United States District Court,
D. South Carolina, Florence Division.

MONSANTO COMPANY,
Plaintiff.
v.
William L. STRICKLAND,
Defendant.

C.A. No. 4:05-3062-RBH

Oct. 16, 2007.

Allen Jackson Barnes, Sowell Gray Stepp and Laffitte, Columbia, SC, Jeff A. Masson, Thompson Coburn, St. Louis, MO, Joel E. Cape, Miles P. Clements, Frilot Partridge Kohnke and Clements, New Orleans, LA, for Plaintiff.

William L. Strickland, Nichols, SC, pro se.

ORDER

R. BRYAN HARWELL**, United States District Judge.**

This matter is before the court for review of the Report and Recommendation of United States Magistrate Judge Thomas E. Rogers, III, made in accordance with 28 U.S.C. s. 636(b)(1)(B) and Local Rule 73.02 for the District of South Carolina.

The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with this court. *See* Mathews v. Weber, 423 U.S. 261, 270-71, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made, and the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. *See* 28 U.S.C. s. 636(b)(1).

The Plaintiff filed no objections to the Report and Recommendation. In the absence of objections to the Report and Recommendation of the Magistrate Judge, this court is not required to give any explanation for adopting the recommendation. *See* Camby v. Davis, 718 F.2d 198, 199 (4th Cir.1983).

After a thorough review of the Report and Recommendation and the record in this case, the court adopts Magistrate Judge Rogers' Report and Recommendation and incorporates it herein. It is therefore

ORDERED that plaintiff's motion for partial summary judgment (docket # 68) is granted on the issue of patent infringement and that plaintiff's request for a permanent injunction be held in abeyance pending a

final hearing on damages of which defendant will be given notice. This matter is recommitted to the Magistrate Judge for further pretrial proceedings.

IT IS SO ORDERED.

REPORT AND RECOMMENDATION

THOMAS E. ROGERS, III**, United States Magistrate Judge.**

I. INTRODUCTION

This is a patent infringement case. Plaintiff asserts that Defendant, who is proceeding *pro se,* infringed Claims 1, 2, 4, and 5 of Plaintiff's U.S. Patent No. 5,352,605 (the '605 patent) by using soybean seed containing Plaintiff's Roundup Ready(R) biotechnology without authorization during the 2005 growing season. Presently pending before the Court is Plaintiff's Motion for Partial Summary Judgment (Document # 68), in which Plaintiff seeks entry of judgment as a matter of law for patent infringement and entry of a permanent injunction.

Because Defendant is proceeding *pro se,* the undersigned issued an Order pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir.1975), advising Defendant of the Motion for Partial Summary Judgment and the possible consequences if he failed to respond adequately. Defendant's Response to the Motion for Partial Summary Judgment was due June 27, 2007. Defendant has failed to respond.

All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28 U.S.C. s. 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(e), DSC. Because this is a dispositive motion, this Report and Recommendation is entered for review by the district judge.

II. FACTUAL HISTORY

The facts as set forth by Plaintiff in its Memorandum in Support of Motion for Partial Summary Judgment are undisputed:

1. Monsanto developed a new plant biotechnology which is embodied in Roundup Ready(R) soybeans. This technology is protected by several United States patents including U.S. Patent No. 5,352,605 (a copy of the '605 patent is attached as Exhibit 1 to the Affidavit of Eloy R. Corona, attached ... as Exhibit B [to Plaintiff's Motion]). FN1 The claims of the ' 605 patent are drawn to a chimeric gene which is expressed in plant cells, comprising a promoter element, which can be a 35S promoter from Cauliflower Mosaic Virus (CaMV) and a structural sequence which is heterologous with respect to the promoter. (See ' 605 patent abstract; Affidavit of Dr. L. Curtis Hannah FN2 ("Hannah Aff.") para. 22, Exhibit A).

FN1. Monsanto Technology, L.L.C. is the owner of the '605 patent and Monsanto Company is the exclusive licensee of the '605 patent and is authorized to file suit to enforce the patent. (Corona Aff. para. 3, Exhibit B). *See* Prima Tek II, L.L.C. v. A-ROO Company, 222 F.3d 1372, 1377 (Fed.Cir.2000).

FN2. Dr. Curt Hannah and Dr. Don Harlan were identified as experts by Monsanto. Copies of their expert reports and resumes were provided to the Defendant in compliance with the Court's Scheduling Order. Dr.

Hannah is an expert in plant molecular biology and Dr. Harlan is an expert in crop production.

2. Roundup Ready(R) soybeans were commercially introduced in 1996. All Roundup Ready(R) soybean seeds sold in the United States since 1996 were sold pursuant to a limited used license which explicitly prohibits an authorized purchaser from saving harvested seed for use as planting seed for a subsequent crop.FN3 (Affidavit of Eloy R. Corona ("Corona Aff."), para. 5 attached as Exhibit B [to Plaintiff's Motion]).
FN3. Monsanto's no replant policy is a valid exercise of Monsanto's rights under the patent laws. [Monsanto Company v.] Scruggs, 459 F.3d 1328, 1340 (Fed.Cir.2006).

3. All seed bags containing Roundup Ready(R) soybean seed sold by Monsanto or its seed partners since the product was first introduced in 1996 were marked with notice that the seed was patented. (Corona Aff., para. 6, Exhibit B). In particular, each bag stated that the seed was protected by U.S. Patent No. 5,352,605. (Id.) A color photocopy of an exemplar Hartz soybean seed bag setting forth the required statutory notice of patent protection is attached to Mr. Corona's Affidavit.FN4 The seed bag label also warns: "A license must first be obtained from Monsanto Company before these seeds can be used in any way." Id.
FN4. The Hartz seed bag is approximately 24 x 17 1/2 x 6 inches in size, The seed bag exhibit attached to Mr. Corona's affidavit has been reduced to 8 1/2 x 11 inches. A seed bag full of seed weighs fifty pounds.

4. Defendant purchased 463 units of Hartz branded Roundup Ready(R) soybean seed and 51 units of Delta Pine and Land branded Roundup Ready(R) soybean seed in May and June 2004. (Affidavit of William Harold Thompson ("Thompson Aff."), para. 8 Exhibit C).
5. Defendant used soybean seed packaged in plain brown bags, i.e. saved seed, to plant his 2005 crop. (Thompson Aff., para. 4, Exhibit C.) Roundup Ready(R) soybean seed is not sold commercially in plain brown bags.FN5 (Corona Aff. para. 8, Exhibit B; Thompson Aff. para. 8, Exhibit C). Monsanto and its seed partners place brand names, trademarks, patent statements and logos on their seed bags. In addition, the Roundup Ready(R) logo is placed on all commercial bags of Roundup Ready(R) soybean seed sold in the United States. (Corona Aff., para. 8). The typical seed bag is multicolored. For example the Hartz seed bag is green and white with black labeling. (Corona Aff. para. 8, Exhibit B; also see Exhibit 2 attached to Corona Aff.).

FN5. Brown bag seed refers to the practice of a farmer buying commercial seed, planting the seed, harvesting the crop, cleaning the harvested crop seed and then replanting the saved seed or selling the seed to other farmers. *Cf.* Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 182, 115 S.Ct. 788, 791, 130 L.Ed.2d 682 (1995). Brown bags are usually provided by a seed cleaner.

6. Monsanto filed suit for patent infringement on or about October 28, 2005. Monsanto alleged that the Defendant, William L. Strickland, planted his 2005 soybean crop using saved Roundup Ready(R) soybean seed in contravention of Monsanto's patent rights. (Complaint, para. 15).
7. On November 16, 2005, Monsanto inspected and sampled 442.2 acres as indicated by FSA records FN6 on which a soybean crop was produced by Defendant in 2005. (Affidavit of Donald D. Harlan ("Harlan Aff.") para. 2, Exhibit D). The soybean samples were collected at random from each field in a pattern designed to represent all areas of the fields. (*Id.*). Thirty-five fields were sampled. (*Id.* at para. 5). Mr.

Strickland identified each of the fields to the sampling team. (*Id*. at para. 2).

FN6. Farmers report the number of acres of each crop planted by them to the Farm Service Agency (FSA) each year in order to qualify for various government farm programs administered by the FSA.

8. The samples collected from Defendants fields were shipped to Biolab Solutions where the soybean samples were analyzed for the presence of the CP4 EPSPS protein by ELISA. (Harlan Aff., para. 2, Exhibit D; Affidavit of Brian Ojala ("Ojala Aff."), para. 4, Exhibit E). ELISA is an immunoassay methodology used to analyze for the CP4 EPSPS protein. If the sample tests positive for the CP4 EPSPS protein, the sample is Roundup Ready(R). (Hannah Aff., para.para. 15, 16, 20, Exhibit A; Harlan Aff., para. 3, Exhibit D; Ojala Aff., para. 2, Exhibit E).
9. Approximately 35 fields, as sampled by the sampling team, totaling 442.2 acres of soybeans were sampled. (Harlan Aff., para. 5, Exhibit D). A total of 83 field samples and 3 soybean samples collected from Mr. Strickland's combine were analyzed. All 86 samples tested positive by ELISA for the CP4 EPSPS protein unique to Roundup Ready(R) soybeans. (Hannah Aff., para.para. 14-16, Exhibit A; Harlan Aff., para. 5, Exhibit D; Ojala Aff., para. 4, Exhibit E).

10. A DNA technique called Polymerase Chain Reaction (PCR) confirmed that the patented construct found in Monsanto's Roundup Ready(R) soybeans was also found in soybean samples collected from Defendant's fields in 2005. Fourteen samples collected from 8 fields and 1 combine sample were tested by PCR. (Hannah Aff., para.para. 17-18, Exhibit A). The CaMV 35S CP4 construct protected by the '605 patent was detected in all 14 samples. (Hannah Aff., para. 18, Exhibit A).

11. The DNA sequence of one PCR product was examined in a third test. The DNA sequence of the Strickland sample matched the DNA sequence of Monsanto's patented chimeric CaMV 35S CP4 construct, including the 35S CaMV promoter, a chloroplast transit peptide, and an EPSPS enzyme coding sequence. (Hannah Aff., para. 19, Exhibit A).

12. The soybeans obtained from William Strickland's fields in November 2005, meet all of the elements of Claims 1, 2, 4 and 5 of the '605 patent because the cells of these plants contained a chimeric gene in which the CaMV 35S promoter drives expression of a CP4 EPSPS structural sequence. Also, the CP4 EPSPS sequence is heterologous with respect to the CaMV 35S promoter. (Hannah Aff., para.para. 16, 18, 20, 21, 24, 25, and 26, Exhibit A).

13. Defendant did not make any authorized purchases of Roundup Ready(R) soybeans during the 2005 growing season. (Corona Aff., para. 7, Exhibit B; Thompson Aff., para. 7, Exhibit C).

14. Defendant's infringement of the '605 patent in 2005 was deliberate and with full knowledge of the '605 patent and with full knowledge that he would deprive Monsanto of a reasonable royalty.

Plaintiff's Memorandum at 2-5 (footnotes in original).

III. STANDARD OF REVIEW

The moving party bears the burden of showing that summary judgment is proper. Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), FRCP; Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265

(1986). Summary judgment is proper if the non-moving party fails to establish an essential element of any cause of action upon which the non-moving party has the burden of proof. Celotex, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265. Once the moving party has brought into question whether there is a genuine issue for trial on a material element of the non-moving party's claims, the non-moving party bears the burden of coming forward with specific facts which show a genuine issue for trial. Fed.R.Civ.P. 56(e); Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The non-moving party must come forward with enough evidence, beyond a mere scintilla, upon which the fact finder could reasonably find for it. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The facts and inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. Shealy v. Winston, 929 F.2d 1009, 1011 (4th Cir.1991). However, the non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. *Barber v. Hosp. Corp. of Am.,* 977 F.2d 874-75 (4th Cir.1992). The evidence relied on must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." Mitchell v. Data General Corp., 12 F.3d 1310, 1316 (4th Cir.1993).

Rule 56(e) provides, "when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *See also* Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves"). To raise a genuine issue of material fact, a party may not rest upon the mere allegations or denials of his pleadings. Rather, the party must present evidence supporting his or her position through "depositions, answers to interrogatories, and admissions on file, together with ... affidavits, if any." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). *See also* Cray Communications, Inc. v. Novatel Computer Systems, Inc., 33 F.3d 390 (4th Cir.1994); Orsi v. Kickwood, 999 F.2d 86 (4th Cir.1993); Local Rules 7.04, 7.05, D.S.C.

IV. DISCUSSION

A. Patent Infringement Generally

The invention claimed in a patent is infringed whenever a person "without authority makes, uses, offers to sell, or sells any patented invention within the United States or imports into the United States any patented invention during the term of the patent therefor." 35 U.S.C. s. 271(a). "An infringement analysis requires the trial court to determine the meaning and scope of the asserted patent claims." Leggett & Platt, Inc. v. Hickory Springs Mfg. Co., 285 F.3d 1353, 1357 (Fed.Cir.2002). "A ... patent infringement analysis involves two steps: the proper construction of the asserted claim and a determination as to whether the accused method or product infringes the asserted claim as properly construed ." Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1581-82 (Fed.Cir.1996).

The first step, claim construction, is a matter of law. Id. at 1582. Claim construction is determined by the court upon consideration of the claims themselves, the specification, and the prosecution history. Markman v. Westview Instruments, Inc., 52 F.3d 967, 979 (Fed.Cir.1995), *aff'd.,* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996).

The second step, infringement analysis, is a question of fact. Stryker Corp. v. Davol, Inc., 234 F.3d 1252, 1258 (Fed.Cir.2000). Infringement of a patent may be either literal or under the doctrine of equivalents.

Jeneric/Pentron, Inc. v. Dillon Co., 205 F.3d 1377, 1380 (Fed.Cir.2000). Plaintiff in the present case appears to assert literal infringement. Literal infringement occurs where each of the limitations in the patent claims asserted are contained in the accused device. Hormone Research Foundation, Inc. v. Genetech, Inc., 904 F.2d 1558, 1562 (Fed.Cir.1990). The accused system must contain each limitation of the asserted claim exactly, without deviation. Litton Sys., Inc. v. Honeywell, Inc., 140 F.3d 1449, 1454 (Fed.Cir.1998) ("Literal infringement requires that the accused device contain each limitation of the claim exactly; any deviation from the claim precludes a finding of literal infringement.").

B. Claim Construction

Plaintiff claims that Defendant's activities in 2005 infringed Claims 1, 2, 4 and 5 of the '605 patent. Those claims are as follows:

Claim 1 A chimeric gene which is expressed in plant cells comprising a promoter from a cauliflower mosaic virus, said promoter selected from the group consisting of a CaMV (35S) promoter isolated from CaMV protein-encoding DNA sequences and a CaMV (19S) promoter isolated from CaMV protein-encoding DNA sequences, and a structural sequence which is heterologous with respect to the promoter.

Claim 2 A chimeric gene of Claim 1 in which the promoter is the CaMV (35S) promoter.

Claim 4 A plant cell which comprises a chimeric gene that contains a promoter from a cauliflower mosaic virus, said promoter selected from the group consisting of a CaMV (35S) promoter and a CaMV (19S) promoter, wherein said promoter is isolated from a CaMV protein-encoding DNA sequence, and a structural sequence which is heterologous with respect to the promoter.

Claim 5 A plant cell of Claim 4 in which the promoter is the CaMV (35S) promoter.

(Hannah Aff. para. 24, Exhibit A; '605 patent attached to Exhibit B).

Plaintiff's Memorandum at 8. The '605 patent has been found to be valid and infringed in a number of cases. *See* Monsanto Company v. Scruggs, 459 F.3d 1328 (Fed.Cir.2006); Monsanto Company v. McFarling, 363 F.3d 1336 (Fed.Cir.2004); Monsanto Company v. Swann, 308 F.Supp.2d 937 (E.D.Mo.2003); Monsanto Company v. Good, 2004 WL 1664013 (D.N.J. July 23, 2004).

At the claim construction step, the Court determines, as a matter of law, the scope of the allegedly infringed patent's claims. Embrex v. Service Eng'g Corp., 216 F.3d 1343, 1347 (Fed.Cir.2000); *see also* Markman, 52 F.3d at 976-77. The undersigned recommends that the scope of the '605 patent claims be construed as follows:

As relevant here, the '605 patent claims cover a chimeric gene which is expressed in plant cells, comprising a promoter element, including a 35S promoter from cauliflower mosaic virus (CaMV), and a structural sequence which is heterologous with respect to the promoter. Additionally, the patent claims cover a plant cell which comprises a chimeric gene that contains a 35S promoter from cauliflower mosaic virus (CaMV), wherein the promoter is isolated from a CaMV protein-encoding DNA sequence, and a structural sequence which is heterologous with respect to the promoter.

C. Infringement Analysis

As stated above, literal infringement occurs where each of the limitations in the patent claims asserted are contained in the accused device. Hormone Research Foundation, Inc. v. Genetech, Inc., 904 F.2d 1558, 1562 (Fed.Cir.1990). Plaintiff collected soybean samples from Defendant's 2005 soybean fields. The samples were tested by three different methods for the presence of the Camv 35S-CP4 construct and the protein produced by the construct, which are unique to Roundup Ready(R) soybeans. Each method demonstrated the presence of Plaintiff's patented invention. As Defendant did not make any authorized purchases of Roundup Ready(R) soybeans during 2005, he planted at least 442.2 acres of saved Roundup Ready(R) soybean seed without authority or license. Because Defendant has failed to present any evidence to the contrary, no reasonable juror could find that Defendant did not infringe Claims 1, 2, 4 and 5 of Plaintiff's '605 patent. Therefore, Plaintiff is entitled to judgment as a matter of law for patent infringement.

D. Permanent Injunction

Plaintiff requests entry of a permanent injunction prohibiting Defendant from making, using, selling, or offering to sell any of Plaintiff's patented crop technologies. It is the general rule that an injunction will issue when infringement has been adjudged, absent a sound reason for denying it. W.L. Gore & Associates, Inc. v. Garlock, Inc., 842 F.2d 1275, 1281 (Fed.Cir.1988). Defendant has produced no reason for denying Plaintiff's request. As such, Plaintiff's request for a permanent injunction should be granted. However, it is recommended that Plaintiff's request for permanent injunctive relief be held in abeyance pending a damages hearing of which Defendant will be given notice.

V. CONCLUSION

In light of the above analysis, it is recommended that Plaintiff's Motion for Partial Summary Judgment (Document # 68) be granted on the issue of patent infringement and that Plaintiff's request for a permanent injunction be held in abeyance pending a final hearing on damages of which Defendant will be given notice.

D.S.C.,2007.
Monsanto Co. v. Strickland

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