

UNITED STATES OF AMERICA
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MONSANTO COMPANY, et al.,)
)
) Plaintiffs,)
V.) No. 4:09-CV-00686-ERW
)
E.I. DUPONT DE NEMOURS & COMPANY,)
et al.,)
)
) Defendants.)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE

OCTOBER 23, 2009

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(Proceedings began at 9:05 a.m.)

THE COURT: Okay. Monsanto Company and Monsanto Technology, LLC, versus E.I. Dupont and Company and Pioneer Hi-Bred International, Incorporated;
4:09-CV-00686-ERW. Plaintiffs ready?

MR. CONRAN: We're ready, Your Honor. Could we talk to you for just a second --

THE COURT: Sure.

MR. CONRAN: -- at side bar? I don't think we need a record, just to get some clarification.

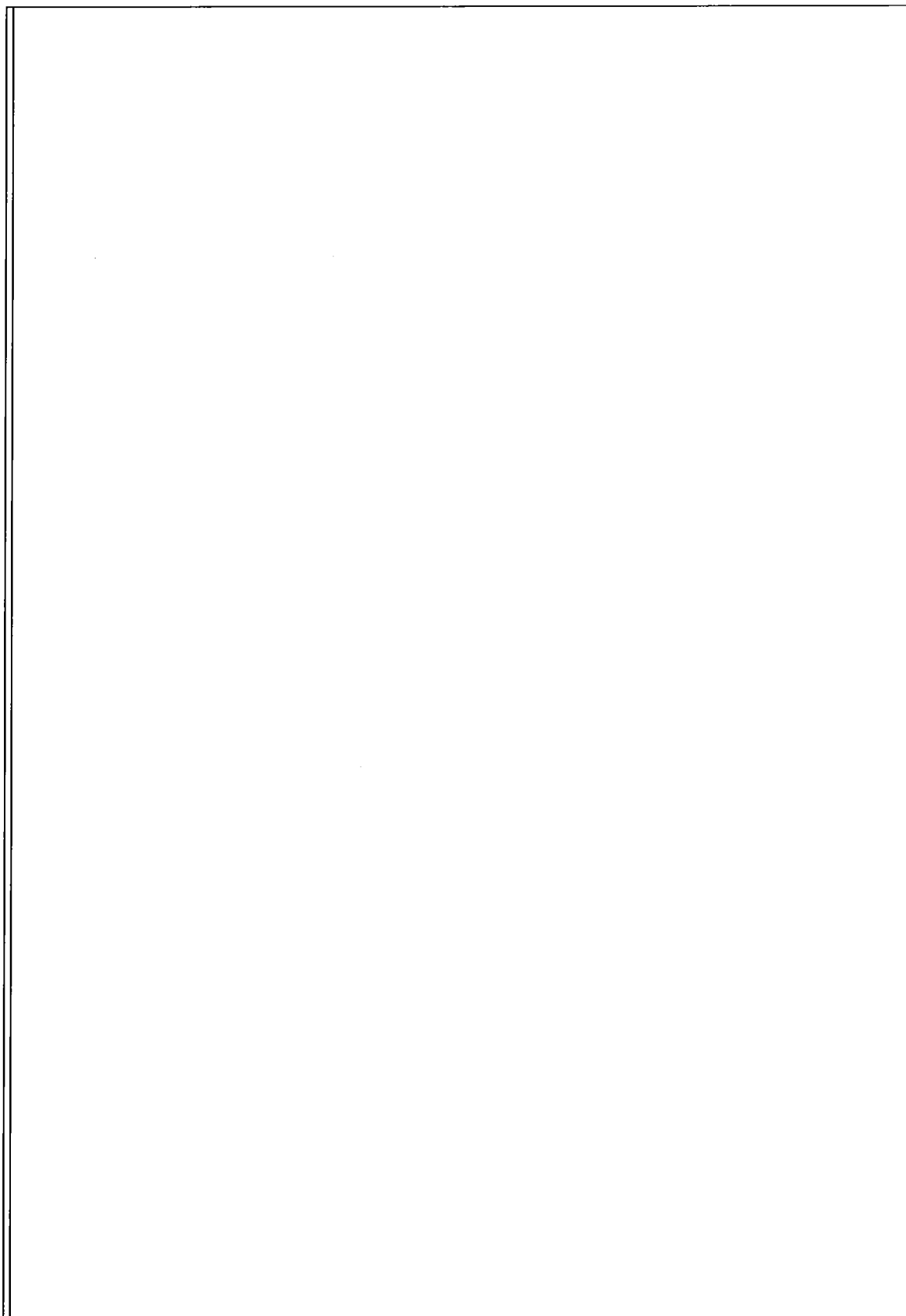
THE COURT: Oh, sure.

(Side bar discussion held off the record.)

(The following proceedings were held at the bench.)

(The bench conference portion of this transcript, page 3, line 15 through page 6, line 15, has been redacted and placed under seal by order of U.S. District Judge E. Richard Webber on November 19, 2009. Transcript of proceedings continues on page 6, line 16.)





(Proceedings continued in open court.)

THE COURT: I'm not sure -- are defendants ready to proceed?

MS. BEN-AMI: Yes, Your Honor.

THE COURT: Thank you. Whenever you are ready.

MR. CONRAN: Thank you, Your Honor. Joe Conran for Monsanto, Your Honor. Thank you very much for the opportunity to be heard on this motion.

As you said a few weeks ago, it's once again to the breach we go. I would suggest to the Court that this

is a very similar situation to the prior Pioneer case. And what Your Honor said in that case is, and I have it on the screen there, but Pioneer, a giant in the seed industry and a sophisticated party to the agreement at issue, now seeks to have this contract construed in ways it wishes it had written the contracts at the time the deal was struck. What Pioneer is asking this Court to do is decree that a contract, which Pioneer knowingly and willingly entered into, does not mean what it plainly says.

And I would suggest to the Court that we are in the exact same situation here. As Your Honor knows, we have moved for a partial judgment on the pleadings. Our view is that language of these license agreements is crystal clear. Pioneer was granted a limited license to operate within the licensed field, and the licensed field expressly prohibits stacking with other Glyphosate-tolerant traits. Defendants have admitted that in both soy and corn they have stacked with Glyphosate-tolerant traits. Thus, the only factual, the only factual issue relevant to the purpose of this motion is undisputed.

Now, the rationale behind these motions is efficiency and conservation of valuable judicial resources, and I believe that granting this motion will

serve those well. As the Court is aware, construing the plain language of unambiguous agreements can obviate time-consuming discovery. And in this instance we have the perfect opportunity for the Court on a limited basis to come to a conclusion with regard to a certain portion of this, and eliminate the need for discovery and other time consuming efforts with regard to that.

As the Court knows, as background, Monsanto invented this Roundup Ready technology. Your Honor has heard a lot about it, so I'm not going to go into a lot of detail about it. But as you know, it's Glyphosate-tolerant plants and, and there are two different plants that we're talking about here, soybeans which has event 40-3-2, that's in the agreement and that, we talk about that. And that's planted, as Your Honor has known from other situations, over many acres in the United States. Corn, Roundup Ready corn is NK603, which is also the reference in the agreement. So --

THE COURT: Was -- NK, was that Northrup King? Is that where NK came from or --

MR. CONRAN: I believe it probably did come from that originally.

THE COURT: Okay.

MR. CONRAN: But the, the agreements in relevant part are, are identical, so I'm, I'm not going to separate

out my argument as between soybeans and corn. The key, the key provisions are identical. The, the agreements were negotiated after, as Your Honor knows, there was a termination of the commercial corn agreement between Monsanto and Pioneer, and Judge Stohr terminated the soybean license agreement between Monsanto and Pioneer.

And as we are here today, what occurred was, after many years, as we have pled in our pleadings, after many years of successfully selling Roundup Ready, both -- in particular Roundup Ready soybeans, Pioneer decided to embark on its own program OGAT to bring to the market an alternative to Monsanto's Roundup Ready technology.

Pioneer publicly stated that they were going to the marketplace to replace us. They said they were going to retire our varieties. They said almost all of their varieties currently contain the gene, Roundup Ready gene, and they intended to capture the market from Monsanto.

Unfortunately, they also publicly announced that after some research they discovered that there were performance problems and that Optimum GAT alone was creating an unacceptable risk for farmers. So, in order to fix their problems they decided to stack Optimum GAT with our Roundup Ready gene. And we believe that this violates clearly the license agreements and the provisions. And we'll go into that in detail in a minute.

As indicated earlier, we seek from the Court very limited relief. It's whether the license agreements permit the defendants to stack other genetically engineered Glyphosate-tolerant trait such as Optimum GAT with 40-3-2 and NK603, and whether they breach the license agreements by stacking Optimum GAT with 40-3-2 and NK603.

As we said in our briefs, a partial judgment on the pleadings is a procedural option open to the federal courts under Rule 12(c). We cited the *Chi-Mil* case, which many other cases seem to cite as the leading case on this subject. We cited the *F.E.C. versus Adams* case that talks about that. You can grant on all of the claims or a part of the claims. The *McLaughlin* case, the *VNA* case -- and the *VNA* talks about in terms, as many of the courts do, comparing it to a motion for summary judgment or a Rule 56. And our view is, and we believe the courts have supported that view, that you can in fact enter partial judgment on the pleadings. And of course, as many cases have said, the purpose of that motion is to save time and expense in case, cases like this.

Now, with regard to the interpretation of contracts, we have been before this Court many times on contract interpretation, so I'm not going to in great measure go there. But I can say that the proper interpretation of an unambiguous contract is appropriate

for motion for judgment on the pleadings. I have cited the *Nuveen Investments* case, and Your Honor I'm sure remembers the *Cavalier Homes* case that you decided several years ago. So, it is appropriate in these circumstances to grant this motion for judgment on the pleadings.

And with regard to the, as I said earlier, the fact of stacking, there is no doubt, they admit that they are stacking Roundup Ready soybean and corn technologies, our patented technologies, with their Glyphosate-tolerant Optimum GAT trait. So, as I said earlier, the only factual issue for the purposes of this motion is undisputed.

Now, basic patent law, as Your Honor knows, is, there's no legal requirement for Monsanto to license this patent technology to anyone. It's also a fundamental principle of patent law that a patent holder has the right to exclude others from making, using or selling the patented product.

And we have quoted to the Court in our briefs the *Cook versus Boston Scientific* case, which beautifully states the black letter law in this subject. And I'll read it to the Court because I think it is important. "Because of the nature of patent rights and licenses, a patent is personal to the licensee and allows only the activities enumerated within the license to the exclusion

of any activity not specified. In other words, silence as to a particular activity implicitly prohibits the licensee from engaging in that activity. Any right not specifically granted by the licensor remains with the licensor, and the rights granted in the license cannot expand beyond the boundaries delineated in the agreement."

we also have cited to the Court the *Shaw* case, where Dupont successfully argued that there is an implicit understanding in the license agreement that licensee will not invade the ungranted part of the patent to the detriment of the estate reserved by the licensor.

And if you look at the agreement itself, let's start with Section 3.01(d).

THE COURT: Okay, just a second. Let me pull up my sophisticated system here.

MR. CONRAN: With your Post-Its?

THE COURT: Yeah, Post-Its. Can't get along without them. Okay, here we go.

MR. CONRAN: Under Section 3.01(d), its basically, you not only have the case law that I just described that sets the black letter law in this subject, but the parties also put it into their contract so there's no -- there can't be any confusion with regard to what the parties have agreed to here.

It says, no license, no license is granted under

Monsanto patent rights to make, use, offer to sell, import, other than specifically licensed under this agreement."

So what they did in the contract was -- it's sort of like a belt and suspenders. You know you have the *Cook* case and other cases out there, but to be 100 percent sure that there is no confusion, they say in the agreement there's no other license granted.

Now, let's go to the key provision. All right, the key provision in this agreement is Section 3.01(a). And it says, subject to the terms of the agreement, Monsanto hereby grants to licensee and licensee hereby accepts -- so it's a grant and acceptance -- a nonexclusive license within the licensed field. And that's obviously a very important phrase here. So, grants, accepts, within the licensed field in the territory under Monsanto's patent rights and biological materials.

So -- and we'll get to the biological materials in a second. And it's only when you get past all those things can they then produce, offer to sell, licensed commercial seed. So you have to get past what they have accepted, what's been granted within the licensed field and the biological materials.

Now, in order to determine what the meaning, in

other words, in order to -- you have to move down and you have to find out what does "within the licensed field" mean in order to interpret this contract correctly.

So it's subject to, they accept, within the licensed field. All right. Licensed field is a defined term. And the defined term is in Section 2.09. And it says, licensed commercial seed which exhibit genetically-engineered protection against Glyphosate herbicide solely, solely due to the presence of the Glyphosate-tolerant soybean event: 40-3-2.

In other words, if seed would contain another Glyphosate-tolerant trait, it would not be licensed commercial seed. So, this is, this says solely due. So, if any Glyphosate tolerance comes from any other trait it cannot be licensed commercial seed. The only time you have licensed commercial seed, which is the only thing that is granted and accepted under the license, the only time you could have licensed commercial seed, if it's solely due to the presence of Glyphosate-tolerant soybean event: 40-3-2.

THE COURT: Just a second, let me catch up.

MR. CONRAN: Sure.

(Pause.)

THE COURT: Okay.

MR. CONRAN: And I would suggest to the Court that

the language could not be clearer. Section 2.09, the license field, is a field of use restriction that is an integral part of the license grant clause itself. In other words, it's in the license grant clause itself here. So it's an integral part. And it was expressly accepted, granted and accepted by the licensee. So there can be no doubt about what this limitation was, and the fact that they accepted the limitation when they entered into the license agreement.

Now, we also have 3.01(g). And in 3.01(g)(iv) -- Roman four -- it says, licensee shall not be entitled to use biological materials outside of the licensed field.

All right, so we have the biological materials, the 30-dash -- excuse me -- 40-3-2, NK603, they cannot be used outside of the licensed field. So you have to go back to Section 2.09. The licensed field is seed which exhibits protection against Glyphosate herbicide solely due to the presence of the Glyphosate-tolerant soybean event. So this is another contractual provision that says specifically what they can't do.

So we have the license agreement that says what they can, and that is subject to the limitations. And we have a particular contract provision that says what they can't do. So they can't combine 40-3-2 or NK603 with OGAT because by their admission OGAT gives herbicide tolerance

to Glyphosate. So they, they are specifically prohibited in the agreement from doing that combination.

Defendants have not disputed that 40-3-2 and NK603 constitute biological materials, which they of course couldn't. And by stacking 40-3-2 and NK603 with Optimum GAT, defendants are in fact using biological materials outside the licensed field. So therefore, they are breaching Section 3.01(g)(iv) and of course they are breaching 3.01(a), which we just put up there, because they are outside the licensed field.

We put in our briefs, and I'll just cover very briefly, Your Honor is aware of the *Schoenbaum* case. And Your Honor is aware of the position that they took in the *Schoenbaum* case as part of a group of defendants that were defending against a claim about stacking. And I, I have the quote in their brief up on the screen. But what they said was, "And the district court in *Scruggs* found the prohibition on stacking traits to be a field of use restriction within the scope of Monsanto's patent rights."

So, what we have is a field of use restriction that has been recognized. And they, and the same lawyers, some of the same lawyers have said it's a field of use restriction within the scope of Monsanto's patent rights.

THE COURT: They also on their, in the sur-reply state that plaintiffs assert that this Court ruled that

Monsanto's refusal to license as soybean seed partners to stack the Roundup Ready trait with transgenic seed -- transgenic traits developed by Monsanto's competitors were clearly field of use restrictions which fall within the scope of the patent monopoly and are therefore lawful. And then they say, the language plaintiff carved out from this court's opinion is nothing but a quotation of another court's statement in a different case and, and far from adopting the reason, in that case the plaintiff's contend, and then there's a quote, the Court believes that plaintiffs have alleged sufficient facts to overcome defendants' motion to dismiss on the issue of whether defendant Monsanto's license agreements with defendants Dupont and Pioneer had the effect and purpose of unlawfully restraining trade and so forth.

MR. CONRAN: Yeah, and I read your opinion again last night just to, to make sure I was well on track there. And as, as Your Honor knows, I just put it up on the screen, this Court cited the *Scruggs* case and did not, did not decide that particular motion based upon that *Scruggs* case. I agree with that. But the Court did cite it, and talked about it in terms of the field of use restrictions.

But the important part of this process is that they argued, and they even did it in their sur-reply, they

said, they admit that their argument in *Schoenbaum* was made in response to the allegation that Monsanto used its patents --

THE COURT: Misused. Misused.

MR. CONRAN: Excuse me. -- misused its patents by imposing stacking restrictions. That's the point we're trying to make here. They are recognizing that there was a stacking restriction in this agreement. And they were making that argument in opposition to a claim that there were imposing stack restrictions. So we're not trying to say that the Court has made a decision on this basis. We're talking about what positions that they have taken that are consistent with our interpretation of this agreement.

I would suggest also, Your Honor, the fact that they are seeking reformation which, in a case like this -- well, I'll try not to characterize it other than to say that it would be highly unusual and I would suggest never successful when you have two sophisticated parties that spend many months with rooms full of lawyers negotiating a long agreement and somehow there's an alleged of a mutual mistake of -- I can't even imagine. But the fact that they made the allegation would suggest that they understand that the plain language of the license agreements does not permit them to stack

Glyphosate-tolerance traits. Because if they, if they thought that they had those rights under this agreement there would be no need to reform, quote, the contract.

Now, Your Honor remembers I'm sure the prior Pioneer case, and it's eerily similar in some senses. The Court rejected Pioneer's interpretation of the corn license agreement. And the Court, you may remember, you actually talked about the phrase sole. And we have the exact same -- it's solely, but the same exact interpretation here. In other words, what they have the right to do is limited by Section 2.09 and the word solely, just like in the other case where Your Honor interpreted the word sole to mean that that was a limitation on what they could do. And it's the same thing. As we said, they have admitted to stacking and they have plainly breached these license agreements.

Now, I'd like to quickly move to several of their arguments that they have presented. Their first argument that we say is incorrect is the defendants' Optimum GAT, OGAT, Roundup Ready stack is permitted by Section 3.01(e). And I would suggest to the Court that not only is that not a good argument, but it actually provides compelling evidence to support Monsanto's position. And I'll put the blowup up.

In Section 3.01(e) it says, licensee shall be free

to introduce any gene or trait into, and commercialize. All right. First of all, 3.01(e) says limitation as set forth in -- as set forth in subparagraph 3.01(a). So when we go to 3.01(a), of course, it has the specific limitation of, within the licensed field.

So, shall be free to introduce as set forth in 3.01(a), so that's free to introduce within the licensed field, okay? By traditional plant breeding or whatever.

Second, it says, except as specifically provided in subparagraph 3.01(g). Well, you put up 3.01(g) and that says, licensee shall not be entitled to use biological materials outside of the licensed field.

So, what 3.01(e) says, that you can do stacking, you can do combinations, except with Glyphosate-tolerant traits. In other words, if you want to do other stacking, this gives you permission. But you cannot violate 3.01(a) and you can't -- there's a specific exception to 3.01(g) which says you can't use biological materials outside the licensed field.

And of course the licensed field is solely due to the presence of Glyphosate-tolerant soybean 40-3-2. And as soon as you combine OGAT with Roundup Ready, you no longer have solely -- because that gives also herbicide tolerance to Glyphosate, you no longer have solely, you have to. And so that is obviously a violation of the

agreement. So rather than support their claim, 3.01(e) actually supports our claim in this case.

As you know, Your Honor, the court must construe the agreement as a whole, giving effect to all provisions therein. And when you, when you have to give effect to all of the provisions, the only interpretation of 3.01(e) and of 3.01(a) is, the licensed commercial seed only can, only can have Glyphosate tolerance from, solely due to 40-3-2. So, there is no ability for them to combine these two traits.

Their second argument that we think is incorrect and not supported is that the Court cannot imply a negative covenant and a patent license is simply a promise not to sue.

Well, first of all, if you go to the statute it says, specifically a patent holder has the right to exclude others from making, using or selling the patented product.

As we said in the *Cook* case, it says, silence as to a particular activity implicitly prohibits the licensee from engaging in that activity.

And we, we don't -- we have more than silence here. We have a specific grant that says they accept the limitations. As you know from 3.01(a), we have a specific grant that says, we grant them and they accept the

limitations within the licensed field. So, not only do we not have a situation where you need to imply a negative covenant, there are specific negative covenants in this agreement along with the *Cook versus Scientific* idea that unless it's specifically granted, they don't get it. All right, so you start with that as a base. And then if you also move to the limitations of the agreement itself, under 3.01(a), and of course the agreement under 3.01(g), you have not only the basic sort of Hallmark of, they don't get anything that they didn't get granted in the license, you also have the specific negative covenants in this agreement, and their specific agreement hereby accepts that it's only within the licensed field, which of course is solely, solely due to the presence of our gene.

Also, Your Honor, if I could point out, Section 1.07 of this agreement says, under this agreement licensee will continue to sell soybean varieties containing Glyphosate-tolerant soybean event: 40-3-2, subject to the terms and conditions provided herein.

And those terms and conditions, of course, include 3.01(d) which says, no license is granted other than specifically licensed; 3.01(a), which says that they accept a limited license within the licensed field; and 3.01(g) which says, licensee shall not be entitled to use biological materials outside of the licensed field.

So, what you have is a circumstance where even Section 1.07 supports our claim. And as Your Honor knows, Pioneer has argued before that subject to the terms is inappropriate, using that as a limitation, and this Court has rejected that in the prior Pioneer case. And you said, you ruled that the contractual language that says they were permitted to act subject to the terms and conditions of the agreement was a provision limiting Pioneer's use of Monsanto Technology for at least some purposes. So 1.7 is another limitation in this agreement.

Their third argument that we would suggest that is incorrect is 3.01(i). And they, they suggest that somehow that favors them. And I would suggest to the Court that, to the contrary, 3.01(i) actually supports Monsanto. 3.01(i) requires the testing of non-Glyphosate-tolerant trait stacks. In other words, those stacks that would be allowed under (e), if you didn't have a Glyphosate-tolerant trait.

In other words, testing of those. And Your Honor, it's undisputed that testing the efficacy of stacks is critical and of course these non Glyphosate stacks would not have -- excuse me -- would have to be tested. The parties specifically excluded Glyphosate-tolerant traits from this testing because they are not permitted at all. Defendants' interpretation would suggest that they would

have the right to stack Glyphosate-tolerant traits and not be required to prove the efficacy or not to do any testing. And that makes no sense at all. None whatsoever. So I would suggest to the Court that 3.01(i) talks about the testing of stacking that is unrelated to Glyphosate tolerance.

Their next claim that I would suggest the argument is incorrect is, they say Monsanto cannot sue for both breach of contract and patent infringement.

THE COURT: Let me just catch --

MR. CONRAN: Sure. Sorry, Judge.

THE COURT: Okay.

MR. CONRAN: Okay. Their next incorrect argument is that Monsanto cannot sue for both breach of contract and patent infringement. I suspect, but I don't know, that they may give up on this argument because I don't think that there is any merit to it. But if they do make the argument, I would suggest this is wrong as a matter of law.

Now, one of the things that they are trying to do as part of this argument is to suggest that 3.01(e) is somehow a limitation. And I -- I've got a slide up on the screen that I think is probably the best way to illustrate why I think this, this argument doesn't make any sense.

If you look at what 3.01(e) actually says, which

is on the left side, it is understood that the only remedy available to Monsanto to prevent activity in this paragraph, subparagraph 3.01(e) -- in other words, stacking with non-Glyphosate-tolerant traits, that's what's allowed by 3.01(e), stacking with non-Glyphosate-tolerant traits, it says, the only remedy available to Monsanto to prevent that activity under that subparagraph shall be through enforcement of the patent rights against the products.

THE COURT: Wait. Let me catch up here just a second.

MR. CONRAN: Sure.

(Pause.)

THE COURT: Okay.

MR. CONRAN: And I would suggest that their argument would re-write this 3.01(e) to suggest that it says, it is understood the only remedy available to Monsanto to prevent any activity prohibited by this agreement shall be through enforcement of the applicable patent rights. And that's not what 3.01(e) says.

So, 3.01(e) is very limited in terms of what it says that a patent claim must be brought. It specifically does not relate to the stacking of Glyphosate-tolerant traits. And this case is not about the stacking of non-Glyphosate-tolerant traits, which is what 3.01(e)

refers to. This case is specifically about the stacking of Glyphosate-tolerant traits.

And I would point to the Court the *Shaw* case, which involved Dupont. That court rejected Dupont's argument that a breach of contract action should be dismissed because the sole cause of action was for patent infringement on grounds that the rights and remedies available under patent law are not exclusive.

I point to the Court a fairly recent ruling by Judge Autrey in this court, in the *Monsanto versus David* case, holding both -- holding the defendants liable for both patent infringement and breach of contract. And I believe, again, I -- they may give up on that argument, but in case they don't, I just wanted to throw that out to the Court.

They're incorrect argument number five, courts cannot issue judgment on the pleadings when a defendant denies plaintiff's contractual interpretation or when affirmative defenses are pending. And we have cited the Court the cases of *D.E. Shaw*, *Meridian*. They are partial summary judgment cases, but many of the case -- much of the case law, as you know, Your Honor, talks about comparing some of the methods of handling partial summary judgment and judgment on the pleadings.

And clearly those cases say that you can decide

this on an unambiguous contract, which we believe this is, despite pending affirmative defenses, and that issuing such a finding is not precluded by the assertion of affirmative defenses.

Next incorrect argument in our opinion is, parol evidence is admissible to construe an unambiguous contract. As Your Honor knows, the black letter law is that if a writing is plain and clear on its face, which we claim this is, its language conveys an unmistakable meaning, and the writing itself is the sole source for gaining an understanding of intent.

And we have cited several Dupont cases, including from Supreme Court of Delaware a case, *City Investing*. And basically the Delaware courts have moved away from the case that's cited in their brief and now the clear Delaware courts -- they have adopted what many courts around the country have adopted, and that is, the court may not consider extrinsic evidence in an effort to construe an unambiguous contract, nor may it twist, distort or torture contractual terms to create an ambiguity when the language is clear an unambiguous.

And that's what we claim that, what they are doing. As I mentioned earlier, this Court has previously entered judgment on the pleadings based exclusively on the plain language of a contract without resorting to

extrinsic in the *Cavalier Homes* case.

And one final thing that, that, another part of this contract, if Your Honor would look at 11.05, it says, this agreement constitutes the entire agreement between the parties regarding the subject matter hereof and all prior negotiations and understandings between the parties shall be deemed merged.

And I would suggest to the Court that this also would prevent any consideration of this so-called letter of intent or other documents that precede this document. I think, I think the law is clear. The agreement says so. That all you can do is look to the document itself, and here that's what we're asking you to do. We believe it's very clear.

That's all I have in the PowerPoint. And I would just say, Your Honor, that we are asking the Court to declare that the license agreements do not permit defendants to stack another genetically engineered Glyphosate-tolerant trait such as Optimum GAT with 40-3-2 and NK603. This is a limited order. It is not a broad order.

We are also asking that you find that they breached the license agreements by stacking Optimum GAT with 40-3-2 and NK603, and I believe that they have admitted in their pleadings that they have done such

stacking. They have admitted in their pleadings that OGAT as they, as we call it, confers Glyphosate tolerance, so they have admitted that they have stacked a Glyphosate-tolerant trait. It violates the contract. It violates the provisions of 3.01(a). It violates the provisions and the definition in 2.09 of licensed commercial field. It violates the term of 3.01(g). And we believe that we have the right to a partial judgment on the pleadings based upon what we have presented. Thank you, Your Honor.

THE COURT: I think probably we'll take about a 10-minute stretch.

(Court recessed from 9:53 a.m. to 10:02 a.m.)

MS. BEN-AMI: May I proceed, Your Honor?

THE COURT: Just as soon as you have those in place.

THE CLERK: Judge, is my monitor in your way?

THE COURT: Yeah, it is.

MS. BEN-AMI: It's a small point, so we shouldn't waste too much time.

THE COURT: Okay, thanks. Miss Ben-Ami, whenever you are ready.

MS. BEN-AMI: Thank you. Your Honor, as the Court is aware, 12(c) motions are rarely granted. They are extraordinary, because they ask the Court to decide issues

without the benefit of discovery, without hearing all the evidence, and to make really a rush to judgment before the parties have had a time, the parties have had time to compile the information and to really give the Court a complete picture. And the danger of a 12(c) motion I think was just indicated in the argument that was made by Monsanto respectfully.

And I raise that as an example, Your Honor, this issue of biological materials. You heard counsel say that Dupont and Pioneer have admitted that their products fit that description. In our answer, in paragraphs 23 through 30, and 76 through 82, we deny that. And with good reason.

THE COURT: Okay. You deny what?

MS. BEN-AMI: That the products that they are alleging infringe or are the breach of the contract are biological materials as defined by the contract.

THE COURT: Okay, just a second. Let me catch up. I don't want to get -- you're saying that you deny that 30-3-2 [sic] and NK603 are biological material as defined by the contract.

MS. BEN-AMI: Yes, Your Honor. That, that the OGAT stack, we'll call it for now, is, fits under the definition of biological materials under the contract. And it is specifically denied. And with good reason.

Your Honor has the contract, I believe.

THE COURT: I do.

MS. BEN-AMI: And if you look at the clause --

THE COURT: Let me, let me get back to that a little bit, because I think this is an important point. If it's not bio -- if OGAT is not biological material, what is it?

MS. BEN-AMI: Oh, that's why we need to look at the definition under the contract.

THE COURT: Okay.

MS. BEN-AMI: And that's -- it is of course biological material, but not Monsanto's biological material. And --

THE COURT: But they aren't claiming that. They aren't claiming that OGAT is their biological material.

MS. BEN-AMI: If we, if we look, if we look at the contract --

THE COURT: Okay.

MS. BEN-AMI: -- I think it will be helpful.

THE COURT: Okay. Which paragraph?

MS. BEN-AMI: 2.02.

THE COURT: Okay, got it.

MS. BEN-AMI: Says, the term biological materials means the biological material previously supplied by Monsanto for the purpose of developing licensed commercial

seed. It's the original material that Monsanto gave to Pioneer to be used to, for development of other things. It's not licensed commercial seed. It's not something else. It's the original material. And it is not replicates or progeny. That's what 2.02 says. It's quite clear. Supplied for the purpose.

If you look at 2.06, you see the difference. There under the term gene it says, a DNA molecule received from Monsanto -- so, like biological material, something received from Monsanto -- but it says, or a replicate. So in other words, as to gene -- a gene is what Monsanto gave to Pioneer? And replicates thereof. As to biological material, it's what Monsanto gave to Pioneer, the physical material. Not replicates, not reused, not changed, the physical material.

That issue was raised only in reply. And when one raises issues in reply and says, under 12(c) now decide all these various things without the ability to see all the evidence, one is asking the Court to engage in a rush to judgment, which is completely unnecessary here. And I bring that up, Your Honor, because the products at issue here are not commercial yet. And in fact, counsel said that Pioneer had admitted that it had a corn stack that was a Roundup Ready 1 and OGAT stack. But Pioneer has said it's only had an experimental corn stack like that;

it has no commercialized or -- product, or product that's being commercialized like that. So again, there is a looseness to these supposed findings of fact that suggests pushing the envelope here. And the worst thing about these kind of motions, when the Court is asked to decide without all the evidence, is that six months later or a year later when the Court does have all the evidence, the Court says, I made a mistake. And what's the result there? Court has an opinion, interlocutory, partial opinion, that is a mistake that everyone out there in the industry, those seed companies that are being asked to destroy their seed, those farmers who are being told, you can't use Pioneer's products, investors, they're all being told something that a year later the Court finds out was wrong, when the Court sees everything.

And why would that be beneficial? It wouldn't. Because the products in dispute here are not on the market now, and they're not coming on the market in the next six months to a year in all likelihood. And why wouldn't we simply wait for the evidence? The evidence will have to be developed either way, Your Honor. Because we do have a claim for reformation. We do have a claim for unenforceability. It's the same discovery. It's going to be the same evidence. And I, I will note just in passing, while counsel said, well, there's a claim for reformation,

that must mean that they agree with us. Obviously Your Honor knows that one can plead in the alternative and say, if they're right, there's something wrong with the contract and it needs to be reformed. That's all we're saying, if they're right. We don't think they're right.

So, we won't be able to develop that evidence and the unenforceability evidence and all the rest as it applies to the contract claim, and therefore, Your Honor, you can't make a decision on the full claim.

That is a very important point here, because picking only on a small part of a claim and then not looking at the bigger picture can lead one into error. And it is improper.

Now, counsel also said, you know, Judge, this is just like another Pioneer case and you should just decide it the way it was decided in the other case. And I'd just like to start by saying, this contract was written to avoid the problems of the other contract, and the contract terms are different. For example, and very importantly, I think, Your Honor, in the other contract the term "licensed corn seed" -- that was the term in that contract -- it said which exhibits the trait, the BT trait, but not other herbicide tolerance.

So, in the definition of licensed seed, in that case it said, that which is licensed seed is only X. It

has the trait but not other herbicide tolerance. If you look at licensed commercial seed in our contract here, the term is very different. And we'll go into that. So it would be a mistake to simply say, well, there's a contract over there in another case, and I kind of think that's the way -- that's -- this is just the same. It's not the same. The terms are very different. And that's very important.

Now, the points that we'd like to take up with Your Honor are reasonably simple. The first point is that Pioneer is licensed to sell licensed commercial seeds. The second point is, there are no prohibitions for other non-infringing traits. Meaning that there is a difference between a grant and a prohibition. And even if the Court were to find that there was no grant, that would not mean that there is a prohibition. If there is no grant -- this is a little bit of a hard concept.

A patent license says, I grant you the right to proceed. I'm not going to exclude you. And that's fine. So, say you have a grant to one thing and now you want to do something else. You stand in the shoes of any other infringer at that point. You stand in their shoes. They can sue you for patent infringement. It's not a prohibition. There's only a prohibition when there's an explicit item in a contract that says you are prohibited

from doing something. So, if I get a license on X and I want to do Y, the fact that I don't have a license there that says X or Y means I can do Y, but I can be sued for patent infringement.

That's why Monsanto tried to use this wrong term, because the contract does not have a prohibition that would stop us. So they tried to squeeze us into this term at the last minute in reply, when they never made motion under 12(c) under this term. And that's incorrect. That is evidence, Your Honor, that we are not prohibited. Because the best they could do was come up with a different term that we don't fit, that we have adamantly denied and said, oh, we'll try to squeeze you in there. That's wrong. There is no termination clause in this contract for anything other than economic issues. And the remedy in this case, if Monsanto is right, is a claim for patent infringement.

Now, Monsanto's interpretation here contradicts the plain meaning of the words of the contract, and it creates internal inconsistencies. And when we talk about ambiguity, if there are inconsistencies between two clauses, there is ambiguity. There is a requirement therefore to review the extrinsic evidence. And that hasn't even all been collected yet, because we're here before discovery has started. And Delaware law does say,

"even seemingly unambiguous language requires consideration of extrinsic evidence to gain understanding of the context and business circumstances under which the language was negotiated."

This contract is under Delaware law. I don't think there's any dispute about that. It says so in the contract. And while Delaware law may be slightly different than some other states, this is Delaware law. And Monsanto suggested that it's old law, it's not current law. But I'd like to hand up to Your Honor the *Concord Steel* case which was decided September 30th, 2009. And in that case, on page seven it says, while extrinsic evidence cannot be used to manufacture an ambiguity where it doesn't exist, an understanding of the context and business circumstances under which the language was negotiated is to be considered. As seemingly unequivocal language may be ambiguous when considered in conjunction with the context in which the negotiating and contracting occurred.

May I hand that up to the Court?

THE COURT: Sure. Thank you.

MS. BEN-AMI: That is September 30th of this year out of Delaware explaining Delaware law. That's not old law. That's current law.

THE COURT: What are the ambiguities that you

think exist in this case?

MS. BEN-AMI: I'm getting right to that.

THE COURT: Okay.

MS. BEN-AMI: But I think the ambiguities in a nutshell are the divergence between licensed commercial seed and, and Monsanto's interpretation of, of a licensed field, is one. The conflict between Monsanto's interpretation in paragraph 6.03 of the contract. And 6.03, Your Honor, says -- under the section that says product quality? It says -- there is, there is no subject to, or in accordance with 3.01(a), it's a very straightforward paragraph. It says, licensed commercial seed may be marketed by licensee so long as the licensed commercial seed reasonably meets the quality control specifications. No licensed field. No subject to 303.01(a). Nothing. It says licensed commercial seed may be marketed by licensee, as long as it meets the quality controls. There is no limitation on that, other than the quality control.

So -- can I have the next slide, please? In the prior case that Monsanto cited to you about Pioneer, as I noted, in that case licensed corn seed had in the definition of licensed seed a limitation that it could not have this other trait, other herbicide tolerance. In this contract, licensed seed does not have any such limitation.

And that is a very, very important point. What we have here is, and what we have put up, is the contract language that says licensee-brand soybean seed, correct; produced by or for the licensee, correct; containing the Glyphosate-tolerant event from 40-3-2, correct; and not containing any other trait that would infringe a Monsanto patent, correct.

THE COURT: Well, if -- but the OGAT/RR alone does not infringe the patent but the stacking does.

MS. BEN-AMI: No, Your Honor. This says, does not contain any other, other gene or trait. So you have to look at the other trait. See, it says it contains the Roundup Ready 1 trait -- that's number three. I'll call it the Roundup Ready 1 trait. That's easiest. It contains the Roundup Ready 1 trait, and it doesn't contain any other gene or trait that if alone would infringe a Monsanto patent. So what you do is, you say, does it contain the Roundup Ready 1 trait? Yes. And then you say, does it contain another gene? Yes. OGAT. Does that infringe any other patent of Monsanto's? No. So then it meets number four.

THE COURT: Okay. Where do you get this -- where have you derived these conclusions? I'm --

MS. BEN-AMI: The one, two, three, four?

THE COURT: Yes.

MS. BEN-AMI: That's, that's the terms of the license. That's the definition of licensed commercial seed in the contract.

THE COURT: Okay. All right. Just a second.

MS. BEN-AMI: That is 2.11, Your Honor.

THE COURT: Okay, wait a minute.

MS. BEN-AMI: So if we look at 2.11, Your Honor, it's just that. We just broke it up for you.

THE COURT: Okay.

MS. BEN-AMI: Those are the words.

THE COURT: Okay.

MS. BEN-AMI: We did it as if, in a patent case, like a claim chart. Do -- the words of the claim, do we meet them or not? Yes, we do, therefore we are licensed commercial seed. And we raised this in our opposition and Monsanto really didn't have an answer for it.

And if you take that language that says licensed commercial seed right there and we meet that, and you plug that into 6.03, 6.03 says we may market licensed commercial seed as long as it meets the quality assurances.

THE COURT: Okay.

MS. BEN-AMI: Next slide, please. I think this is reasonably evident. Our product is licensed, commercial and seed. And commercial has its standard meaning. And

what Monsanto is saying to you today is that we have a contract where we fit as being licensed commercial seed, but they won't let us sell it. We have that contract right under this contract. We are licensed commercial seed. And there is no --

THE COURT: Wait a minute.

MS. BEN-AMI: -- there is no limitation in the licensed commercial seed that takes us out of that definition.

THE COURT: Well, I'm missing something, because I don't think, I don't think there's any dispute. Monsanto is not claiming that you do not have licensed commercial seed. There's not -- that's not a dispute. Right?

MS. BEN-AMI: I believe that Monsanto is not arguing that we don't have one, two, three, four of what I just showed you?

THE COURT: Uh-huh.

MS. BEN-AMI: But that they're saying that the licensed field takes away the definition of licensed commercial seed. I think that's what they're saying.

THE COURT: Yeah, I agree, that's what they're saying.

MS. BEN-AMI: That's what they're saying, and that's not right. Because they're two separate terms. One is a field term. One is what the definition of

licensed commercial seed is.

And that's why it's so important to look at something like 6.03, because it doesn't say in the licensed field or subject to 301(a) or anything else. It just says, licensed commercial seed may be marketed by licensee for so long as the licensed commercial seed reasonably meets the quality control specifications.

THE COURT: But aren't you -- isn't your interpretation just taking away the language of, of the field restriction as --

MS. BEN-AMI: No. And I'll get to that. I'll get to that. And if that's where you would like to go, that's where I will go. Because there is a misunderstanding about what this means. Can we go to --

THE COURT: I don't want to interrupt. I realize that, you know, these arguments are prepared very carefully in an order. And just because, you know, we may get to this question later, I don't want to disrupt your presentation.

MS. BEN-AMI: Oh, that's -- I always follow the Court. That's fine.

THE COURT: Okay.

MS. BEN-AMI: No. 21, please. What does this clause really mean? This clause means that we don't have the right to use other Monsanto Glyphosate-resistance

traits.

THE COURT: Okay, now that's -- see, that's where I -- that's the trouble I'm having.

MS. BEN-AMI: Okay.

THE COURT: I can't understand why Monsanto would enter into a contract which would authorize you to use its 30-3-2 [sic], NK603 traits with the understanding you could also use your traits to gain efficacy or, or whatever. So I -- you -- you know, start with that.

But more importantly, I don't think they are saying you can't stack. You just can't stack your trait with 40-3-2 or, or NK603. I mean, that's what I understand they're saying.

MS. BEN-AMI: That's what they're saying.

THE COURT: Okay.

MS. BEN-AMI: And your question, once again, suggests the reason why 12(c) isn't appropriate. Because your question is, why would Monsanto do this? And that's where we need the extrinsic evidence. For example, we have a letter of intent. That letter -- these contracts were moving quickly. There were many of them going simultaneously. The letter of intent says, Pioneer shall not be prohibited by such licenses from combining or stacking other traits or genes in soybeans.

THE COURT: Okay. But now that language was not

included in the contract. So, doesn't that mean that that was rejected?

MS. BEN-AMI: No. And that -- the letter of intent says that the parties will cooperate to complete this contract subject to the intent of this letter of intent. So, it only means that if you look at the negotiation documents and see that somebody changed their mind and told the other side and they agreed.

That's why this is so inappropriate for 12(c). So inappropriate. Because it was clear that the parties agreed to freedom. And if you read licensed commercial -- licensed field as we do, which we believe is the correct reading, it is completely consistent with the letter of intent. If you read it the way Monsanto reads it, there was fraud in the execution of the agreement. Because under Delaware law -- and now I am truly out of order, Your Honor -- but under Delaware law, where there is -- I'm looking for the reformation slide, if you could help me.

Under Delaware law, which is a law applicable here, if the parties came to a specific prior understanding, which is the letter of intent, and Monsanto agreed to fully cooperate, and it's a material deviation, which we have to assume it would be considered material since they're trying to stop us, and they didn't bring it

up and they slipped it in, and they didn't bring it up and they remain silent and didn't say, I'm changing our intent, do you agree or not? Then there is fraud in the execution of the agreement. And that would require at the very least reformation, but it would certainly render the contract unenforceable, and it would be further evidence of Monsanto's anti-competitive behavior.

So, if you accept what Monsanto says this contract means, that Monsanto is telling you, because it doesn't want to look at extrinsic evidence, there was fraud. We think, Your Honor, the better course is to deny this motion, look at the documents, get the whole picture, and then understand what's going on.

Because under Delaware law, you can't slip something in and hope somebody else catches it. Not if you have a letter of intent that says otherwise.

THE COURT: But in this case they wouldn't be slipping it in, it would be, it didn't get included and they should have brought it up, is the argument -- the way the argument is --

MS. BEN-AMI: well, the argument is that they are saying that they put in licensed field to remove some of the right to stack. That's what they saying. As I understand it, what they're saying is, you have a right to stack, and that fits licensed commercial seed, but now

we're telling you licensed field somehow takes away the right that licensed commercial seed gives, and so now you don't have the right to stack. But the letter of intent says we do have the right to stack. Completely. We shall not be prohibited.

THE COURT: Okay.

MS. BEN-AMI: And so, our explanation is consistent with the letter of intent. Their explanation is consistent with fraud. And so, if we can go back to 21, which is I think where I was, we need to understand what was going on here at the time. And this is again one of the reasons why we're at the wrong time period here to be deciding this case. We should wait for discovery. But what was going on is, you know that Monsanto licensed this patent, the '247 patent. That's one of the patents in this contract. And in that patent it said, well, you know, you might go ahead and double-stack Glyphosate-resistance traits, and we have others. This is all in the public patent. So it says, we have other Glyphosate-resistance traits and we're disclosing that in this patent as well. We are giving you a cross-reference.

If they didn't say, we're only giving you a right to the 40-3-2 event, then we would have had an implied license to all their patent -- their Glyphosate-resistance traits that are in these patents. Solely means, we are

giving you the right to the Roundup Ready 1 trait, not to our other traits that are in these patents.

And so if you look at slide 23, we have our graphic of a seed. Let's imagine where it says OGAT it was the GOX; that's also in the '247 patent. We wouldn't have a license to that because the Glyphosate resistance would be coming from their other trait. The remedy for our traits -- because we did exactly what the contract contemplated. Go invent. We're only giving you Roundup Ready 1. You want two Glyphosate-resistant traits? Go invent. And we did.

And what does the contract say? We can stop you by suing you for patent infringement on that other trait. So if they had a patent on OGAT, they could sue us for infringing the OGAT. But we have a license on the Roundup Ready 1 trait, and that's what this means. And take that explanation, and it is completely consistent with 6.03, and it is completely consistent with licensed commercial seed. You take their explanation, it is not consistent with 6.03, which does not have any limitation subject to the field or subject to 3.01(a). It's not consistent. It's not consistent with the letter of intent. Where ours is consistent. It all holds together. And I believe under Delaware law and Missouri law, also, you are supposed to read, one is supposed to read a contract to

give meaning to all its provisions and to put them all in context together. And if there is inconsistency in position between provisions there is ambiguity. So in our position, the field of use or the licensed field, whatever the licensed field provision means that you are not getting all our genes for Glyphosate resistance, you're getting the 40-3-2. Even if we're giving you a patent license. We're not giving you a patent, an implied license on everything else that's in the patent. You are getting 40-3-2, not GOX.

And therefore, that is what you have the right to. We are licensed commercial seed. We have the right to sell licensed commercial seed. We're not violating the field -- the licensed field proviso. We are consistent with 6.0 3 and we are consistent with the letter of intent. It all holds together.

You cannot read their argument, their interpretation, and make it consistent with the letter of intent. You cannot make it consistent with 6.03. You have to add words into this license to do that, Your Honor. You have to put into 6.03, "subject to this and that." But it's not there.

I think I will have to speed up, Your Honor. Can I go to slide 12, please.

THE COURT: In that regard, I know that we talked

something about time, but don't allow a view that somehow you need to avoid saying something you want to say, because I have built in a little extra time. So it's more important to, that you get the opportunity to fully develop your arguments than it is to abide by the strict time constriction. Go ahead.

MS. BEN-AMI: Okay. Then I'll go to seven, Your Honor. And then we look at 3.01(e). 3.01(e) then tells you exactly what you can do. What's the remedy if we use their GOX gene? What's the remedy if we do something? The remedy is to sue us for patent infringement. It all holds together. Because the contract says, we're giving you a license to the '247 patent but only for the Roundup Ready 1 event. If you use another part of our patent, what is our remedy? Our remedy is to sue you for patent infringement. It all holds together.

And what was the intent of this contract as reflected in the agreement itself? Paragraph -- number nine, please.

Your Honor has it in front of you, hopefully, but what this, it says is, the only reason to terminate this contract is based on economic terms. Because if you do something else, we sue you for patent infringement. It all holds together. This contract was meant to be peace in our time. We didn't want Monsanto to get with one hand

and drag us into court with another. And now the contract is being misinterpreted to do exactly what we bargained for -- against. We bargained for peace. That's what that termination clause says. Again, very different than the prior contracts, Your Honor. The ones that they want you to look at.

Can I have slide 10, please.

And 3.01, this is the actual language in 3.01, we just put commercial rights and non commercial rights on it. It says, we can offer to sell and sell licensed commercial seed. And when they didn't want us to be able to sell something, they told us. And we can develop, produce, have produced and import but not sell soybean parent lines.

So, we have a contract here where it's very easy to say what you can't do. They have the BT agreement, I think it was, where it said corn seed has this trait but not any other herbicide tolerance trait. That concept was taken out of the agreement when this agreement was drafted. We have a contract where, when Monsanto doesn't want us to be able to sell something, they know how to tell us, they tell us right here in 3.01(a), you can do certain things but you can't sell parent lines. So we have a contract where, when they want to tell us we can't sell, they know how. That's why there's, there's no

prohibition in this contract. If they wanted to say affirmatively, you cannot sell something, they would tell us.

Can I have slide 12, please.

And under Delaware law, where there's an agreement, and the context of that agreement has explicit terms saying, you agree not to do this, you agree not to do that, you can't then start implying prohibitions. Because it's clear that the parties know how to say, "you can't." And if they don't say you can't, then you can, subject to a claim for patent infringement, which is explicit in 3.01(e). And that is Delaware law.

Can I have 15, please.

So I'll go briefly, Your Honor, into the reason for the extrinsic evidence, why it's allowable under Delaware law. Under Delaware law, as indicated in the case I handed up, as well as other cases in our brief, where there are inconsistencies such as here, if you believe Monsanto's interpretation, parol evidence must be examined. Our interpretation means we do have a license and there is no inconsistency. But if you accept their interpretation, there is inconsistency and there has to be a look to extrinsic evidence.

We have gone through the letter of intent where it says, we shall not be prohibited. There is other

evidence, if we ever got to discovery, we haven't pulled all our documents yet but we did have the letter of intent to show you. We do have --

THE COURT: Is that different than the one you cite in the brief, or the language you cite in the brief?

MS. BEN-AMI: Yes.

THE COURT: Oh, okay.

MS. BEN-AMI: Yes. I mean, again, because we're not into discovery yet, there are other documents I'm sure that are going to come up. But we have the letter of intent, which is so clear and it's so definitive that, and we were able to find it quickly. We also would ask Your Honor, if you look at -- slide 18, please.

There was a draft provision -- I'm sorry, 17, please -- which did have an explicit prohibition. That provision was removed. So if you look at 17 and 18, slide 17 and 18 that you have in your book, Your Honor, you'll see, there is a 3.01(h) in the agreement but it doesn't say this anymore. There was a draft that said, licensee shall not be entitled to do this. And that provision was removed. And it was removed, the evidence will show, if we get to the evidence, because Pioneer said, hey, letter of intent, we have the right to do this. So it would be a tragedy to go ahead and have a case come out that says, I'm not looking at all these documents now, and six months

or a year from now go back and say, oh, yeah, but I have to fix this contract because if that's what it means it's completely wrong. And meanwhile, the public has been led to believe for a year that we don't have a right that we have. And this is a case of public interest, Your Honor.

And now if I could go to 24, please. We're catching up. We've gone out of order but we're almost done.

THE COURT: Okay.

MS. BEN-AMI: Okay. I'd like to address this issue about prohibition briefly -- 25, please. This is what I was saying before, Your Honor. If there's no negative covenant, the contract can't restrain a licensee from doing something. And that's good law, it's appropriate law, and it's understandable law if one understands what a patent license is.

THE COURT: But Monsanto takes the view that if there is no grant, you can't do anything other than what's granted. You're saying --

MS. BEN-AMI: If there's no grant, they can sue us for patent infringement. Let's imagine we didn't have a license with Monsanto at all, and we did what we did. We wouldn't have a license, there's no grant, and what would they do to us? They'd sue us for patent infringement. Just like every other patent case you see where there's no

license; right? A license grant gives us a right. If we don't have that right, it doesn't prohibit us, it just means we have the right to say, the patent's invalid, we don't infringe, the patent's unenforceable, we fight it out. That's the difference between a grant and a prohibition. To have a prohibition, I agree I will not do something, that requires an explicit contract provision.

And this patent -- using a patent as a right to exclude in a license, it's maybe a little counter-intuitive, but that is the law. And it makes perfect sense because all it says is, I stand in the shoes of anybody else who is a potential infringer. I did something you don't like, sue me for infringement. It's not in your grant? Sue me for infringement. And that is Delaware law.

And so -- can I go to 28, please.

I'd like to close this, Your Honor, really with, with the reasons why this is the wrong time to reach the wrong decision. Monsanto has said, well, you know, field abuse restrictions are okay and we can do whatever we want, we own patents. And I think Your Honor is well aware that if you have monopoly power, you don't have unfettered rights to do every single thing you want to do. That's why there are antitrust laws. Those antitrust laws apply to people who have monopoly power.

To go ahead and take an entity with monopoly power and to give it half a loaf, and then a year later to find out it was wrong, think of the implications on that, on the marketplace, on investors, on farmers, on seed companies. They will be told, without looking at all the evidence, without looking at reformation, Monsanto's the only game in town, destroy your seed, you have no choice. You will not save discovery time because of our affirmative defenses. We will not have our rights under Delaware contract law, which is this -- the law applicable here. You will be looking at something, writing a decision, and deciding again in a year. A difficult thing to do.

For those reasons, Your Honor, that is why partial judgments on the pleadings are disfavored. In a year? It could all work itself out. Thank you, Your Honor. Unless you have questions.

THE COURT: You know, I may. Let me see. I'm -- this is a little archaic but I had some -- you may have covered them, let me look through this a little bit.

You may have covered it. I was looking at the page four of your brief -- make sure I'm right -- yeah. And there's a paragraph that says, Pioneer owns the patents covering the OGAT technology and current RR seeds critically. The RR licenses provided Pioneer with freedom

under the RR licenses to stack the RR trait stating specifically that this would not constitute a breach. And then there's language cited. And I think, I think that's been covered. Let me go on to something else here.

(Pause.)

Okay, thank you.

MS. BEN-AMI: I just -- Your Honor?

THE COURT: Go ahead.

MS. BEN-AMI: If you look at 3.01(e) at the bottom.

THE COURT: 3.01(e), as in echo?

MS. BEN-AMI: Echo. It's slide number seven. You will see at the bottom it says, the remedy is enforcement of patent rights, and such activity is not a breach of the agreement. That's not a crazy principle. There's a Supreme Court case that came out a couple years ago, maybe more than a couple now, it seems like yesterday to me, but it may be more than a couple. The *MedImmune* case? And in the way licenses were done in the past, if you didn't like your license and you thought the patent was invalid, you had to take your chances. Your license would be terminated. You could sue for invalidity. But what the Supreme Court said was, no, if there's a dispute about the license, you are allowed to keep your license and fight about patent infringement. It's consistent. This

contract says, it's not a breach. If there's a fight, we fight about patent infringement. But it's not a breach. And it's explicit. Thank you, Your Honor.

THE COURT: All right. Do you want few minutes before a response or are you ready?

MR. CONRAN: If I could just have one minute, Judge.

THE COURT: All right. We'll take about five minutes.

MR. CONRAN: Five minutes? Thank you.

(Court recessed from 10:57 a.m. to 11:04 a.m.)

THE COURT: Whenever you are ready.

MR. CONRAN: Thank you, Your Honor. I'd like to start with the, the discussion of licensed commercial seed. And I think that basically the way to look at that is -- if I could put up these two boards next to each other. As Your Honor knows, what 301(a) says is, subject to this term of the agreement, licensee accepts this non exclusive license. So this is the grant, what they get within the licensed field in the territory, licensed, blank, blank, blank, in order to get to licensed commercial seed. So, before you ever get to what is, quote, licensed commercial seed, you have to go through, subject to the terms of this agreement, what they agree to, and within the licensed field.

And what their argument suggests is -- I have put together a second board. And what their argument suggests is, you wipe out, subject to the terms of this agreement and say, Monsanto hereby grants. They wipe out, licensee accepts. They wipe out, within the licensed field. They wipe out, under Monsanto's patent rights, biological materials. And they say, to develop or use licensed commercial seed. In other words, if you read it the way they want to read it: Monsanto grants a license to sell licensed commercial seed. That's all that they are suggesting this says. And as they have so aptly said, you have to read all of the provisions of the agreement.

And so in order to get to licensed commercial seed you first have to talk about, subject to the terms of this agreement, which of course would include 3.01(d) which says, no license is granted other than specifically licensed. Which of course, Your Honor, goes to the *Cook* case that we have talked about, and other cases that cite that. So, that's one of the terms that this is subject to, before you get to licensed commercial seed.

And of course, you have to get past 3.01(g) which says, they shall not be entitled to use biological materials outside the licensed field. And you have to get past the specific term which they want to eliminate, which is the licensed field.

And interestingly enough, this very clear, 2.09 which says that it's not -- the license does not include, does not include anything other than traits that have Glyphosate herbicide tolerance solely due to the presence of 40-3-2. So it specifically says that. They are basically saying, wipe that out. And I couldn't really understand the argument, but I will say that the way I heard it was that their interpretation of this is that this is not an anti-stacking provision, which of course is contrary to what they said in *Schoenbaum*. They say it's not an anti-stacking provision, but what it is, is, a provision that says that you are only getting one of several Glyphosate-tolerant traits from Monsanto. Well, that's not what it says. What it says is, that licensed commercial seed, their big argument, can only -- is only licensed if it has Glyphosate herbicide tolerance solely due to the presence of 40-3-2.

So, if you think what they've got, they've got OGAT and Roundup Ready here, and they've got the original Roundup Ready here. The original Roundup Ready is unquestionably licensed commercial seed because it has protection against Glyphosate herbicide solely due to the presence of Glyphosate-tolerant soybean event: 40-3-2.

Over here, clearly under the interpretation of solely, it can't possibly be licensed commercial seed. So

you never get to licensed commercial seed because it is not licensed.

Of course, they argue that there are no prohibitions. And of course, I have talked about the various prohibitions that are here, including 3.01(d), which could not be clearer. No license is granted -- that's a prohibition. No license is granted other than specifically licensed herein. That is a prohibition against any other license. They're trying to say you can imply a license. This says specifically you can't. No license is granted. And of course, the only license that is granted is one that's limited. And it's limited to a license within the license field, which we have gone through on 2.09.

This letter of intent argument is sort of crazy to me. But I'll --

THE COURT: Yeah, don't -- please don't use quite that term.

MR. CONRAN: I apologize. It's -- the, the letter of intent argument, first of all, contradicts directly the provision in the agreement 11.05, as I had showed Your Honor before. 11.05 says, this agreement constitutes the entire agreement between the parties regarding the subject matter hereon, and all prior negotiations. Understandings between the parties shall be deemed merged into this

agreement. That's 11.0 5.

Any suggestion that some prior letter of intent that was discussed as part of the process that got to this agreement, there's not a case in the land that suggests that, if you have this provision, the parties have agreed to it, that you then go back and start looking at other documents. These parties have specifically contracted to the contrary. These parties have said, you -- we will not go back and look at those prior documents. With regard to the claim of fraud, all I can say is that there is no allegation of fraud in this case, and any suggestion of fraud is improper.

THE COURT: Well, they claim it in their defenses.

MR. CONRAN: I don't believe that they claim fraud in the inducement of this agreement. I do not --

THE COURT: Oh, okay, inducement. Okay.

MR. CONRAN: I do not believe that.

THE COURT: No, I was talking about fraud in procurement of the patent before the patent office.

MR. CONRAN: Right. Right.

THE COURT: Okay.

MR. CONRAN: There's no fraud with regard to this agreement. And if you go to, with regard to the, the remedies, counsel talked about 9.02(b). Let's talk about 9.02(c). I'll read it to the Court. And there were

limitations on termination, but there also were, it says -- 9.02(c) says, notwithstanding Monsanto's inability to terminate this agreement for breaches or defaults other than nonpayments of royalty due to this agreement, and I quote, Monsanto shall not be prevented from seeking any other remedy which may be available to it in, at law or in equity, injunctive relief, specific performance and damages. So, the contract specifically says that we have the right to bring these claims.

Now, I -- if I can quote counsel, I think it says if you, the law is if they don't say you can't, then you can. I think that's -- I tried to write it down. And I would suggest to the Court that that is exactly the opposite of what the law is. And the law is, if you don't say they can, then you can't. And we quantified that and put it in writing in 3.01(d) and we say, if we don't say you can, then you can't. That's what 3.01(d) says. No license is granted other than specifically licensed. So contrary to, to the argument, both the law and the contract itself contradict that.

Let's go to 3.01(e) for a minute. I, I have already made all of these arguments, so I don't want to repeat too much, Your Honor. But I'd just like to remind the Court, 3.01(e) has the specific reference to 3.01(a), which has of course the limitation on licensed commercial

seed, and it has, "except as specifically provided in 3.01(g), " which of course is the biological materials.

And any suggestion -- Your Honor is well aware of how this works, but -- and the contracts talk about it. Parties over the years develop, using the biological materials which start as a specific event, 40-3-2, NK603, and then they repeat that process. And of course when the contract is signed, there have been many of those repetitions that have occurred. And what counsel is suggesting is that this paragraph, 3.01(g), is completely irrelevant and means nothing because there have been those additional -- that additional work with this biological material. And of course that, that is contrary to common sense.

Of course, 40-3-2 and NK603 are the basic biological materials that make up these licensed commercial seed products and they are specifically prohibited, specifically prohibited from using those to combine them with OGAT in this agreement.

And by the way, just so, so it's clear, Your Honor, 3.01(e) allows them to do stacking with any other trait. It is not a limitation on the stacking of all traits or all transgenic traits. Counsel seemed to suggest that. It only limits them, only, the single limitation on stacking in this agreement is that they

cannot stack under licensed commercial seed that exhibits Glyphosate herbicide protection due to the presence of some other event. In other words, it has to be solely this. That's the only time they can't stack. Every other circumstance, they can stack. So there's specific limitation on this type of stacking. And 3.01(e) is 100 percent compatible with this limitation, and it's limited by 3.01(g), which is a specific limitation itself.

And what happened was, that Pioneer had decided to go their own way with OGAT, which was fine with us. But then they discovered these problems and they decided to solve the problems by combining it with our product, which is prohibited. So that's the only reason why we are here, is because they have violated this specific and very limited stacking prohibition.

Your Honor, I put on the screen a case that Pioneer was involved in, that is the *Ottawa Plant Food* case, which is a federal court that said that their limited label license was a valid field of use restriction. In other words, Pioneer -- I'll read to the Court, Pioneer's express limitation on any use other than production of grain or forage, which reserves the right to Pioneer, the right to sell the invention, as stated, falls squarely within the patent grant. To put it another way, the restrictions in Pioneer's limited label license are

field of use restrictions, and such restrictions are generally upheld.

That's what we have here. A field of use restriction. We have restricted them very narrowly, only with regard to the stacking of a particular Glyphosate-tolerant trait that is other than 40-3-2. And it's -- Pioneer argued to that court successfully. The court made this statement, Ottawa's contention -- that's Ottawa on the other side, Pioneer -- that patent rights must be expressly reserved or they are waived, stands on its head the principle that patentee's rights under the patent is the right to exclude.

Now, they claim that they don't -- that we don't have the right to sue for breach in patent infringement. I thought they would give up that claim, but I would like to hand up to the Court -- I'm handing up to the Court a suit that Pioneer has recently filed in United States District Court for the Central District of Illinois in Peoria, and it involves a license agreement and a patent. And clearly it demonstrates, as you remember Judge Autrey in the *David* case found, they are seeking breach of contract and patent infringement. Of course, we have the right to seek those. And they recognize that in their own pleading.

Finally, Your Honor, I'd just say that we have

established, and I don't believe the argument in any way eliminated what we have established, and that is that we have a contract that was entered into by very sophisticated parties, clearly. And it came after another dispute over another agreement, and that's undisputed. This Court knows that. The parties put exactly what they intended in the agreement. And both parties have to live with what this contract says. This contract is not ambiguous, and the suggestion somehow that licensed commercial seed makes this contract ambiguous is -- does not make sense.

Because if you look at licensed commercial seed, as I said before, you don't get to licensed commercial seed. You don't get to sell, import, use -- and by the way, they did admit on corn. They tried to make the distinction on soybeans. They have a commercial product. They are trying to develop a commercial product. On corn apparently they are doing research and other activities. Well, that's also prohibited. To use it in any way in combination is prohibited. And that happens to be similar to what we, what we did litigate in the last case. So it's not just a commercial product that's prohibited.

But, licensed commercial seed only exists, only exists after you do this analysis of these limitations. So there's absolutely no ambiguity. Once you get to

licensed commercial seed, then the contract says what you do with licensed commercial seed, and that goes to some of the paragraphs they said before. So with that, Your Honor, I would urge the Court, I believe that it is appropriate to grant this motion and I thank you for your patience.

THE COURT: Miss Ben-Ami.

MS. BEN-AMI: I'll try to do this quickly. I apologize.

THE COURT: That's all right. No apologies.

MS. BEN-AMI: If you look at -- well, it's there. Let's do it. Okay. Counsel said that where there's an integration clause, you don't look at extrinsic evidence. However, Delaware says differently. You have the case. There are integration clauses in many contracts. Extrinsic evidence is looked at in many contracts.

But let's look at 3.01(f), taking up on counsel's last point about experimental corn being improper. 3.01(f) says, licensee shall be free to use Glyphosate-tolerant soybean event: 40-3-2 and licensed commercial seed to conduct yield and other comparative field trials in the development of other soybean lines -- and I'm reading the soybean contract instead of the corn contract, but it's the same thing -- no, it's not.

Oh, I have -- I'll read from the corn contract.

Licensee shall be free to use Glyphosate-tolerant corn event: NK603 and licensed corn product to conduct field or other comparative field trials -- yield or other comparative field trials in the development of other corn lines which may or may not contain Glyphosate-tolerant corn event: NK603. The contract specifically allows us to do research. That is number one. And that was the corn contract I read from now. I apologize.

I don't want to argue the *Schoenbaum* case, Your Honor. But what Monsanto is telling you isn't *Schoenbaum*, is what the plaintiffs are alleging, not what we said. So I'd like to just leave that be.

I would like to go to this (d) provision because I do -- I'm a patent lawyer. I have to admit it. I'm sorry. But I do a lot of licensing and, and there is some confusion there.

This 3.01(d) says, no license is granted other than what we say is granted. That tells you what was granted. In other words, this is, as counsel I think called it, belt and suspenders, to say our grant -- there's no implied grant. Right? So, field of use is to say, even though you have a -- even though you have a patent grant, we're telling you you don't have our other Glyphosate-resistant traits. And 3.01(d) says, you can't imply any license to anything else. That's saying there's

no grant. That's not saying there's a prohibition. That's standard patent licensing. You have a grant. If you are outside the grant, you stand naked as to a claim for patent infringement. That's standard. A prohibition is an affirmative agreement that I will not do something ever. That's the distinction. A grant says, you don't have a grant, fine. I can do what I want. You can sue me for patent infringement. This is standard, standard, standard.

Now, this *Ottawa* case, I guess it's the grain and whatever case that counsel just raised. That case is what a normal field of use case is about, I think, because a field of use normally is -- it says you can, you can sell licensed commercial seed but only in the northwest or only in the southeast. Right? Or, you can sell a drug, but that drug can be used for two different indications. It can be used for kidney failure. It can be used for cancer treatment. You can use it for only cancer treatment. You can only sell it for one. That's a traditional field of use license. So we shouldn't be reading other, other cases.

And so here they're saying, yeah, you have a field of use. You can do this, but only for grain storage or something like that. It's a limit on how much you can sell. It's not a limit on what you're making.

In this contract, licensed commercial seed is a defined term. It's not defined by 3.01(a). It's defined in section two. So, you have to look -- when you use defined terms in a contract, you have to look at the contract. And the contract tells you what licensed commercial seed is.

THE COURT: Well, but doesn't it tell you on 3.01(a) that you may sell it if you comply with these other terms first?

MS. BEN-AMI: No. Because your first statement is, what is licensed commercial seed; right?

THE COURT: And it's defined.

MS. BEN-AMI: Right? And it's defined. And we meet that; right? And then it says, your grant is within the licensed field; right? And what does licensed field mean? It means, solely to the part of the patents where you have the Roundup Ready 1 trait. And --

THE COURT: Okay. And that's the difference --

MS. BEN-AMI: That's --

THE COURT: -- that's the difference.

MS. BEN-AMI: And that's the distinction. Because if this is true, 6.03 cannot exist. Because let's go back to 6.03. There it says, licensed commercial seed can be marketed as long as it meets quality control. And it doesn't say, subject to field of use. It doesn't say, no

licensed field. It doesn't say, subject to 3.01(a). It doesn't say any of that. So right there, if you accept Monsanto's argument, it's inconsistent with 603, extrinsic evidence is necessary.

On this issue of biological materials, I think there is some confusion, respectfully.

THE COURT: Just a second, let me catch up here.

MS. BEN-AMI: Sure.

THE COURT: Okay, go ahead. You were just saying biological material, there's confusion. Go ahead.

MS. BEN-AMI: I think if you look at 2.02 defines biological materials. And it says, biological material previously supplied. So that means it existed in the past. Previously. Plain English. What Monsanto is trying to do now, to use that provision that is inapplicable on biological materials, is convert that term into 3.08. 3.8 [sic] is Glyphosate-tolerant soybean event: 43-3-2, and that means the event embodied in a specific place.

That's a different -- see, biological materials is not the same as Glyphosate-tolerant soybean event: 40-3-2. They are separately defined. And so if, if one is to not red pencil or blue pencil a contract, then you can't take the word previously out of 2.02. 2.02 says biological material means the biological material, the biological

material previously supplied. We're not biological material.

THE COURT: Okay. You're going to have to go with that because I'm, I'm confused.

MS. BEN-AMI: Okay.

THE COURT: I see what it says. It means biological material previously supplied, and that would be in conjunction with this contract. The biological material would have been 30 -- or 40 -- I keep saying 30 -- 40-3-2 and NK603, that would be the biological material previously supplied; correct?

MS. BEN-AMI: That would be all different biological material that might be previously supplied. It doesn't say that.

THE COURT: Well, it says --

MS. BEN-AMI: It says, for the purpose of developing the event. You see, that's, that's where -- you see, it says biological material means biological material. It doesn't tell you what -- previously supplied by Monsanto for the purpose of developing licensed commercial seed from the event. Right?

THE COURT: Mm-hmm.

MS. BEN-AMI: So the licensed commercial seed is a different animal than the biological material. The licensed commercial seed is something that is developed

using the information from the biological material, but it is not the biological material. You see, that's what 2.02 says. It says, biological material previously supplied to develop licensed commercial seed. They're not the same thing. One is used to develop, as a research tool, for others. And the research tool that they actually physically supplied to you has certain limitations on it. It's not the licensed commercial seed. They're different things. That's my point, Your Honor.

Now, as to this issue of whether we previously said that Monsanto, if they were right on the contract, had violated the letter of intent and had committed fraud in the execution of the agreement, eighth additional defense, equitable estoppel, each and every one of Monsanto's breach of contract causes of action contained in this complaint is barred by reason of acts, omissions, representations, and acts to conceal material and facts and courses of conduct by Monsanto made with knowledge, actual or constructive, of those facts by which defendants were led to rely to their detriment, et cetera. That's a pleading.

Ninth additional defense, reformation. which is the classic, what we went through earlier, that you have a letter of intent or something like that, and then you change something in the agreement and you don't bring it

up to the other side. It's inconsistent. So in the eighth additional defense and ninth additional defense we specifically say this, reformation is here. Equitable estoppel is here.

There has been -- I -- I apologize. I'm not clear why, what Dupont or Pioneer pled in another case on a different contract is at all relevant here. But we're saying they don't have a right to sue us for breach because 3.01(e) says so. It's not a breach. 3.01(e) says it's not a breach, sue us for patent infringement. I'm not -- it's not the same contract. It's irrelevant.

And finally, Your Honor, what I would say is this: There is a defined term in this contract, licensed commercial seed. If you meet the definition in the contract, you have licensed commercial seed. If they wanted to limit what was licensed commercial seed, what existed as licensed commercial seed, they would do what they had, was in the BT agreement. It would say, licensed commercial seed is, one, two, three, four that we went through, but not if it has another Glyphosate-resistance trait. It would be in the definition of licensed commercial seed. Just like in the BT agreement.

You don't redefine licensed commercial seed using a term licensed field. That tells you this field of the patent grant. See, it's not being used as licensed field

is typically used. It's telling you the field of the patent grant. The field of the patent grant of the '247 patent is to not every Glyphosate-resistance trait that Monsanto has, but the Roundup Ready 1 trait. So, not GOX. Not whatever else is in that patent. That's the field of the patent. That's what it defines. And that makes sense.

So, if licensed commercial seed is not licensed, then there's ambiguity.

THE COURT: Final word.

MR. CONRAN: All right. Thank you, Your Honor. Very quickly. And I, I think I'd start with the last statement that I -- it may be the only thing we agreed on all day. Counsel says, licensed field is the field of the patent grant, and I agree with that.

In other words, there is no license except under the license field. And so therefore LCS can be marketed, of course it can under 6.3, but it doesn't become LCS. You can't have LCS until it's within, as counsel says, the field of the patent grant. It has to be licensed first. And for, in order for it to get within the field, it has to meet the definition of 2.09. And this doesn't.

Secondly, if you look at 1.03 of the contract, it talks also about biological materials. It says, Monsanto has certain rights relating to biological materials,

including technical information, know-how, relating to, transform plants and seeds, useful for making soybean varieties, exhibiting tolerance to Glyphosate herbicide, and various other rights. And then if you combine that with 2.02 which says, term biological materials means biological materials previously supplied. So you've got a description of it in 1.03. You've got a statement in 2.02. And then if you take that and you apply those to 3.01(g), it says, they shall not be entitled to use those biological materials outside the licensed field. And of course we know what 2.09 says about the licensed field.

So therefore, they have taken the biological materials, they have used them outside the licensed field, and it's a breach of the agreement. Thank you very much, Your Honor.

THE COURT: Okay. Well, I have said this before and I don't want to sound patronizing or anything, but it is always an exciting time for me to hear these arguments by great lawyers and I thank you for them. They have been helpful. There's a lot of work here for us to do and we'll get at it. So thank you very much. Court's in recess.

(Court recessed at 11:40 a.m.)

Reporter's CERTIFICATE

I, Christine A. Simpson, Registered Merit Reporter and Certified Realtime Reporter in and for the United States District Court for the Eastern District of Missouri, do hereby certify that I was present at and reported in machine shorthand the proceedings in the above-mentioned court; and that the foregoing transcript is a true, correct, and complete transcript of the electronic recording.

I further certify that I am not an attorney for, nor employed by, nor related to any of the parties or attorneys in this action, nor financially interested in the action.

I further certify that this transcript contains pages 1-78 and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

IN WITNESS WHEREOF, I have hereunto set my hand at St. Louis, Missouri, this 6th day of November 2009.

s/Christine A. Simpson, RMR, CRR

Christine A. Simpson, RMR, CRR