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Bayer Animal Health GMBH, Bayer Intellectual Property GMBH

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BAYER HEALTHCARE, LLC, BAYER
ANIMAL HEALTH GMBH, BAYER
INTELLECTUAL PROPERTY GMBH,

CASE NO.

COMPLAINT

Plaintiffs,

vs.

(Jury Trial Demanded)

SHP CHEMICAL, INC.,

Defendant.

Plaintiffs Bayer HealthCare, LLC, Bayer Animal Health GmbH, Bayer Intellectual
Property GmbH (collectively "Bayer"), by its attorneys, hereby alleges as follows:

NATURE OF THE ACTION

This is an action for patent infringement under the patent laws of the United States, Title 35, United States Code, and declaratory judgment under the Federal Declaratory Judgment Act, Title 28, United States Code, §§ 2201 and 2202, relating to SHP Chemical, Inc.'s ("SHP") application for registration with the Environmental Protection Agency of an imidacloprid

1 technical product for formulation into companion animal products. Bayer owns patents relating
2 to certain uses of imidacloprid in treatment of companion animals, as well as formulations of
3 imidacloprid suitable for such treatment. The formulation or use of SHP's imidacloprid technical
4 product as intended by SHP will infringe one or more of Bayer's patents, and SHP's offer for
5 sale or sale of its imidacloprid technical product with a label for companion-animal uses will
6 infringe one or more of Bayer's patents.
7

8 **THE PARTIES**

9 1. Plaintiff Bayer HealthCare, LLC is a limited liability corporation organized and
10 existing under the laws of the State of Delaware, having its Animal Healthcare Division located
11 at 12809 Shawnee Mission Parkway, Shawnee Mission, Kansas 66216.

12 2. Plaintiff Bayer Animal Health GmbH is a corporation organized and existing
13 under the laws of the Federal Republic of Germany (HRB 52145 Cologne), with a place of
14 business at Kaiser-Wilhelm-Allee 10, 51373 Leverkusen, Germany.
15

16 3. Plaintiff Bayer Intellectual Property GmbH is a corporation organized and
17 existing under the laws of the Federal Republic of Germany, with a place of business at Alfred-
18 Nobel-Strasse 10, 40789 Monheim, Germany.

19 4. On information and belief, defendant SHP is a corporation organized and existing
20 under the laws of the State of Nevada, with a place of business at 311 West Third St., Suite
21 #212-2808, Carson City, Nevada 89703.
22

23 **JURISDICTION AND VENUE**

24 5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1338(a),
25 2201, and 2202.

26 6. SHP is subject to personal jurisdiction in Nevada because, among other things, it is
27 incorporated in Nevada, regularly transacts and/or solicits business in Nevada and has purposefully
28

1 at least Bayer's K9 Advantix II for Dogs products.

2 13. Bayer is the assignee and current owner of the '011 patent, and the owner of all
3 rights, title, and interest in and to the '011 patent, including all rights to enforce the '011 patent
4 and to recover for any and all infringement thereof.

5 **BACKGROUND**

6 14. Bayer HealthCare's Animal Health division has been a world leader in
7 researching and developing products for animal health and pest control since 1919, including for
8 both food-producing and companion animals. Among the products it has developed for
9 companion animals are imidacloprid-based topical solutions used for the prevention and
10 treatment of fleas and other parasites for cats and dogs. These products include the Advantage
11 line, including Advantage II for Cats and Dogs, Advantage Multi for Cats and Dogs, and K9
12 Advantix II for Dogs.

13 15. SHP holds conditional EPA registration No. 90057-1, for imidacloprid technical.

14 16. On information and belief, as set forth below, SHP has taken significant, concrete
15 steps and has made meaningful preparations, either alone or in concert with third-parties, to offer
16 to sell, sell, and/or use imidacloprid technical material labeled for use in companion animals.
17 The offer for sale, sale, or use such material will constitute infringement of the '328, '858, and/or
18 '011 patents.

19 17. In a letter dated October 4, 2013, SHP informed Bayer that SHP was applying for
20 a new product registration for a product with the proposed name "Imidacloprid Technical." Ex.
21 D.

22 18. SHP's October 4, 2013 letter stated that the "sole labeled use" of the Imidacloprid
23 Technical product "is for formulation into insecticide products for use on companion animals."
24 Ex. D.

1 19. In response to SHP's letter, Bayer has repeatedly, but unsuccessfully, sought
2 assurances from SHP that SHP would not infringe Bayer's patents.

3 20. On October 15, 2013, counsel for Bayer wrote a letter to the Director of J&T
4 Associates, LLC, SHP's listed agent for its imidacloprid registration, specifically identifying the
5 '328, '858, and '011 patents, and requesting that SHP identify any basis it has to believe that it is
6 not infringing, inducing infringement, or contributing to infringement of these patents. Ex. E.

7 21. On October 22, 2013, the Director of J&T Associates, on behalf of SHP,
8 responded to Bayer's October 15, 2013 letter. SHP's response did not identify any basis to
9 support a belief by SHP that it was not infringing, inducing infringement, or contributing to
10 infringement of Bayer's identified patents. Instead, the response stated that "[SHP] are not
11 willing to reveal in writing any basis for the belief that they are not infringing, inducing
12 infringement or contributing to the infringement of any Bayer patent." Ex. F.

13 22. On October 31, 2013, counsel for Bayer wrote to the Director of J&T Associates,
14 again requesting that SHP state the basis for its belief that it is not, and will not be, infringing,
15 inducing infringement, or contributing to infringement of Bayer's patents. Ex. G. Bayer has
16 received no response.

17 23. On August 28, 2014, SHP received conditional registration for its imidacloprid
18 product. The conditional approval is tied to a label that states:

19 Only for formulation into an insecticide for the following uses:

- 20 (1) Residential Indoor: Companion Animal
21 (2) Uses for which the U.S. EPA has accepted the required data and/or
22 citations of data that the formulator has submitted in support of
23 registration; and
24 (3) Uses for experimental purposes that are in compliance with U.S.
25 EPA requirements.

26 Ex. H.

1 24. The only EPA-approved use of imidacloprid in companion animals involves the
2 non-systemic control of parasitic insects by topical application, a use covered by the '328 patent.

3 25. Based on the foregoing, Bayer has formed a reasonable belief that SHP is
4 infringing, or will soon be infringing, Bayer's intellectual property rights.

5 26. On information and belief, SHP, either alone or in concert with third parties, has
6 offered for sale, sold, or used and/or will offer for sale, sell, or use throughout the United States
7 its imidacloprid technical product, knowing and intending that its customers or the end-users of
8 its customers will use these imidacloprid-based products in accordance with the methods covered
9 by the '328 patent.
10

11 27. On information and belief, SHP, either alone or in concert with third parties, has
12 offered for sale, sold, or used and/or will offer for sale, sell, or use throughout the United States
13 its imidacloprid technical product, knowing and intending that its customers or the end-users of
14 its customers will formulate imidacloprid into a product covered by, or the use of which is
15 covered by, the claims of the '858 or '011 patents.
16

17 28. Bayer has made substantial investments in its imidacloprid-companion-animal
18 business, including acquiring intellectual property, improving products through research and
19 development, marketing its products and establishing a strong brand, and developing strong
20 customer relationships.
21

22 29. To help protect its substantial investments, Bayer has obtained patents, including
23 the '328, '858, and '011 patents that grant Bayer the legal right to exclude others from using its
24 inventions. If SHP is permitted to use, sell, and/or offer for sale its imidacloprid technical
25 material for use in companion animals, Bayer will suffer irreparable harm—unrecoverable by
26 money damages, and incalculable.
27

28 ///

32. In light of SHP's concrete steps and meaningful preparations to sell, use, and offer for sale imidacloprid technical material for use in companion animals in the United States, and the fact that SHP's infringing activity may have already begun; its refusal to change course in the face of its knowledge of the '328, '858, and '011 patents; its approved EPA registration for companion animal uses for its imidacloprid technical material for commercial sale; its failure to provide assurances of non-infringement to Bayer, there is a real and immediate controversy concerning SHP's infringement of the '328, '858, and '011 patents.

33. Bayer incorporates by reference all preceding paragraphs as if set forth in their entirety.

35. SHP's infringement of the '328 patent was, is, and will continue to be willful.

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1 law. These injuries will continue unless and until SHP's infringing activities are preliminarily
2 and permanently enjoined by this Court.

3 37. As a consequence of SHP's infringement of the '328 patent, Bayer suffered, is
4 suffering, and will continue to suffer damages in an amount not yet determined.

5 COUNT II

6 38. Bayer incorporates by reference all preceding paragraphs as if set forth in their
7 entirety.

8 39. SHP has infringed, is infringing, will continue to infringe, and/or will imminently
9 infringe, literally or under the doctrine of equivalents, one or more claims of the '858 patent
10 directly, or indirectly by contributory infringement and/or by actively inducing infringement.

11 40. SHP's infringement of the '858 patent was, is, and will continue to be willful.

12 41. As a consequence of SHP's infringement of the '858 patent, Bayer suffered, is
13 suffering, and will continue to suffer irreparable harm for which there is no adequate remedy at
14 law. These injuries will continue unless and until SHP's infringing activities are preliminarily
15 and permanently enjoined by this Court.

16 42. As a consequence of SHP's infringement of the '858 patent, Bayer suffered, is
17 suffering, and will continue to suffer damages in an amount not yet determined.

18 COUNT III

19 43. Bayer incorporates by reference all preceding paragraphs as if set forth in their
20 entirety.

21 44. SHP has infringed, is infringing, will continue to infringe, and/or will imminently
22 infringe, literally or under the doctrine of equivalents, one or more claims of the '011 patent,
23 directly, or indirectly by contributory infringement and/or by actively inducing infringement.

24 ///

1 45. SHP's infringement of the '011 patent was, is, and will continue to be willful.

2 46. As a consequence of SHP's infringement of the '011 patent, Bayer suffered, is
3 suffering, and will continue to suffer irreparable harm for which there is no adequate remedy at
4 law. These injuries will continue unless and until SHP's infringing activities are preliminarily
5 and permanently enjoined by this Court.

6
7 47. As a consequence of SHP's infringement of the '011 patent, Bayer suffered, is
8 suffering, and will continue to suffer damages in an amount not yet determined.

9 WHEREFORE, Bayer requests the following relief:

10 (a) A declaration that the sale, use, and offer for sale of SHP imidacloprid
11 technical product for use in companion animals will infringe one or more claims of the '328,
12 '858, or '011 patents, either directly and/or by contributory infringement, and/or by actively
13 inducing infringement;

14
15 (b) Preliminarily and permanently enjoining SHP and its officers, agents,
16 servants, employees, parents, subsidiaries, affiliates, successors, assignees, licensees, and
17 attorneys, and all persons acting in concert or participation with it, from infringing the '328,
18 '858, or '011 patents, directly, or by contributory infringement, and/or by actively inducing
19 infringement;

20
21 (c) In the event that SHP's product is commercialized, damages in an amount
22 adequate to compensate Bayer for harm caused by SHP's plans to engage in activities that
23 constitute infringement, and any infringement after the filing of this action, of the '328, '858, or
24 '011 patents, that may be Bayer's lost profits, but in no event less than a reasonable royalty;

25 (d) If necessary at some future date, awarding Bayer pre-judgment and post-
26 judgment interest on the damages caused to it by reason of SHP's past and ongoing infringement
27 of the '328, '858, or '011 patents;

28

1 (e) A declaration that this is an exceptional case and an award of attorneys'
2 fees pursuant to 35 U.S.C. § 285;

3 (f) An award of Plaintiffs' costs and expenses in this action; and

4 (g) Such further and other relief as this Court may deem just and proper.

5 DATED: This 6th day of February, 2015.

6
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