

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BASF PLANT SCIENCE, LP,)
)
Plaintiff,)
)
v.)
) C.A. No. 17-_____
NUSEED AMERICAS INC.,)
) **JURY TRIAL DEMANDED**
Defendant.)

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff BASF Plant Science, LP (“BASF Plant Science”) brings this action against Defendant Nuseed Americas Inc. (“Nuseed”) for Declaratory Judgment of Invalidity of United States Patent Nos. 7,807,849; 7,834,250; 8,106,226; 8,288,572; 8,575,377; 8,809,559; 8,853,432; and 9,458,410. BASF Plant Science alleges as follows:

THE PARTIES

1. BASF Plant Science, LP is a Delaware registered limited partnership, having a principal place of business at 100 Park Avenue, Florham Park, New Jersey.
2. On information and belief, Nuseed Americas Inc. is a Delaware corporation with a principal place of business at 11901 S. Austin Avenue, Alsip, Illinois.

JURISDICTION AND VENUE

3. This action arises under the Declaratory Judgment Act and the patent laws of the United States, 35 U.S.C. § 101 *et seq.* This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1338(a), 2201 and 2202.
4. Nuseed is subject to personal jurisdiction in this District because it is incorporated in the State of Delaware.
5. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b), (c) and/or

1400(b) because Nuseed resides in the State of Delaware.

BACKGROUND FACTS

6. On information and belief, United States Patent No. 7,807,849 (“the ‘849 Patent”) is entitled “Synthesis of Long-Chain Polyunsaturated Fatty Acids by Recombinant Cells,” and was issued by the United States Patent Office on October 5, 2010. The assignee identified on the face of the ‘849 Patent is Commonwealth Scientific and Industrial Research Organization (“CSIRO”). A copy of the ‘849 Patent is attached as Exhibit A.

7. On information and belief, United States Patent No. 7,834,250 (“the ‘250 Patent”) is entitled “Synthesis of Long-Chain Polyunsaturated Fatty Acids by Recombinant Cells,” and was issued by the United States Patent Office on November 16, 2010. The assignee identified on the face of the ‘250 Patent is CSIRO. A copy of the ‘250 Patent is attached as Exhibit B.

8. On information and belief, United States Patent No. 8,106,226 (“the ‘226 Patent”) is entitled “Synthesis of Long-Chain Polyunsaturated Fatty Acids by Recombinant Cells,” and was issued by the United States Patent Office on January 31, 2012. The ‘226 Patent is a continuation of the ‘849 Patent. The assignee identified on the face of the ‘226 Patent is CSIRO. A copy of the ‘226 Patent is attached as Exhibit C.

9. On information and belief, United States Patent No. 8,288,572 (“the ‘572 Patent”) is entitled “Synthesis of Long-Chain Polyunsaturated Fatty Acids by Recombinant Cells,” and was issued by the United States Patent Office on October 16, 2012. The ‘572 Patent is a continuation of the ‘226 Patent, which in turn is a continuation of the ‘849 Patent. The assignee identified on the face of the ‘572 Patent is CSIRO. A copy of the ‘572 Patent is attached as Exhibit D.

10. On information and belief, United States Patent No. 8,575,377 (“the ‘377 Patent”) is

is entitled “Synthesis of Long-Chain Polyunsaturated Fatty Acids by Recombinant Cell,” and was issued by the United States Patent Office on November 5, 2013. The ‘377 Patent is a continuation of the ‘572 Patent, which in turn is a continuation of the ‘226 Patent, which in turn is a continuation of the ‘849 Patent. The assignee identified on the face of the ‘377 Patent is CSIRO. A copy of the ‘377 Patent is attached as Exhibit E.

11. On information and belief, United States Patent No. 8,809,559 (“the ‘559 Patent”) is entitled “Enzymes and Methods for Producing Omega-3 Fatty Acids,” and was issued by the United States Patent Office on August 19, 2014. The assignee identified on the face of the ‘559 Patent is CSIRO. A copy of the ‘559 Patent is attached as Exhibit F.

12. On information and belief, United States Patent No. 8,853,432 (“the ‘432 Patent”) is entitled “Synthesis of Long-Chain Polyunsaturated Fatty Acids by Recombinant Cell,” and was issued by the United States Patent Office on October 7, 2014. The ‘432 Patent is a continuation of the ‘377 Patent, which in turn is a continuation of the ‘572 Patent, which in turn is a continuation of the ‘226 Patent, which in turn is a continuation of the ‘849 Patent. The assignee identified on the face of the ‘432 Patent is CSIRO. A copy of the ‘432 Patent is attached as Exhibit G.

13. On information and belief, United States Patent No. 9,458,410 (“the ‘410 Patent”) is entitled “Synthesis of Long-Chain Polyunsaturated Fatty Acids by Recombinant Cell,” and was issued by the United States Patent Office on October 4, 2016. The ‘410 Patent is a continuation of the ‘432 Patent, which in turn is a continuation of the ‘377 Patent, which in turn is a continuation of the ‘572 Patent, which in turn is a continuation of the ‘226 Patent, which in turn is a continuation of the ‘849 Patent. The assignee identified on the face of the ‘410 patent is CSIRO. A copy of the ‘410 Patent is attached as Exhibit H.

14. Collectively, the ‘849 Patent, the ‘250 Patent, the ‘226 Patent, the ‘572 Patent, the ‘377 Patent, the ‘559 Patent, the ‘432 Patent, and the ‘410 Patent are referred to herein as the “Patents-in-Suit.”

15. On information and belief, Nuseed is the exclusive licensee of each of the Patents-in-Suit. See <http://nuseed.com/corporate-news/australian-scientific-collaboration-set-break-worlds-reliance-fish-long-chain-omega-3/>.

16. Nuseed has expressed an intent to enforce the Patents-in-Suit against BASF Plant Science, if the parties do not enter into a negotiated license agreement. In September 2016, as a predicate to negotiations over their respective technologies concerning long chain polyunsaturated fatty acids, the parties entered into a Confidentiality Agreement.

17. Subsequently, between October 2016 and April 2017, the parties met by teleconference or in person at least six times, and engaged in additional written correspondence. The express purpose of these meetings and correspondence was to determine whether a commercial agreement, including a patent license covering the United States and other jurisdictions, could be negotiated, or whether litigation would be necessary.

18. In the course of those negotiations, Nuseed identified the Patents-in-Suit to BASF Plant Science. Nuseed further made licensing demands, the terms of which were not acceptable to BASF Plant Science. BASF Plant Science has repeatedly rejected Nuseed’s licensing demands and has informed Nuseed that it believes the Patents-in-Suit are invalid. The parties have reached an impasse in their negotiations, and there is now a real and immediate risk that Nuseed will imminently commence patent infringement litigation against BASF Plant Science in the United States. During the most recent telephone conference, on April 13, 2017, representatives of Nuseed stated, “With the numbers you’re talking about, there is no path

forward.” BASF Plant Science’s representatives understood this to mean that litigation is inevitable and imminent.

19. A genuine dispute and actual controversy therefore exists about whether the Patents-in-Suit are invalid.

20. As set forth in detail below, each claim of each of the Patents-in-Suit is invalid under at least 35 U.S.C. §§ 102, 103 and/or 112.

COUNT I: INVALIDITY OF THE ‘849 PATENT

21. BASF Plant Science refers to and incorporates by reference each of its allegations in paragraphs 1-20.

22. An actual and justiciable case or controversy exists between BASF Plant Science and Nuseed regarding the validity of the ‘849 Patent.

23. All claims of the ‘849 Patent are invalid under 35 U.S.C. § 112 at least because they lack adequate written description, lack enablement and/or are indefinite.

24. Independent Claim 1 of the ‘849 Patent recites a process for producing oil by obtaining a transgenic rape seed, transgenic cotton seed, or transgenic flax seed wherein the total fatty acid content of the transgenic seed comprises at least 2.5% C20 ω 3 fatty acids (w/w) and including EPA, DPA and DHA fatty acids.

25. Claim 1 of the ‘849 Patent is invalid for lack of written description because the specification does not teach the preparation of any transgenic rape plant, cotton plant or flax plant, let alone any plant from the Brassica genus (an oil seed plant). The specification provides no examples of a plant from the Brassica genus capable of producing seeds having the claimed fatty acid content.

26. The specification of the ‘849 Patent further does not disclose any oil produced

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