 F.3d at 1342-43 (quoting MedImmune, 549 U.S. at 127). Defendants have not accused plaintiffs of infringement or asserted the right to any royalties from plaintiffs, "nor have they taken any actions which imply such claims. Instead, all we have before us is [plaintiffs'] allegation that [their activities do] not infringe the defendants' patents." Prasco, 537 F.3d at 1340.¹⁰

Defendants' patent-infringement suits against other, dissimilar parties cannot by themselves create subject matter jurisdiction, and the diaphanous allegations that defendants have threatened but not sued unintentional infringers do not add much weight to the substantiality of the dispute. Nor have plaintiffs pointed to any other circumstances that bolster the

that he would bring suit. The insured had stopped paying his premiums because he claimed he was disabled and was therefore entitled to benefits; he had made "a claim of a present, specific right" on the insurance company. Id. at 242. Defendants here have advanced no analogous claim with respect to plaintiffs.

¹⁰ Plaintiffs' attempt to distinguish Prasco on the basis of a footnote that declines "to consider whether similar facts would be sufficient to establish jurisdiction if, instead, [plaintiff] had conceded infringement and was only arguing invalidity," 537 F.3d at 1342 n.12, is unavailing. While plaintiffs here do argue that defendants' patents are invalid, they do not concede that they have infringed those patents, which is what the Prasco court was suggesting may have created an imminent, real dispute.

objective reasonableness of their claims of threat of injury. Defendants' statement regarding the exercise of their patent rights against inadvertent infringers is, if anything, a source of comfort rather than worry. Their actions subsequent to the filing of the complaint cannot reasonably be construed as threatening and, regardless, are simply the product of plaintiffs' transparent effort to create a controversy where none exists. Even were there credible threats of suit from defendants, there is no evidence that plaintiffs are infringing defendants' patents, nor have plaintiffs suggested when, if ever, such infringement will occur.

Taken together, it is clear that these circumstances do not amount to a substantial controversy and that there has been no injury traceable to defendants. We therefore do not have subject matter jurisdiction over this action, and it is, accordingly, dismissed.

CONCLUSION

For the foregoing reasons, the motion (docket no. 19) is granted.

Dated: New York, New York
February 24, 2012


NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

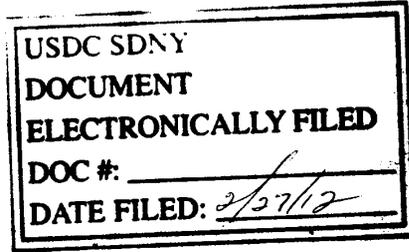
Copies of the foregoing Order have been mailed on this date to the following:

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
ORGANIC SEED GROWERS AND TRADE
ASSOCIATION, et al.,

Plaintiffs,

11 CIVIL 2163 (NRB)

-against-

JUDGMENT

MONSANTO COMPANY and MONSANTO
TECHNOLOGY LLC,

Defendants.
-----X

Defendants having moved to dismiss for lack of subject matter jurisdiction, and the matter having come before the Honorable Naomi Reice Buchwald, United States District Judge, and the Court, on February 24, 2012, having rendered its Memorandum and Order granting defendants motion and dismissing the action, it is,

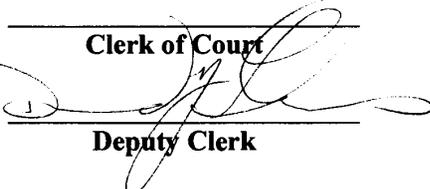
ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order dated February 24, 2012, defendants' motion is granted, and the action is dismissed.

Dated: New York, New York
February 27, 2012

RUBY J. KRAJICK

Clerk of Court

BY:



Deputy Clerk

**THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON _____**

PROOF OF SERVICE

I hereby certify that, on this the 5th day of July, 2012, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that, on the same date, the required paper copies of the foregoing were deposited with United Parcel Service for delivery to the Clerk, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 717 Madison Place, N.W., Washington, D.C. 20439.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Melissa A. Dockery
Melissa A. Dockery
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CERTIFICATE OF COMPLIANCE
With Type-Volume Limitation, Typeface Requirements,
And Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 8,952 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 Point Times Roman.

Dated: July 5, 2012

/s/ Daniel B. Ravicher

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