No. 2018-1614

In the United States Court of Appeals for the Federal Circuit

SYNGENTA CROP PROTECTION, LLC,

Plaintiff - Appellant,

v.

WILLOWOOD, LLC, WILLOWOOD USA, LLC, WILLOWOOD AZOXYSTROBIN, LLC, WILLOWOOD LIMITED,

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of North Carolina
in No. 1:15-cv-00274-CCE-JEP, Judge Catherine C. Eagles

CORRECTED OPENING BRIEF OF APPELLANT SYNGENTA CROP PROTECTION, LLC

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FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Syngenta Crop Protection, LLC **v.** Willowood, LLC et al.

Case No. 18-1614

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ■ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Syngenta Crop Protection, LLC	None.	See Attachment A

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Kirkland & Ellis LLP: Kourtney Baltzer and Scott Skiles

Smith Moore Leatherwood LLP: Richard A. Coughlin, C. Bailey King, Whit D. Pierce

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None.

3/12/2018
Date

/s/ Russell E. Levine, P.C.
Signature of counsel

Please Note: All questions must be answered

Russell E. Levine, P.C.
Printed name of counsel

cc: _____

Reset Fields

Attachment A

Syngenta Crop Protection, LLC is a wholly owned U.S. subsidiary of Syngenta Seeds, Inc.

Syngenta Seeds, Inc. is a wholly owned U.S. subsidiary of Syngenta Corporation, which is a wholly owned U.S. subsidiary of Syngenta Participations AG. Syngenta Participations AG is a wholly owned non-U.S. subsidiary of Syngenta AG.

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STATEMENT OF RELATED CASES

Appellant Syngenta Crop Protection, LLC ("Syngenta") brought suit against Willowood, LLC ("W-LLC"), Willowood USA, LLC ("W-USA"), and Willowood Limited, LLC ("W-Ltd") (collectively, "Willowood"), as well as Willowood Azoxystrobin, LLC ("W-Azoxystrobin"), in the United States District Court for the Middle District of North Carolina, Case No. 1:15-cv-00274-CCE-JEP. Syngenta asserted infringement of U.S. Patent Nos. 5,602,076 ("the '076 Patent") and 5,633,256 ("the '256 Patent") (collectively, the "Compound Patents"); U.S. Patent No. 5,847,138 ("the '138 Patent"); and U.S. Patent No. 8,124,761 ("the '761 Patent"), as well as infringement of Syngenta's registered copyrights in its QUADRIS® and QUILT XCEL® product labels.

There is no other previous or currently pending civil action involving these same patents or copyrights. No other appeal from this same civil action was previously before this or any other appellate court. Counsel for Syngenta knows of no other case pending in this Court or any other U.S. court that may directly affect, or be directly affected by, this Court's decision in this appeal.

INTRODUCTION

Syngenta discovered, researched, and developed azoxystrobin, a breakthrough fungicide that effectively controls fungal growth in a wide range of crops. Before commercially launching azoxystrobin in 1997, Syngenta registered azoxystrobin and end-use product formulations incorporating azoxystrobin with the U.S. Environmental Protection Agency ("EPA"). Syngenta also obtained patent protection for both the azoxystrobin compound (e.g., the '076 and '256 Compound Patents) and processes for manufacturing azoxystrobin (e.g., the '138 and '761 Patents). Syngenta spent nearly eighteen years, conducting thousands of trials, to support the safety and efficacy claims on its product labels registered with the EPA. These product labels, which Syngenta has approved by the U.S. Copyright Office, clearly, effectively, and creatively tell Syngenta's story to growers about how they can use, and reap the benefits of, Syngenta's azoxystrobin products.

As a generic supplier of crop protection products, Willowood sought to capitalize on Syngenta's success and took unauthorized shortcuts to get a head start on entering the azoxystrobin market post patent protection, without regard to Syngenta's intellectual property. Among other things, Willowood did not wait for Syngenta's Compound Patents

to expire before importing 5 kg of relatively pure azoxystrobin into the United States in 2013 so that it could use that azoxystrobin to develop its own end-use formulations, test those formulations, and then obtain product registrations with the EPA. When it was unable to find any supplier who could or would manufacture azoxystrobin using a process different from Syngenta's patented process, Willowood instructed its Chinese supplier to divide the manufacturing process between multiple Chinese entities in an attempt to circumvent Syngenta's '138 Patent. When preparing its application to register its own azoxystrobin products with the EPA, Willowood did not draft its own product labels, but instead copied verbatim Syngenta's product labels, and in a few instances, did not remove references to Syngenta.

Even though Willowood admittedly copied Syngenta's labels, the district court held on summary judgment that the Federal Insecticide Fungicide and Rodenticide Act ("FIFRA"), the statutory scheme governing pesticide registrations, precludes copyright protection of pesticide labels. In doing so, the district court usurped Congress' role and created a judicial exception to copyright protection for pesticide labels, while disregarding longstanding precedent from the Eastern District of

Pennsylvania holding that pesticide labels are protected by copyright. *FMC Corp. v. Control Solutions, Inc.*, 369 F. Supp. 2d 539 (E.D. Pa. 2005). This Court should vacate the district court's ruling on Syngenta's copyright claims and remand for further consideration of those claims.

With respect to Syngenta's '138 Patent, 35 U.S.C. § 271(g) prohibits importing, selling, offering to sell, or using in the United States a product made by a patented process. But even though the district court found that Willowood's azoxystrobin was made by Syngenta's patented process, the district court, in its summary judgment order, read into this statute a requirement that the product must be made by a single entity in order for the importer, seller, or user of that product to infringe. That reading runs directly contrary to the statute's plain language, Congress' intent, and this Court's guidance in *Zoltek Corp. v. United States*, 672 F.3d 1309 (Fed. Cir. 2012) (*en banc*). This Court should reverse and hold that Willowood infringed Syngenta's '138 Patent under § 271(g).

Finally, the jury returned a verdict that "Defendants" infringed Syngenta's '761 Patent, but the district court nullified that verdict as it applied to W-Ltd on grounds that are contrary to the record. This Court should reverse and hold that W-Ltd infringed the '761 Patent.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action under 28 U.S.C. §§ 1331 and 1338(a), as an action for copyright infringement under 17 U.S.C. §§ 101 et seq. and patent infringement under 35 U.S.C. §§ 1 et seq. Appx268. The district court issued its final judgment disposing of all claims on November 20, 2017, and its order denying Syngenta's motions for judgment as a matter of law on January 30, 2018. Appx001, Appx091. Syngenta timely filed its notice of appeal on February 5, 2018, and Willowood filed its notice of cross-appeal on February 19, 2018. Appx140, Appx142. This Court has jurisdiction under 28 U.S.C. § 1295(a)(1).

STATEMENT OF THE ISSUES

1. Whether the district court erred, as a matter of law, in dismissing Syngenta's copyright claims, because the district court's holding that FIFRA precludes copyright actions based on copying of pesticide labels by generic pesticide registrants is incorrect and contrary to the well-reasoned decision in *FMC*.

2. Whether the district court erred, as a matter of law, in entering judgment that Willowood did not infringe Syngenta's '138 Patent for three reasons. First, the district court construed 35 U.S.C. § 271(g) as requiring the product "made by a process patented in the

United States" to be made by a single entity, contrary to the statute's plain language, Congress' intent, and this Court's guidance, *en banc*, in *Zoltek*. Second, the district court found that Willowood's azoxystrobin technical was manufactured using the claimed process but left it to the jury to decide if the single-entity requirement was met. Third, even under the district court's construction of § 271(g), the trial record established that either a single entity carried out the claimed steps, or Willowood directed and controlled the entities who carried out the claimed steps.

3. Whether the district court erred, as a matter of law, in entering judgment that W-Ltd did not infringe any of the asserted patents for three reasons. First, Willowood Limited sold 5 kg of azoxystrobin technical, covered by Syngenta's Compound Patents, to Willowood USA located in the United States in 2013 before the Compound Patents expired. Second, Willowood Limited has since sold and shipped azoxystrobin technical, made by Syngenta's '761 Patent process, to Willowood USA in the United States, coordinates that shipping in the United States, and obtains title to the azoxystrobin technical upon delivery to the United States. Third, the jury returned a

verdict that "Defendants," including W-Ltd, infringed Syngenta's '761 Patent, and the district court improperly nullified that verdict as to W-Ltd, contrary to the record.

STATEMENT OF THE CASE

In March 2015, Syngenta sued Willowood for patent and copyright infringement.[1] Syngenta alleged that Willowood infringed Syngenta's '076 and '256 Compound Patents, '138 Patent, and '761 Patent. Appx286-289. Syngenta also alleged that Willowood infringed Syngenta's copyrights in its QUADRIS® and QUILT XCEL® fungicide labels. Appx289-292.

I. The Parties

A. Syngenta

Syngenta is an agribusiness committed to researching, developing, manufacturing, and selling fungicides, herbicides, insecticides, and other crop-protection products. Appx269. Azoxystrobin is a fungicide that

[1] Syngenta also named W-Azoxystrobin as a defendant, and asserted state law claims under North Carolina's Unfair and Deceptive Trade Practices Act. The state law claims were dismissed in August 2016, and Syngenta does not appeal that dismissal. Appx103 (Dkt. 74). Syngenta also does not appeal any of the court's holdings with respect to W-Azoxystrobin.

effectively controls certain fungal growth in a variety of crops, and is one of the products Syngenta (through its predecessors) discovered, researched, developed, and commercialized. Appx273. The term "azoxystrobin technical" refers to a relatively pure form of azoxystrobin that is used as an active ingredient (i.e., biologically active component) in formulating end-use products. Appx6660-6661. Syngenta registered its azoxystrobin technical and end-use products with the EPA. Appx275. Since commercially introducing azoxystrobin in 1997, Syngenta has manufactured, marketed, and sold azoxystrobin products under several brands, including QUILT XCEL® and QUADRIS®. Appx273.

B. Willowood

W-Ltd is a Hong Kong company that purchases azoxystrobin technical from its Chinese supplier, Yangcheng TaiHe Chemicals Corp. ("TaiHe"), pursuant to an Exclusivity and Supply Agreement. Appx7412-7415, Appx6713. W-Ltd and TaiHe entered into that agreement to develop demand for and sell azoxystrobin technical in the United States. Appx7412. TaiHe agreed that W-Ltd would be the sole seller and distributor of TaiHe's azoxystrobin technical in the United States during the term of the agreement, and that TaiHe would not sell its azoxystrobin

technical to anyone other than W-Ltd or W-USA. Appx7413-7414. Under the terms of the agreement, title to the azoxystrobin passes from TaiHe to W-Ltd "upon delivery to [W-Ltd's] designated port in the USA."[2] *Id.*

W-USA is W-Ltd's U.S. affiliate, based in Oregon. Appx6708, Appx7430, Appx7416, Appx7418, Appx7420. W-USA was launched as W-Ltd's affiliate to sell W-Ltd's products to customers in the United States. Appx6712-6713. There is a close relationship between W-USA and W-Ltd, with each entity providing a direct link from its own website to that of the other. Appx7422, Appx7423, Appx6711. W-USA and W-Ltd also share corporate management. Appx7424, Appx6709.

W-Ltd sells TaiHe's azoxystrobin technical to W-USA under the terms of a Supply Agreement between W-Ltd and W-USA. Appx6793-6794 at 19:14-21:16, Appx7406-7411. The Supply Agreement states W-Ltd "agrees to deliver all Products FOB the place of destination designated by [W-USA]." Appx7408. W-USA has designated AgraForm

[2] Although the agreement states "Willowood" is making recitals and agreements, the agreement is only between TaiHe and W-Ltd (Appx7412); "Willowood" is defined in the agreement as a company with its principal place of business in Hong Kong as W-Ltd has (*id.*); and W-Ltd is the only Willowood entity that is a signatory to the agreement (Appx7415).

in St. Louis, Missouri, who formulates the azoxystrobin technical into end-use products for W-USA, as the location for delivery.[3] Appx6728-6729, Appx6794-6795 at 24:18-25:16, Appx8225-8227. The majority of the azoxystrobin shipments are by sea, and for those shipments, W-Ltd coordinates the shipment of the azoxystrobin technical from Hong Kong or Shanghai to the port of entry (generally Long Beach or Los Angeles), and then from the port of entry to the location designated by W-USA. Appx6794-6795 at 23:24-25:24.

W-USA sells both azoxystrobin technical and end-use products to customers in the United States. Appx6733, Appx7611. W-LLC is additionally responsible for marketing and selling azoxystrobin technical and end-use products in the United States. Appx013.

II. Syngenta's Patent Claims

A. The Compound Patents

Syngenta's Compound Patents claim the chemical compound for azoxystrobin. Appx145, Appx168-169, Appx171, Appx194, Appx6666-6668. The patents expired on February 11, 2014. Appx006. Syngenta

[3] At least once, W-USA also designated delivery to Adjuvants Unlimited in the United States, who developed the formulations for Willowood's end-use azoxystrobin products. Appx6721-6722.

alleged that W-Ltd infringed the Compound Patents because, before the Compound Patents' expiration, W-Ltd purchased 5 kg of azoxystrobin technical from TaiHe, offered it for sale to W-USA, and shipped it directly into the United States. Appx007-008, Appx6721-6725. Syngenta alleged that W-USA infringed the Compound Patents because W-USA purchased, imported, and used that azoxystrobin technical in the United States. *Id.* Syngenta alleged that W-LLC infringed the Compound Patents because it commissioned Adjuvants Unlimited to use that azoxystrobin technical to create product formulations and samples of those formulation, and commissioned another third party to use and test those product samples to support Willowood's EPA applications. *Id.*

1. Summary Judgment

Syngenta moved for summary judgment of infringement and no invalidity of the Compound Patents. W-USA and W-LLC did not dispute the facts alleged by Syngenta. Appx007-010, Appx2539-2540. W-Ltd, however, asserted that there was a genuine issue of material fact regarding its infringement because the 5 kg of azoxystrobin technical was

allegedly shipped "f.o.b. China."[4] Appx007-010, Appx2539-2540 at n.3. The district court granted summary judgment in Syngenta's favor that W-USA and W-LLC infringed the Compound Patents, but denied Syngenta's motion with regard to W-Ltd. *Syngenta Crop Protection, LLC v. Willowood, LLC*, No. 1:15-cv-274, 2017 WL 1133378, at *2-3 (M.D.N.C. Mar. 24, 2017). The district court also granted Syngenta summary judgment of no invalidity as to the Compound Patents. *Id*. at *2.

2. Trial and Post-Trial

At trial, W-Ltd's only rebuttal to the undisputed fact that it sold and shipped 5 kg of azoxystrobin technical to the United States before the expiration of the Compound Patents was its position that the shipment was "f.o.b. China." Appx6794 at 23:12-23. At the close of its case-in-chief, Syngenta moved for judgment as a matter of law that W-Ltd offered to sell and sold azoxystrobin technical to W-USA in the United States and/or imported the same into the United States. FED. R. CIV. P. 50(a); Appx6950 at 171:10-172:6, Appx132 (Dkts. 312-13). The district court denied the motion. Appx133 (9/12/17 Minute Entry).

[4] "FOB" or "f.o.b." is a method of shipment whereby legal title passes from seller to buyer at the designated location. *Litecubes, LLC v. N. Light Prods., Inc.*, 523 F.3d 1353, 1358 n.1 (Fed. Cir. 2008).

The jury returned a verdict finding that W-Ltd did not infringe the Compound Patents, and awarded Syngenta $75,600 in damages for W-USA and W-LLC's infringement of those patents. Appx266. Syngenta renewed its motion for judgment as a matter of law, which the district court denied. FED. R. CIV. P. 50(b); Appx138 (Dkts. 356-57), Appx091.

B. The '138 Patent

The '138 Patent claims a process suitable for making azoxystrobin on a commercial scale, including what is commonly referred to as an "etherification" step followed by a "condensation" step. Appx196, Appx209-212, Appx6672. The '138 Patent expired on December 8, 2015. Appx006. Syngenta alleged that Willowood infringed the '138 Patent under § 271(g) because, before the expiration of the '138 Patent, Willowood imported, used, sold, and offered for sale in the United States azoxystrobin technical that was manufactured using the process patented by the '138 Patent. Appx013-014.

1. Summary Judgment

The district court granted Syngenta summary judgment of no invalidity of the '138 Patent, but denied summary judgment of infringement. *Syngenta*, 2017 WL 1133378, at *3-5. The district court found it "undisputed that the azoxystrobin technical that W-Ltd buys

from TaiHe is made overseas by a process that includes the etherification and condensation steps set forth in the '138 patent." *Id.* at *4. The district court further found it undisputed that W-Ltd sells the azoxystrobin technical obtained from Tai He to W-USA, who in turn "imports the azoxystrobin technical into the U.S. and uses it to formulate its end products, which W-LLC sells to the public." *Id.* But the district court held that the single-entity rule of § 271(a) also applies to § 271(g), such that a product imported into the United States that is manufactured using a patented process only infringes if a single entity performs all the steps of the patented process. *Id.* at *5. Under that interpretation of § 271(g), the district court found there was a genuine issue of material fact as to whether all the steps of the '138 Patent's process are performed by, or attributable to, a single entity. *Id.*

2. Trial and Post-Trial

At trial, Syngenta presented evidence that, even under the district court's interpretation of § 271(g), Willowood infringed the '138 Patent because either (1) a single entity, TaiHe, made Willowood's azoxystrobin technical using the process claimed in the '138 Patent, or (2) Willowood directed or controlled how the steps of the '138 Patent were performed.

TaiHe provided W-Ltd with a description of its azoxystrobin technical manufacturing process ("TaiHe Process Document") pursuant to a clause in their agreement. Appx6989 at 121:10-25, Appx7412; Appx8482-8489. The TaiHe Process Document, which is undated, identifies seven steps for manufacturing azoxystrobin technical. It identifies the entities that perform certain steps, but does not identify who performs the etherification and condensation steps. Appx8482-8484. Willowood understood this to mean that TaiHe itself performed both the etherification and condensation steps. Appx6990-6991 at 125:10-127:11.

Willowood[5] submitted an EPA Process Submission in support of its request to register azoxystrobin technical that is consistent with the TaiHe Process Document, naming TaiHe as the entity that performs the etherification and condensation steps. Appx7285-7302. In May 2014, a representative of W-Ltd visited TaiHe and confirmed that TaiHe was manufacturing azoxystrobin technical according to the process Willowood submitted to the EPA. Appx7459-7460; *see also* Appx7287, Appx7293, Appx7295, Appx7298, Appx7300. In April 2015, another W-Ltd employee

[5] Willowood submitted this document under the name of Greenfields Marketing, a company that Willowood created to hold its technical registrations. Appx6750, Appx6753.

again confirmed that TaiHe performed the etherification and condensation steps. Appx8215-8216, Appx8481-8489.

Willowood responded to this evidence with a second TaiHe document, also undated, allegedly describing the azoxystrobin manufacturing process and stating that TaiHe does not perform the etherification step. Appx8232-8241, Appx7682 at 63:22-64:11. Syngenta presented evidence however, that if TaiHe did not perform the etherification step, it was because Willowood had directed how the etherification and condensation steps of the '138 Patent were to be performed.

Willowood initially sought to have TaiHe make the azoxystrobin technical without using the claimed method, but that was not feasible. Appx2319-2320. Willowood then received guidance from its attorney about dividing the etherification and condensation steps between different entities, believing that would avoid infringement in the United States, and the President of W-USA (Mr. Heinze) asked if it was possible for TaiHe to do so. Appx7453-7456, Appx6757-6758. Mr. Heinze further stated: "I cannot over emphasize how important it is for us to make absolutely sure that at lead [*sic*] two or three of the manufacturing steps

are done by an intermediate factory … I know this is very cumbersome, but we cannot afford to get caught up in a lawsuit that we would potentially loose [*sic*] because of patent infringement." Appx7450; *see also* Appx7683 at 103:20-105:6. Shortly after Syngenta filed its lawsuit against Willowood, Mr. Heinze again emailed Willowood's management team and told them that "[t]he first thing we need to confirm is that our manufacturer is making the product ***the way we have instructed them to do so***." Appx7458 (emphasis added).

Based on this evidence at trial, Syngenta moved for judgment as a matter of law that Willowood infringed the '138 Patent. FED. R. CIV. P. 50(a); Appx6950 at 171:10-172:6, Appx132-133 (Dkts. 314-315). The district court denied the motion. Appx133 (9/12/17 Minute Entry). The jury found that Syngenta did not prove that Willowood infringed the '138 Patent. Appx266. Syngenta renewed its motion for judgment as a matter of law, which the district court denied. FED. R. CIV. P. 50(b); Appx138 (Dkts. 358-359), Appx091.

C. The '761 Patent

The '761 Patent claims a method for manufacturing azoxystrobin using the DABCO catalyst in an amount between 0.1 and 2 mol %.

Appx214, Appx224, Appx 6682-6683. The '761 Patent does not expire until April 2029. Appx006. Syngenta alleged that Willowood infringed, and infringes, the '761 Patent because the azoxystrobin technical Willowood imported, used, offered for sale, and sold in the United States was made by the process claimed in the '761 Patent. Appx018.

1. Summary Judgment

The district court denied both parties' motions for summary judgment with respect to infringement of the '761 Patent, and further denied Syngenta's motion for summary judgment of no invalidity as to this patent. *Syngenta*, 2017 WL 1133378, at *5-7. Because Syngenta demonstrated a substantial likelihood that Willowood infringed and Syngenta made reasonable but unsuccessful efforts in discovery to determine the process by which the accused azoxystrobin is made, the district court shifted the burden to Willowood to prove noninfringement of the '761 Patent, pursuant to 35 U.S.C. § 295. *Id*. at *7-11.

2. Trial and Post-Trial

The jury found that Willowood did not prove that it did not infringe the '761 Patent or that the '761 Patent is invalid, and the jury awarded Syngenta $900,000 in damages for infringement of the '761 Patent. Appx267. Despite the jury's verdict that "***Defendants***" infringed the '761

Patent, the district court entered judgment in favor of W-Ltd on all claims, over Syngenta's objections, and only entered judgment of infringement of the '761 Patent against W-USA and W-LLC. Appx003. Syngenta again raised this issue in its renewed motion for judgment as a matter of law regarding W-Ltd's liability, but the district court denied the motion. FED. R. CIV. P. 50(b); Appx138 (Dkts. 356-357), Appx091.

III. Syngenta's Copyright Claims

A. Syngenta's QUADRIS® and QUILT XCEL® Labels

FIFRA, 7 U.S.C. §§ 136-136y, requires all pesticide products, including fungicides, that are distributed in the United States to be registered with the EPA. Syngenta (through its predecessors) registered its azoxystrobin technical and end-use products with the EPA in 1997, along with the product labels. Appx275. Since that initial registration, the EPA has approved numerous amendments to Syngenta's labels to accommodate, among other things, further uses and applications of azoxystrobin. *Id.*

Syngenta spent nearly eighteen years, and conducted over 9,000 trials, in developing its current QUADRIS® and QUILT XCEL® labels. Appx276-277. Syngenta's QUADRIS® and QUILT XCEL® labels are approximately fifty and thirty pages, respectively, and comprise

narrative text and charts setting forth detailed directions for use, storage, and disposal; application rate information; precautions; first-aid instructions; and environmental, physical, and chemical hazards. Appx424-477, Appx481-509.

Syngenta holds registered copyrights in its product labels for QUADRIS® and QUILT XCEL®. Appx276-277, Appx479.

B. Willowood's Azoxy 2SC and AzoxyProp Xtra Labels

In anticipation of the February 2014 expiration of Syngenta's Compound Patents, Willowood filed applications with the EPA for approval of its generic azoxystrobin products, Azoxy 2SC and AzoxyProp Xtra. Appx714. The applications included proposed labels for those products, which also required approval. *Id.*

As Willowood has admitted, the labels that Willowood submitted to the EPA for approval of its Azoxy 2SC and AzoxyProp Xtra products copied verbatim the language from Syngenta's QUADRIS® and QUILT XCEL® labels. Appx9042-9043. Indeed, in the initial Azoxy 2SC label it submitted to the EPA, the few changes Willowood made to the labels' language mainly involved substituting Willowood's company and product

names for Syngenta's. Appx285-286. But Willowood did not even replace all references to "Syngenta" with "Willowood":

RESISTANCE MANAGEMENT

GROUP	11	FUNGICIDE

Willowood Azoxystrobin 2.08SC (azoxystrobin) is a Group 11 fungicide. The mode of action for Willowood Azoxystrobin 2.08SC is the inhibition of the Qol (quinone outside) site within the electron transport system [Group 11]. Fungal pathogens can develop resistance to products with the same mode of action when used repeatedly. Because resistance develop cannot be predicted, use of this product should conform to resistance management strategies established for the crop and use area. Consult your local or State agricultural authorities for resistance management strategies that are complementary to those in this label. Resistance management strategies may include alternating and/or tank-mixing with products having different modes of action or limiting the total number of applications per season. Syngenta encourages responsible resistance management to ensure effective long-term control of the fungal diseases on this label.

Appx547 (emphasis added).

Willowood's products and labels ultimately were approved, with the end-use registrations approved by May 2014 and the technical registration approved by June 2014. Appx714, Appx270-271.

C. Willowood's Summary Judgment Motion

Syngenta alleged that Willowood infringed Syngenta's copyrights on its QUADRIS® and QUILT XCEL® labels because Willowood had copied the labels and used substantial portions of Syngenta's copyrighted work in Willowood's labels. Appx289-292. Willowood moved for summary judgment on Syngenta's copyright claims. Appx702. Willowood did not deny that it copied Syngenta's labels. Instead, Willowood argued that Syngenta's labels are not entitled to copyright

protection, or that Willowood's copying was permissible under either FIFRA or the fair-use doctrine. Appx730-740.

The day before the hearing on summary judgment motions, the United States filed a Statement of Interest on Syngenta's copyright claims. Appx110 (Dkt. 132), Appx2969. The court then indicated at the summary judgment hearing that it would hold the copyright issues open, and it set a briefing schedule for responding to the Statement of Interest. Appx110 (2/28/17 Text Order). Ultimately, the court granted Willowood's motion for summary judgment on Syngenta's copyright claims. Appx033-034. The court held that FIFRA "precludes" copyright protection for the required elements of pesticide labels. *Id.*

SUMMARY OF THE ARGUMENT

1. The district court erred, as a matter of law, in interpreting FIFRA as precluding copyright protection for pesticide labels and granting Willowood summary judgment on Syngenta's copyright claims. The district court's ruling departs from the longstanding precedent in *FMC*, which held that pesticide labels are entitled to copyright protection. FIFRA's plain language, and the regulations and guidance implementing it, do not require generic pesticide registrants to copy the

original registrant's labeling, and in fact, provide relatively wide creative room for pesticide registrants to distinguish themselves. Since *FMC* was decided in 2005, Congress has had numerous opportunities to amend FIFRA, or the copyright laws, but has chosen not to create any copyright exceptions for pesticide labels. This Court should vacate the district court's grant of summary judgment and remand for further proceedings.

2. The district court erred, as a matter of law, in entering judgment that Willowood did not infringe the '138 Patent. The district court found that Willowood imported, offered for sale, sold, and used in the United States azoxystrobin made by the '138 Patent's process. The district court's holding that § 271(g) requires that the azoxystrobin to not only be made by the '138 Patent's process but also be made by a single entity is contrary to the statute's plain language, which uses passive voice to signify that infringement does not depend on who made the product. It also runs contrary to Congress' intent and this Court's guidance in *Zoltek*. Even under the district court's statutory construction, Willowood infringed the '138 Patent because the steps of the patented method were either performed by a single entity or attributable to Willowood, who directed or controlled the performance of

those steps. This Court should reverse and hold that Willowood infringed the '138 Patent.

3. The district court erred, as a matter of law, in entering judgment that W-Ltd did not infringe any of Syngenta's patents. There is no dispute that W-Ltd sold azoxystrobin to W-USA. There also is no dispute that W-Ltd coordinated shipping the azoxystrobin both to and within the United States. The district court elevated form over substance when it denied judgment to Syngenta because W-Ltd's invoices to W-USA state "f.o.b. Hong Kong" (contradicting W-Ltd's contracts with W-USA and its supplier), despite the clear evidence about W-Ltd's actions and intentions to sell and import azoxystrobin in the United States. By entering judgment in W-Ltd's favor on all patents, the district court also nullified the jury's verdict that "Defendants" collectively infringed the '761 Patent, contrary to the record. This Court should reverse and hold that W-Ltd infringed the Compound Patents and the '761 Patent.

STANDARD OF REVIEW

This Court reviews "questions of patent law *de novo*." *Madey v. Duke Univ.*, 307 F.3d 1351, 1358 (Fed. Cir. 2002). On procedural issues not unique to patent law, this Court follows the rule of the regional

circuit. *Exmark Mfg. Co. Inc. v. Briggs & Stratton Power Prods. Grp., LLC*, 879 F.3d 1332, 1340 (Fed. Cir. 2018) (summary judgment); *Jang v. Boston Scientific Corp.*, 872 F.3d 1275, 1282 (Fed. Cir. 2017) (JMOL).

The Fourth Circuit reviews *de novo* a district court's decisions on summary judgment or judgment as a matter of law (JMOL), applying the same legal standards as the district court and viewing all facts in the light most favorable to the non-moving party or prevailing party. *Am. Humanist Assoc. v. Maryland-Nat'l Capital Park & Planning Comm'n*, 874 F.3d 195, 203 (4th Cir. 2017) (summary judgment); *Dotson v. Pfizer, Inc.*, 558 F.3d 284, 292 (4th Cir. 2009) (JMOL). "A trial court may grant judgment as a matter of law when it 'finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for' the non-moving party." *Dotson*, 558 F.3d at 292 (quoting FED. R. CIV. P. 50(a)); *see also* FED. R. CIV. P. 56(a) (permitting "summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law").

ARGUMENT

I. The District Court Erred, as a Matter of Law, in Holding that FIFRA Precludes Syngenta's Copyright Claims.

The district court held that FIFRA "precludes copyright protection for the required elements of pesticide labels as [applied] against the labels of [generic] registrants." Appx033. Despite stating that copyright protection is precluded ***for the required elements*** of pesticide labels, the district court granted Willowood's motion for summary judgment on Syngenta's copyright claims.[6] Appx033-034. In doing so, the district court created a judicial exception to copyright protection for pesticide labels in their entirety. The district court's interpretation of FIFRA as precluding copyright protection of pesticide labels such as Syngenta's is incorrect and directly contrary to the result reached by the Eastern District of Pennsylvania more than a decade ago that upheld copyright

[6] Significant portions of Syngenta's labels include information that is not required for EPA approval. *See, e.g.,* Appx2794, Appx9704-9787. For example, the EPA does not require efficacy claims on pesticide labels. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 440 (2005) (recounting FIFRA's legislative history, finding FIFRA has not required that the EPA evaluate pesticide efficacy and that the "EPA's approval of a pesticide label does not reflect any determination on the part of EPA that the pesticide will be efficacious" (citations omitted)). The majority of Syngenta's QUADRIS® and QUILT XCEL® labels relate to the efficacy of the products. Appx9788-9791.

protection of pesticide labels. *FMC*, 369 F. Supp. 2d at 560. Therefore, this Court should vacate the district court's grant of summary judgment on Syngenta's copyright claims and remand for further consideration of those claims.

A. FIFRA's Plain Language Does Not Require a Generic Label to Copy the Original Label.

FIFRA does not require a generic registrant to "copy from the original pesticide label." Appx033. To the contrary, FIFRA's plain language refutes any suggestion that it ***requires*** generic registrants to use identical or substantially similar labels to an original registrant, let alone copy the original labels. In relevant part, FIFRA provides:

> The Administrator ***shall, as expeditiously as possible, review and act on any application*** received by the Administrator that … [**1**] would be identical or substantially similar in composition and labeling to a currently-registered pesticide identified in the application, ***or*** that [**2**] would ***differ in*** composition and ***labeling*** from such currently registered pesticide only in ways that would not significantly increase the risk of unreasonable adverse effects on the environment.

7 U.S.C. § 136a(c)(3)(B)(i)(I) (emphasis added). In other words, pursuant to the first clause of this provision, generic products with "identical or substantially similar" labeling will receive expedited review by the EPA. But under the second clause, the EPA ***must also*** accept and

expeditiously review all applications that ***differ in labeling***, provided that they "do not significantly increase the risk of unreasonable adverse effects to the environment." § 136a(c)(3)(B)(i)(I). Although there may be some circumstances in which an identical or substantially similar label is submitted to the EPA, not ***all*** generic registrant labels must be identical or substantially similar to the original registrant's labels, as the district court suggests. As the court in *FMC* found, "verbatim or nearly wholesale copying of another registrant's label is unnecessary to obtain expedited review by the EPA of a label." 369 F. Supp. 2d at 560.

B. The EPA's Implementation of FIFRA Does Not Require a Generic Registrant to Copy an Original Registrant's Product Label.

FIFRA authorizes the EPA to prescribe regulations to carry out its provisions. 7 U.S.C. § 136w(a)(1). The EPA has developed a regulatory framework for registering pesticide products. As part of this framework, the EPA publishes the EPA Label Review Manual ("LRM") (Appx9044-9315) to provide instructions for the agency's review and approval of pesticide labels. *See FMC*, 369 F. Supp. 2d at 556. The LRM "provides guidance on pesticide labeling with the goal of improving the quality and consistency of pesticide labels." Appx9054. It is a training tool for EPA

staff, but also provides guidance to pesticide registrants. *Id.* Nothing in the EPA's regulations or its LRM supports the district court's finding that FIFRA precludes copyright protection for pesticide labels.

In fact, the EPA regulations regarding pesticide labeling "provide significant latitude to determine the content and placement of product label language." *FMC*, 369 F. Supp. 2d at 559. For example, the regulations state that the directions for use only must "be stated in terms which can be easily read and understood by the average person likely to use or to supervise the use of the pesticide." 40 C.F.R. § 156.10(i)(1)(a); *see also* § 156.10(a)(2)(i) (providing that pesticide label must be "expressed in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use").

The LRM also expressly advises registrants "to develop their own language for product labels." *FMC*, 369 F. Supp. 2d at 559. For example, it states "[r]egistrants and EPA reviewers may use their discretion when choosing storage statements for any given product," and may "develop storage instructions for each product based on" certain considerations. Appx9228-9229.

When reviewing the directions for use in accordance with the EPA's regulations, the LRM instructs reviewers to make a "side-by-side" comparison of the proposed set of use directions for an identical or substantially similar product and the use directions of the registered product. Appx9189. But as the *FMC* court recognized, this directive is ***not*** "designed to assure ([or], thereby require) copying." 369 F. Supp. 2d at 558. That is, the LRM provides that the directions for use of a generic registrant's product "may not vary ***in meaning*** from the source product label," not that the directions must be ***expressed*** identically ***in wording, arrangement, and presentation***. Appx9189 (emphasis added). In fact, the LRM recognizes that the directions for use on a product may be presented in different ways:

> ***The format for the presentation of use information*** on the identical or substantially similar label ***need not be identical to the format on the registered (cited) label*** as long as the critical information as described above remains the same and the identical product meets applicable legal requirements on labeling.

Appx9189-9190 (emphasis added); *see also FMC*, 369 F. Supp. 2d at 559.

Indeed, the LRM warns reviewers "*against* limiting themselves to label-to-label comparisons." *FMC*, 369 F. Supp. 2d at 557. "Label

reviewers should use the guidance [of policy documents] along with the applicable laws to make case-by-case determinations on the acceptability of label language." Appx9185. "[C]hecking two documents merely to determine whether they are identical is not difficult," but it "is not the task assigned to the EPA reviewing staff." *FMC*, 369 F. Supp. 2d at 558. Instead, it is assumed that "EPA personnel have the requisite education, skill and experience in their respective fields to determine … by a side-by-side comparison, whether the language in purportedly similar labels has the same ***import***." *Id.* (emphasis added).

In briefing before the district court, the government suggested that the EPA "encourages the use of 'me too' label language that is identical or substantially similar to already registered pesticide label language." Appx2984; *see also* Appx2978, Appx2996. But the government did not identify any written policy to that effect. The only written policies are those of FIFRA, the EPA regulations, and the EPA's LRM—none of which evidence an intent that a registrant ***must*** submit a label that is identical or substantially similar ***in wording, arrangement, and presentation*** to that of the original label. Instead, those written policies provide wide discretion for drafting labels, including as to the language and format,

and specifically instruct EPA reviewers to evaluate labels on a case-by-case basis. Even if the EPA did have an undocumented practice of encouraging labels that are identical or substantially similar in wording, arrangement, and presentation, that still does not evidence a policy ***requiring*** the submission of only such labels.

Therefore, the district court committed legal error in holding that FIFRA precludes copyright protection over the required elements (such as directions for use) of pesticide labels.

C. FIFRA and Copyright Law Are Not in Conflict.

"Where two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (quoting *Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 133-34 (1974)). There is no clearly expressed intent in either FIFRA or its legislative history to exclude pesticide labels from copyright protection.

FIFRA dates back as far as 1947. L. Schierow & R. Esworth, *Pesticide Law: A Summary of the Statutes*, Report No. RL31921, CONGRESSIONAL RESEARCH SERVICE (Nov. 14, 2012) (Appx9316-9333) at Appx9320. Congress revised FIFRA in 1972, and the 1972 law "is the

basis for current federal policy." Appx9321. Four years later, Congress passed the Copyright Act of 1976, in a major overhaul of earlier copyright laws. *Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code*, Circular 92, U.S. COPYRIGHT OFFICE (Dec. 2016) (Appx9334-9703) at Appx9338. There is nothing in the Copyright Act, as enacted or as later amended, that exempts pesticide labels from copyright law. And while FIFRA has undergone several substantial changes since the Copyright Act of 1976 (described at Appx9321), Congress has not created an exception to copyright law in the framework of FIFRA—indeed, the word "copyright" does not appear anywhere in FIFRA. *See generally* 7 U.S.C. §§ 136-136y.

Where Congress sought to modify existing intellectual property law rights through FIFRA, it did so directly and explicitly. For example, Congress recognized that original registrants who conduct scientific studies to generate and submit data to the EPA in support of a pesticide registration have a property interest in that data that may be cognizable under certain state laws. *Ruckelshaus*, 467 U.S. at 1002-03. In 1978, Congress amended FIFRA to add data-exclusivity and data-compensation provisions that specifically limited these state-law rights

and effectively put in place a forced-licensing scheme that allows generic registrants to rely on (but not to view) the original registrant's health and safety data to support a registration, in exchange for providing data compensation to the original registrant. *Id.* at 1006-08; 7 U.S.C. § 136a(c)(1)(F). Yet, Congress has not enacted any similar provisions purporting to limit other existing intellectual property rights held by original registrants under established law, such as copyrights.

In 2005, the Eastern District of Pennsylvania decided *FMC*, holding that no conflict exists between FIFRA and copyright because FIFRA does not require "verbatim or nearly wholesale copying of another registrant's label … to obtain expedited review by the EPA of a label."[7] 369 F. Supp. 2d at 560. Since *FMC*, Congress has amended FIFRA at least once and the Copyright Act at least eleven times. Appx9321 (listing 1 amendment); Appx9344-9345 (listing 11 amendments). Thus, if anything, Congress' clear directive in FIFRA that the EPA must accept and review products with dissimilar labels, combined with its silence as to the *FMC* decision, reflects Congress' acceptance of *FMC* and

[7] As noted above, FIFRA explicitly allows, and in fact requires, the EPA to accept applications with labels that differ from those of the original registrant. 7 U.S.C. § 136a(c)(3)(B)(i)(I).

underscores the lack of any conflict between FIFRA and copyright law. *See Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409-10 (2015) (holding that when "Congress has spurned multiple opportunities to reverse" a judicial interpretation of a statute, this indicates that the judicial interpretation is consistent with Congress' intent).

D. The District Court's Reliance on *SmithKline* Is Misplaced.

The district court relied on *SmithKline Beecham Consumer Healthcare L.P. v. Watson Pharms., Inc.*, 211 F.3d 21 (2d Cir. 2000), to support its conclusion that FIFRA "precludes copyright protection for the required elements of pesticide labels as [applied] against the labels of [generic] registrants." Appx033. In *SmithKline*, the Food and Drug Administration (FDA) rejected a generic drug producer's amended label, requiring the generic producer to "copy verbatim substantially all of the text used in the SmithKline" label and giving it little leeway to deviate from the branded label produced by SmithKline. 211 F.3d at 24 (citation omitted). The appellate court found that this created a conflict between the Hatch-Waxman Amendments and the Copyright Act. *Id.* at 27. It resolved the conflict by holding that the generic producer "cannot be liable for copyright infringement because the Hatch-Waxman

Amendments require generic drug producers to use the same labeling as was approved by the FDA for, and is used by, the producer of the pioneer drug." *Id.* at 23. Because no similar conflict exists between FIFRA and the Copyright Act, and because FIFRA explicitly requires the EPA to accept and review dissimilar labels, the district court's reliance on *SmithKline* was misplaced. *See FMC*, 369 F. Supp. 2d at 568-71 (distinguishing *SmithKline*).

As discussed above, neither FIFRA nor the EPA's implementation of FIFRA require that a registrant's label be identical or substantially similar in wording to the original registrant's label. The relevant provision of FIFRA places the burden on the EPA and expressly requires the EPA to accept and expedite review of applications that ***differ in labeling***. In contrast, the Hatch-Waxman provision at issue in *SmithKline* places the burden on the generic applicant and expressly requires the use of the ***same labeling*** to obtain expedited FDA review:

Hatch-Waxman	FIFRA
"An abbreviated application for a new drug ***shall*** … show that the ***labeling proposed for the new drug is the same as the labeling approved for the listed drug*** … ." 21 U.S.C. § 355(j)(2)(A)(v) (emphasis added).	"The Administrator ***shall, as expeditiously as possible, review and act on any application*** received by the Administrator … that would ***differ in*** composition and ***labeling*** from such currently-registered pesticide only in ways that would not significantly increase the risk of unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(3)(B)(i)(I) (emphasis added).

Although the court in *SmithKline* found that "'same' may be something less than 'identical'" in the Hatch-Waxman context, it also explained that "whatever difference may exist … is narrow and intended to prevent misstatements" such as allowing a generic manufacturer to change references in the label to the name/address of the manufacturer or the color of a product. 211 F.3d at 28 (citing H. Rep. No. 98-857 at 22 (1984)). Thus, the Hatch-Waxman Amendments' "same" standard provides hardly any flexibility or creative room for companies to distinguish themselves, as illustrated by the FDA's rejection of the generic producer's label that did not "copy verbatim substantially all of the text" of SmithKline's label. *See SmithKline*, 211 F.3d at 24.

Conversely, FIFRA offers relatively wide latitude to generic registrants in developing labels that differ from the original registrant's.[8] *FMC*, 369 F. Supp. at 558-60. In fact, as the *FMC* court recognized, the EPA has expedited and approved labels that were ***not*** copied from an original registrant. 369 F. Supp. 2d at 552. Contrary to the district court's reasoning, *SmithKline* does not support the conclusion that FIFRA precludes copyright protection over pesticide labels.

E. The District Court Conflated FIFRA's "Substantial Similarity" Standard with Copyright Infringement.

The district court stated:

> FIFRA contemplates that a [generic] applicant will copy from the original pesticide label in ways that would otherwise infringe a copyright. Even with some changes, use of the original pesticide label as a "go by" for the new label will result in copyright infringement. In enacting FIFRA, Congress intended a narrow exception to copyright protection for the required elements of pesticide labels as against [generic] registrants.

Appx033-034 (citation omitted). This analysis, however, appears to conflate FIFRA's "substantial similarity" requirement with copyright

[8] Willowood presented no evidence that the EPA refused to approve its products unless it copied Syngenta's labels. Indeed, after this lawsuit was initiated, Willowood revised the labels for its azoxystrobin products, and the EPA still approved them. *See* Appx2793-2794.

infringement.

"Copyright protection subsists … in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated." 17 U.S.C. § 102(a). A copyright owner has the exclusive right "to reproduce the copyrighted work in copies," § 106, and anyone violating that right is a copyright infringer, § 501. Significantly, copyright protection does not extend to an idea itself, but rather lies in the expression of the idea. § 102(b); *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., Inc.*, 74 F.3d 488, 492 (4th Cir. 1996) ("copyright protection does not extend to ideas or facts"). In other words, copyright infringement results when a defendant ***copies*** the original elements of a copyrighted work, ***not*** merely when a defendant expresses an idea that is similar to that of the copyrighted work, even if that expression is substantially similar to the copyrighted work. *See Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984) ("[N]o matter how similar the two works may be (even to the point of identity), if the defendant did not copy the accused work, there is no infringement.").

To establish copyright infringement, a plaintiff must show that (1) it owns a valid copyright; and (2) the defendant copied the original elements of that copyright. *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 801 (4th Cir. 2001). When there is no direct evidence of copying, the plaintiff may raise a rebuttable presumption of copying by presenting evidence that the "alleged copier had access to the material and that the original material and the alleged copy are substantially similar." *Keeler Brass Co. v. Cont'l Brass Co.*, 862 F.2d 1063, 1065 (4th Cir. 1988). However, "substantial similarity" between a copyrighted work and another work is not copyright infringement; it merely serves as a proxy to demonstrate ***copying***. 17 U.S.C. §§ 106, 501; *Keeler*, 862 F.2d at 1065 (explaining substantial similarity is only circumstantial evidence of copying).

Even to the extent the question of substantial similarity arises in the copyright context, it only creates a rebuttable presumption of copying, which an alleged infringer could rebut by showing that it ***independently*** created its work. *Keeler*, 862 F.2d at 1065. In this case, the question of substantial similarity never arose, because Willowood ***admitted to copying*** Syngenta's labels.

Unlike the copyright context, the question whether two labels are substantially similar under FIFRA is a ***substantive*** one that is evaluated based on FIFRA's core requirement that a product not present a risk of "unreasonable adverse effects on the environment." *See* 7 U.S.C. §§ 136(bb) (defining "unreasonable adverse effects"), 136a(c)(3)(B)(i)(I), 136a(c)(5), 136a(c)(7) (incorporating "unreasonable adverse effects" standard). Thus, pesticide labels can be substantially similar under FIFRA even if they differ in their selection, arrangement, and presentation of information, such that they would not be substantially similar under copyright law. *See, e.g., NTE, LLC v. Kenny Constr. Co.*, No. 14-cv-9558, 2016 WL 1623290, at *6 (N.D. Ill. Apr. 25, 2016) (granting summary judgment of copyright infringement where evidence did not establish copying of selection and arrangement of data). That is, FIFRA, at most, requires that subsequent labels include "substantially similar" ***information*** about a product, but this information may be expressed in ways that do not infringe any copyrights in the original label. *Superior Form*, 74 F.3d at 492 (explaining "copyright protection does not extend to ideas or facts").

Contrary to the district court's reasoning, nothing in FIFRA precludes copyright protection of pesticide labels. Therefore, this Court should vacate the district court's grant of summary judgment on Syngenta's copyright claims and remand.

II. The District Court Erred, as a Matter of Law, in Entering Judgment in Favor of Willowood Regarding Infringement of the '138 Patent.

A. The District Court Erred in Interpreting 35 U.S.C. § 271(g) as Imposing a Single-Entity Requirement on the Product Made by the Patented Process.

The district court found that Willowood's azoxystrobin technical is made by the process claimed in the '138 Patent. Appx013. Notwithstanding this finding, the district court denied Syngenta's motion for summary judgment that Willowood infringed Syngenta's '138 Patent. The district court held that the "product which is made by a process patented in the United States" must be "made" by a single entity, thereby applying the single-entity rule of § 271(a) in the context of § 271(g). Appx014. For two interrelated reasons, this Court should reverse the district court's denial of summary judgment on Syngenta's claim of infringement of the '138 Patent, hold that Willowood infringed the '138 Patent, and remand for determination of the damages attributable to this infringement. First, the district court's statutory construction runs

contrary to the plain language of § 271(g), Congress' intent, and this Court's guidance. Second, the district court found that Willowood's azoxystrobin technical is made by the process claimed in the '138 Patent, and thus, absent the district court's statutory construction, summary judgment of infringement should have been entered.

1. The Plain Language and Legislative History of § 271(g) Show That It Does Not Require the Product Made by the Patented Process to Have Been Made by a Single Entity.

Statutory language, "'[u]nless otherwise defined, … will be interpreted as taking [its] ordinary, contemporary, common meaning." *Bilski v. Kappos*, 561 U.S. 593, 603 (2010) (quoting *Diamond v. Diehr*, 450 U.S. 175, 182 (1981)). The Supreme Court has "more than once" cautioned against reading into the patent laws "limitations and conditions" that Congress has not expressed. *Diamond*, 450 U.S. at 182. Section 271(g) reads:

> Whoever without authority imports into the United States or offers to sell, sells, or uses within the United States a product which is made by a process patented in the United States shall be liable as an infringer, if the importation, offer to sell, sale, or use of the product occurs during the term of such process patent.

There is no indication in that language that it matters ***who*** made the product by a patented method—one entity or multiple. Liability arises from the importation, sale, offer for sale, or use of the product in the United States, not from making the product itself.

This is consistent with the well-established practice of courts to consider whether a given statutory provision uses active or passive voice in determining whether Congress intended that provision to place limits on the actors subject to that statute. For example, in *Dean v. United States*, the Supreme Court interpreted a statute that called for a sentencing enhancement if a firearm "is discharged" during a crime. 556 U.S. 568, 571-72 (2009). The Court held that the statute did not require the discharge to be carried out knowingly or intentionally, relying in part on Congress' use of the passive voice. *Id.* at 572. That is because "[t]he passive voice focuses on an event that occurs without respect to a specific actor … It is whether something happened—not how or why it happened—that matters." *Id.* Other cases have similarly interpreted statutes based on their use of passive voice. *See, e.g., Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 102-03 (1979); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 844-45 (4th Cir. 1992) (reasoning "[t]he

district court arbitrarily deprived these words of their passive element by imposing a requirement of active participation as a prerequisite to liability"); *see also generally* A. Krishnakumar, *Passive-Voice References in Statutory Interpretation*, 76 BROOK. L. REV. 941 (2011) (Appx9792-9800).

Indeed, this Court itself has interpreted another provision of the Patent Act based on its use of the passive voice. The pre-AIA version of 35 U.S.C. § 102(b) bars patentability if "the [claimed] invention was … on sale in this country, more than one year prior to the date of application for patent in the United States." In interpreting this provision, this Court explained that "[b]y phrasing the statutory bar in the ***passive voice***, Congress indicated that ***it does not matter who*** places the invention 'on sale'; it only matters that someone—inventor, supplier or other third party—placed it on sale." *Special Devices, Inc. v. OEA, Inc.*, 270 F.3d 1353, 1355 (Fed. Cir. 2001) (emphasis added).

Section 271(a) requires a single entity to carry out all of the steps of a claimed method because it describes infringing conduct in active voice, *i.e.*, liability attaches to "whoever without authority makes, uses, … a patented invention." *See BMC Res., Inc. v. Paymentech, L.P.*, 498

F.3d 1373, 1380 (Fed. Cir. 2007). Similarly, in § 271(g), liability is described in the active voice, attaching to "[w]hosoever without authority imports … or offers to sell, sells, or uses within the United States a product …." But the description of the product that the infringer imports, offers for sale, sells, or uses—"a product which is ***made by a process*** patented in the United States" (emphasis added)—is set forth in passive voice because it does not matter ***who*** makes the product. For liability under § 271(g), all that matters is that the product imported, sold, offered for sale, or used in the United States was made by a patented process. *See Trs. of Columbia Univ. in City of N.Y. v. Roche Diagnostics GmbH*, 272 F. Supp. 2d 90, 108 (D. Mass 2002) (explaining "it is irrelevant under Section 271(g) who manufactured the goods so long as the goods were manufactured using a patented process").

Further, interpreting § 271(g) to include a single-entity rule, as the district court did, would frustrate its legislative purpose. Congress expressly enacted § 271(g) to "prevent circumvention of a U.S. process patentee's rights through manufacture abroad and subsequent importation into the United States of products made by the patented process." S. Rep. No. 100-83 (1987), 1987 WL 967478. Congress also

recognized that in such circumstances, "'*the offending act is the importation of a product* made through the use of a protected process patent or its subsequent sale within the United States.'" *Zoltek*, 672 F.3d at 1324 (quoting H. Rep. No. 100-60 at 6 (1987)). To interpret § 271(g) to impose a single-entity requirement on the product made by the patented process would essentially eviscerate Congress' intent.

2. This Court's *Zoltek* Decision Confirms § 271(g) Does Not Impose a Single-Entity Requirement on the Product Made by the Patented Process.

While this Court has not directly addressed whether § 271(g) imposes a single-entity requirement on the product made by the patented process, this Court sitting *en banc* has addressed § 271(g) in the context of interpreting 28 U.S.C. § 1498(a). Section 1498(a) waives sovereign immunity and imposes liability on the government for patent infringement by its contractors. 28 U.S.C. § 1498(a); *Zoltek*, 672 F.3d at 1326-27. This Court was asked to determine whether the scope of government liability for infringement under § 1498(a) was limited to direct infringement under § 271(a), or whether it extended to liability under § 271(g). *Zoltek*, 672 F.3d at 1314-15. After reviewing the legislative history, *id.* at 1318-23, this Court concluded that "under

§ 1498(a) the Government has waived its sovereign immunity for direct infringement, which extends not only to acts previously recognized as being defined by § 271(a) but also acts covered under § 271(g) due to unlawful use or manufacture." *Id.* at 1327.

This Court further analyzed whether the government could be subject to liability under § 1498(a) based on actions that would be infringing under § 271(g). *Id.* at 1323. The patent at issue in *Zoltek* claimed a two-step process: partially carbonizing fibers, and then processing those fibers into sheets. *Id.* at 1312. The first step took place in Japan. *Id.* Thereafter, the fibers were imported in the U.S., where the second step of the process took place. *Id.* Despite the fact that the government's contractor subcontracted out the manufacture of the accused products such that the steps of the claimed method were carried out by multiple, different entities (both outside and inside the United States), this Court held that Zoltek's infringement case could go forward. *Id.* at 1327. Therefore, this Court's *en banc* treatment and application of

§ 271(g) confirms that the statute does not require a single entity to carry out the claimed process.[9]

3. Absent the District Court's Single-Entity Requirement, There Is No Dispute that Willowood Infringed the '138 Patent.

Willowood's sole defense to infringement of the '138 Patent is its contention that § 271(g) requires a single entity to perform all of the steps of a claimed method. The district court found it was undisputed that Willowood's azoxystrobin technical is made by the process claimed in the asserted claims of the '138 Patent. Appx013. The district court also found it was undisputed that W-Ltd buys azoxystrobin technical from TaiHe and sells it to W-USA, who imports the azoxystrobin technical. *Id.* The district court further found it was undisputed that W-USA arranges for the azoxystrobin technical to be used and formulated into end-use

[9] Before the district court, Willowood cited *Mycogen Plant Sci. v. Monsanto Co.*, 252 F.3d 1306 (Fed. Cir. 2001), in support of its argument that § 271(g) imposes a single-entity requirement. However, *Mycogen* is inapposite, as it relates to whether liability can attach under § 271(g) if the product made by the patented process was manufactured before the patent issued. *Id.* at 1317-18. In reaching its decision, this Court referenced the fact that, under § 271(a), entities "do not infringe a process patent if they practice the process before the beginning of the patent term," but nothing in *Mycogen* suggests that § 271(a) and § 271(g) are congruous in *all* respects. *Id.*

products in the United States, and that W-USA and W-LLC sell azoxystrobin technical and/or end-use products in the United States. *Id.* Finally, the district court found that W-Ltd, W-USA, and W-LLC performed these actions during the term of the '138 Patent. Appx240. In the absence of a single-entity requirement, all of the elements of infringement liability under § 271(g) are met. Therefore, this Court should reverse the district court's denial of summary judgment and hold that W-Ltd, W-USA, and W-LLC infringed Syngenta's '138 Patent.[10]

B. The District Court Erred in Holding that the Jury's Verdict that Willowood Did Not Infringe the '138 Patent Was Supported by Substantial Evidence.

At trial, the jury was instructed that the azoxystrobin technical that Willowood imported and used was made by the process claimed in the '138 Patent. Appx240. Based on its interpretation of § 271(g), the district court instructed the jury that its job was to "decide whether both steps of the '138 [] Patent, specifically the etherification and condensation steps, are performed by a single entity or are attributable to a single

[10] W-Ltd's liability with respect to the Compound Patents and the '761 Patent is addressed further below in Section III.

entity."[11] Appx240-241. The jury found that Syngenta did not prove that Willowood infringed the '138 Patent. Appx002. Substantial evidence does not support that finding, and in fact, the evidence presented at trial contradicts that finding. The evidence at trial established that Willowood infringed the '138 Patent because either: (i) TaiHe carried out both the etherification and condensation reactions used to manufacture Willowood's azoxystrobin technical, or (ii) Willowood directed or controlled the entities that carried out these reactions. Thus, the district court erred in denying Syngenta's JMOL motion on this issue.

1. The Claimed Steps of the '138 Patent Are Performed by a Single Entity, TaiHe.

Under the single-entity rule of § 271(a), all steps of a claimed method must be "performed by or attributable to a single entity." *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022 (Fed. Cir. 2015) (*en banc*) (per curiam). Applying this rule in the context of § 271(g), the district court instructed the jury that "Willowood infringed the ['138] patent if you find by the greater weight of the evidence that a single entity, TaiHe, performed both the etherification and condensation steps

[11] Syngenta objected to that instruction as erroneously imposing a single-entity requirement for infringement under § 271(g). Appx7074.

of the process used to manufacture the azoxystrobin imported by Willowood into the United States." Appx242. The evidence presented at trial established that TaiHe performed both steps of the method claimed in the '138 Patent.

On March 26, 2013, W-Ltd entered into an Exclusivity and Supply Agreement with TaiHe, located in China, for the supply of azoxystrobin technical. Appx7412. As part of that agreement, TaiHe agreed to "provide … all information regarding the manufacturing process and inert ingredients of Azoxystrobin Technical 98% as required by the U.S. EPA for registration of the product" to Willowood. *Id.*; Appx6716. Pursuant to that agreement, TaiHe provided Willowood with a sample of azoxystrobin and a TaiHe Process Document. Appx6989 at 121:1-25, Appx8482-8489.

Based on the information in the TaiHe Process Document, Willowood submitted an EPA Process Submission, dated July 24, 2013, in support of its azoxystrobin technical registration. Appx7274, Appx6990-6991 at 125:4-127:11. That EPA Process Submission stated that TaiHe manufactured Willowood's azoxystrobin technical. Appx7275, Appx6753. Additionally, the EPA Process Submission stated

that the step of etherification ***and*** the step of condensation—the two steps of the '138 Patent—were both performed by TaiHe. Appx7295, Appx7300, Appx6753-6754. The EPA, for its part, considered the information in the EPA Process Submission before ultimately approving Willowood's azoxystrobin technical registration. *See* Appx8919 (amending EPA's registration of Willowood's azoxystrobin technical).

Considering the harsh penalties for submitting incorrect information to the EPA, *see* 7 U.S.C. § 136j(a)(2)(M) and 18 U.S.C. § 1001(a), Willowood's EPA Process Submission should be considered an admission that TaiHe performed both the etherification and condensation steps claimed in the '138 Patent while the '138 Patent was in force.[12] No reasonable jury could disregard this evidence and find that TaiHe did not perform both steps of the process claimed in the '138 Patent. *See* FED. R. CIV. P. 50(a).

Further, Willowood employees confirmed on multiple occasions that TaiHe performed both the etherification and condensation steps, consistent with the EPA Process Submission. In May 2014, Mr. Shen, a

[12] Shortly before trial, and after the '138 Patent expired, Willowood amended its EPA registration to identify an entity other than TaiHe as performing the etherification step. Appx6965 at 25:8-25.

manager at W-Ltd, visited TaiHe. He confirmed that TaiHe had set up the manufacture of azoxystrobin technical ***according to the manufacturing process that Willowood submitted to the EPA***, with three factories performing steps other than the etherification and condensation steps, and one (TaiHe's own factory) performing the "***last two steps***," i.e., the etherification and condensation steps claimed in the '138 Patent. Appx7459-7460 (emphasis added); *see also* Appx7287, Appx7293, Appx7295, Appx7298, Appx7300. In April 2015, shortly after Syngenta filed suit, another W-Ltd employee again confirmed that TaiHe performed both the etherification and condensation steps. Appx8215-8216. That same employee circulated TaiHe's description of its manufacturing process, on which the EPA Process Submission was based, in an email with a subject of "azoxystrobin" just days later. Appx8481-8489.

To attempt to rebut this evidence, Willowood presented at trial a second (undated) document from TaiHe allegedly describing the azoxystrobin manufacturing process. Appx8232-8241, Appx7682 at 63:22-64:11. This second process document states that TaiHe does not perform the etherification step. Appx8234-8235. But there are no

documents evidencing that TaiHe purchases an etherification intermediate, or the terms on which it acquires the intermediate. Appx6978 at 78:4-16. The only ***dated*** documentary evidence presented to the jury is the EPA Process Submission, which indicates that TaiHe performed ***both*** the etherification and condensation steps.

Additionally, Willowood claimed that it obtained this second process document from TaiHe by the end of 2013. Appx6991 at 128:6-25. But Willowood offered no explanation of why, if TaiHe was not performing both the etherification and condensation steps ***as of 2013***, W-Ltd employees confirmed ***in 2014 and 2015*** that TaiHe was performing both steps. Willowood also did not explain why, if it knew ***in 2013*** that its EPA Process Submission was purportedly wrong, it waited until the eve of trial ***in 2017*** to amend its EPA registration and name an entity other than TaiHe as performing the etherification step.

Willowood's attempts to rebut its own EPA Process Submission and the evidence of its own employees that TaiHe performed both the etherification and condensation steps while the '138 Patent was in force do not provide a legally sufficient basis for the jury's verdict. Therefore,

the district court erred in denying Syngenta's JMOL motion. *See* FED. R. CIV. P. 50(a), 50(b).

2. Even If Separate Entities Performed the Claimed Steps, They Did so at Willowood's Direction and Control.

An entity may also be liable for infringement under the single-entity rule of § 271(a) if all of the steps are "attributable to a single entity." *Akamai*, 797 F.3d at 1022. "[T]he acts of one are attributable to the other such that a single entity is responsible for the infringement" where that entity "directs or controls others' performance." *Id.* An entity exercises sufficient direction and control if, for example, it "contracts with another to perform one or more steps of a claimed method" or "conditions participation in an activity or receipt of a benefit upon performance of a step or steps of a patented method and establishes the manner or timing of that performance." *Id.* at 1023 (finding liability despite presence of multiple actors). Here, even if the jury accepted Willowood's arguments that TaiHe did not perform both claimed steps of the '138 Patent, the jury lacked substantial evidence to conclude that Willowood did not sufficiently direct or control the entities that perform these steps.

In its efforts to avoid infringement of the '138 Patent, Willowood first attempted to find a manufacturer who did not use the claimed etherification and condensation steps, but was unable to do so. Appx2319. Willowood then pursued a strategy of dividing the steps of the azoxystrobin manufacturing process among different entities. *See* Appx7446 (asking whether it was possible for Willowood to "get something like this in place" with TaiHe [a.k.a. Zenith] to have a third party perform certain steps of the process). Willowood asked TaiHe if it had the capability to purchase intermediates so that TaiHe would only perform the condensation step. Appx6757-6758. The owner of TaiHe confirmed it did have that capability. *Id.*

Mr. Heinze, W-USA's President and CEO, emphasized "how important it is for us to make absolutely sure that at [least] two or three of the manufacturing steps are done by an intermediate factory." Appx7450. Mr. Mundhra, W-Ltd's Managing Director, testified that he sought to verify whether TaiHe was performing the manufacture of azoxystrobin technical "***according to the instructions***" provided by Willowood's attorney. Appx7685 at 107:18-108:10 (emphasis added). Mr. Heinze also told Willowood's management team that "[t]he first thing

we need to confirm is that our manufacturer is making the product ***the way we have instructed them to do so***." Appx7458 (emphasis added). Mr. Shen, a manager at W-Ltd, asked TaiHe's owner to take him to three different factory locations so that he could confirm at least three different factories were involved in the azoxystrobin manufacturing process. Appx7727 at 89:15-89:22.

In other words, Willowood specifically asked TaiHe to divide the steps of the azoxystrobin manufacturing process between different factories, as Willowood wanted, thus conditioning (whether explicitly or implicitly) its future business with TaiHe on whether TaiHe divided the manufacturing process as Willowood directed. Willowood further established the manner of how the steps of the process would take place by instructing TaiHe that "at [least] two of the three manufacturing steps are [to be] done by an intermediate factory." Appx7450.

Moreover, this is not a situation where the alleged third parties acted without knowing why they were carrying out particular steps. TaiHe's owner testified that when it purchases the etherification intermediate, the seller knows TaiHe is purchasing it to manufacture azoxystrobin. Appx7725 at 71:24-72:12. That is, even if another entity

performs the etherification step and supplies the product of that step as an intermediate to TaiHe, as Willowood suggests is done, there can be no question that all of the parties involved know and expect that the etherification intermediate will be used to manufacture azoxystrobin.

To the extent Willowood sought to divide the steps of the azoxystrobin manufacturing process between different entities in order to avoid infringement of the '138 Patent, the evidence presented at trial demonstrated that Willowood accomplished the opposite result. Willowood directed and controlled how the manufacturing process would be divided, such that the performance of the steps of the '138 Patent can be attributed to Willowood. Therefore, substantial evidence does not support the jury's verdict, and the district court erred in denying Syngenta's JMOL motion.

III. The District Court Erred, as a Matter of Law, in Entering Judgment in Favor of W-Ltd on All Claims.

A. The District Court Erred in Finding a Genuine Issue of Material Fact Regarding W-Ltd's Infringement of the Compound Patents.

The district court held that there was a genuine issue of material fact about whether W-Ltd's sale of 5 kg azoxystrobin technical to W-USA before the expiration of the Compound Patents took place in the United

States, thereby precluding summary judgment that W-Ltd infringed the Compound Patents. Appx009. The facts surrounding W-Ltd's sale of azoxystrobin technical to W-USA in 2013, however, were undisputed. W-Ltd sold azoxystrobin technical to W-USA, which is located in the United States, and W-Ltd shipped that azoxystrobin technical to the United States. Appx0008, Appx2540. This Court has held that to sell an infringing product to a buyer is to commit an act of infringement at the buyer's location. *N. Am. Philips Corp. v. Am. Vending Sales, Inc.*, 35 F.3d 1576, 1579 (Fed. Cir. 1994). "To hold otherwise would exalt form over substance." *Id.*; *see also Snap-on Inc. v. Robert Bosch, LLC*, No. 09-cv-6914, 2011 WL 4901313, at *1-2 (N.D. Ill. Oct. 14, 2011) ("[W]hen a foreign company sells and ships an infringing product directly to a customer in the United States, the foreign company sells the product 'within the United States' under Section 271(a).").

Willowood's sole argument was that there was a genuine issue of material fact because W-Ltd sold azoxystrobin technical to W-USA f.o.b. China. Appx2539-2540 at n.3. Even accepting as true that W-Ltd's sale to W-USA was f.o.b. China, the shipment of goods f.o.b. a foreign location does ***not*** mean the sale of those goods took place outside the United

States. For example, in *Litecubes*, a Canadian defendant sold the accused products to customers in the United States and shipped the accused products f.o.b. Canada from its offices to those U.S. customers. 523 F.3d at 1358. Even though the products were shipped f.o.b. Canada, substantial evidence supported the jury's verdict of infringement because "the American customers were in the United States when they contracted for the accused cubes, and the products were delivered directly to the United States." *Id.* at 1371; *see also Emerson Elec. Co. v. Suzhou Cleva Elec. Appliance Co.*, No. 4:13-cv-01043, 2015 WL 2179377, at *3 (E.D. Mo. May 8, 2015) (denying defendant's motion for summary judgment of noninfringement that was premised on defendant's argument it made no sales in the United States because its goods were shipped f.o.b. China). As this Court stated in *Philips*, there is no "controlling significance" of where legal title passes between the seller and the buyer in an infringement case. 35 F.3d at 1579-80.

Put simply, this was a legal issue, based on undisputed facts, and it should have been decided in Syngenta's favor on summary judgment. FED. R. CIV. P. 56(a) (providing that summary judgment should be granted when "there is no genuine dispute as to any material fact and

the movant is entitled to judgment as a matter of law"). There was no reason to submit the issue to a jury. Therefore, this Court should reverse the denial of summary judgment and hold that W-Ltd infringed Syngenta's Compound Patents.

B. The District Court Erred in Denying Syngenta's Motion for Judgment as a Matter of Law that W-Ltd Infringed the Compound Patents and the '761 Patent.

The facts regarding W-Ltd's importation, sale, and offer for sale of azoxystrobin technical in the United States did not change between summary judgment and trial, and those facts do not support the jury's verdict. Additionally, the district court's grant of judgment in favor of W-Ltd as to all patents (Appx003) is contrary to, and essentially vitiated, the jury's verdict that ***all "Defendants"—including W-Ltd***—infringed the '761 Patent (Appx002). Therefore, the district court erred in denying Syngenta's JMOL motion regarding W-Ltd's infringement, and this Court should reverse and grant judgment as a matter of law to Syngenta with regard to W-Ltd's infringement of both the Compound Patents and the '761 Patent.

1. The Jury's Verdict That W-Ltd Did Not Infringe the Compound Patents Is Not Supported by Substantial Evidence.

At trial, W-Ltd did not dispute that it sold and shipped azoxystrobin technical to W-USA. Appx6713, Appx6720-6721, Appx6793 at 19:14-20:18, Appx6795 at 25:3-24. The only issue the district court submitted to the jury to decide was whether W-Ltd's sale of azoxystrobin technical to W-USA took place in the United States or its shipment of azoxystrobin technical was an import into the United States. Appx230-231. Substantial evidence does not support the jury's verdict that W-Ltd did not infringe the Compound Patents.

a. W-Ltd Sold or Offered for Sale Azoxystrobin Technical in the United States, and Imported It Into the United States.

The jury heard and saw evidence that W-Ltd had a clear intent to sell or offer for sale its azoxystrobin in the United States. In its "Exclusivity and Supply Agreement" with TaiHe, W-Ltd represented "that it will apply for a registration with the [EPA] for Azoxystrobin Technical98% manufactured by TAIHE." Appx7412. W-Ltd further represented that "it possesses the ability to promote the sale and use" of TaiHe's azoxystrobin technical, and that "it is desirous of developing demand for and selling such product on an exclusive basis in the USA &

Canada." *Id.* W-Ltd agreed to be "the exclusive seller" of TaiHe's azoxystrobin technical in the USA. Appx7413. In an effort to support the registration of its azoxystrobin technical with the EPA, in early 2013, W-Ltd provided 5 kg of azoxystrobin technical to W-USA and shipped it to the United States. Appx6721. After that, W-Ltd continued to offer to sell and sell azoxystrobin technical to W-USA in the United States. Appx6793 at 19:14-20:18.

The jury also heard evidence that W-Ltd had a clear intent to import its azoxystrobin into the United States. W-USA's president, Mr. Heinze, testified that the transport of azoxystrobin technical to the United States "is all coordinated" by W-Ltd. Appx6795 at 25:3-24. W-USA completes a purchase order for azoxystrobin technical that lists the final destination for the order, and W-Ltd coordinates the shipment of the product "door to door." W-Ltd coordinates both the shipment from TaiHe to the destination port in the United States and the shipment from the destination port in the United States to its ultimate destination in the United States. Appx6794-6795 at 24:18-25:24.

Indeed, W-Ltd purposefully established W-USA in the United States to act as its U.S. affiliate to distribute and sell its crop protection

products, such as azoxystrobin, to customers throughout the United States.[13] Appx6712-6713. When W-Ltd formed W-USA, Mr. Mundhra stated on behalf of W-Ltd: "[w]e are very excited about this new opportunity to expand and grow our company in the United States." Appx7431. Mr. Mundhra has been openly involved in the management of W-USA and his picture and biography appear on W-USA's "Meet the Team" webpage, further indicating to the jury that the W-USA is merely an outpost of W-Ltd. Appx7424.

This evidence presented at trial demonstrates that W-Ltd's sale and importation of azoxystrobin technical to W-USA in both 2013 and later took place within the United States. W-Ltd sold and delivered its azoxystrobin technical to W-Ltd's admitted U.S. outpost with the intention of using W-USA as a conduit to distribute W-Ltd's azoxystrobin throughout the United States.

[13] In holding it could exercise personal jurisdiction over W-Ltd, the district court found that "W-Limited chose to direct the allegedly infringing product to the United States market by selling to an affiliate formed explicitly for that purpose." *Syngenta Crop Protection, LLC v. Willowood, LLC*, 139 F. Supp. 3d 722, 734 (M.D.N.C. 2015).

b. Willowood's "FOB" Argument Does Not Support the Jury's Verdict.

Willowood argued at trial that W-Ltd did not import azoxystrobin technical into the United States, or otherwise sell or offer for sale azoxystrobin technical in the United States, because W-Ltd supposedly shipped the azoxystrobin f.o.b. Hong Kong and passed title to W-USA outside the United States. Appx6794 at 23:12-23. This argument does not support the jury's verdict for three fundamental reasons.

First, Willowood's claim that title to the azoxystrobin technical transferred from W-Ltd to W-USA in Hong Kong is contradicted by the documents. W-Ltd's agreement with TaiHe states that title does not pass from TaiHe to W-Ltd until "delivery to [W-Ltd]'s designated port in the USA." Appx7414. It is axiomatic that W-Ltd cannot pass title to W-USA until W-Ltd itself holds title to the azoxystrobin. *See, e.g., Brown Univ. v. Tharpe*, No. 4:10-cv-167, 2013 WL 2446527, at *11 (E.D. Va. June 5, 2013); *City of Portland v. Berry*, 86 Or. App. 376, 379 (Or. Ct. App. 1987). Thus, W-Ltd cannot pass title to W-USA ***outside*** the United States if W-Ltd itself does not obtain title to the goods until the goods are delivered to a designated port ***in the United States***. Appx7414. If anything, the

location of title transfer confirms that W-Ltd's offer for sale and sale of azoxystrobin technical to W-USA occurs in the United States.

Second, even if the title to the azoxystrobin technical did pass from W-Ltd to W-USA in Hong Kong, passing title is not determinative of whether the azoxystrobin technical was offered for sale or sold in, or imported into, the United States. When other factors indicate an intention to sell infringing products to customers in the United States, shipment f.o.b. a foreign location neither limits the place of sale to the location from which the goods were shipped nor precludes liability for patent infringement. *SEB S.A. v. Montgomery Ward & Co., Inc.,* 594 F.3d 1360, 1375 (Fed. Cir. 2010), *aff'd sub nom. Glob.-Tech Appliances, Inc. v. SEB S.A.,* 563 U.S. 754 (2011). Additionally, a sale can take place in more than one location. *Carnegie Mellon Univ. v. Marvell Tech. Grp., Ltd.*, 807 F.3d 1283, 1308 (Fed. Cir. 2015); *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Contractors USA, Inc.*, 617 F.3d 1296, 1310-11 (Fed. Cir. 2010) (explaining "a sale does not only occur at a 'single point where some legally operative act took place'" and citing *Litecubes*, 523 F.3d at 1369-70). Here, W-Ltd had a clear intent to sell azoxystrobin throughout the United States. Appx7412 (stating W-Ltd entered into

agreement with TaiHe because it "is desirous of developing demand for ***and selling*** [azoxystrobin technical] on an exclusive basis in the USA & Canada" (emphasis added)). Regardless of whether title passed from W-Ltd to W-USA in Hong Kong, or even if the sale took place there, substantial evidence demonstrates that the sale *also* took place in the United States.

Third, even if W-Ltd shipped the goods f.o.b. Hong Kong and this indicates the location of W-Ltd's sale or offer for sale of azoxystrobin technical to W-USA, this does not rebut Syngenta's evidence that W-Ltd also infringed the Compound Patents by ***importing*** the goods into the United States. W-Ltd did not need to have legal title to the azoxystrobin for it to import the azoxystrobin technical and infringe the Compound Patents. It only needed to ship the product into the United States or "bring [the azoxystrobin] into [the United States] from the outside." *Roche*, 272 F. Supp. 2d at 109 ("Whether or not Roche owned the cells is irrelevant. It is undisputed that Roche shipped the cells into the United States, and thus imported them under the statute"); *see also ClearCorrect Operating, LLC v. Int'l Trade Comm'n.*, 810 F.3d 1283, 1309 (Fed. Cir. 2015). Syngenta presented unrebutted evidence at trial that W-Ltd not

only arranged for the azoxystrobin technical to be shipped to the port of entry in the United States, but also arranged to ship it to the location at which it was to be formulated within the United States. Appx6794-6795 at 23:24-25:24.

No reasonable jury could have found, on a legally sufficient evidentiary basis, that W-Ltd did not import azoxystrobin technical into the United States, or sell or offer for sale azoxystrobin technical in the United States, in violation of Syngenta's Compound Patents. *See* FED. R. CIV. P. 50(a), 50(b). Therefore, the district court erred in denying Syngenta's JMOL motion regarding W-Ltd's liability for infringing Syngenta's Compound Patents.

2. The District Court Nullified the Jury's Verdict that All "Defendants," Including W-Ltd, Infringed the '761 Patent.

The jury returned a verdict that "Defendants" ***collectively*** infringed the '761 Patent. Appx267. By entering judgment in favor of W-Ltd with regard to ***all*** patents, including the '761 Patent, the district court nullified the jury's verdict without any support in the record.[14]

[14] Syngenta also contends the jury lacked substantial evidence to conclude that W-Ltd did not infringe the '761 Patent, for the same

According to the district court, "the parties implicitly agreed to resolve Willowood Limited's liability for the process patents based on the answer to the importation question which was first on the verdict sheet," reasoning "[n]either party asked the court to submit a separate issue as to Willowood Limited's infringement of the '138 patent or the '761 patent." Appx6489. The record, however, is to the contrary. Willowood proposed a jury instruction that would have charged the jury with considering the f.o.b.-shipment issue with respect to the Compound Patents ***and*** the '138 and '761 Patents. Appx6162. Syngenta specifically objected to this proposed instruction as follows:

> ***Syngenta objects to this instruction in its entirety***. First, Willowood has waived any argument that Willowood Ltd. does not infringe the '138 and '761 patents because it does not import or sell azoxystrobin technical in the United States. Willowood did not raise this defense in its non-infringement contentions at all, and only raised it in a footnote in the summary judgment briefing as to the '076 and '256 Compound Patents. (*See* Dkt. 105 at 1-2 n.3.)

Appx6163 (emphasis added).

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reasons discussed above with the Compound Patents. Because the same reasons apply, Syngenta does not repeat those arguments here.

The district court did not adopt Willowood's proposed instruction in its final jury instructions. Instead, the final jury instructions set forth the f.o.b.-shipment issue ***only*** under the heading "The Compound Patents" and made clear that this issue related ***only*** to the 5 kg of azoxystrobin that was relevant to the Compound Patents: "***we are talking here about the 5kg of azoxystrobin technical that came into the United States in 2013***." Appx230 (emphasis added). The jury instructions did not address or set forth ***any*** defenses specific to W-Ltd's infringement of the '138 or '761 Patents. *See generally* Appx240-243, Appx248-250. For its part, Willowood did not object to the final jury instructions regarding infringement of the '138 Patent (Appx7077), and only objected to the final jury instructions regarding infringement of the '761 Patent to the extent they shifted the burden of proof to Willowood to prove noninfringement (Appx7078-7079).

The district court's assertion that "the parties implicitly agreed to resolve Willowood Limited's liability for the" '761 Patent based on the final verdict form is not supported by the record either. Under the heading "The Compound Patents," the verdict form specifically charged the jury with determining whether W-Ltd infringed the Compound

Patents. Appx266. In contrast, under the heading "The '761 DABCO Patent," the verdict form charged the jury to determine whether "***Defendants***"—not any specific Willowood entity, but "Defendants" as a whole—infringed the '761 Patent. Appx267. The verdict form did ***not*** include any specific questions as to W-Ltd's infringement of the '761 Patent. Willowood did not object to the verdict form except to the extent it requested the jury make separate determinations of whether W-LLC, W-USA, and W-Ltd's infringement ***of the Compound Patents*** was willful. Appx7065. In fact, in discussing the final verdict form, the district court expressly stated that "we certainly treated [the Willowood entities] all together for all purposes except this infringement of the compound patent question," and Willowood's counsel agreed. Appx7066.

If Willowood sought to raise a specific noninfringement defense as to W-Ltd (however untimely or improper), it was incumbent on Willowood to incorporate that defense into the jury instructions and verdict form ***and*** to object to the extent that they said something to the contrary. Willowood failed to do so, and thus waived this defense. *See* FED. R. CIV. P. 49(a)(3) (stating a party waives its right to trial on an issue raised in the pleadings but not submitted to the jury unless it demands the issue

be submitted to the jury); FED. R. CIV. P. 50(d) (stating a party preserves its argument of error in a jury instruction "if that party properly objected" to the jury instruction); *Mitsubishi Elec. Corp. v. Ampex Corp.*, 190 F.3d 1300, 1304 (Fed. Cir. 1999) (holding that objections to verdict form were waived due to failure to object; collecting cases); *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 666, n.12 (4th Cir. 1993) (holding that objections to jury instructions and verdict form were waived due to failure to object).

Mitsubishi is particularly instructive here. In that case, the defendant initially proposed a verdict form that included separate questions regarding individual patent invalidity defenses, but the district court ultimately adopted a simplified verdict form that did not separate out these defenses. 190 F.3d at 1303. The defendant did not object or raise any arguments as to the verdict form until after trial. *Id.* at 1304. The Federal Circuit held that the defendant "did not preserve its objection to the form of the verdict." *Id.* (citing *Hoechst Celanese Corp. v. BP Chems. Ltd.*, 78 F.3d 1575, 1581 (Fed. Cir. 1996); *McCord v. Maguire*, 873 F.2d 1271, 1274 (9th Cir. 1989); 9 MOORE'S FEDERAL PRACTICE § 49.20[5] (3d ed. 1997)).

Put simply, the jury made a factual finding that "***Defendants***" infringed the '761 Patent. The district court had no basis on which to hold that despite this express language in the verdict form and the jury's finding, the parties meant to limit the jury's verdict to only W-USA and W-LLC. Therefore, this Court should reverse district court's denial of Syngenta's JMOL motion regarding W-Ltd's liability and enter judgment that W-Ltd infringed Syngenta's Compound Patents and '761 Patent.

CONCLUSION

Syngenta respectfully requests a three-part judgment from this Court. First, this Court should vacate the district court's grant of summary judgment on Syngenta's copyright claims and remand for further proceedings. Second, this Court should reverse the district court's entry of judgment in favor of Willowood regarding infringement of the '138 Patent, enter judgment that W-Ltd, W-USA, and W-LLC infringed the '138 Patent, and remand for determination of the damages attributable to this infringement. Third, this Court should reverse the district court's entry of judgment in favor of W-Ltd regarding infringement of the Compound Patents and the '761 Patent and enter judgment that W-Ltd infringed these patents.

Dated: April 27, 2018

Respectfully submitted,

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Addendum

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

SYNGENTA CROP PROTECTION, LLC, *Plaintiff*, v. WILLOWOOD, LLC, WILLOWOOD USA, LLC, WILLOWOOD AZOXYSTROBIN, LLC, and, WILLOWOOD LIMITED, *Defendants*.	)	1:15-CV-274

FINAL JUDGMENT

WHEREAS, on March 27, 2015, the plaintiff Syngenta Crop Protection, LLC ("Syngenta") filed a Complaint in this Court against the defendants Willowood, LLC; Willowood USA, LLC; Willowood Azoxystrobin, LLC; and Willowood Limited (collectively, "Defendants"), Doc. 1;

WHEREAS, Counts I though IV of Syngenta's Complaint alleged the Defendants infringed Syngenta's U.S. Patent Nos. 5,602,076 ("the '076 Patent") (Count I), 5,633,256 ("the '256 Patent") (Count II), 5,847,138 ("the '138 Patent") (Count III) and 8,124,761 ("the '761 Patent") (Count IV);

WHEREAS, a jury trial of this matter was conducted from September 5, 2017, through September 13, 2017 regarding Counts I though IV and the Defendants' defenses to those claims;

WHEREAS, on September 13, 2017, the jury returned a verdict by responding to certain questions asked of it on a verdict form, Doc. 319, as follows:

1. Did Syngenta prove that Willowood Limited imported azoxystrobin technical into the United States or otherwise sold or offered for sale azoxystrobin technical in the United States?

   Answer: No, in favor of Willowood Limited

2. What damages has Syngenta proven it is entitled to recover for infringement of the Compound Patents by the Defendants?

   Amount: $75,600.00

3. Has Syngenta proven that the infringement of the Compound Patents by the Defendants was willful?

   Answer: No, in favor of Willowood USA and Willowood LLC

   Answer: No, in favor of Willowood Limited

4. Did Syngenta prove that the same entity carried out both the etherification and condensation reactions used to manufacture the Defendants' azoxystrobin technical, or, if not, that the Defendants directed or controlled the entities that carried out the etherification and condensation reactions used to manufacture the Defendants' azoxystrobin technical?

   Answer: No, in favor of Willowood

[The jury did not answer questions 5 and 6, per the instructions on the verdict form.]

7. Did the Defendants prove that the condensation reaction used to manufacture its azoxystrobin technical is not performed in the presence of between 0.1 and 2.0 mol % DABCO?

   Answer: No, in favor of Syngenta

8. What amount of additional damages, if any, has Syngenta proven it is entitled to recover for any infringement of the '761 DABCO Patent by the Defendants?

Amount: $900,000.00

9. Did the Defendants prove that the ’761 DABCO Patent is invalid?

Answer: No, in favor of Syngenta

AND WHEREAS, the Court has previously entered certain other rulings in this case in connection with the parties’ summary judgment motions, motions to dismiss, motions in limine, and other motions. Docs. 74, 141, 150.

NOW THEREFORE, in accordance with the Court’s prior rulings and the jury’s verdict of September 13, 2017, **IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT**:

1. Judgment is entered in favor of Willowood Limited as to all claims;

2. Syngenta’s ’076 Patent and ’256 Patent are not invalid;

3. Willowood, LLC and Willowood USA, LLC infringed, and owe damages for their infringement of, the ’076 Patent and ’256 Patents;

4. Syngenta shall recover $75,600 jointly and severally from Willowood, LLC and Willowood USA, LLC for their infringement of the ’076 and ’256 Patents;

5. The ’138 Patent is not invalid;

6. The Defendants have not infringed the ’138 Patent;

7. Syngenta’s ’761 Patent is not invalid;

8. Willowood, LLC and Willowood USA, LLC have infringed, and owe damages for their infringement of, the ’761 Patent;

9. Syngenta shall recover $900,000 jointly and severally from Willowood, LLC and Willowood USA, LLC for their infringement of the ’761 Patent up to the date of the verdict;

10. Syngenta shall recover pre-judgment interest on the judgment amounts in the sum of $48,000;

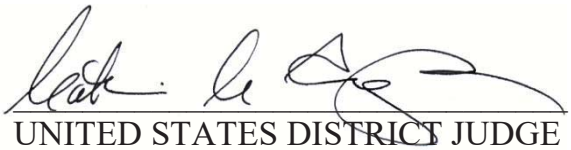
11. Syngenta shall recover post-judgment interest on the judgment amounts set forth herein, as allowed by law;

12. Syngenta’s copyright claims as set forth in Counts V and VI of its Complaint are dismissed with prejudice pursuant to the Court’s April 10, 2017, Order, Doc. 150; and

13. Syngenta’s claim of unfair and deceptive trade practices under N.C. Gen. Stat § 75-1.1 is dismissed with prejudice pursuant to the Court’s August 12, 2016, Order. Doc. 74.

14. A permanent injunction is being entered concomitantly herewith.

This the 20th day of November, 2017.



UNITED STATES DISTRICT JUDGE



IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

SYNGENTA CROP PROTECTION, LLC,	)	
Plaintiff,	)	
v.	)	1:15-CV-274
WILLOWOOD, LLC, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Catherine C. Eagles, District Judge.

Syngenta Crop Protection, LLC has sued four affiliated companies denominated collectively here as Willowood,[1] alleging patent and copyright infringement. Syngenta contends Willowood has infringed its patents in connection with the manufacture and sale of Willowood's Azoxy 2SC, AzoxyProp Xtra, and Tebustrobin SC products and has infringed its copyrights by verbatim copying of Syngenta product labels. Syngenta seeks partial summary judgment on Counts I through IV, asserting that its 5,602,076 Patent, 5,633,256 Patent, 5,847,138 Patent, and 8,124,761 Patent are valid and that Willowood infringed the patents. Syngenta makes related evidentiary objections to opinion testimony by the defendant's expert Dr. Mark A. Lipton.[2] Willowood seeks summary

[1] The defendants are Willowood, LLC; Willowood USA, LLC; Willowood Azoxystrobin, LLC; and Willowood Limited. Where it is necessary to distinguish between the defendants, these companies are referenced individually as W-LLC, W-USA, and W-Ltd.

[2] Syngenta has objected to other expert testimony and related declarations, which the Court will address in separate orders.

judgment on Count IV, asserting that its products do not infringe the '761 Patent as a matter of law, and on Counts V and VI, asserting that Syngenta does not have a valid copyright and that its copying constituted fair use.

The Court will grant in part and deny in part Syngenta's motion for summary judgment and will deny Willowood's motion for summary judgment as to Count IV. The Court retains under advisement Willowood's motion for summary judgment as to Counts V and VI, which will be resolved by separate order.

I. Facts

The following facts are undisputed. Syngenta holds several patents protecting azoxystrobin, a fungicidal compound used to protect various crops, and the process for making it.[3] The '076 and '256 Patents expired on February 11, 2014, and the '138 Patent expired on December 8, 2015. Doc. 96-1 at ¶¶ 29, 30. The '761 Patent will expire in April 2029. *Id.* at ¶ 31. Willowood sells generic versions of crop-protection products, including the generic azoxystrobin fungicides Azoxy 2SC and AzoxyProp Xtra. Doc. 12 at ¶¶ 73, 75; Doc 16 at ¶¶ 4, 8. Willowood and Syngenta use azoxystrobin technical, a relatively pure form of the chemical compound azoxystrobin, as the active ingredient in their azoxystrobin fungicides. Doc. 96-1 at ¶¶ 34-35; Doc. 12 at ¶ 37 (admitting allegation in Doc. 1 at ¶ 37).

[3] *See* Doc. 12 at ¶¶ 20-21; Doc. 96-1 at ¶¶ 29-31; Doc. 1-8 (the '076 Patent); Doc. 1-9 (the '256 Patent); Doc. 1-10 (the'138 Patent); Doc. 1-11 (the '761 Patent). All citations in this opinion are to the ECF docket and page numbers, or where appropriate internal paragraph designations, except for deposition transcripts, where citations are to the ECF docket number and the deposition page and line numbers provided by the court reporter.

II. Count I (the '076 Patent) and Count II (the '256 Patent)

Syngenta moves for summary judgment on these two counts, contending that the evidence shows that the two patents are valid and that Willowood infringed the patents. The Court views the evidence in the light most favorable to Willowood, the non-moving party, as is appropriate at summary judgment.

a. Validity

Patents are "presumed valid," 35 U.S.C. § 282(a), unless the defendant can show invalidity by clear and convincing evidence. *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 95 (2011); *Insite Vision Inc. v. Sandoz, Inc.*, 783 F.3d 853, 858 (Fed. Cir. 2015). Willowood presents no evidence of invalidity for either the '076 or '256 Patents. Doc. 137 at 17:13-18:15. The Court will grant summary judgment for Syngenta on this issue.

b. Infringement

i. Relevant Facts

The '076 and '256 Patents claim a group of chemical compounds, which include azoxystrobin. Docs. 1-8, 1-9; Doc. 96-1 at ¶¶ 74, 87. In 2013, W-Ltd bought five kilograms of azoxystrobin technical from its Chinese supplier, Yangcheng Tai He Chemicals Corp., ("Tai He"), and sold it to W-USA. *See* Doc. 137 at 41:12-:15; Doc. 105 at 6-7 n.3; Doc. 15 at ¶ 6. W-USA imported the five kilograms of azoxystrobin technical into the United States before the expiration of the two patents. Doc. 96-7 at 3; Doc. 96-9 at 5, 6. W-LLC commissioned Adjuvants Unlimited, Inc. to formulate fungicides using azoxystrobin technical and to create product samples. *See* Doc. 137 at 26:3-:7. W-LLC then commissioned Analytical & Regulatory Chemistry, Inc. (ARC) to

analyze the product samples for its EPA applications. Doc. 96-7 at 3; Doc. 96-10 at 41:21-42:10. Before performing these studies, and before importing the azoxystrobin technical, Willowood knew of the '076 and '256 Patents and knew that these activities would likely infringe the patents. *See* Doc. 96-7 at 3; Doc. 96-10 at 305:11-:18.

ii. Direct Infringement by W-USA and W-Ltd

Anyone who "makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention" without the patent holder's permission has infringed the patent. 35 U.S.C. § 271(a).

Willowood concedes that in 2013, W-USA infringed the '076 and '256 Patents by importing five kilograms of azoxystrobin technical into the United States. Doc. 96-9 at 5, 6. The Court will grant summary judgment against W-USA on these two counts.

Willowood also concedes that W-Ltd sold azoxystrobin technical to W-USA, which is located in Roseburg, Oregon. *See* Doc. 15 at ¶ 6; Doc. 16 at ¶ 3. Willowood asserts that the sale did not infringe because the shipment of azoxystrobin technical "FOB China" by W-Ltd, a Hong Kong company, was not a sale "within the United States" under § 271(a). *See* Doc. 15 at ¶ 3, 6; Doc. 137 at 18:16-:19.

Free on board or "FOB" is a shipping term that indicates when in the delivery process title transfers from the buyer to the seller. *Litecubes, LLC v. N. Light Prods., Inc.*, 523 F.3d 1353, 1358 n.1 (Fed. Cir. 2008). "FOB China" means that title transferred to the buyer, W-USA, when the seller, W-Ltd, conveyed the goods to the shipper in China. *See id.* at 1358 n.1, 1369.

In analyzing where a sale took place, the Court should not "exalt form over substance." *Id.* at 1370 (quoting *N. Am. Philips Corp. v. Am. Vending Sales, Inc.*, 35 F.3d 1576, 1579 (Fed. Cir. 1994)). When other factors indicate an intention to sell infringing products to customers in the United States, shipment FOB a location abroad neither limits the place of sale to the location from which the goods were shipped nor precludes liability under § 271. *SEB S.A. v. Montgomery Ward & Co., Inc.*, 594 F.3d 1360, 1375 (Fed. Cir. 2010), *aff'd sub nom. Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011); *see also Transocean Offshore Deepwater Drilling, Inc. v. Maersk Contractors USA, Inc.*, 617 F.3d 1296, 1310-11 (Fed. Cir. 2010). To determine the location of the sale, the fact-finder can consider the location of the buyer and seller, *N. Am. Philips*, 35 F.3d at 1579, "where the products were shipped from and where the products were shipped to," *SEB*, 594 F.3d at 1375, "the transfer of tangible property," *Transocean*, 617 F.3d at 1311, and "the agreement by which such a transfer t[ook] place." *Id.*; *see also Litecubes*, 523 F.3d at 1369.

Here, the seller, W-Ltd, was in Hong Kong, Doc. 15 at ¶ 3, while the buyer, W-USA, was in the United States. Doc. 16 at ¶ 3. W-Ltd shipped the azoxystrobin technical FOB China to W-USA, for delivery in the United States. *See id.* at ¶ 8; Doc. 15 at ¶ 6. There is a genuine issue of material fact on whether the sale took place in the United States. *See SEB*, 594 F.3d at 1375 (approving instructions to the jury to consider evidence including FOB terms, invoices with U.S. companies, and delivery to the United States to determine the location of the sale). Summary judgment will be denied as to whether W-Ltd infringed.

iii. Indirect Infringement by W-LLC

"Whoever actively induces infringement of a patent shall be liable as an infringer." 35 U.S.C. § 271(b). Induced infringement requires (1) "active steps taken to encourage direct infringement," *Takeda Pharm. U.S.A., Inc. v. W.-Ward Pharm. Corp.*, 785 F.3d 625, 630 (Fed. Cir. 2015) (quotation omitted), and (2) knowledge or willful blindness that the induced acts constitute patent infringement. *Glob.-Tech Appliances*, 563 U.S. at 766, 768. An active step sufficient for induced infringement includes causing, urging, encouraging, or aiding another to infringe the patent. *Takeda Pharm.*, 785 F.3d at 631 n.3 (citing *Tegal Corp. v. Tokyo Electron Co., Ltd.*, 248 F.3d 1376, 1379 (Fed. Cir. 2001)).

W-LLC commissioned Adjuvants to formulate azoxystrobin fungicides from the imported azoxystrobin technical and commissioned ARC to analyze samples of the resulting end products. Doc. 137 at 20:9-:19, 26:3-:7; Doc. 96-10 at 41:21-42:10. W-LLC knew that this use of azoxystrobin technical by Adjuvants and ARC would infringe Syngenta's patents. Doc. 96-10 at 305:5-:18. By commissioning Adjuvants and ARC to undertake formulation and analysis that required using azoxystrobin technical, W-LLC actively induced infringement of the '076 and '256 Patents. The Court will grant summary judgment in favor of Syngenta against W-LLC.

III. Count III (the '138 Patent)

a. Validity

Syngenta moves for summary judgment as to the validity of the '138 Patent, which protects a chemical process used to produce azoxystrobin technical. Willowood proffers

Dr. Lipton's expert opinion as evidence that the '138 Patent is invalid due to obviousness, *see* 35 U.S.C. § 103, and asserts that summary judgment should be denied. Syngenta contends that Willowood's evidence of obviousness is insufficient to raise a disputed question of material fact and moves to exclude Dr. Lipton's analysis.

As noted *supra*, the burden to show invalidity is on the challenger, and therefore Willowood must show by clear and convincing evidence that at the time of the invention, the patent's claimed subject matter was obvious to a person of ordinary skill in the art. *Plantronics, Inc. v. Aliph, Inc.*, 724 F.3d 1343, 1353 (Fed. Cir. 2013). To prove obviousness, the defendant must explicitly provide "[a] reason for combining disparate prior art references." *InTouch Techs., Inc. v. VGO Commc'ns, Inc.*, 751 F.3d 1327, 1351 (Fed. Cir. 2014); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (requiring that arguments explicitly provide an "articulated reasoning with some rational underpinning" to make the asserted combinations (quoting *In re Kahn,* 441 F.3d 977, 988 (Fed. Cir. 2006))).

In evaluating obviousness, an expert should take steps "to guard against slipping into use of hindsight and to resist the temptation to read into the prior art the teachings of the invention in issue." *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 36 (1966) (quotation omitted); *see KSR Int'l*, 550 U.S. at 421 (noting a factfinder "must be cautious of arguments reliant upon *ex post* reasoning"); *Insite Vision*, 783 F.3d at 859. In this case, Dr. Lipton stated several times that "the substance of claim 6" was the "starting point" of his obviousness analysis. Doc. 96-15 at 142:8-:21, 144:5-:6. He explicitly admitted that he started with Claim Six and worked backwards. Doc. 96-15 at 140:7-:19.

Relying on *Interactive Gift Express, Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1331 (Fed. Cir. 2001), Willowood contends that "an analysis of claim validity must start with the claim itself." Doc. 102 at 13. However, *Interactive* involved claim construction, not validity, and it does not justify a hindsight analysis. *See* 256 F.3d at 1331. Willowood also asserts that Dr. Lipton only started with Claim Six to identify prior art and to understand the invention. *See* MPEP § 2145(X)(A) (9th ed. Nov. 2015). However, his deposition belies this assertion:

> Q: So as part of your invalidity analysis you assume that someone of ordinary skill would be interested, in the first instance, in making compound (XV) from compound (X), correct?
> A: Since that is the substance of claim 6, that's my starting point.

Doc. 96-15 at 142:16-:21. Willowood points to no explanation from Dr. Lipton indicating that he had a reason beyond the '138 Patent to assume that a person of ordinary skill would be motivated to attempt the intermediate combinations of prior art necessary to achieve the '138 Patent's process. Dr. Lipton analyzed obviousness using the "patent itself as [a] roadmap" and "did not articulate reasons why a person of ordinary skill in the art at the time of the invention would combine" particular prior art references. *InTouch Techs.*, 751 F.3d at 1351; *see* Doc. 96-15 at 146:11-:20.

Because of the hindsight embedded in his analysis and the lack of reasons for combining the relevant prior art, Dr. Lipton's expert opinion is not the product of a reliable method and will not help the jury determine obviousness. *See* Fed. R. Evid. 702; *InTouch Techs.*, 751 F.3d at 1351-52. The Court will grant Syngenta's motion to exclude this evidence. Without any additional evidence on the validity of the '138 Patent,

Willowood cannot meet its burden to demonstrate obviousness.[4] The Court will grant summary judgment for Syngenta on the issue of the validity of the '138 Patent.

b. Infringement

The '138 Patent claims a process for preparing a group of compounds, including azoxystrobin, by performing an etherification step followed by a condensation step. *See* Doc. 96-1 at ¶¶ 94-99, 111-13; Doc. 1-10 at 16-17. It is undisputed that W-Ltd buys azoxystrobin technical from Tai He and sells it to W-USA, and that W-USA imports the azoxystrobin technical into the U.S. and uses it to formulate its end products, which W-LLC sells to the public. Doc. 96-10 at 64:4-:15, 278:4-:14; Doc. 96-8 at 3. It further is undisputed that the azoxystrobin technical that W-Ltd buys from Tai He is made overseas by a process that contains the etherification and condensation steps set forth in the '138 patent. *See* Doc. 99-9 at 23, 28;[5] Doc. 99-8 at 4-5, 7; Doc. 137 at 40:9-41:10.

[4] Willowood suggested at oral argument that even without Dr. Lipton's testimony, it can prove invalidity through the prosecution history. Doc. 137 at 60:10-:16 (suggesting that the prosecution history alone could convince the jury of obviousness). *But see* Doc. 137 at 50:10-:15 (conceding that Dr. Lipton's testimony is the only evidence of obviousness). Willowood has since filed the prosecution history. Doc. 133-1. Willowood has not identified the relevant portions of the history in its briefing or explained how it supports obviousness. The Court will not scour the record to locate evidentiary support. *Hughes v. B/E Aerospace, Inc.*, No. 1:12CV717, 2014 WL 906220, at *1 n.1 (M.D.N.C. Mar. 7, 2014) ("A party should not expect a court to do the work that it elected not to do."); *see also Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001) ("[A] court is not required to scour the record in search of evidence to defeat a motion for summary judgment" (quotation omitted)). Since it was not raised in the briefing, Syngenta has not had an opportunity to address Willowood's argument. Consequently the Court has not considered the prosecution history.

[5] The parties have submitted much of the evidence in this case under seal, subject to motions to seal. The Court will resolve those motions to seal by separate order.

It is an act of infringement to "import[] into the United States or offer[] to sell, sell[], or use[] within the United States a product which is made by a process patented in the United States." 35 U.S.C. § 271(g). Syngenta contends that it is entitled to summary judgment on infringement because the Willowood entities infringed the '138 Patent under § 271(g) by importing into the United States azoxystrobin technical made by the claimed process, using it to formulate end products, and selling the azoxystrobin technical and resulting end products in the United States. Willowood asserts that § 271(g) requires that a single entity perform the patented process and that the evidence here shows that no single entity performed all the steps claimed in the '138 Patent.

The Federal Circuit has not decided whether the single entity requirement applies to claims of infringement under § 271(g), and there do not appear to be district court decisions on this question. While there are arguments both ways, the Court concludes that the single-entity rule in § 271(a) should also apply in § 271(g) infringement actions.

The single-entity rule requires that "all steps of a claimed method are performed by or attributable to a single entity." *See Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022 (Fed. Cir. 2015) (en banc) (per curiam). If more than one actor is involved in practicing the steps, "the acts of one are attributable to the other such that a single entity is responsible for the infringement . . . . in two sets of circumstances: (1) where that entity directs or controls others' performance, and (2) where the actors form a joint enterprise." *Id.*

Here, there is a factual dispute as to whether all steps of the process claimed by the '138 Patent are performed by or attributable to a single entity. Syngenta has evidence

that Tai He either performed all of the claimed steps of the '138 Patent, *e.g.*, Doc. 99-9 at 23, 28 (stating that the etherification and condensation steps are "carried out at" Tai He), or alternatively that Willowood arranged for Tai He and other entities to manufacture azoxystrobin according to the patented process. Doc. 99-8 at 4-5; Doc. 96-10 at 229:2-:8, 252:12-253:8. Willowood points to conflicting evidence indicating that Tai He controls its own process, acts independently from Willowood, and contracts at arms-length with other companies, who perform portions of the manufacturing process. Doc. 105-4 at 20:5-21:18.

Finding a disputed question of material fact, the Court will deny Syngenta's motion for summary judgment as to the infringement of the '138 Patent.

IV. Count IV (the '761 Patent)

The '761 Patent claims a process for making azoxystrobin technical that uses DABCO,[6] a catalyst, at concentrations between 0.1 and 2 mol % for the condensation step. Doc. 1-11 at 2; Doc. 96-1 at ¶ 31. Syngenta moves for summary judgment on the issue of validity. Syngenta and Willowood both move for summary judgment as to the infringement of the '761 Patent.

a. Validity

To meet its burden to show invalidity, Willowood offers Dr. Lipton's expert testimony to show that the '761 Patent was obvious in light of Weintritt, an earlier patent application. In turn, Syngenta moves to exclude this testimony, contending that hindsight

[6] DABCO stands for 1,4-diazabicyclo[2.2.2]octane. Doc. 1-11 at 3.

bias infected Dr. Lipton's analysis and that he parrots Willowood's counsel, rather than presenting his own opinion and analysis. Syngenta further contends that Dr. Lipton's opinions are insufficient to establish invalidity based on obviousness.

i. Admissibility of Dr. Lipton's Opinion

In contrast with Dr. Lipton's invalidity analysis for the '138 Patent, where he started with the patent's claim and worked backwards, Dr. Lipton's obviousness analysis for the '761 patent starts with the prior art reference. His report describes why a person of ordinary skill in the art would want to minimize the amount of catalyst from that claimed in the Weintritt reference. *See* Doc. 96-3 at ¶¶ 36, 39 (noting researchers are motivated to decrease the amount of catalyst used to lower costs and health hazards).[7]

Dr. Lipton attests that he performed his own analysis. Doc. 96-15 at 38:18-:20 ("I arrived at a decision about invalidity based on discussions with counsel and my own reading of the patents."); *see also* Doc. 96-15 at 35:12-:15. In his deposition, he was responsive to counsel's questions and demonstrated a firm understanding of his report. *See* Doc. 96-15. His report explains the patent's chemistry, the role of a catalyst in a chemical reaction, and how manipulation of the catalyst affects the reaction. Doc. 96-3 at ¶¶ 33-40. Every indication is that the opinions expressed in his report are his own, and those opinions will not be excluded. *Cf. Numatics, Inc. v. Balluff, Inc.*, 66 F. Supp. 3d 934, 941-43, 945 (E.D. Mich. 2014) (excluding opinion after the expert admitted that he

[7] In his report, Dr. Lipton refers to Weintritt as the '723 Patent. Doc. 96-3 at ¶ 18.

signed a report written by the lawyer and showed a lack of understanding both of the facts and relevant legal standards).

Syngenta has not identified any evidence of hindsight bias in Dr. Lipton's analysis. Rather, Syngenta disputes his understanding of the teachings of the Weintritt reference. *See* Doc. 96-2 at ¶ 53 (Dr. Joseph Fortunak's testimony that "Weintritt would have discouraged . . . using DABCO at even lower amounts"). This is a question of fact underlying the obviousness analysis. *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 839 F.3d 1034, 1051 (Fed. Cir. 2016) (en banc), *pet. for cert. filed*, No. 16-1102 (U.S. Mar. 10, 2017).

Dr. Lipton's report also includes verbatim an invalidity claims chart provided to him by counsel. Doc. 96-15 at 37:2-39:5; *see* Doc. 96-3 at pp. 21-26. The Court does not decide here whether this chart will be admissible at trial.

ii. Obviousness

Obviousness "is a question of law based on underlying questions of fact." *Plantronics*, 724 F.3d at 1353 (quotation omitted); *Apple Inc.*, 839 F.3d at 1051 ("What a prior art reference teaches and whether a skilled artisan would have been motivated to combine references are questions of fact."). As noted *supra*, Willowood must show obviousness by clear and convincing evidence.

As evidence of obviousness, Willowood offers Dr. Lipton's testimony that, based on Weintritt, a person of ordinary skill in the art would have been motivated to test smaller amounts of DABCO in the reaction, *see* Doc. 105-6 at ¶¶ 36-40, and the proximity of the '761 Patent's claimed range to the range described by Weintritt.

Compare Doc. 96-34 at 8 (claiming use of DABCO from 2 to 40 mol %) *with* Doc. 1-11 at 2 (claiming use of DABCO between .1 and 2 mol %). This evidence conflicts with Syngenta's evidence, including Dr. Fortunak's testimony on what Weintritt teaches. *See* Doc. 96-2 at ¶ 53.

There is a disputed question of material fact underlying obviousness. The Court will deny Syngenta's motion for summary judgment as to validity of the '761 patent.

b. Infringement of the '761 Patent

Syngenta and Willowood both move for summary judgment on the issue of infringement of the '761 Patent. They agree that if the azoxystrobin technical used by Willowood was made with DABCO within the claimed range, then Willowood infringes the '761 Patent by importing it, using it to make its end products, and selling those end products. Conversely, they agree that if DABCO is not used or is used outside the claimed range, then the products do not infringe. Doc. 137 at 67:10-:22. In its motion for summary judgment, Syngenta contends that Willowood should bear the burden to prove non-infringement under § 295. Syngenta also moves to exclude certain laboratory tests offered by Willowood as inadmissible. Willowood opposes these motions. Each party contends that either way, the Court should grant summary judgment in its favor.

i. Evidence of Infringement and Non-Infringement

Willowood provides testimony from Tai He's president, Wu Xiaolong, stating that neither Tai He nor its intermediaries use DABCO to manufacture azoxystrobin technical. Doc. 88-5. Willowood also provides analyses from JDM Research and Product Safety

Laboratories (PSL), which show that their azoxystrobin technical contains no DABCO.[8] Doc. 99-10 at 2 (JDM); Doc. 88-4 at 10 (PSL). This evidence, if believed, is sufficient to prove non-infringement.

In turn, Syngenta presents tests from two laboratories, CAC Shanghai and JDM Research,[9] which detected DABCO in Willowood's azoxystrobin technical, Doc. 99-1 at ¶¶ 129-133; Doc. 99-4 at 270:2-271:20, 273:19-275:11, and its own analysis that Willowood's Azoxy 2SC contains DABCO. Doc. 96-1 at ¶ 128. This is well sufficient to prove that DABCO was used.

Whether Syngenta has sufficient evidence showing that DABCO is used within the infringing amount is a closer question. Syngenta relies on Dr. Fortunak's analysis that it would not be commercially reasonable for Tai He to manufacture azoxystrobin technical using DABCO outside the range claimed by the '761 Patent. Doc. 96-1 at ¶ 138; Doc. 88-2 at 100:13-101:15. Dr. Fortunak is a Professor of Chemistry and Pharmaceutical Sciences at Howard University. Doc. 96-1 at ¶ 6. He has extensive experience in relevant product development, including transferring process technology to commercial scale production. *See id.* at ¶¶ 5-20. He appears qualified to offer such an

[8] As discussed *infra*, Willowood also offers inadmissible evidence from EAG, which shows that a form of azoxystrobin tested before the condensation step contained no DABCO.

[9] There appears to be some confusion about what the JDM results show and both sides offer the JDM tests to support their position. *See* Doc. 96-1 at ¶ 52 & n.31 (Dr. Fortunak relying on Mr. Heinze's testimony that JDM detected DABCO); Doc. 99-2 at ¶¶ 21-23 (Dr. Lipton explaining Mr. Heinze's confusion and that JDM did not detect DABCO).

opinion. While on the edge, the Court concludes that this creates a disputed question of material fact as to whether DABCO was used in an infringing amount.[10]

There is a genuine dispute of material fact as to whether DABCO is used in the manufacture of Willowood's azoxystrobin technical and if so, in what amount. Thus, the Court will deny both motions for summary judgment.

ii. Burden-Shifting under § 295

Syngenta and Willowood disagree on which party should bear the burden of proof on the claim of infringement of the '761 Patent. Ordinarily, the plaintiff bears the burden to show infringement, but when "the accused infringer is in a far better position to determine the actual manufacturing process than the patentee," the patent statute authorizes shifting the burden to the accused infringer to show non-infringement. *Creative Compounds, LLC v. Starmark Labs.*, 651 F.3d 1303, 1314-15 (Fed. Cir. 2011) (citation omitted). Section 295 provides:

> [I]f the court finds—
> (1) that a substantial likelihood exists that the product was made by the patented process, and
> (2) that the plaintiff has made a reasonable effort to determine the process actually used in the production of the product and was unable to so determine,
> the product shall be presumed to have been so made, and the burden of establishing that the product was not made by the process shall be on the party asserting that it was not so made.

35 U.S.C. § 295.

[10] If the Court is mistaken in this conclusion, it provides a further reason to shift the burden of proof. *See* discussion *infra* at pp. 16-24.

Syngenta asserts that it has satisfied both prongs of the § 295 test, showing a substantial likelihood that Willowood's azoxystrobin technical was made with an infringing amount of DABCO and that it has made reasonable efforts to determine the actual process, without success. Willowood disagrees, emphasizing that Syngenta's evidence is insufficient and that Willowood disclosed the non-infringing manufacturing process for their azoxystrobin technical. The Court finds that Syngenta has shown both a substantial likelihood and reasonable efforts, and the Court will shift the burden to Willowood to show non-infringement at trial.

The Court has discretion to determine when § 295 "will be brought into play." *Nutrinova Nutrition Specialties & Food Ingredients GmbH v. Int'l Trade Comm'n*, 224 F.3d 1356, 1360 (Fed. Cir. 2000); *West v. Jewelry Innovations, Inc.*, No. C 07-1812 JF (HRL), 2009 WL 1010848, at *7 (N.D. Cal. Apr. 14, 2009) ("A district court may rule on a § 295 motion at any stage of the proceedings."). It is appropriate to consider this burden-shifting provision now: discovery has closed; the Court has the benefit of summary judgment briefing; and resolution of the issue now will allow for better trial preparation by the parties.

1. Substantial Likelihood

As the patent holder, Syngenta must show a substantial likelihood that the azoxystrobin technical imported and sold by Willowood was made by the patented process before burden-shifting is appropriate. 35 U.S.C. § 295(1). The patent holder must "present evidence that would support a reasonable conclusion that the imported product was made by the patented process," but need not show that the patented method

is the "only commercially practical method of manufacture." *West*, 2009 WL 1010848, at *8. This requires something less than proving the issue at trial by a preponderance of the evidence, but more than a slight possibility. *Id.* (citation omitted); *LG Display Co., Ltd. v. AU Optronics Corp.*, 709 F. Supp. 2d 311, 335 (D. Del. 2010); *see also Aventis Pharm., Inc. v. Barr Labs., Inc.*, 411 F. Supp. 2d 490, 510 (D.N.J.), *aff'd*, 208 F. App'x 842 (Fed. Cir.) (per curiam), *and aff'd,* 208 F. App'x 843 (Fed. Cir. 2006) (examining evidence for a "persuasive showing of substantial likelihood").

As discussed *supra*, Syngenta presents persuasive evidence that the azoxystrobin technical imported by Willowood was manufactured using DABCO during the condensation phase, including internal and external testing by several laboratories and admissions by Willowood. Its evidence that DABCO was used in an infringing amount—Dr. Fortunak's opinion about commercial reasonableness—is less strong. Nonetheless, given Dr. Fortunak's experience and qualifications, his opinion is adequate to make a "persuasive showing of substantial likelihood." *Aventis*, 411 F. Supp. 2d at 510. This is especially so in light of Willowood's failure to rebut Dr. Fortunak's opinion[11] and the absence of evidence that anyone actually manufactures azoxystrobin using DABCO by a method different than that claimed by the '761 Patent. Doc. 137 at 85:16-86:5.

[11] Willowood's expert, Dr. Lipton, has not offered any opinion on the commercial benefits and burdens of producing azoxystrobin according to particular methods. *See* Doc. 96-15 at 66:14-70:16, 121:20-122:2; Doc. 110-5 at 17:11-18:2, 19:1-:11.

While Willowood offers testimony from Tai He's president, Mr. Wu, that neither Tai He nor any of its intermediaries use DABCO to make azoxystrobin technical, Doc. 88-5, his testimony has credibility issues.[12] Moreover, Mr. Wu did not provide any manufacturing or batch records to confirm his testimony, even though he was asked for them and admitted they existed. *See* Doc. 96-13 at 87:6-88:4; Doc. 88-7. Nor has Willowood provided a non-infringing explanation for how DABCO and its by-products could be detected in its end products or the samples of azoxystrobin technical.

Because Syngenta offers significant persuasive evidence of the presence of DABCO, consistent with the use of the patented process, and expert testimony opining that the patented process is used, the Court finds Syngenta has shown a substantial likelihood that Willowood's azoxystrobin technical is made with the process claimed by the '761 Patent.

2. Reasonable Efforts

Syngenta contends that it made reasonable efforts to discover Tai He's process for producing azoxystrobin technical, but that it has been thwarted by Willowood's lack of full cooperation and its inability to get information from Tai He, a Chinese company. To show "reasonable efforts," the patentee must follow "all of the avenues of discovery likely to uncover the defendant's [or manufacturer's] process, including written discovery

[12] For example, Mr. Wu's testimony on other production matters contradicts manufacturing documents from Tai He. *Compare* Doc. 99-6 at 20:9-:12 (stating Guoshang creates intermediate from etherification step) *and* at 93:24-94:2 (stating condensation step is not performed at Tai He) *with* Doc. 99-9 at 23, 28 (noting the etherification and condensation steps are "carried out at" Tai He) *and* Doc. 96-10 at 246:10-247:8 (discussing email stating Tai He performs the etherification and condensation steps).

requests, facility inspections, first-hand observation of the process, independent testing of process samples, the use of experts, and depositions of the defendant's [or manufacturer's] officials." *LG Display Co.*, 709 F. Supp. 2d at 335 (quotation omitted).

Syngenta tested Willowood's azoxystrobin technical and the Azoxy 2SC end product, employed experts, and deposed representatives from Willowood. *See, e.g.*, Doc. 99-1 at ¶¶ 128-31; Doc. 96-10. Syngenta also attempted to obtain production documents and information from Willowood and Tai He. *See, e.g.*, Docs. 88-5, 88-6.

On December 17, 2015, Syngenta submitted several interrogatories and requests for production to Willowood, seeking information on the manufacture of Willowood's azoxystrobin technical. Doc. 96-5 at 12-13, 16; Doc. 96-6 at 11, 14. Willowood provided two documents describing Tai He's process, one that had been submitted to the EPA and one from its manufacturer Tai He. Docs. 99-9, 99-8. Syngenta followed up on March 1, 2016, asking Willowood to clarify what catalyst was used in the process or to state whether no catalyst was used. Doc. 96-28 at 2-3. Willowood responded that, to the best of its knowledge, DABCO was not used, but that it bought the azoxystrobin technical from Tai He. Doc. 96-29 at 2-3. On June 15, 2016, Syngenta requested that Willowood provide all communications between Willowood and Tai He and any agreements between the two companies not yet provided. Doc. 110-14 at 2-4. Willowood asserted that it had no written communications with Tai He, because they corresponded only in person, via telephone, or via a chat program that did not save correspondence. Doc. 110-15 at 2.

Finally, on July 26, 2016, following Willowood's decision to depose Mr. Wu at the end of the discovery period, Syngenta told Willowood it would need several categories of documents, including on the manufacturing process, from Tai He before the deposition so that the deposition would not be "significantly one-sided." Doc. 88-6 at 2. Willowood forwarded the request for documents to Tai He on July 28, 2016. Doc. 88-7 at 2-3. Shortly before the deposition on August 31, 2016, Doc. 99-6 at 3, and after the date originally established for the close of fact discovery on July 29, 2016, Doc. 48 at 2, Willowood provided another Tai He document describing the manufacturing process. *See* Doc. 99-17.

At his deposition, Mr. Wu testified that Tai He and its intermediaries make azoxystrobin technical without the use of DABCO. Doc. 88-5. He also affirmed that Tai He has production records with the ratios and quantities of materials used in the manufacturing process, *see* Doc. 96-13 at 87:6-88:4, but that no one associated with Willowood informed him that Syngenta was asking for those documents, apart from sharing the July 28 letter about a month before his deposition. *Id.* at 55:9-56:4. He did not produce any of these documents at his deposition, despite being aware that Syngenta had asked for them.

The Court finds that these efforts by Syngenta to discover how Willowood's azoxystrobin technical is made were reasonable. While Syngenta did not seek discovery directly from Tai He, Willowood itself admitted that it "is extremely difficult, if not impossible…to compel the Manufacturer [in China] to produce any documents," Doc. 75 at ¶ 11, and Mr. Wu appeared for his deposition voluntarily at the request of Willowood,

not under compulsion by law. Willowood had to obtain an extension of the discovery schedule in order to take Mr. Wu's deposition, which the Court allowed over Syngenta's objection, *see* Docs. 75, 78; Text Order 08/22/2016, and which prevented any follow-up discovery directly from Tai He. Moreover, given Tai He's location in China, requesting voluntary facility inspections or observing the process firsthand are unlikely possibilities for discovering information.

"Reasonable efforts" under § 295 do not require fruitless discovery attempts overseas or motions to compel against a party, like Willowood, who says it does not have the documents. *See Kemin Foods v. Pigmentos Vegetales Del Centro S.A. de C.V.*, No. 4:02-cv-40327, 2004 U.S. Dist. Lexis 17206, at *34-35, 45-47 (S.D. Iowa Aug. 27, 2004) (finding reasonable efforts and shifting the burden despite some cooperation by the defendant and no motions to compel). Moreover, Syngenta did not know that Tai He had additional production records not shared with Willowood until Mr. Wu's late deposition, a month after the close of fact discovery. *See id.* at *34-35 (applying § 295, noting *inter alia* that the defendant's failure to produce production documents creates problems for patent holder in proving infringement). Here, Syngenta repeatedly requested that Willowood provide the information, it conducted its own tests, employed experts, and it asked Tai He for the production records; this establishes that Syngenta has made reasonable efforts to obtain the information.

The Court further finds that despite these reasonable efforts, Syngenta has not been able to determine the process actually used in the production of the product, particularly as to the amount of DABCO used. As discussed above, Willowood provided

some information about the manufacturing process for its azoxystrobin technical. Docs. 99-8, 99-9, 99-17. However, this information has been inconsistent. *Compare* Doc. 99-9 at 14, 28 (noting the condensation step is "carried out at" Tai He) *with* Doc. 99-6 at 93:8-94:2 (stating Tai He oversees the condensation step, performed by Guangda). It does not explain the presence of DABCO in Willowood's end products or samples of azoxystrobin technical, and it is incomplete given the relevant production records held but not provided by Tai He. *See* Doc. 96-13 at 87:20-88:4; *see also Kemin Foods*, 2004 U.S. Dist. LEXIS 17206, at *43 (applying § 295 when patent holder "was left with a host of inconsistent observations, unexplained solvents, and constantly changing representations").

Willowood contends that it cooperated with discovery and provided Syngenta with relevant information about the process. Yet, Mr. Wu testified that no one associated with Willowood told him Syngenta was requesting documents from Tai He until a short time before the close of the planned discovery period. Doc. 96-13 at 54:5-:20. This does not indicate full cooperation and, regardless, Willowood was in a better position than Syngenta to obtain the relevant production records. *See Creative Compounds*, 651 F.3d at 1314-15. In any event, the plain language of § 295 indicates that Syngenta's, and not Willowood's, actions are determinative to the "reasonable efforts" question.

Willowood also contends that it has given Syngenta information about the manufacturing process showing that DABCO is not used, and that the burden should not be shifted merely because Syngenta does not like Willowood's evidence. Certainly Willowood is correct that the burden should not be shifted where discovery indicates a non-infringing process. *See Nutrinova*, 224 F.3d at 1360. Here, however, Syngenta has

produced significant evidence that DABCO is used, and Willowood has not suggested a non-infringing reason for the appearance of DABCO in Syngenta's tests. Nor has it made Tai He's production records available to Syngenta.

Because Syngenta has shown a substantial likelihood of infringement and made reasonable but unsuccessful discovery efforts to obtain Tai He's production records, the Court will shift the burden under § 295 to Willowood to show non-infringement of the '761 Patent.

iii. Syngenta's Motion to Exclude Lab Analyses and Expert Testimony

The '761 Patent claims a process to make azoxystrobin technical using DABCO as a catalyst. As previously discussed, Willowood contends that Tai He uses a different process, without DABCO, to make its azoxystrobin technical and that its importation of Tai He's azoxystrobin technical did not infringe the '761 Patent. To support this contention, it offers test reports from Product Safety Laboratories (PSL) and EAG Laboratories (EAG) on the absence of DABCO in azoxystrobin technical and testimony from Dr. Lipton explaining the test reports. *See* Doc. 99-2 at ¶¶ 24-26, pp. 24-110. Syngenta asserts that the Court should exclude test reports from PSL and EAG and Dr. Lipton's interpretation of those reports under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), because the testing was fundamentally flawed and will not assist the trier of fact.

1. The EAG Test and Dr. Lipton's Related Testimony

Willowood admits that EAG did not test azoxystrobin technical, but rather a form of azoxystrobin from a stage of manufacturing before the condensation reaction, when

DABCO is added under the '761 Patent's claimed process. Doc. 102 at 17; *see* Doc. 96-4 at ¶ 26. In other words, EAG tested for DABCO at a point during the process when DABCO would not have yet been added. The absence of DABCO is hardly surprising under those circumstances. To the extent Willowood offers the EAG test to show that the absence of DABCO before the condensation step tends to prove that Willowood did not infringe the '761 Patent's claimed process, the Court will exclude the test and Dr. Lipton's related testimony.

Willowood suggests that the EAG test shows that DABCO was not present before the condensation step, and that this may be otherwise relevant. Doc. 137 at 125:11-126:2. Syngenta contends that even if this is so, it would tend to confuse the jury and be unfairly prejudicial. *See* Fed. R. Evid. 403. If and when Willowood decides to offer the EAG test into evidence at trial, it shall advise the Court outside the presence of the jury.

2. The PSL Test

PSL analyzed azoxystrobin technical from Tai He's completed process. Its finding that the sample did not contain DABCO is relevant to the issue of whether Tai He's manufacturing process infringes the '761 Patent. Based on its own testing, Syngenta contends that PSL's test lacked sufficient sensitivity to detect DABCO. However, Dr. Lipton critiques the reliability and methodology of Syngenta's tests and testifies that PSL performed its analysis "to a very high level of confidence." *See* Doc. 99-2 at ¶¶ 13-20, 24. Syngenta has not challenged his qualifications to offer this opinion.

The jury should determine the appropriate weight to be given to PSL's test and Dr. Lipton's testimony explaining the PSL test. *See i4i Ltd. P'ship v. Microsoft Corp.*, 598

F.3d 831, 852 (Fed. Cir. 2010), *aff'd*, 564 U.S. 91 (2011). The Court will deny the motion to exclude as to the PSL test and Dr. Lipton's corresponding opinion because they are relevant to whether the process for making Willowood's azoxystrobin technical infringes on the '761 Patent and they are based on sufficient data and reliable methods to reach the jury. *See* Fed. R. Evid. 702.

V. Counts V and VI: Copyright Claims

Willowood moves for summary judgment on Syngenta's claims for copyright violation. The Court will rule by separate order on this aspect of Willowood's motion, along with Syngenta's motion to exclude certain evidence offered by Willowood in support of summary judgment on these claims.

VI. Conclusion

For the reasons stated, the Court will grant summary judgment in favor of Syngenta as to validity of the '076, '256, and '138 Patents; will grant Syngenta's motion as to infringement of the '076 and '256 Patents by Willowood USA and Willowood, LLC and deny it as to Willowood Limited; will deny Syngenta's motion as to infringement of the '138 patent and as to validity and infringement of the '761 patent; and will deny Willowood's motion as to the infringement of the '761 patent. The Court will also grant in part, deny in part, and otherwise defer Syngenta's motion to exclude as to Dr. Lipton's testimony, as stated herein.

Willowood's motion on Syngenta's copyright claims will be resolved by separate order. The Court will also resolve by separate order Syngenta's remaining motions to

exclude certain evidence proffered by Willowood related to the copyright claim, *see* Docs. 90, 106, and damages. *See* Doc. 90.

It is **ORDERED** that the plaintiff's motion for summary judgment, Doc. 93, is **GRANTED in part and DENIED in part** and the defendants' motion for summary judgment, Doc. 87, is **DENIED in part and is otherwise retained under advisement**, as follows:

1. Counts I and II: The Court grants summary judgment in favor of Syngenta as to validity for the '076 and '256 Patents and in favor of Syngenta as to infringement of the '076 and '256 Patents by Willowood, LLC and Willowood USA, LLC. The Court denies summary judgement as to infringement by Willowood Limited. The issues remaining for trial are infringement by Willowood Limited, willfulness, and damages.
2. Count III: The Court grants summary judgment to Syngenta as to validity of the '138 Patent and denies summary judgment as to infringement. The issues of infringement, willfulness, and damages remain for trial.
3. Count IV: The Court denies Syngenta's motion for summary judgment on validity and infringement of the '761 Patent and denies Willowood's motion for summary judgment on infringement. The Court grants Syngenta's request to shift the burden to prove non-infringement to Willowood under § 295. All issues related to Count IV remain for trial.

4. Counts V and VI: The Court retains under advisement the part of Willowood's motion for summary judgment directed towards Syngenta's copyright claims and will rule on this aspect of the motion by separate order.

It is further **ORDERED** that the plaintiff's motion to exclude certain expert opinions, Doc. 90, is **GRANTED in part, DENIED in part, and DEFERRED in part** and is **otherwise retained under advisement** as follows:

1. The Court grants the motion to exclude Dr. Lipton's testimony about the validity of the '138 Patent. Subject to developments at trial, the Court also grants the motion to exclude the EAG test and Dr. Lipton's related testimony. The Court defers until trial the question of admissibility of the claims chart for the '761 Patent in Dr. Lipton's report. Otherwise, the Court denies the motion directed towards Dr. Lipton's testimony.
2. The Court retains under advisement the remaining issues raised by the motion, relating to testimony of Mr. Steven Schatzow and Mr. John C. Jarosz.

This the 24th day of March, 2017.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

SYNGENTA CROP PROTECTION, LLC,	)	
Plaintiff,	)	
v.	)	1:15-CV-00274
WILLOWOOD, LLC, et al.,	)	
Defendant.	)	

ORDER

Syngenta Crop Protection, LLC has sued four affiliated companies, denominated collectively here as Willowood, claiming patent and copyright infringement. Because the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) precludes copyright protection for the required elements of pesticide labels as against the labels of me-too registrants, the Court will grant summary judgment to Willowood on Syngenta's copyright claims. *Cf. SmithKline Beecham Consumer Healthcare, LP. v.Watson Pharm., Inc.,* 211 F.3d 21, 29 (2d Cir. 2000) (holding that the Hatch-Waxman Act precludes copyright protections for prescription drug labels as against generic drug manufacturers).

The Court appreciates the analysis of *FMC Corp. v. Control Solutions, Inc.*, 369 F. Supp. 2d 539, 555-71 (E.D. Pa. 2005), but finds it unconvincing. FIFRA contemplates that a "me-too" applicant will copy from the original pesticide label in ways that would otherwise infringe a copyright. 7 U.S.C. § 136a(c)(3)(B)(i)(I). Even with some changes, use of the original pesticide label as a "go by" for the new label will result in copyright

infringement. *See* 17 U.S.C. § 106; *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 801 (4th Cir. 2001) (discussing substantially similar standard for copyright infringement). In enacting FIFRA, Congress intended a narrow exception to copyright protection for the required elements of pesticide labels as against me-too registrants.

Syngenta has moved to exclude an expert report from Steven Schatzow and declarations from Gerald Simmons, Lois Rossi, Debra Edwards, and Janelle Kay, all offered by Willowood in its defense of Syngenta's copyright claims. Because the Court is granting the summary judgment motion on legal grounds unrelated to the proffered evidence, the Court has not considered this evidence and concludes that these evidentiary motions are moot.

It is **ORDERED** that the Willowood's motion for summary judgment, Doc. 87, is **GRANTED in part** as to Counts V and VI and Syngenta's copyright claims are dismissed. It is further **ORDERED** that Syngenta's motions to exclude Mr. Schatzow's report, Doc. 90, and certain declarations, Doc. 106, are **DENIED as moot**.

This the 10th day of April, 2017.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

SYNGENTA CROP PROTECTION, LLC,	)	
Plaintiff,	)	
v.	)	1:15-CV-274
WILLOWOOD, LLC, WILLOWOOD USA, LLC, WILLOWOOD AZOXYSTROBIN, LLC, and WILLOWOOD LIMITED,	)	
Defendants.	)	

ORDER

This matter is before the Court on the plaintiff Syngenta's two motions for judgment as a matter of law. Doc. 356, 358. Upon consideration, the motions will be denied. The evidence is sufficient to support the jury's verdict. The Court's decision that the parties implicitly agreed to resolve Willowood Limited's liability for the process patents based on the answer to the importation question is not contrary to the record.

It is **ORDERED** that Syngenta's motions for judgment as a matter of law, Doc. 356 and Doc. 358, are **DENIED**.

This the 30th day of January, 2018.

UNITED STATES DISTRICT JUDGE

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This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32. According to the word processing system used to prepare it and a manual count of the words contained in embedded images not counted by the word processing system, the brief contains 13,709 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Century Schoolbook.

/s/ *Russell E. Levine, P.C.*
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