

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION**

PIONEER HI-BRED INTERNATIONAL,
INC.,

Plaintiff,

v.

IVAN L. NELSON AND THOMAS M.
NELSON,

Defendants.

Case No. _____

COMPLAINT

Plaintiff Pioneer Hi-Bred International, Inc. (hereinafter "Pioneer") brings this action against Ivan L. Nelson and Thomas M. Nelson and for its Complaint states and alleges as follows:

PARTIES

1. Pioneer is a corporation organized and existing under the laws of the State of Iowa, with its principal place of business in Polk County, Iowa. Pioneer is authorized to do and does business in the State of Illinois. Pioneer is in the business of, among other things, developing, manufacturing, licensing and selling agricultural products, including soybean seed.

2. Ivan L. Nelson and Thomas M. Nelson are residents and citizens of the State of Illinois. Ivan L. Nelson and Thomas M. Nelson are brothers. Ivan L. Nelson and Thomas M. Nelson reside in Toulon, Stark County, Illinois. Ivan L. Nelson and Thomas M. Nelson are in the business of, among other things, producing soybeans.

JURISDICTION AND VENUE

3. The claims alleged herein arise under the Patent Laws of the United States, 35 U.S.C. § 1, *et seq.*

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1338(a), and 2201(a).

5. This Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a) because the claims are so related to the federal claims that they form part of the same case or controversy and derive from a common nucleus of operative facts.

6. This Court has personal jurisdiction over Ivan L. Nelson and Thomas M. Nelson based on their residence and citizenship.

7. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c), and 1400(b).

8. Pursuant to Rule 40.1 of this Court, this lawsuit was properly filed in the Peoria Division of this Court because the events giving rise to this lawsuit occurred in Stark County, Illinois.

FACTUAL BACKGROUND

9. On April 25, 2006, United States Patent No. 7,034,211 B2 (“the 93M42 Patent”), entitled Soybean Variety XB34D04, was duly and legally issued by the United States Patent and Trademark Office. Pioneer is the owner by assignment of all right, title and interest to the 93M42 Patent. A true and correct copy of the 93M42 Patent is attached as Exhibit A to this Complaint.

10. On January 30, 2007, United States Patent No. 7,169,979 B2 (“the 93M61 Patent”), entitled Soybean Variety XB35C06, was duly and legally issued by the United States

Patent and Trademark Office. Pioneer is the owner by assignment of all right, title and interest to the 93M61 Patent. A true and correct copy of the 93M61 Patent is attached as Exhibit B to this Complaint.

11. In 2008, Ivan L. Nelson and Thomas M. Nelson purchased 550 bags of soybean variety 93M42 and 200 bags of soybean variety 93M61 from Pioneer. Each bag of seed recited the following terms of sale:

**USE RESTRICTIONS, LIMITATION OF WARRANTY
AND LIABILITY; OTHER TERMS**

NOTICE: PLEASE CAREFULLY READ THE TERMS BELOW, ON THE PIONEER INVOICE, AND ON THE TAG AND/OR TOP OF BAG. BY OPENING THE BAG, YOU ACKNOWLEDGE THAT YOU HAVE READ AND UNDERSTOOD THESE TERMS AND THAT YOU AGREE TO BE BOUND BY THEM TO THE EXTENT ALLOWABLE BY THE APPLICABLE LAWS. IF YOU DO NOT AGREE WITH THESE TERMS, PLEASE CONTACT YOUR SEED PROVIDER REGARDING THE RETURN POLICY.

.....

USE RESTRICTIONS AND LIMITED LICENSES FOR VARIETY SEED:

THE ONLY PERMISSIBLE USE OF THE SEED CONTAINED IN THIS BAG IS FOR THE PRODUCTION OF FORAGE OR GRAIN FOR FEEDING OR PROCESSING. ABSOLUTELY NO RESEARCH OR BREEDING MAY BE DONE WITH THIS MATERIAL. EXPORT OF THIS SEED OR ITS PROGENY FROM THE COUNTRY OF PURCHASE IS STRICTLY PROHIBITED, EXCEPT THAT FORAGE OR GRAIN MAY BE EXPORTED SOLELY FOR USE IN FEEDING OR PROCESSING. RESALE OR TRANSFER OF THIS SEED IS STRICTLY PROHIBITED. For availability of other licenses, contact Pioneer.

This product is proprietary to Pioneer. This product may be protected by Plant Variety Protection (PVP) laws and may also be protected under the laws of other countries. Export of PVP protected seed is prohibited.

This product may be protected under one or more patents. Purchaser agrees that it is only granted a limited license under patent to produce forage or grain for feeding or processing. Resale of this seed or supply of saved seed to anyone, including Purchaser, for planting is strictly prohibited under this license. Use of this product in development or breeding also is strictly prohibited.

12. Following the 2008 harvest, Pioneer received reports that Ivan L. Nelson and Thomas M. Nelson intended to clean and save patented Pioneer soybean seed, including but not necessarily limited to soybean varieties 93M42 and 93M61, and use such seed for planting soybeans in 2009. These reports were subsequently confirmed by statements from Ivan L. Nelson.

13. On information and belief, Ivan L. Nelson and Thomas M. Nelson have completed planting their 2009 soybean crop. On information and belief, the testing of their 2009 soybean crop will confirm that Ivan L. Nelson and Thomas M. Nelson have planted Pioneer soybean varieties 93M42 and 93M61 and possibly other Pioneer varieties, without having purchased the seed from Pioneer.

COUNT I: PATENT INFRINGEMENT

14. Each and every allegation set forth in the above-numbered paragraphs is hereby incorporated by reference just as if it were explicitly set forth hereunder.

15. Ivan L. Nelson and Thomas M. Nelson have infringed the 93M61 Patent, the 93M42 Patent, and possibly other Pioneer patents in violation of 35 U.S.C. § 271 by making, using, selling and/or offering for sale in the United States, without authority, seed that falls within the scope of the claims of the 93M61 Patent, the 93M42 Patent, and possibly other Pioneer patents. Ivan L. Nelson and Thomas M. Nelson were not authorized to and did not have a license allowing them to engage in the infringing conduct.

16. On information and belief, Ivan L. Nelson and Thomas M. Nelson's infringement of the Pioneer patents has taken place with knowledge of the patented nature of the seed and is willful and deliberate.

17. Pioneer has given notice to the public that its soybean seed is patented by, *inter alia*, marking its soybean seed bags with language indicating the varieties are protected by a patent, thereby complying with 35 U.S.C. § 287(a).

18. As a result of Ivan L. Nelson and Thomas M. Nelson's infringing activities, Pioneer has been damaged and will be irreparably injured unless and until such infringing activities are enjoined by this Court.

19. Pursuant to 35 U.S.C. § 283, Pioneer is entitled to injunctive relief in accordance with the principles of equity to prevent the future infringement of rights secured by the 93M61 Patent, the 93M42 Patent, and possibly other Pioneer patents.

20. Pursuant to 35 U.S.C. § 284, Pioneer is entitled to damages adequate to compensate for the infringement by Ivan L. Nelson and Thomas M. Nelson, but in no event less than a reasonable royalty for the use made of Pioneer's soybean seed, together with interest and costs as fixed by the Court. Pioneer is entitled to treble damages under 35 U.S.C. § 284 based on the nature of the wrongful conduct of Ivan L. Nelson and Thomas M. Nelson as described herein.

21. Pursuant to 35 U.S.C. § 285, Pioneer is entitled to recover its attorneys' fees, along with related expenses and costs.

WHEREFORE, Pioneer respectfully requests this Court:

- A. To find and enter judgment that Ivan L. Nelson and Thomas M. Nelson have infringed the 93M61 Patent, the 93M42 Patent, and any other patent identified in through discovery and trial;
- B. To enter orders preliminarily and permanently enjoining Ivan L. Nelson and Thomas M. Nelson, and its respective officers, agents, servants, privies, and employees, and all persons in active concert or participation with any of them, from infringing the 93M61 Patent, the 93M42 Patent, and any other patent identified in through discovery and trial;
- C. To award Pioneer its damages in an amount sufficient to compensate it for Ivan L. Nelson and Thomas M. Nelson's infringement of the 93M61 Patent, the 93M42 Patent, and any other patent identified in through

discovery, but in no event less than a reasonable royalty for the unlawful use made of any Pioneer soybean variety, together with pre-judgment and post-judgment interest and costs and treble damages under 35 U.S.C. § 284;

- D. To declare this case to be “exceptional” under 35 U.S.C. § 285, and to award Pioneer its attorneys’ fees, along with related expenses and costs incurred in this action; and
- E. To award Pioneer such other and further relief as this Court deems just and proper.

COUNT II: VIOLATION OF LICENSE AGREEMENT

22. Each and every allegation set forth in the above-numbered paragraphs is hereby incorporated by reference just as if it were explicitly set forth hereunder.

23. Ivan L. Nelson and Thomas M. Nelson have violated Pioneer’s license agreement by saving and planting Pioneer seed. Pioneer did not authorize Ivan L. Nelson and Thomas M. Nelson to save and plant Pioneer seed.

24. Pioneer’s license agreement appeared on every bag of seed sold to Ivan L. Nelson and Thomas M. Nelson. Accordingly, Ivan L. Nelson and Thomas M. Nelson had knowledge of the content of the license pursuant to which Pioneer’s seed was sold.

25. As a result of Ivan L. Nelson and Thomas M. Nelson’s actions in violating the license agreement by saving and planting Pioneer seed, Pioneer has suffered damages.

WHEREFORE, Pioneer respectfully requests this Court:

- A. To find and enter judgment that Ivan L. Nelson and Thomas M. Nelson have violated Pioneer’s license agreement;
- B. To enter an order permanently enjoining Ivan L. Nelson and Thomas M. Nelson and their agents, servants, privies, and employees, and all persons in active concert or participation with any of them, from continued or future acts constituting violating Pioneer’s license agreement by unauthorized sale of seed;

- C. To award damages sufficient to compensate Pioneer for Ivan L. Nelson and Thomas M. Nelson's violation of Pioneer's license agreement together with interest, costs, and reasonable attorneys' fees permitted by law; and
- D. To award Pioneer such other and further relief as this Court deems just and proper.

COUNT III: CONVERSION

26. Each and every allegation set forth in the above-numbered paragraphs is hereby incorporated by reference just as if it were explicitly set forth hereunder.

27. Ivan L. Nelson and Thomas M. Nelson intentionally obtained and, upon information and belief, illegally saved and planted Pioneer soybeans, exercising unauthorized dominion and control over Pioneer's soybean varieties and technology.

28. The 93M61 Patent, the 93M42 Patent, and other patents identified through discovery, are the property of Pioneer.

29. Ivan L. Nelson and Thomas M. Nelson have converted Pioneer soybean varieties to their own use without permission, thereby depriving Pioneer of its property rights.

30. As a result of Ivan L. Nelson and Thomas M. Nelson's actions, Pioneer has been damaged.

WHEREFORE, Pioneer respectfully requests this Court:

- A. To find and enter judgment that Ivan L. Nelson and Thomas M. Nelson have converted Pioneer varieties to their own use without permission;
- B. To award damages sufficient to compensate Pioneer for Ivan L. Nelson and Thomas M. Nelson's conversion of Pioneer's property rights, together with interest, costs, and reasonable attorneys' fees as permitted by law; and
- C. To award such other relief to which Pioneer may be entitled as the Court may deem appropriate.

Dated: July 17, 2009

/s/ Jacob D. Bylund

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