

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CORTEVA AGRISCIENCE, LLC, .
et al, . Case No. 1:23-cv-01059-JFM
.
Plaintiffs,.
.
vs. . Courtroom 3B
.
INARI AGRICULTURE, INC., . 601 Market Street
et al, . Philadelphia, Pennsylvania 19106
.
Defendants..
.
Wednesday, February 26, 2025

TRANSCRIPT OF MOTION TO DISMISS HEARING
BEFORE THE HONORABLE JOHN F. MURPHY
UNITED STATES DISTRICT COURT JUDGE

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1 (Proceedings commence at 3:02 p.m.)

2 (Call to order of the Court)

3 THE COURT: Good afternoon, everyone.

4 COUNSEL: Good afternoon, Judge. Good afternoon,
5 Your Honor.

6 THE COURT: Have a seat, please.

7 Just give me a second.

8 (Pause in proceedings)

9 THE COURT: Okay. So we are here for 23-cv-1059,
10 Corteva v. Inari, in the District of Delaware.

11 And let's have introductions, please, starting with
12 the plaintiff.

13 MR. STOVER: Good afternoon, Your Honor. Chad
14 Stover from Barnes & Thornburg for Corteva. And with me
15 today, I have Peter Bicks, Gary Frischling, and Brian Raphel
16 from Orrick, and also Thomas Warnock, who's the head of
17 litigation at Corteva. Thank you, Your Honor.

18 MS. DELLINGER: Good afternoon, Your Honor. Megan
19 Dellinger from Morris Nichols, and I'm Delaware counsel for
20 Inari. And I'm joined this afternoon at counsel table by my
21 co-counsel from White & Case, Raj Gandesha and Jason Lee and,
22 a little farther back, Dimitrios Drivas. And from Leason and
23 Ellis, Robert Isackson. And also, we have two client
24 representatives from Inari here, Pierre-Etienne Boin and
25 Joshua Price.

1 THE COURT: All right. Very good. Thank you,
2 everyone.

3 So I have gathered you together to discuss a motion
4 to dismiss. There's -- I know we're sort of deep into the
5 case, just by virtue of how things have played out, for this
6 kind of discussion. But what we have here is a -- Inari's
7 answer and affirmative defenses to the second amended
8 complaint, as well as some counterclaims. That's been filed
9 on the docket at Docket Number 73.

10 And then we have a motion to dismiss filed by
11 Corteva; it's actually a combination motion to dismiss/motion
12 to strike. It's Docket Number 173. And then there's a
13 couple substantive filings to that, as well.

14 The -- I will give it -- hand the baton over to the
15 movant to take things away. I would -- I think I have --
16 I'll -- if you really want to do it different, I will -- you
17 can do it differently. But I think I'd like to talk about
18 the 12(b)(1) issues first.

19 MR. BICKS: Thank you, Your Honor. Peter Bicks
20 from Orrick on behalf of Corteva. And it's nice to be here
21 today.

22 In terms of how we're going to proceed, with Your
23 Honor's permission, I'm going to handle certain of the
24 arguments and Mr. Frischling is going to handle some of the
25 more patent-oriented arguments in what I call kind of the

1 "middle," if we proceed in order here. And then Mr. Raphel,
2 who I'm proud to say just became a partner, I've asked him to
3 handle the Massachusetts 93A claims.

4 Before I start, I would say, Your Honor, I have
5 three graphics that I think -- I hope are of help. I've
6 given them to our court reporter. I have another copy if
7 that's helpful.

8 And what these are, Your Honor, is just, number
9 one, a -- kind of a -- just a list of the claims for us, just
10 keeping track of them. It's been something we wanted to make
11 sure we've done right, so I've prepared that for you.

12 And I -- also, here with the list, we've put
13 together where the affirmative defenses fit in, so you can
14 see how the affirmative defenses fold into the counterclaims
15 because we don't intend, today, to focus a lot on the
16 affirmative defenses because they seem to be kind of mirrors
17 of the counterclaims, except, as I think it relates to
18 judicial estoppel, so I've prepared that chart.

19 The second document I have there is just a time
20 line. I think the time line is relevant when we get to the
21 abuse of process claims, so we just have a simple time line.

22 And then we've prepared a graphic that takes the
23 press release, which is the focus of Inari's arguments, and
24 shows how the press release that was issued on the day the
25 complaint was filed tracks to the complaint.

1 THE COURT: Would it be okay with you if we did --
2 if we do the 12(b)(1) first, go back and forth on that, and
3 then switch to the 12(b)(6) and the 12(f) and take that in
4 more topical buckets, like talk about the -- you know, we can
5 talk about the unenforceability related ones first, and then
6 some of the odds and ends after that?

7 MR. BICKS: Absolutely.

8 THE COURT: Okay.

9 MR. BICKS: So let me, Your Honor, just -- with a
10 moment, just kind of update you as to where we are because I
11 think it's actually relevant to some of these arguments.

12 Your Honor probably knows that we amended our
13 complaint. The original complaint was really focused on
14 corn, and we had one patent at issue.

15 During discovery, we now realize that Inari had
16 done what we claim to be the same/similar misconduct as to
17 one of Corteva's most important products, it's called "E3,"
18 Enlist 3; "3" because it's resistant to three different kinds
19 of herbicides. It's a soy product, not corn, and is one of
20 our client's most important products. We found that out in
21 discovery and we've amended the complaint, so we now have a
22 five-patent case, and the addition is primarily because of
23 the addition of these E3 patents.

24 The other thing that's important is we've amended
25 the complaint to assert another claim based on the MTA. We

1 discovered a 2017 MTA, which we had not known about.

2 And we also discovered that, whereas, before, we
3 thought all the seeds went from the ATCC through Inari's
4 agent to Belgium, we then found out in discovery that, in
5 fact, seeds have gone from ATCC to Inari's facility in West
6 Lafayette, and those seeds were then exported to Chile. We
7 had not known about that and, through discovery, we found
8 that out, so we've added an additional claim based on the
9 2017 MTA. Those involve about 17 different seeds that are
10 covered by PVP certificates. The patents expired, but the
11 PVP certificates, because of timing, are still in existence.
12 And so that's a whole new set of claims that is now in the
13 case.

14 I guess the other thing I want to point out to the
15 -- Your Honor is, in terms of where we are, a lot of this
16 case, at this point, is undisputed, and it's very important
17 when we come to one of the core questions of sham litigation.
18 You can imagine that we bristle at that kind of an
19 allegation. It's pretty serious.

20 But what we've pointed out in our papers -- and
21 it's based on actual admissions by Inari in their pleadings -
22 - that a lot of the core facts, as we're before you today,
23 are undisputed.

24 THE COURT: Well, like a lot of the core facts
25 having to do with where the seeds went and what happened to

1 them, I would --

2 MR. BICKS: Exactly.

3 THE COURT: I mean, I would have to imagine, in a
4 case with five utility patents, that, when you zoom in,
5 there's plenty of disputes to be had.

6 MR. BICKS: Not -- I totally agree with you --

7 THE COURT: Okay.

8 MR. BICKS: -- on that.

9 But in terms of the core facts, we're -- a lot is
10 not in dispute, and we point that out in our papers. I think
11 it's important because of the allegation of a sham
12 litigation.

13 I guess the other thing is a lot has been revealed
14 in discovery that is not really featured at this stage
15 because it's not relevant, necessarily, directly to the
16 motion because we have to take as true what they claim.

17 But I will point out that Your Honor has seen, in
18 certain documents that we've submitted as part of the in
19 camera process, where we've claimed they've over-designated
20 things, a series of documents that are further confirming of
21 the value of our technology, the fact they knew they needed a
22 license, the fact that they got a huge head start of 2 -- it
23 probably took them 2 to 3 years, they're claiming, what took
24 our client over 15 years, that our technology is elite, that
25 it's allowed them to tape into what they've said is a five-

1 to-ten-billion-dollar market. They knew they were going to
2 be sued before any of this even occurred, some pretty
3 important and -- facts that really take us pretty far down
4 the field, when you take -- put that on top of the undisputed
5 facts.

6 The other thing I want to point out, in terms of
7 where we are, is we just filed our claim construction papers
8 with the Court. They were over 700 pages, which a lot if it
9 is exhibits, but the charts are detailed. And I say that to
10 our point -- first point we're going to talk about, which is
11 the 12(b)(1) jurisdiction.

12 We've got a five-patent case where claim
13 construction terms have been submitted. We're about to now
14 get into the briefing. We've got a document completion date
15 for substantial completion in about three weeks. So, as Your
16 Honor noted in the beginning, we're pretty far down the road.

17 THE COURT: So you're getting at the discretionary
18 piece of --

19 MR. BICKS: Exactly.

20 THE COURT: -- DJ jurisdiction.

21 MR. BICKS: What I'm saying to Your Honor is the
22 notion that -- and putting aside the fundamental subject
23 matter jurisdiction problem of lack of a case of controversy,
24 the notion that we're going to interject into this case 232
25 patents, it's going to, for all practical purposes, I can

1 imagine, stop this case, and that's just under the
2 discretionary standard.

3 And I say that knowing full well what was at issue
4 on the five patents that we just submitted the claim
5 construction rulings -- terms and our varying interpretations
6 on. We haven't even gotten to the briefing. But we have
7 that schedule in place for a case that has been ongoing for a
8 year and a half since it was filed, and a year into
9 discovery. So that's kind of the background of where we are.

10 On 12(b)(1), Your Honor, they're trying to bring in
11 232 patents. Okay? We have not asserted those patents. We
12 have not written a letter about the patents. We have not
13 threatened in a phone call, we have not threatened in an
14 email. We have amended our pleadings and have not brought
15 those patents into the case.

16 They're attempting to bring them in by virtue of
17 our assertion of claims under what Your Honor has already
18 recognized as a completely distinct statutory regime, the PVP
19 law, and apparently under one patent, the 378 patent because,
20 in one paragraph of our complaint, the event that was covered
21 by that patent, we've raised an issue, not relating to the
22 patent, but because that event, we wanted to know where they
23 got it. It's not an event that had anything to do with the
24 ATCC deposits. We wanted to know where did they get that
25 event. Did they get it from a farmer? Because that's

1 covered by that technology use agreement. So that one
2 patent, which is -- has nothing to do with the case, the 378
3 patent, is tied to an event that is tangential, at best, to
4 the case.

5 So, when it comes to the declaratory judgment --
6 this is Count 7 and 8, the 378 patent; and then, in total,
7 231 asserted patents -- there is no affirmative act that our
8 client has engaged in which would indicate that we're
9 bringing those patents or that they are at play in this case.

10 THE COURT: Let me ask you a question about that.
11 So there's this giant table that's attached to the pleadings
12 that lists many -- in the rows, many of the PVP certificates
13 and also corresponding utility patents. Is that -- are you
14 familiar with what I'm talking about?

15 MR. BICKS: Yes.

16 THE COURT: The nature of that correspondence
17 between PVP certificates and utility patents, what is -- who
18 decided that those were corresponding, why, and what am I to
19 make of that?

20 MR. BICKS: I think it's nothing other than just
21 showing that these seeds are also covered by patents, in
22 addition to PVP certificates; it's nothing more than kind of
23 an organizational way to make something that everybody knows
24 clear. It's not an indication that they're at play in the
25 case in any way.

1 THE COURT: Okay. But --

2 MR. BICKS: I mean, it's a housekeeping --

3 THE COURT: But is it -- can I accept -- either
4 it's undisputed or I can accept it in the way that I accept
5 the allegations that Inari is making on this motion? One way
6 or the other, can I accept that there -- when I look at that
7 table and I see a row and there's a seed and a given row
8 corresponds to a particular seed, that the PVP certificate
9 and the utility patent in that row, they both cover that
10 seed? Is that --

11 MR. BICKS: That's correct.

12 THE COURT: That's correct?

13 MR. BICKS: Yes.

14 THE COURT: Okay. So let's just take like a way
15 simpler situation. Forget all of the complexities of this
16 case and just take a very simple situation where a plaintiff
17 has a PVP certificate and a utility patent both covering the
18 same seed. And let's just say it's, you know, one of each.
19 And the plaintiff, for whatever reason, decides to sue on the
20 PVP certificate, but not on the utility patent. Would your
21 position be that there's no DJ jurisdiction for a
22 counterclaim targeted at the corresponding utility patent?

23 MR. BICKS: I think, under W.L. Gore, just because
24 something has related technology, I don't think it would
25 satisfy the standard, just as Your Honor indicated there can

1 be overlapping regimes between the patent law and trademark
2 patent law and copyright. The fact that there may be
3 overlapping legal kind of doctrines that apply to a
4 particular piece of technology in no way is an indication or
5 an affirmative act that somebody is going to bring a lawsuit
6 based on that, particularly because, as Your Honor knows,
7 they're completely different statutory regimes.

8 If you compare the PVP law to the patent law and
9 you go element by element, what is required to get a PVP
10 certificate versus a patent? Different. How long is the
11 term? When does it start from? Different. What defenses
12 are available? Different. What are these criteria by which
13 the things are issued? Different.

14 THE COURT: Yeah --

15 MR. BICKS: What are the statutes that govern them?

16 THE COURT: I agree with all --

17 THE COURT: Completely different.

18 THE COURT: I agree with all of that. And it may
19 be that some of those distinctions you're drawing are a good
20 tactical reason for the hypothetical plaintiff I'm talking
21 about to sue on the PVP certificate and not the utility
22 patent. But those distinctions are different from the
23 question as to whether there's an adequately real -- I'll
24 just say "real" -- an adequately real dispute about the
25 utility patent?

1 MR. BICKS: Right. Well, I mean, I think the law
2 is clear, Your Honor, that you have to have something more
3 than a subjective belief; you have to have an affirmative
4 act.

5 If you look at the W.L. Gore case, a patent had
6 been in play in another context, the tech -- the actually --
7 the technology was similar, and the District Court said that
8 doesn't get you where you need to get. And so --

9 THE COURT: Yeah.

10 MR. BICKS: -- I will --

11 THE COURT: Well, let's talk about --

12 MR. BICKS: -- say that's --

13 THE COURT: But let's talk about the circuit cases
14 that Inari cited.

15 So I think Vanguard is probably their best case. I
16 didn't think the ANDA case they cited was as compelling
17 because it relied so much on Hatch-Waxman and the way that's
18 set up.

19 Vanguard is a tough case, I think, because there
20 you have trade secret allegations going forward by the
21 plaintiff, and then you had the counterclaim on -- for the
22 utility patent, a DJ on the utility patent. And the Federal
23 Circuit put a lot of weight on it being the, quote/unquote,
24 you know, "same technology."

25 MR. BICKS: Right.

1 THE COURT: That's a problem for you, right? That
2 case.

3 MR. BICKS: Well, I think, though, in that case,
4 you had more of an indication of a potential threat that
5 something may actually happen, as it relates to those
6 different doctrines.

7 THE COURT: You mean, if --

8 MR. BICKS: That -- you have none of that here.
9 And I --

10 THE COURT: I think Inari feels pretty threatened.

11 MR. BICKS: Well, but let me also point this out,
12 Your Honor. From a practical standpoint, the question is you
13 want to resolve a case in an efficient way, right?

14 THE COURT: Yeah. Okay. Let's talk --

15 MR. BICKS: So what --

16 THE COURT: Let's talk about the discretionary
17 piece.

18 MR. BICKS: When you look at, however, the issue
19 that they are raising in this, there's one threshold question
20 that runs across all of this. When we make a patent deposit
21 -- right? As Your Honor pointed out, is it open hunting
22 season, right? That issue is going to be answered in this
23 case. Your Honor already wrote about it on a motion to
24 dismiss, and we know a motion to dismiss is a motion to
25 dismiss ruling and that only.

1 However, if the issue is are they going to get
2 guidance of what to do, they're going to get that in this
3 case because we've got five patents at issue, we've got a
4 substantial number of PVP certificates, the same legal issues
5 that could be implicated -- right? As it relates to 230
6 other patents -- are going to, for all practical purposes, be
7 dealt with in this case.

8 So then the question becomes how, possibly, under
9 the discretionary standard, when we're the ones who have
10 framed our case -- we're the plaintiff in the case -- how is
11 it possible that we're going to interject 232 patents from a
12 practical standpoint?

13 THE COURT: I don't know, but -- I don't know. And
14 that's going to be tough if that's the road this goes down.
15 But Corteva took the position that Inari was not entitled to
16 traffic in 200 and some seeds.

17 MR. BICKS: Well, it's a little bit different than
18 that, that what they've done and the conduct they've
19 undertaken is wrong. It's not that certain activities are
20 permitted, it's what they've done is impermissible.

21 THE COURT: With -- okay. I hear you.

22 MR. BICKS: Yeah.

23 THE COURT: But with 200 plus seeds.

24 MR. BICKS: That's correct.

25 But that's a different argument, Your Honor, than

1 the patent claims. I mean, to be very direct, we could have
2 brought the patents in, if we wanted to. We're a year in --
3 a year and a half into the case. At a certain point, we have
4 to be practical about the prospect of something.

5 And by the way, on the Federal Circuit case, the
6 Vanguard case, I don't believe they were a year and a half
7 into the case, that -- where the -- everything had been
8 framed and the parties are, you know, past the fifty-yard
9 line.

10 THE COURT: No, it was -- actually, it was a weird
11 situation where the patent issued during the case --

12 MR. BICKS: Right.

13 THE COURT: -- which gave sort of --

14 MR. BICKS: Which --

15 THE COURT: -- actually gave some momentum to
16 establishing DJ jurisdiction because it was like oh, well, it
17 was as surprise.

18 Whereas, here, you know, a fact in your favor is
19 all those utility patents were sitting there --

20 MR. BICKS: Right.

21 THE COURT: -- and you chose not to sue on them,
22 which tends to erode the --

23 MR. BICKS: Right.

24 THE COURT: I understand.

25 MR. BICKS: But -- and by the way, Your Honor, we

1 framed the issues for you in the original case management
2 order. We've been at this for a year and a half. What you
3 point out, there's no surprise here. And from a practical
4 standpoint, it doesn't add anything to the case, other than
5 it stops it, and we're definitely not in favor of that.

6 And as I say, the issues that we're going to be
7 dealing with, if they want to have guidance, they're going to
8 know, you know, does their open hunting season argument fly,
9 does the 271(f)(2) argument fly, does the argument about the
10 contract -- commercial behavior, transferring seeds outside
11 of your organization. If those issues are going to bleed
12 across any kind of a patent, they'll get the guidance they
13 need. And I have a feeling, when we get to summary judgment,
14 we'll be very focused on those issues, so --

15 THE COURT: Do you think -- if this case gets to
16 the point where there's a final judgment and -- I mean, I
17 don't know -- and you're moving forward, Corteva and Inari
18 are moving forward, do you think that there would be claim
19 preclusion on all of those unasserted utility patents.

20 MR. BICKS: I had anticipated you would ask me
21 that, Your Honor, and the answer is I can't predict that.

22 What I can predict is, at a minimum, we're going to
23 have very persuasive authority that should be guidance to the
24 parties. But the preclusive effect is so tricky because you
25 have to -- it depends on what the issue is that we get the

1 preclusive effect on.

2 THE COURT: Yeah.

3 MR. BICKS: I think there's a good chance of it,
4 but you have to go issue by issue and -- you know, and look
5 at it that way.

6 I can't begin to get into the specific claim
7 construction issues on 230 plus additional patents. What I
8 can say, as to the core issues, particularly as they frame
9 their defense -- which is basically one, right? When we made
10 those deposits, we basically -- all bets are off, that's
11 still their core argument, even here -- that we will get
12 guidance from the Court on that because we already have
13 gotten guidance from you.

14 So, look, I hear everything you're saying. I got
15 to be -- on the discretion point --

16 THE COURT: Nobody wants these claims in the case
17 less than I do, believe me.

18 MR. BICKS: Yeah. Well, I just think, honestly,
19 Your Honor, with the discretionary piece to this, you know, I
20 just can't imagine that we're going to completely alter the
21 cadence of this case. I don't even know, practically, how it
22 could be done. I don't actually think it could be done.

23 I know, from experience -- and there are others
24 here, particular, Mr. Frischling -- you know a five-patent
25 case -- and Your Honor knows better than I -- that's a lot.

1 And I know it from the 700 pages on claim construction and
2 the back-and-forth. I can't imagine, from a practical
3 standpoint, where we would go.

4 And as I say, this case has been going on for a
5 long time. They never raised this issue in the case
6 management order, where we were supposed to kind of lay out
7 issues to come. This was never, ever raised; never raised on
8 the motion to dismiss, never raised during discovery when we
9 framed everything.

10 And I will also say this, from a practical
11 standpoint because we know it on our side. Every time you
12 interject a new patent, it's not just the claim construction.
13 Then it become the inventors, then it becomes the document
14 collection on our side, and it's massive; it is a massive
15 effort that I would just ask the Court, being both an
16 experienced litigator and a judge, to just put your litigator
17 hat on for a moment and remember what this is all about
18 because this, for us, would be -- I cannot begin to say what
19 would be involved in -- from a practical discovery
20 standpoint. It would crippling, distracting, and frankly,
21 unnecessary on the fundamental question of resolving
22 something that should be resolved here.

23 So we would urge you, Your Honor, to exercise your
24 jurisdiction and to deny their effort to amend a year and a
25 half, to bring in 232 new patents. We don't think there's

1 been an affirmative act.

2 And we haven't -- as I said, we could have brought
3 them in, if we wanted to; we've amended the complaint. And
4 we're to the point where amendments, you know, will be
5 restricted, and we haven't brought them in, and for a
6 practical reason: We don't think they need to be and we
7 haven't done it.

8 So I don't have much further to add on that, unless
9 Your Honor has any more questions.

10 THE COURT: Yeah. I assume, if the big DJ count
11 with all these patents comes in, then you would have no
12 choice but to assert compulsory counterclaims of
13 infringement.

14 MR. BICKS: That's right.

15 THE COURT: All right.

16 MR. BICKS: And it's -- the case starts again, and
17 it's now -- I did the math. What, we got 5 patents and then
18 230? What, 5 times 40? What, 40 times, you know, plus?
19 Massive. It would make the case unmanageable, frankly.

20 THE COURT: All right. Let me hear from Inari on
21 the 12(b)(1).

22 (Participants confer)

23 MR. GANDESHA: Thank you, Your Honor. Raj Gandesha
24 for Inari.

25 THE COURT: Let me start you with a small question,

1 and then we'll go to the big one. The small question is --

2 MR. GANDESHA: Okay.

3 THE COURT: -- what -- I just -- if I looked
4 closely enough, I maybe could have figured this out. But
5 what's -- why is the -- does -- the 378 patent, why did that
6 get special treatment in its own counterclaim? Is it not on
7 the big list or something?

8 MR. GANDESHA: It's not on the big list --

9 THE COURT: Oh, okay.

10 MR. GANDESHA: -- in that the 378 patent doesn't
11 have a corresponding PVP certificate --

12 THE COURT: Oh, okay.

13 MR. GANDESHA: -- that's been asserted.

14 THE COURT: Okay. So --

15 MR. GANDESHA: It's an event patent; it's not a --
16 it's not a patent claiming a variety --

17 THE COURT: Oh, all right.

18 MR. GANDESHA: -- right?

19 THE COURT: So that -- and that one, the connection
20 to the case is through the misappropriation --

21 MR. GANDESHA: Correct.

22 THE COURT: -- claim. Okay.

23 MR. GANDESHA: That's right.

24 THE COURT: The big question is I think -- you
25 know, you heard my discussion. I think you have some wind in

1 your sails on what you're entitled to do here, but I'm
2 struggling with the case management question. So talk me
3 down off this cliff, tell me how this is going to work.

4 MR. GANDESHA: Yeah, sure. Thank you, Your Honor.
5 I thought that discussion was very important and I think it
6 focused on, really, the key issues.

7 Let me just address the substantive question first
8 because I agree, I think the Vanguard case is an important
9 case and it supports us.

10 I think here, though, our situation is one where
11 the connection between the sort of basis for invalidity and
12 the conduct of the patent owner is even more stark because, I
13 mean, essentially, our position is it's the very claims of
14 PVP infringement that give rise to the invalidity challenge
15 to those patents claiming the same varieties, so it's even
16 more starkly connected than the issue in Vanguard.

17 Now, on the case management discretionary basis for
18 denying jurisdiction issue, first of all, you know, I -- Your
19 Honor is aware the case was already massive with the 248 PVP
20 certificates at issue. But the important thing to sort of
21 note here, I think, is that our primary challenge to the
22 invalidity of these patents is, essentially, the same basis
23 as to which we're challenging the other asserted patents.
24 It's an issue under 112. It's about the impact of
25 restricting access to the written description of those

1 patents. That issue is the same.

2 Now what's important about is that --

3 THE COURT: Well, like there's a big part of that
4 that's the same --

5 MR. GANDESHA: Uh-huh.

6 THE COURT: -- relating to all of the, I'll just
7 call it "unenforceability issues" --

8 MR. GANDESHA: Yes.

9 THE COURT: -- that you've raised. That, I assume,
10 would be the same. But at a more micro level, I would assume
11 that the significance of the biological deposit to the
12 substance of the written description or enablement as to
13 whether it's adequate, I would assume that would vary patent
14 by patent.

15 MR. GANDESHA: Well, it may, Your Honor. I think
16 our position is that the -- again, you ask a question about,
17 you know, where does notion that, you know, certain utility
18 patents correspond to certain PVP certificates come from.
19 The issue is they claim exactly the same variety, right?
20 There's -- there is no dispute.

21 These are -- remember, I think Your Honor is
22 probably familiar with some of the asserted utility patents
23 in this case that have claims that vary in some way to a --
24 you know, to a seed containing a genetic construct and so
25 forth. The unasserted utility patents with respect to the

1 varieties are -- they don't vary in quite the same way from
2 patent to patent. They, essentially, claim the variety in
3 the same way that the PVP certificate does.

4 So I don't anticipate here this is going to be --
5 there are going to be significantly different arguments as to
6 look, do we need to make a -- you know, was the deposit
7 necessary to enable for this patent in a way that maybe it
8 wasn't necessary over here. These are, essentially, the same
9 kinds of patents. And the sort of arguments about the impact
10 of 112 are going to be the same.

11 By the same token, we don't anticipate major claim
12 construction issues. In fact, we served our invalidity
13 contentions recently to Corteva. We identified invalidity
14 grounds for those unasserted patents claiming the varieties,
15 as you can imagine, under 112. We then exchanged claim
16 construction terms. Neither side identified any terms from
17 those unasserted patents that, according to us, are in the
18 case.

19 So this sort of fear that we're going to explode
20 this case because we're going to be construing thousands of
21 claims if these patents come in, I think that's, frankly,
22 unfounded. I think the --

23 THE COURT: I mean, it's -- you know, when you --
24 when I see this on the flip side, if you have one of these
25 cases where there's -- you know, five is a decent number, but

1 you see even more than that -- many, many patents that are
2 asserted or many claims, hundreds of claims, there's always
3 this tension between, on one hand, every one of those patent
4 claims is a right you're entitled to pursue in court. The
5 flip side is the case management side and just being
6 realistic about --

7 MR. GANDESHA: Uh-huh.

8 THE COURT: -- what the real issues are. And you
9 think -- usually, in those kinds of cases, there's a way to
10 get from point A to point B, there's a way to sequence
11 things, simplify the issues, set some things aside, come back
12 to them later, whatever it is.

13 This particular combination -- this particular
14 combination of issues and the sheer quantity is a little --
15 well, it's a new one on me, but I mean, you're talking like
16 you have thought this through as to what you would do.

17 MR. GANDESHA: Your Honor, we have. And again,
18 we're happy to provide more concrete detail --

19 THE COURT: Yeah.

20 MR. GANDESHA: -- to what that would look like.
21 Obviously, you know, there's the threshold issue here of
22 jurisdiction. But I think you're right. I think this is an
23 issue that we can work through as parties.

24 Now the other point we've made, and I think Corteva
25 gave it the back of the hand here, is that, if Corteva is

1 concerned about the expansion of, you know, the case through
2 our counterclaim, they can obviously give us a covenant not
3 to sue. That's one way to resolve the DJ issue. Now they
4 appear not to be interested in that from their reply brief.
5 But there are things the parties can do to work through this.
6 But on the fundamental question as to whether or not
7 jurisdiction exists, we absolutely believe it does.

8 THE COURT: Okay. Thank you.

9 MR. GANDESHA: Thank you.

10 THE COURT: I'll go back to Corteva, if you have
11 any final words on the 12(b)(1), and then you can move to the
12 12(b)(6).

13 MR. BICKS: Yes, Your Honor. I -- just, if the --
14 if it really is the case that there's an overarching issue,
15 as they're saying, that runs across all of them, then that
16 plays directly into my point, which is then we don't really
17 need them in the case because their argument that they claim
18 is overarching is going to be resolved, and then I guess
19 we'll get litigating about claim preclusion. But if they're
20 right about that, then that's really a reason not to bring
21 them in.

22 And I will also just say that I really don't think
23 it's legitimate to understate the additional burden that has
24 to be done, once you bring in those whole new patents. We
25 have to go gather and get into all the inventor issues as to

1 each of the patents, the document production, the claim
2 construction, and all of those issues. I don't think it's
3 fair to say oh, this is suddenly just a minor addition to the
4 case. I don't think it is, so ...

5 And for just the reasons right there, the practical
6 question, I'm all for -- which will happen, by the way, on
7 summary judgment because it won't surprise you, based on
8 certain of the things that I'm saying about what I feel is
9 undisputed, particularly on the contract issues, particularly
10 on the 271(f)(2) -- I mean, that's all admitted, what
11 happened over in Belgium. It's also admitted that seeds went
12 outside of their facility. It's also admitted that they
13 breached the contract.

14 Those summary judgment issues, I think, will
15 provide a huge amount of guidance, particularly on this
16 question of, you know, when we deposit under -- you know, the
17 alleged -- the Budapest Treaty, that we lose all of our
18 rights. So that's going to be teed up on summary judgment.
19 And you know, I think we can certainly then, at that point,
20 see if there's anything to do on that. But to derail the
21 case now, I don't think is appropriate. And if they wanted
22 to do this, we should have done it a long, long time ago, and
23 it should have been, frankly, raised with the Court. There's
24 nothing new.

25 And also, I will say the management of the PVP

1 certificates is completely different than management of a
2 patent case. We don't have claim construction issues. There
3 will be very easy ways to -- whether by just using a handful
4 of the certificates -- well, I told the Court about that when
5 I was first before you. Managing a PVP certificate case is
6 completely different. So to suggest that we, somehow,
7 invited some, you know, case -- you know, case-crushing
8 response because of the fact that they exported so many
9 seeds, you know, I don't think is appropriate. Those are
10 very, very different theories and managed very, very
11 differently.

12 So, with that, Your Honor, I thought where we are
13 now is whether the next claims, which are -- I have them as 9
14 and 10, that's 12(b)(6), and that's the unenforceability of
15 the patents and the PVP certificates.

16 THE COURT: Yeah, you organized -- you grouped
17 together those -- Counterclaims 9 and 10 --

18 MR. BICKS: Yes.

19 THE COURT: -- with Affirmative Defenses 23, 24,
20 36, and 37.

21 MR. BICKS: Exactly.

22 THE COURT: Okay. So --

23 MR. BICKS: So, with your permission, I thought I
24 would just --

25 THE COURT: Yeah.

1 MR. BICKS: -- quickly address those.

2 To call this case a "sham," Your Honor, is,
3 frankly, a sham. Your Honor knows the basis for the
4 complaint. Your Honor obviously ruled --

5 THE COURT: This question may be better posed to
6 Inari, and I am going to ask it. But could you give me your
7 -- let's just start with: Could you give me your take on
8 these two counts? I guess Count 9 is the utility patents,
9 Count 9 is the PVP certificates. But like what is -- what
10 are they asking for? What's your interpretation of what's
11 being asked for? What is the theory of -- what is the legal
12 theory being advanced and the relief being sought? Let's
13 just start there because I struggle with that on some of the
14 counterclaims.

15 MR. BICKS: Well, I think I'll take a shot at it,
16 and then, if Mr. Frischling wants to chime on, those were --
17 he was going to deal with those.

18 But it's kind of an unusual theory, Your Honor.
19 The theory is that, because we have asserted claims based on
20 PVP certificates, which, as Your Honor knows, have a
21 different trigger point for when they became effective,
22 right? When you get a patent, it's when you file. When you
23 get a PVP certificate, it's when it's issued, right? So you,
24 therefore, have PVP certificates that, as a general rule, go
25 one to two years after a patent can expire, so --

1 THE COURT: Is that your interpretation of the core
2 mis -- I guess that would be the alleged flavor of misuse.
3 That's the core misuse theory underlying all of these counts,
4 or is it -- because I've had trouble picking apart -- I have
5 trouble picking apart --

6 MR. BICKS: Yeah.

7 THE COURT: -- saying that that theory, the --

8 MR. BICKS: Right.

9 THE COURT: -- un -- inappropriate extension of a
10 patent term theory, like Brulotte, right?

11 MR. BICKS: Right.

12 THE COURT: I had trouble picking that apart from
13 the litigation is sham, and so we're under the PRE exception
14 in Noerr-Pennington. And unclean hands, I have trouble --
15 where does that fit in? I really struggled.

16 MR. BICKS: Right, right. So, I mean, honestly,
17 Your Honor, we struggled, too. It's what I would call the
18 "kitchen sink" pleading approach. We spent a lot of time
19 trying to understand where the lines were drawn; they're not
20 well drawn. They put together sham, unclean hands, and
21 patent misuse as three arguments as to why our patent claims
22 are unenforceable and why our PVP certificate claims are
23 unenforceable.

24 So, as to each of those counts, it's 9 and 10, and
25 then they bring back in the argument about misuse in the next

1 claims. It bleeds over several claims. So I -- we struggle
2 with the same thing Your Honor is raising. All we can do is
3 just go element by element and say they don't meet it, and
4 they clearly don't meet it, so --

5 THE COURT: Well, I guess -- so let's just take
6 some of the ingredients and talk about those separately. And
7 why don't we start with this -- well, we start with -- let's
8 take the individual ingredients of this --

9 MR. BICKS: Yeah.

10 THE COURT: -- these -- this family of counts.

11 MR. BICKS: Right.

12 THE COURT: Start where you want and --

13 MR. BICKS: So I would start with sham litigation -
14 -

15 THE COURT: Okay.

16 MR. BICKS: -- right? That's the one they say it
17 25 times.

18 I don't need to go through what the standard is
19 with Your Honor, other than to say it's basically, if we have
20 a claim that has a chance of possibly prevailing at the time
21 it's filed, it's not a sham litigation. All right? That's
22 the standard. Okay?

23 So here we are with now we have patent claims. The
24 patents are valid as we're here now, which gets you pretty
25 far down the field.

1 We've got PVP claims. The PVP certificates are
2 valid, as were here. It's actually undisputed that they
3 exported the seeds.

4 We've got the 271(f)(2) claim, which we know that
5 they took seeds, they exported them, they grew them in the
6 plants. They combined them with water, nutrients, and air,
7 right under (f)(2).

8 And what is also significant, and I alluded to it,
9 they also transferred the seeds outside of their warehouse in
10 Belgium, which directly breaches the MTA, which says you
11 can't take it outside of your facility. Okay?

12 Those are the patent claims. And the question is:
13 Do we have a chance of winning one of those claims at the
14 time that we filed, such that a reasonable person would have
15 probable cause to file a case?

16 Your Honor wrote already on a motion to dismiss,
17 and I know that's not dispositive.

18 THE COURT: I could be wrong.

19 MR. BICKS: I know you -- that's not dispositive.
20 But it was a very important kind of legal posture, a little
21 bit different than many cases because there was such a
22 fundamental legal question that ran across all of their
23 claims. You may have been wrong. But remember, the standard
24 for sham litigation is not whether or not we will win -- and
25 we believe we will -- it's whether, at the time we filed, we

1 have a puncher's chance of a claim. All right? So those are
2 the patent claims.

3 What's really important here, Your Honor -- and I
4 believe it's just done on this basis alone -- they don't
5 mention the 93A claim as being a sham. They don't even
6 address it. It's focused on the patent claims. Okay? The
7 93A claim is in the case, and Your Honor knows about the
8 allegations about the *quid pro quo*, the actions in Belgium --
9 I mean the actions in Massachusetts.

10 And then the other significant thing, Your Honor --
11 and it -- I have to point it out just because I thought it
12 was pretty significant -- is that we also have, Your Honor,
13 remember, the conversion claim. Okay? They don't even touch
14 the conversion claim. And there's an exhibit that was
15 submitted -- and you'll recall one of the things that we did
16 here is -- there's a lot of allegations about Corteva was
17 conspiring with Bayer, they were doing it with Syngenta. We
18 issued the press release.

19 Your Honor will recall that we submitted those
20 documents, they're on my time line. Yes, it's true, we told
21 Bayer and Syngenta when we found out our seeds were taken and
22 we didn't get notice. It's actually true, our general
23 counsel Cornel Fuerer called up his counterpart and said FYI,
24 we saw that -- in what ATCC gave us, and we didn't know about
25 it happened to you, here's what we saw, and we -- and sent it

1 to them, absolutely happened. And is it also true that the
2 day we filed the complaint we told them that we filed it?
3 Absolutely.

4 But what's very significant -- and it's also said
5 they -- we threatened ATCC, that's one of their arguments,
6 coercion, as if it's even part of a legal claim. It's not.
7 But one of the documents that got attached, and it's our
8 Exhibit I, is a question-and-answer from the ATCC, where they
9 say that the depositor maintains ownership of patent deposit
10 material at the time of the deposit, which goes directly to
11 the conversion claim. We had an argument like that and
12 evidence before the Court in another document at ATCC. But
13 now, in materials that they brought into the case, we have
14 yet further evidence on the conversion claim, a claim they
15 don't even contest on this motion as being a sham.

16 So, when you go element by element and claim by
17 claim, and you look at the fact that the patents are valid,
18 Your Honor is aware of the MTA provision about commercial
19 restriction, about non-transfer. Mr. Boin is in the
20 courtroom. I'm happy and can represent to the Court that I
21 have a clip of him testifying under oath, sitting in my
22 folder, where he said that they breached the contract. Okay?

23 So then to say this is a sham, knowing that that
24 evidence is in this case and knowing that we're debating
25 whether or not their conduct is so-called "commercial," when

1 they say that their goal is to be largest and most profitable
2 seed company in the world, and somebody suggesting that this
3 case is a sham, that, Your Honor, in my view, that argument
4 is the actual sham.

5 So the standard is so hard to meet, and they don't
6 even come anywhere close to it. Again, it's not whether or
7 not we're going to win. Back to your point about your
8 decision. It's whether or not we have a chance on one of our
9 claims. And I gave you a preview of all of the claims. They
10 don't even challenge the bulk of them in claiming that the
11 case is a sham.

12 It's also clear, Your Honor, yes, there are cases
13 which say you don't typically resolve this on a 12(b)(6).
14 But there are cases, including in this district, District of
15 Delaware, Circuit Court, which do it. We've cited those
16 cases, and some of them are very detailed decisions,
17 including within this district, which do dismiss sham claims
18 on a 12(b)(6) motion.

19 THE COURT: Would any type of allegation of sham
20 litigation, whether it's -- whatever it is an ingredient of,
21 is that something that can only get fully decided after the
22 resolution of everything else in the case?

23 MR. BICKS: No, Your Honor.

24 THE COURT: No. I mean --

25 MR. BICKS: No.

1 THE COURT: -- I know you're telling me you want me
2 to throw it out, I get it. But suppose I didn't. Would --
3 the final decision on that would be after everything else,
4 like if -- it's sort of like deciding a fee award or
5 something, like it comes after everything, or do you decide
6 it --

7 MR. BICKS: No.

8 THE COURT: -- alongside everything else?

9 MR. BICKS: Well, first of all, let me very clear.

10 THE COURT: Does it go to a jury, you know?

11 MR. BICKS: Well, to be clear, one, it can be
12 disposed of and it is disposed of by courts on 12(b)(6).
13 Okay? If it's not, then I guess we're into discovery on sham
14 litigation --

15 THE COURT: You'd have --

16 MR. BICKS: -- right?

17 THE COURT: You'd have to sequence the discovery
18 because --

19 MR. BICKS: Well, I'd have to think about exactly
20 how we're going to start discovering a sham litigation case.
21 That opens up a whole other can of worms.

22 There are sham litigation decisions on summary
23 judgment, right? Where they're resolved on summary judgment.

24 And then, if they're not resolved on summary
25 judgment and -- you know, then we would have to look at is

1 that a judge question or a jury question, whether or not a
2 case is a sham litigation. I hope we don't need to get
3 there, I don't believe we do.

4 If they think this was a sham, they should have
5 moved for Rule 11 when we filed the complaint, right? And
6 Your Honor ruled on the motion to dismiss that all of the
7 claims pleaded all of the elements. There was no allegation,
8 much less suggestion, of a sham. And honestly, they should
9 have moved for Rule 11.

10 THE COURT: Well, right. I hear you. But their
11 best-case scenario would be that the facts turn out entirely
12 different from the way that Corteva pled them, A; and, B,
13 that my legal rulings were all wrong.

14 MR. BICKS: Well, yeah.

15 THE COURT: And so all those things could be true,
16 I don't know.

17 MR. BICKS: But that doesn't bear on -- let me --
18 hold on for a minute. The question of whether or not
19 something is a sham --

20 THE COURT: Yeah.

21 MR. BICKS: -- is determined when the complaint is
22 filed. Okay? That's very important. That's what the
23 standard is. We don't look back on something that happens
24 down the road.

25 And by the way, we're already -- Judge, we're a

1 year into discovery in the case. As I mentioned to you,
2 three weeks from now, document discovery is substantially
3 complete.

4 Look at the arguments that they're making about why
5 it's a sham. One of the main arguments is, once we made the
6 patent deposit, it's we gave up all our rights. Okay? Your
7 Honor ruled on that on the motion to dismiss. Obviously, we
8 agree with that. Even if it turns out to be wrong, it's
9 pretty compelling evidence that -- and we don't think it will
10 -- it's pretty compelling evidence that the case, as filed,
11 wasn't a sham.

12 And again, I look at the substance of the case.
13 They signed a contract, Your Honor, which said you can't do
14 anything commercial, you can't send this stuff outside of
15 your organization. He'll tell you, when he gets up, if you
16 say if it's really true that, as Mr. Bicks said, that seeds
17 went from West Lafayette to Chile, guess what? That went
18 outside of their organization. Is it really true, as Mr.
19 Bicks said, that seeds were in your Belgium facility and went
20 to a greenhouse outside, when the contract says you can't do
21 that? He's going to say that did happen; and, if he doesn't,
22 I'll show the testimony of Mr. Boin where he said they
23 breached the contract.

24 THE COURT: Okay. But the --

25 MR. BICKS: So that's where we are on sham, Your

1 Honor. It's determined at the time the complaint was filed.
2 And it's not are we going to win; it's was there, you know,
3 an objective basis --

4 THE COURT: What --

5 MR. BICKS: -- and probable cause. And then they'd
6 have to show that we had a belief that we knew really didn't
7 have a case --

8 THE COURT: Yeah, I get it.

9 MR. BICKS: -- and we did it for ulterior purposes.
10 How is that even possible based on the allegations that are
11 made?

12 THE COURT: Why don't you address some of the other
13 ingredients; for example, the unclean hands or the -- because
14 this count kind of touched everything, right?

15 MR. BICKS: Right, right.

16 THE COURT: It touched --

17 MR. BICKS: Right.

18 THE COURT: -- the unclean hands part, the
19 competitive misconduct, the alleged promise to make the seeds
20 available, but then suing Inari anyway, and also the
21 extension of the patent terms, sort of mixed all those things
22 together.

23 MR. BICKS: Right, right, right.

24 So the unclean hands, Your Honor, requires fraud,
25 deceit, unconscionability, or bad faith directly related to

1 the matter in issue that injures them and affects the balance
2 of equity. All right? It's a pretty hard standard. We'd
3 debate whether or not it has to be governed by 9(b); we do
4 believe it does because their claim, essentially, is we
5 engaged in misrepresentation, right? That's their real
6 theory. Their -- that has to satisfy 9(b), that's a tough
7 standard.

8 And so what are they saying makes this unclean
9 hands? It's the same argument about well, we represented
10 that our seeds would be available, and we've had that
11 discussion with Your Honor. That's not unclean hands.

12 THE COURT: Well, the unclean hands part also has
13 the piece where Corteva was allegedly doing the same thing
14 that they're --

15 MR. BICKS: Right.

16 THE COURT: -- accusing Inari of doing.

17 MR. BICKS: That's exactly right.

18 And let's be very clear about that because Your
19 Honor knows about that because we had a discovery dispute
20 about that. Their allegation is that Corteva does
21 surveillance activity, and we certainly do. We do not like
22 people stealing our property. And it is absolutely true that
23 we order seeds from ATCC. That was never in dispute in the
24 case. But suddenly, in discovery, they learned what we've
25 all known was undisputed.

1 And it's absolutely true that Corteva looks at
2 seeds to determine if other people are stealing our property,
3 unquestionable. We provided an affidavit to Your Honor from
4 the fellow of the germ surveillance unit, who said exactly
5 what we do. What -- now let's be clear. Nobody sued us for
6 our surveillance activity, nobody. Nobody said wait a
7 minute, what are you doing, you're violating our patent,
8 you're violating a contract because you're engaged in
9 commercial activity. Nobody sued us about that.

10 THE COURT: That's the distinction, the commercial
11 activity?

12 MR. BICKS: That's the --

13 THE COURT: Yeah.

14 MR. BICKS: -- distinction.

15 And let's be very clear. There is a very big
16 difference from people in this industry doing surveillance --
17 and it happens all the time in any IP context, where people
18 get products and then look to make sure people aren't
19 stealing their property. That's very different than
20 representing to ATCC we're only doing this for research, then
21 creating a structure where, had we even received notice of
22 what happened, which we didn't, we never would have known it
23 was Inari because they had a front person, an agent, on the
24 paperwork, right?

25 Then they shipped the seeds, and they have

1 documents saying, if we do any of this in the United States,
2 we're going to be violating the law, we got to get it over to
3 Belgium.

4 Then they get it over to Belgium, and they're
5 engaged in editing activities, all with the express plan --
6 and this is undisputed -- developing seeds with our client's
7 technology as the -- their words -- "chassis" for their
8 product, selling it back into the United States. And it
9 won't surprise you, Your Honor. Who do you think, in their
10 projections to investors, do they include as one of their
11 customers? Us. They're going to take our stuff, ship it
12 overseas, commercialize it, bring it back, and apparently
13 come to us and say do you want to buy what we stole from you.

14 That's not what our germ surveillance unit does.
15 Full stop. So the notion that protecting your IP through
16 surveillance has anything to do with what is alleged in this
17 case and what is pretty much undisputed right now -- I say
18 "pretty much" because some is undisputed -- is disputed.
19 They say that no, no, no, we fall into the research
20 exemption. And I said bring that one on, we're going to see
21 about that, if that's really true, based on what we know.
22 But the conduct is completely different.

23 And so to suggest that that's unclean hands, that
24 doctrine is such a stretch. If anything, that would be an
25 argument that an expert would say oh, I guess the custom and

1 usage in the industry is that people do stuff like this. But
2 that's not unclean hands. That would be, in theory -- and
3 I'm not even saying that's a viable argument. Maybe someone
4 could say oh, custom and usage, people do this.

5 But the purpose -- the point is -- and Your Honor
6 has seen this, with the affidavit we presented, because they
7 wanted to get into all this discovery on this, and Your Honor
8 ruled on it. But the bottom line is the activity is
9 completely different and that's just not unclean hands.

10 THE COURT: Okay. Let me -- let's -- let me hear
11 from Inari on this. I'll come back to you on it. Okay?

12 So what I want to focus on are -- let's focus on
13 Counts 9 and 10, for starts, and see what that does. And I
14 guess my question, to get you going is just explain to me
15 what these counts are.

16 MR. GANDESHA: Certainly, Your Honor, I'm very
17 happy to. And I think we have a slide deck that I -- that
18 has a few slides that go exactly to some of the questions
19 that you asked. I'm happy to hand up a copy --

20 THE COURT: Sure.

21 MR. GANDESHA: -- and we can put them on the
22 screen.

23 THE COURT: Whatever you'd like. Thanks.

24 (Participants confer)

25 MR. GANDESHA: So, Your Honor, I want to -- well,

1 actually, let's stay here and then I'll go back.

2 So, Your Honor, I'd like to answer that question
3 first --

4 THE COURT: Okay. So you're calling these counts
5 sham litigation. That was not obvious to me --

6 MR. GANDESHA: So --

7 THE COURT: -- reading the counterclaims.

8 MR. GANDESHA: Yeah. So I wouldn't read too much
9 into the slide title there.

10 THE COURT: Well --

11 MR. GANDESHA: That's really an indicator --

12 THE COURT: Okay.

13 MR. GANDESHA: -- of what we expected Corteva to
14 bring up here.

15 I think the answer to your question is -- first of
16 all, you asked what's the relief that's being sought in
17 Counts 9 and 10. The answer to that is pretty clear:
18 Unenforceability, Count 9, unenforceability of the asserted
19 utility patents, those five patents; Count 10,
20 unenforceability of the asserted 248 PVP certificates. Okay?

21 Now the question is: What are the grounds for
22 that? And I think the answer is the three things that you
23 want to hear from the parties about: Sham litigation,
24 unclean hands, and patent misuse.

25 And I will say the patent misuse theory that

1 underlies Counts 9 and 10 is not the theory about extending
2 the term of expired patents. Okay? That's Count 13. And I
3 do hope --

4 THE COURT: Okay.

5 MR. GANDESHA: -- we get to that.

6 THE COURT: So that particular flavor of patent
7 misuse is just for Count 13.

8 MR. GANDESHA: Yes.

9 THE COURT: Got it.

10 MR. GANDESHA: And there's a different flavor of
11 misuse --

12 THE COURT: Okay.

13 MR. GANDESHA: -- that underlies things.

14 Now I think, to understand, really, what is alleged
15 in support and why we believe the law compels a conclusion
16 here that, at this point in the case, we've pled enough to
17 survive 12(b)(6), I think we have to go back and look at some
18 of the factual allegations.

19 THE COURT: And let me -- to just put a finer point
20 on my question.

21 MR. GANDESHA: Yeah.

22 THE COURT: I decide 12(b)(6) motions constantly,
23 multiple a week, and probably -- I don't know, it feels like
24 it, but maybe not -- but the standard battle plan for a
25 12(b)(6) is you look at it, you say okay, what is the cause

1 of action and what are the elements of proof, let's look at
2 the pleading and see if the elements of proof are in the
3 pleading, check, check, check, done, right?

4 I'm having trouble doing that with the
5 counterclaims, so I need you to help me. What am I -- what
6 boxes do I need to look for and check?

7 MR. GANDESHA: Yes, absolutely. And that's what I
8 want to do, Your Honor.

9 THE COURT: Okay.

10 MR. GANDESHA: And -- but to do that, I want to set
11 the stage a little bit.

12 Jason, if we could go back to Slide 2.

13 I do want to address Mr. Bicks' arguments here.

14 Sorry. Slide 1, the first slide. Yeah.

15 About what it is that Inari is contending at this
16 point of the case. And he's made some statements about how a
17 sham litigation, if it's going to be at all, has to be a sham
18 at the time the complaint is filed. Okay? We heard him say
19 that three or four times. There was nothing cited in
20 Corteva's briefing to establish that point. And our position
21 is, A, that's not true as a matter of law; and, secondly,
22 that's not what we're contending here. Okay?

23 Now, as Your Honor knows, when we moved to dismiss
24 Corteva's claims, we made legal arguments, right?
25 Essentially, what our arguments were, was that there are

1 implications that flow from making a deposit of biological
2 material in order to satisfy the written description and
3 enable the requirements of Section 112. Our position still
4 is, despite Your Honor's ruling, that, as a matter of law, we
5 believe Corteva's claims are untenable.

6 That's not what our counterclaims are based on.
7 Our counterclaims are based, instead ...

8 (Participants confer)

9 MR. GANDESHA: On substantial discovery that was
10 taken before Corteva filed the second amended complaint.

11 Now we've heard Mr. Bicks talk about some of that
12 discovery. And by the way, you won't be surprised here that
13 we disagree with every characterization that Corteva has
14 provided as to what is undisputed or even what Pierre-Etienne
15 Boin testified to, right? He -- we heard him say yes, he
16 admitted that we breached. I don't think that's what the
17 testimony is. Now Mr. Bicks may stand up and, you know,
18 proffer it. Who knows?

19 But what our counterclaims are based on here is the
20 discovery that was taken between the time we argued the
21 motion to dismiss, after which Your Honor said commence
22 discovery, March 27th, 2024, and the filing of Corteva's
23 second amended complaint on September 30th, 2024. A lot of
24 discovery took place. ATCC produced their entire document
25 production.

1 THE COURT: Can I assume that whatever is in all
2 this discovery, whatever is in that that matters to you in
3 defeating this motion is in the papers that I have?

4 MR. GANDESHA: Yes, Your Honor.

5 THE COURT: Okay.

6 MR. GANDESHA: Absolutely. And in the
7 counterclaims.

8 THE COURT: Okay.

9 MR. GANDESHA: And they're also in the slides.

10 THE COURT: Okay.

11 MR. GANDESHA: Now that's what I'd like to do, is
12 to walk you through some of what this discovery shows because
13 it's highly material to the plausibility of our Counts 9 and
14 10.

15 So, first of all, Your Honor asked at the end of
16 the motion to dismiss hearing do I have a copy of Corteva's
17 agreements with ATCC. We had been talking a lot at that
18 hearing about ATCC's agreements with Inari, the MTA.

19 THE COURT: Yeah.

20 MR. GANDESHA: Your Honor asked a great question,
21 well, what about Corteva's agreements with ATCC. We have
22 those now, Your Honor, and here's what they say. Okay?

23 You can say, under the provision that's blown up
24 here, Section 8, "Availability," ATCC says that it may
25 furnish, as permitted by or required under Budapest Treaty or

1 applicable law.

2 "Notwithstanding anything to the contrary, ATCC
3 may, without restriction, furnish samples of the
4 deposit at any time after the issuance of any
5 relevant parent."

6 And that was signed by Claire Moxon, a Senior
7 Patent Agent at Pioneer, Corteva's predecessor. And we have
8 agreements for every single patent deposit that's at issue in
9 this case, and they all say exactly the same thing.

10 Okay. We also know that now, through discovery
11 ATCC has produced, that ATCC's practice is that, when it
12 learns upon -- of the issuance of a patent for which a
13 depositor has made a biological deposit, it contacts that
14 patent owner and says please confirm, A, that the patent
15 issued, and B -- and it's right there and highlighted,
16 slightly small language, but it says:

17 "Please confirm to ATCC in writing within 15
18 business days of this letter that the relevant
19 patent issuance listed above is accurate and that
20 you understand that the patent deposit will be
21 distributed to the public pursuant to Budapest
22 Treaty and U.S. patent law."

23 Okay. That's the same term that's in the deposit
24 agreement that we just looked at.

25 Here's the response that Pioneer provides, again,

1 for every one of the patent deposits at issue here. They
2 confirm patent issuance, and then they go on to say:

3 "We hereby confirm authorization for the ATCC to
4 furnish a sample of each listed ATCC deposit in
5 connection with the corresponding issued U.S.
6 patent. We also wish to receive notification of
7 any sample provided to any interested party,
8 pursuant to Rule 11.4(g) of the Budapest Treaty."

9 At no point did Pioneer ever say you can only
10 furnish to U.S. entities, you can only furnish provided there
11 are commercial use restrictions attached, you may only
12 furnish if the receiving party agrees not to transfer it
13 somewhere else. Okay? We have all these letters, and it's
14 not reflected. Oka?

15 Now you're familiar with the ATCC MTA terms because
16 we made some arguments about those on the motion to dismiss,
17 and Corteva has allegations in their complaint about them.
18 And one of the issues the parties are disputed about is the
19 meaning of this highlighted term, right? This highlighted
20 term here, under the compliance with laws provision of the
21 MTAs that are at issue here says:

22 "Distribution by ATCC of Budapest Treaty patent
23 deposits are made pursuant to and in compliance
24 with all applicable laws and regulations, including
25 the Budapest Treaty and related 37 C.F.R.

1 provisions."

2 That's those patent law regulations that we saw a
3 reference in the earlier documents.

4 It goes on to say:

5 "If there's any conflict between the terms of this
6 MTA and any applicable law or regulation with
7 respect to ATCC material that is supplied hereunder
8 from the stock of a Budapest Treaty deposit, then
9 the terms of the applicable law or regulation shall
10 govern."

11 Right? So our position, as you know, as a matter
12 of law in this case, has been well, this is a -- this
13 supersedes whatever the other terms are.

14 Our counterclaims, however, are based on facts.
15 Okay? We now have discovery from ATCC that shows what ATCC
16 understands that provision to mean.

17 Here is a piece of correspondence between an
18 associate licensing MTA specialist at ATCC, on November 4th,
19 2016, to a member of the public; he works for -- he's a
20 farmer, he works for a commercial farm. And he reached out,
21 in order to ask for some had (phonetic) deposits. And he
22 asked about whether or not the commercial use provisions of
23 the MTA would govern it. And here is the ATCC's response.
24 And again, this is from the M -- the licensing specialist,
25 the MTA specialist. She says:

1 "With respect to patent deposit materials, the
2 transfer and commercial use restrictions in the
3 ATCC MTA are superseded by Budapest Treaty and U.S.
4 PTR regulations. Patent deposits are not subject
5 to the transfer provisions" --

6 Okay?

7 "-- nor the commercial use license provisions."

8 These are the facts that have emerged in discovery
9 since we were before you on that motion to dismiss argument.

10 THE COURT: Yeah.

11 MR. GANDESHA: That --

12 THE COURT: So, regard -- in other words,
13 regardless of my take on the law, which -- let's just set
14 that aside, you'll have to --

15 MR. GANDESHA: Yes.

16 THE COURT: -- sort that out later. But regardless
17 of that, you may yet prevail, that's -- okay. I'll give you
18 that, but --

19 MR. GANDESHA: Now -- but more significantly, Your
20 Honor, this is discovery that Corteva had when it filed its
21 second amended complaint. There's no acknowledgment of any
22 of this. There is a continued prosecution of the same claims
23 that were at issue when we moved to dismiss.

24 Our position is that, in the face of discovery that
25 has been provided, the filing in the second amended complaint

1 of claims that assert breach of the MTA and other claims that
2 I'll address in a few minutes, that is baseless.

3 Now Mr. Bicks said well, at the time the suit is
4 filed, we prevailed on a motion to dismiss, so what are we
5 talking about here. That's irrelevant to what our
6 counterclaims allege. Our counterclaims are based on facts
7 produced in discovery, including facts produced by Corteva
8 itself.

9 Okay. Now we talked about -- we've heard a little
10 bit about exporting. Your Honor will recall that there was
11 an issue of phytosanitary testing that came up at the time of
12 the motion to dismiss. And during -- in the motion to
13 dismiss, really, Your Honor, I think, noted in a footnote
14 that it's unclear at this point what's involved in
15 phytosanitary testing. There's sort of a fact question here,
16 right?

17 Well, we know the facts now, and this is what we
18 allege in the counterclaims, right? The issue we debated
19 during the motion to dismiss was well, is phytosanitary
20 testing a beneficial use of the claimed invention. Okay? We
21 now know that what happened during phytosanitary testing at
22 issue here were a couple of things:

23 First of all, the testing was done by Iowa State
24 University. Okay? Not by Inari and not by Infinite
25 Eversole. And it was done by Iowa State University under

1 instruction from the USDA, that's how it works. Okay?

2 More significantly, what Iowa State University did
3 to the seeds, in order to test for pathogens on the outside
4 of the side, which is what phytosanitary testing is, is that
5 it had to destroy the seeds. They ground them and then used
6 various chemicals to test for the existence of the pathogen.

7 Those ground seeds that were destroyed by ISU were
8 never provided to Inari, they were never exported, they never
9 reached Inari, so there couldn't have been any beneficial use
10 based on those facts. Okay? The seeds that were exported,
11 obviously, were not tested. So there can't be an
12 infringement in those seeds based on the phytosanitary
13 testing theory. Okay?

14 Now I just -- I want to pause on this issue for a
15 moment because you might ask well, why am I spending so much
16 time talking about phytosanitary testing when Mr. Bicks is
17 talking about commercialization, right? That's what he's
18 been saying. He -- we found all this discovery that shows
19 Inari --

20 THE COURT: I remember the infringement theories.

21 But I guess the question I have for you is -- so I
22 think what I heard from Mr. Bicks was Inari may yet prevail
23 in this case for any of the reasons maybe you're going
24 through -- I don't know, you know, some of these things are
25 probably jury questions, maybe some are questions for me, I

1 don't know. Inari may yet prevail. But how can it be said
2 at the pleadings level that the case is baseless, and
3 especially with regard to the 93A claim or the conversion
4 claim, which are -- which, you know, maybe those alone are
5 enough to say the case isn't baseless?

6 MR. GANDESHA: Okay. Well, Your Honor, I -- you
7 know, we plead that the claims are baseless and we pled facts
8 to show that.

9 And Jason, if you can just jump ahead here to Slide
10 24. Thanks.

11 Now we've pled that these claims were baseless
12 based on discovery that was provided, right? And we just
13 walked through some of them. There's other points in the
14 slide, but I think Your Honor sort of gets the sense of where
15 we're going.

16 In the Third Circuit, courts have held, including
17 the Third Circuit Court of Appeals; for example, in the In Re
18 Lipitor Antitrust Litigation, that these are inherently
19 factual types of claims, right? Whether or not something is
20 objectively baseless qualifies for immunity -- or you know,
21 exception to Noerr-Pennington, right?

22 Now Corteva cites cases saying well, you know,
23 courts in the Third Circuit grant motions. Those are the
24 extreme situations where a counterclaim plaintiff said sham,
25 but didn't even identify the litigation at issue, right?

1 Those are exceptions -- and we address them in our opposition
2 brief -- that prove the rule here that 12(b)(6) is not the
3 time to essentially make a determination as a matter of law
4 as to whether or not something is objectively baseless and, I
5 would say, in particular, where the objective
6 unreasonableness of the claims are based on the facts that
7 have emerged in discovery, not on legal arguments, right?

8 And again, the notion that the relevant time period
9 is only when the complaint is filed, that is not the law.
10 I'm not aware of any case that limits the inquiry that -- to
11 that point.

12 But it's also not how -- Your Honor talked about a
13 fee award, you know, when is this determination made. Fee
14 awards are routinely granted -- right? Findings of
15 exceptional cases are routinely granted based, not on what
16 was known and happened at the beginning of the case, but
17 after discovery has emerged. Discovery shows there's no
18 infringement. After a claim construction ruling, there's no
19 possible way in which a plaintiff --

20 THE COURT: Yeah, but --

21 MR. GANDESHA: -- can prevail.

22 THE COURT: -- like in this case, with the remedy
23 of unenforceability, like if Corteva wins, well, then it's
24 not much of a sham litigation, I guess. But if -- and so --
25 does this unenforceability remedy only come -- become

1 relevant if Corteva loses, in which case what do you need the
2 unenforceability remedy for? I'm a little confused by that.

3 MR. GANDESHA: Well, Your Honor, I think that --
4 well, I think yes. I mean, I guess, you know, that gets us
5 into issue preclusion, potentially. But to the extent
6 Corteva is going to refashion a different kind of theory that
7 would support another assertion of infringement and so forth,
8 I think that could come into play here.

9 Now I want to jump a head a little bit to unclean
10 hands. I think Your Honor understands our position --

11 THE COURT: Yeah.

12 MR. GANDESHA: -- on sham litigation. As I said,
13 unclean hands here are a separate basis for unenforceability
14 in Counts 9 --

15 THE COURT: Okay. So that's how count -- that --
16 for example, that's how Counts 9 and 10 work, is there are
17 multiple ways to achieve the goal remedy of unenforceability.

18 MR. GANDESHA: That's right, that's right.

19 THE COURT: Independent ways.

20 MR. GANDESHA: Yes.

21 THE COURT: What -- it's not like a soup, it's more
22 like a menu item.

23 MR. GANDESHA: I'd say -- I mean, I think it is a
24 broth --

25 THE COURT: Okay.

1 MR. GANDESHA: -- because I think you can consider
2 them all together. But I think they are each, independently
3 -- so, for example, if Your Honor found okay, I'm not with
4 Inari on X, but there's still Y and Z, right? That get you
5 there. So I don't think -- we haven't pled it in a way that
6 the whole count stands -- rises or falls with a single
7 element that we are pointing to.

8 THE COURT: Okay.

9 MR. GANDESHA: Now, on unclean hands, we've kind of
10 set forth here in this slide, really, the key legal
11 principles that we think support why Corteva's patents and
12 PVP certificates should be deemed unenforceable here as
13 against Inari, right?

14 Under unclean hands, a court may refuse to grant
15 relief to one who is a wrongdoer with respect to the subject
16 matter of the suit. Okay? The issue here is: Is there a
17 relationship between what we're contending is the inequitable
18 conduct by Corteva and the matters before the Court for
19 resolution?

20 Now it's important here to think about what
21 Corteva's actual claims of infringement are, right? We
22 heard, again, Mr. Bicks talk about commercialization. That's
23 what makes Inari's conduct different than Corteva, when it
24 comes to buying seeds of competitors and doing things with
25 them. Mr. Bicks says we don't commercialize it. But again,

1 the infringement theories in this case are not based on
2 commercialization. They're based on phytosanitary testing.

3 They're also based on 271(f)(2), right? Which is I
4 export the seed abroad, and it's foreseeable that I'm going
5 to combine then with water, soils, air, physical support, and
6 grow the plant.

7 THE COURT: I see. So you can probably say the
8 right way to view your unclean hands allegations is not
9 through the lens of, let's say Corteva's second amended
10 complaint, rather, through the lens of -- as I think I have
11 to, through your counterclaims, which include the discovery
12 that you talked about. In other words, there's facts that
13 you found in discovery that, if I view then in the way I --
14 that you have pled them, that would tend to support unclean
15 hands in a way that maybe they -- it wouldn't have been as
16 supported right when the case was originally pled.

17 MR. GANDESHA: Absolutely, absolutely.

18 So, yeah, we've heard Mr. Bicks say well, Your
19 Honor, why haven't they -- they haven't told us about some of
20 this stuff, you know, not in a case management conference and
21 so forth. It's because it all emerged in discovery.

22 Now a critical component here of our unclean hands
23 allegations are statements that Corteva itself made to the
24 PTAB in a PGR, right? And we detail this in our
25 counterclaims.

1 Jason, can you take us to that slide?

2 Where Inari had challenged a patent that's not at
3 issue in this case, a Corteva patent, based on obviousness,
4 other grounds for invalidity. And what Corteva said was
5 Inari's expert didn't go and get seed from a depository, grow
6 the seed, and then compare them phenotypically or do a
7 genetic comparison between the prior art and the claimed
8 invention. Okay?

9 Now these are all -- these are all statements that
10 undercut their theory of infringement here. Twenty --
11 271(f)(2), growing seeds abroad, sequencing the DNA. Well,
12 if -- according to Corteva in the PGR, you can do it in the
13 U.S., it can't be infringement abroad.

14 And Your Honor, so our position is that is not
15 infringement. This is perfectly consistent with the patent
16 laws. But if they are asserting a theory of infringement
17 against us that they engage in outside of the lawsuit, that's
18 unclean hands because they're doing it too, right? We don't
19 think it's an issue, but if it is -- right? They are doing
20 it too.

21 THE COURT: Okay.

22 MR. GANDESHA: Now, Your Honor, I want to address
23 the patent misuse theory.

24 And I'm going to have to find my way back in the
25 slides. Go back a little bit, Jason. Yeah. No, Jason, go

1 back to Count 10, Counts 9 and 10.

2 (Participants confer)

3 MR. GANDESHA: Sorry, Your Honor.

4 (Participants confer)

5 MR. GANDESHA: Okay. So the misuse theory in
6 Counts 9 and 10 is not about the literal extension of the
7 temporal scope of a patent. That's Count 13, as I said. But
8 it goes to the first principles that underlie the patent
9 misuse doctrine, right?

10 And if you look at Kimble, you look at Bonito
11 Boats, you look at Brulotte -- right? Cases that have
12 informed the doctrine over the years, it all goes back to the
13 "delicate balance," as the Supreme Court has said, between,
14 on the one hand, fostering innovation by protecting and
15 rewarding inventors, and on the other hand, ensuring public
16 access to discoveries, right?

17 In Bonito Boats, the Court talked about the public
18 paying a congressionally mandated price. Okay? A grant of
19 limited exclusivity for the disclosure contained in a patent.
20 Patent misuse is conduct that extends a patent right in a way
21 that interferes with that right the public has to get what it
22 paid for, right? Which is disclosure.

23 So the patent misuse theory in Counts 9 and 10 is
24 that, by asserting 271(f)(2) to restrict of the ability for
25 members of the public to export patent deposits by asserting

1 PVP infringement claims to, again, restrict foreign members
2 of the public to having access to the congressionally
3 mandated price that was paid, what is happening is Corteva is
4 misusing its intellectual property to upset that balance.

5 And Brulotte, I think, is extremely instructive
6 here. Brulotte said patents are in the federal domain, and
7 whatever the legal device employed a projection of the patent
8 monopoly after the patent expires is not unenforceable.
9 Okay? Patent misuse is not literally extending a patent
10 term. It's using other instruments that extend the
11 exclusivity or that interfere with the right of the public to
12 have access to disclosure after that limited term is over.

13 In Brulotte, we know it was a contract that was
14 deemed unenforceable. I believe, in Bonito Boats, there was
15 an issue about a state law restriction that came into play.
16 The Supreme Court is getting at the idea that patent owners
17 can abuse, can misuse their rights in a way that interferes
18 with the public access, using instruments other than the
19 patent itself. Okay? So that's really what we're talking
20 about in Counts 9 and 10.

21 THE COURT: And is there a suggestion the
22 instrument, other than the patent itself, are these MTAs?

23 MR. GANDESHA: MTAs, right, and I'll say why in a
24 moment, but also PVP certificates, right? These are --

25 THE COURT: Now you've also taken -- is this

1 alternative, I guess? You're taken the position that the
2 MTAs don't restrict in the way that Corteva says they do,
3 anyway.

4 MR. GANDESHA: Correct.

5 THE COURT: Okay.

6 MR. GANDESHA: So, in our view --

7 THE COURT: Okay.

8 MR. GANDESHA: -- there shouldn't be a restriction.

9 Obviously, having to defend a litigation, having to
10 pay millions of dollars to attorneys and so forth, in order
11 to get that result, I would argue that's a restriction.
12 That's not contemplated by Section 112.

13 Now Your Honor picked up on a point Mr. Bicks said,
14 which is well, what about the 93A claim, what about
15 conversion, right? Our position is that the facts, as we've
16 talked about here -- and again, there are other facts in our
17 counterclaims and our slides. But the facts we've addressed
18 here show why the misappropriation theory, the deceit theory
19 under the 93A claim, and the claim to be entitled to a
20 proprietary interest in seeds deposited with the ATCC that
21 are purchased with Corteva's authorization to ATCC, purchased
22 for value -- right? Because Inari pays money to buy these
23 seeds. That there is no possessory interest after that. And
24 again, facts have supported that.

25 So I think it's a little disingenuous to say well,

1 we don't say anything about those two claims. Obviously, the
2 very factual allegations in support of our counterclaims
3 clearly underlies why we believe the 93A and conversion
4 claims are also objectively unreasonable.

5 THE COURT: Uh-huh.

6 MR. GANDESHA: So --

7 THE COURT: Okay. Let me go back to Corteva now.
8 And just so everyone can plan and think here, I don't -- I
9 want to wrap this up in about 20 minutes and try to be
10 reasonably equitable about the distribution of time. So, Mr.
11 Bicks, why don't you -- if there's any little bit of cleanup
12 you want do there --

13 MR. BICKS: Right.

14 THE COURT: -- you do that. And then -- you know,
15 you don't have to try to hit everything. Obviously, I have
16 all this great briefing, so --

17 MR. BICKS: Yeah.

18 THE COURT: But you can just touch on --

19 MR. BICKS: Yeah.

20 THE COURT: -- maybe the things you think are --
21 you really want to bring to my attention.

22 MR. BICKS: Yeah, I really do, Your Honor.

23 THE COURT: Yeah.

24 MR. BICKS: I apologize there's a debate about what
25 case law says, and I said to you that sham is determined at

1 the time the litigation is filed. It's in the United States
2 Supreme Court's PRE decision. If you would like to hear one
3 of the cases we cited --

4 THE COURT: And there's no like exception for a
5 second amended complaint?

6 MR. BICKS: No.

7 THE COURT: Okay.

8 MR. BICKS: "An 'essential; inquiry in determining
9 whether a suit was sham is not whether the suit
10 ultimately succeeds, but rather, whether it was
11 objectively baseless at the time it was filed."

12 This is the Third Circuit quoting the United States
13 Supreme Court. So that's why I said it was determined at the
14 time was filed because that's what the United States Supreme
15 Court says.

16 THE COURT: Well, wouldn't it be -- wouldn't it be
17 logical -- I mean, what if a plaintiff completely transformed
18 the case through an amended complaint that made it baseless?
19 Am I -- that could happen.

20 MR. BICKS: Well, let's talk a little bit about
21 that, whether -- what the discovery -- right? And exactly
22 what they're speaking about. This is quite remarkable.

23 Remember, we're back to the question of sham
24 litigation. You'll recall the interlocutory appeal, right?
25 Where it was said to Your Honor there is a good faith dispute

1 between the parties on two of the patent claims, a good faith
2 dispute that, therefore, required that you certify the
3 interlocutory appeal. Reasonable minds can differ, that's
4 what they said to you.

5 THE COURT: I think what -- but what they said is
6 there's kind of -- there's two layers:

7 There's a high-level legal layer that they tried to
8 win on the motion to dismiss.

9 And then there's -- even accepting for them,
10 counter-legally to the rule -- my ruling on the motion to
11 dismiss, that the facts, as they have evolved, and then as
12 pled in the second amended complaint, that's where I need to
13 be focusing.

14 MR. BICKS: Yeah, that's exactly right.

15 And Your Honor will -- may also remember that, in
16 their brief on the interlocutory appeal, they actually
17 referred to the discovery. And they went through and they
18 said discovery has shown in the case that their argument that
19 we did all these things in Belgium isn't right, we were just
20 engaged in research. And they discussed the extensive
21 discovery in their brief on reply on the interlocutory
22 appeal.

23 So the argument to you, it's just not accurate,
24 Your Honor, to say that oh, we didn't know anything about
25 discovery when we filed the interlocutory appeal motion, that

1 motion was filed two months before the pleading was filed.
2 The discovery was out there and they actually refer to it in
3 their reply brief. This is cited in our reply brief. It's
4 just not accurate what they're saying, Your Honor. They did
5 refer to discovery, they had the discovery.

6 And let's talk about the discovery for a minute. I
7 heard counsel say -- and it will be in the record -- he said
8 twice there's a dispute between the parties about the MTA.
9 Okay. There's a dispute. So that means it's not a sham,
10 right? That's what they've said.

11 Let me come -- and Your Honor may remember this
12 because what they referred to, they showed you a document
13 that was part of what was -- when we made our deposits, we,
14 essentially, agreed to availability without restriction
15 language. He showed you that.

16 Your Honor may not remember, but we had -- they
17 tried to supplement the record on the motion to dismiss with
18 that exact document that they showed you. And when they did
19 that, we then had to respond in the briefing and say Judge,
20 they haven't shown you the whole document. And we showed you
21 the whole document that was part of our submission. In that
22 document, it says the depositor keeps all of their
23 intellectual property rights and nothing is to be read with
24 this deposit to suggest people give up their rights. Okay?
25 We've already submitted that.

1 They showed you that same series of documents to
2 try to have you consider that when the motion to dismiss was
3 pending. So we've addressed that to you, and we've pointed
4 out what was just said to you was a misrepresentation because
5 they didn't show you the entirety of the document. If it's
6 helpful to the Court, I didn't think I would need to do this,
7 but I'm happy to go back and show you the D.I. submission we
8 made where we presented you with the entire document.

9 The testing argument. They're the ones who went
10 and had the phytosanitary testing done. Your Honor may
11 recall that, when we had this argument, you turned around to
12 them and kind of said I don't understand what you're saying,
13 is it okay for you to eat the seeds, I mean, what are you
14 saying can be done with them. Well, we're not really sure,
15 et cetera.

16 They've known whatever was done with the
17 phytosanitary certificate and the testing. The fact that our
18 seeds were destroyed somehow helps their case, a fact they've
19 known all along? They destroyed our client's stuff and that
20 isn't potentially an infringing use under the definition of
21 "use," as the Federal Circuit and as you've indicated is
22 broad, a fact that they are the ones who know it because
23 they're the ones, through their agent, who commissioned the
24 testing.

25 So to now suggest that oh, my gosh, we learned all

1 this stuff in discovery is, frankly, fabrication. They've
2 known that all along. And it doesn't bear on the question of
3 whether or not it's a sham to say that they did an infringing
4 use when they took our client's seeds and then, apparently,
5 had an agent destroy them. That's potentially an infringing
6 use, and we're going to maintain that it is.

7 So that really addresses what are these so-called
8 new facts? There aren't any new facts. They have one email
9 from somebody at the ATCC who's dealing with another
10 arrangement, and it happened to involve a situation where the
11 patent was expired. We briefed that issue for Your Honor, we
12 showed you that information already, and I realize it was a
13 while ago. But there is nothing new through discovery that
14 hasn't actually be before the Court. That was another
15 document. So they've got an email, the fact now that
16 something was destroyed, and they think that helps their
17 case. I think it hurts it. And this one deposit form where
18 they haven't given you the full context.

19 So I've -- hopefully, I've corrected some of the
20 things that they've said. And I'm happy, really, to make
21 sure the Court has the complete picture, but it's --

22 THE COURT: I think I've got that.

23 MR. BICKS: -- it's not correct to say what they've
24 said.

25 So what I would ask now, Mr. Frischling will

1 address the misuse issue quickly.

2 THE COURT: Yeah.

3 MR. BICKS: And then we can deal, I guess, with the
4 three other claims.

5 MR. FRISCHLING: I share the Court's concern about
6 trying to unpack what exactly is the misuse that's alleged
7 here and, for that matter, the --

8 THE COURT: You're doing --

9 MR. FRISCHLING: -- unclean hands --

10 THE COURT: -- Count 13?

11 MR. FRISCHLING: I am doing Count 13, and I'm also
12 doing the misuse piece of Counts 9 and 10, I -- because I
13 think they're two sides of the same coin.

14 THE COURT: Okay.

15 MR. FRISCHLING: So, with respect to Counts 9 and
16 10, the alleged misuse is, presumably -- they cite Brulotte,
17 but that's a case that deals with expired patents. With
18 respect to Counts 9 and 10, they're not expired patents. So
19 the question is, simply: Was there infringement or not
20 infringement? Nobody has extended their term by enforcing,
21 for example, the 271(f)(2) against export that would
22 constitute infringement under that subsection of the statute.

23 THE COURT: Yeah, I think --

24 MR. FRISCHLING: They cite --

25 THE COURT: Yeah, so the misuse theory for 9 and

1 10, as it was just explained to me, is that there are other
2 instruments, such as -- there are others, I think -- but such
3 as the MTAs, that serve to unduly -- to prevent the public
4 from accessing what they're entitled to access and what
5 Corteva promised the public could access. I think that's the
6 gist of it.

7 MR. FRISCHLING: I think that's a generous
8 characterization, Your Honor. But I think the problem is
9 that it doesn't align with the case law.

10 And I'd focus the Court on the Princo en banc
11 decision by the Federal Circuit, which reiterates the point
12 that there's no such thing as misuse --

13 THE COURT: Yeah.

14 MR. FRISCHLING: -- in the --

15 THE COURT: I know --

16 MR. FRISCHLING: -- air --

17 THE COURT: -- Princo. I can't -- there is some
18 general language in Princo kind of like about what "misuse"
19 is, but there's just so -- there's no connection between
20 Princo and this case, so I just -- it's not helping me. I
21 don't know --

22 MR. FRISCHLING: Well, we --

23 THE COURT: Not necessarily that it's a bad thing
24 for you, it's just --

25 MR. FRISCHLING: No, I --

1 THE COURT: -- that I don't find Princo helpful.

2 MR. FRISCHLING: Well, I think Princo is helpful in
3 pointing out it's not a doctrine that is applied expansively,
4 and that it's really a handful of things: Negotiating
5 licenses for payment post-expiration, which extends the scope
6 of the patent -- or the term of the patent; or tying
7 arrangements, which essentially extend its scope.

8 There is no case that has held that enforcing --
9 making a 271(f) claim --

10 THE COURT: Yeah.

11 MR. FRISCHLING: -- irrespective of what contract
12 you might have that might also impose additional restrictions
13 during the term of the patent -- right? Because the problem
14 here is that making a deposit -- and this was, essentially,
15 the issue that sunk Inari, I believe, in the original motion
16 to dismiss -- making a deposit is not a license to infringe,
17 right? It's access after the patent expires for parties that
18 then want to take advantage of the claim, or access for
19 purposes that are permissible under the patent laws. It's
20 not a license, because we made the deposit, you can ignore
21 271(f), you can use it for commercial purposes, you can
22 export it, you can do a variety of things that are
23 infringing.

24 So I don't believe they have pled anything close to
25 the elements of misuse as recognized by any case they've

1 cited or that we've seen. The Brulotte case doesn't apply.
2 The Kimble case just reaffirms Brulotte. Bonito Boats is
3 completely different because Bonito Boats is actually about
4 whether state law can impose a, you know, post-patent
5 expiration, additional form of IP.

6 And to the extent that their argument is the PVP
7 certificates are doing that, that, of course, is Congress
8 acting. And Congress is entitled to convey multiple
9 different kinds of rights, and it's not patent misuse.

10 That really gets then to Count 13. Is it patent
11 misuse, after the patent expires, to enforce a PVP
12 certificate that's still in force? That argument flies,
13 effectively, in the face of the J.E.M. case and, frankly, of
14 the statutory structure. The reason that there's a
15 difference in term is, as Mr. Bicks noted, PVP certificates
16 still run from when they issue is their twenty-year term.
17 The patent term changed and runs from when they're filed.
18 So, even if you filed them on exactly the same day, it takes
19 the Department of Agriculture a couple of years to examine,
20 you're going to end up with somewhat different expiration
21 dates.

22 Nothing in the case law that we've -- that has been
23 cited by Inari, nothing that we're aware of would suggest
24 that enforcing a validly issued PVP certificate is somehow
25 patent misuse. Never mind, also, that the cases are very

1 clear that the misuse -- this is one place where I do think
2 Princo is useful -- of the patent in suit.

3 THE COURT: Right.

4 MR. FRISCHLING: The other case that I think is
5 extremely important is C.R. Bard, which we addressed in our
6 opening papers and they didn't respond to. Bard, first of
7 all, says that sham litigation or wrongful enforcement of a
8 patent is not, essentially, patent misuse; that, as long as
9 the patent wasn't acquired by fraud, you don't have a patent
10 misuse claim.

11 So, between Bard and Princo and then the District
12 Court and Circuit Court cases that we cited, I don't think
13 there's any room for a patent misuse claim here.

14 I don't think there's any use -- room for an
15 unclean hands claim because it's not the same conduct. Even
16 if one was -- even if we were, hypothetically, infringing the
17 patents of some third party by doing surveillance, which I
18 don't think is the case, but if that were the case, that's
19 not related to the matter at issue in this case. The unclean
20 hands doctrine is narrow and it focuses on the issues that
21 are in front of the case, whether or not we've engaged in
22 unclean hands or unclean behavior.

23 I know they -- like they cite the Gilead case. For
24 example, that was putting on a witness who perjured himself
25 in the trial in that case --

1 THE COURT: Yeah.

2 MR. FRISCHLING: -- a very different fact pattern.
3 None of these cases are supportive of this sort of amorphous
4 unclean hands claim that they offer here.

5 THE COURT: Okay. I want to make sure Inari has
6 some time to respond, so I'm going to -- let's go to them.

7 MR. FRISCHLING: Thank you.

8 MR. GANDESHA: Thank you, Your Honor. So --

9 THE COURT: And you can -- and you can respond to
10 what you just heard, if you like; or, if you'd like to -- you
11 know, being the non-movant, if there's something important
12 you need to tell me about some other part of the motion, feel
13 free. I'm -- you can use your remaining time the way you
14 like.

15 MR. GANDESHA: Okay. Thank you, Your Honor. And -
16 -

17 THE COURT: Which is about eight minutes.

18 MR. GANDESHA: Eight minutes and that's it.

19 THE COURT: Yeah, I got to go at quarter of.

20 MR. GANDESHA: Got it. Okay. Well, obviously,
21 Your Honor, if there are things you would like to hear from
22 me on that I'm -- that's the highest priority for me.

23 But let me just talk about --

24 THE COURT: Well, I mean, if you want to answer the
25 Brulotte question --

1 MR. GANDESHA: Yes.

2 THE COURT: -- I don't know. Like if you have a
3 utility patent and a design patent, it's -- that have
4 different terms, like what's the big deal?

5 MR. GANDESHA: Well, again, Your Honor, I think --

6 THE COURT: It's not patent misuse, right?

7 MR. GANDESHA: Right. But a utility patent and a
8 design patent protect and cover different aspects, perhaps of
9 the same thing.

10 THE COURT: Just like a -- just like a utility
11 patent and a --

12 MR. GANDESHA: No, see --

13 THE COURT: -- PVP patent.

14 MR. GANDESHA: -- that's, I think, the fallacy
15 that's been created, in part, by Corteva because, again, if
16 you look at -- this goes back to the issue of subject matter
17 jurisdiction. If you look at the claims of the utility
18 patents that claim those varieties and the PVP certificates,
19 there's literally no difference. It is literally --

20 THE COURT: Okay.

21 MR. GANDESHA: -- the same variety.

22 THE COURT: That's -- you need to win that, you
23 need to convince me of that --

24 MR. GANDESHA: Okay.

25 THE COURT: -- piece of it. Yeah, okay.

1 MR. GANDESHA: Yeah.

2 THE COURT: I get it.

3 MR. GANDESHA: Well, again, I really don't think
4 that will be hard. It's just a cursory review, I think, will
5 show that.

6 And we heard a couple --

7 THE COURT: I -- because of the -- because of the
8 J.E.M. case, I'm -- I am pretty entrenched in the view that
9 you've got two different IP regimes that need to be treated
10 differently.

11 MR. GANDESHA: I understand. But I really -- I
12 mean, our position is that the J.E.M. Court didn't have this
13 issue before them, right?

14 THE COURT: Okay.

15 MR. GANDESHA: And nothing in the J.E.M. decision
16 precludes the concept that there is something potentially
17 improper, right? About seeking to enforce a PVP certificate
18 after the utility patent on exactly the same plant has
19 expired, and even more significantly here because, you know,
20 again, we have additional facts in support of why we think
21 this is problematic.

22 Now we heard about the different way the term is
23 calculated, right? And that's a very important part of our
24 misuse theory, right?

25 THE COURT: This is not your best way to use the

1 time.

2 MR. GANDESHA: Okay.

3 THE COURT: So --

4 MR. GANDESHA: All right. Fine.

5 THE COURT: -- talk about something while you --
6 something else.

7 MR. GANDESHA: Okay. Well, Your Honor, I will --
8 let me go back to -- I mean, I -- you know, Your Honor heard
9 from Mr. Bicks about some of the factual issues. Obviously,
10 we have a -- we have a different view here. I feel like --
11 you know, I'm happy to answer any questions that you had
12 about that.

13 THE COURT: No. I think the argument on the -- on
14 Counts 9 and 10, on that -- on those, I think the argument
15 has gotten me as far as I can get. I can't quite get to the
16 finish line on those without doing -- hitting the books
17 again.

18 MR. GANDESHA: Okay.

19 THE COURT: So I think you've given me all that you
20 can on those.

21 MR. GANDESHA: Okay. Understood.

22 Well, on Count 13, I think, really, just -- I
23 think, you know, it's really a question of going back to
24 first principles, articulated in Brulotte, articulated in
25 Kimble and Bonito Boats, about what the patent misuse

1 doctrine is all about, right? I think that's really -- I
2 think Your Honor understand us there.

3 I think, you know, with respect to some of the
4 state law claims, which we haven't had a chance to talk too
5 much about here, you know, on the mass -- on the 93A issue,
6 really, the briefing focuses on the question of whether or
7 not the alleged misconduct occurred primarily and
8 substantially. I think you've seen the cases we cite, that,
9 at the 12(b)(6) stage, essentially create a framework for
10 courts to evaluate how to address that.

11 The cases that Corteva --

12 THE COURT: I don't know. We're all over the map
13 on that because -- it is that -- it is a 12(b)(6). But gosh,
14 I mean, we've been talking in this room a lot about all of
15 the stuff you know about each other's cases now.

16 MR. GANDESHA: Understood.

17 THE COURT: If you don't have the Massachusetts
18 goods now, I don't know. Are you going to get them?

19 MR. GANDESHA: Well, there's discovery to happen,
20 Your Honor.

21 But I think, more significantly, it's not really a
22 question of discovery, right?

23 THE COURT: Yeah.

24 MR. GANDESHA: We -- our allegation is not that
25 there's some nationwide conduct that has only an incidental

1 connection to Massachusetts, right? Our theory is this is --
2 there is a scheme, it's that broth that we talked about here,
3 it's a scheme that's targeted at Inari.

4 You know, you can see in our complaint -- our
5 counterclaims, we plead that Corteva clearly views Inari as a
6 competitive threat. They have an investment in a company
7 called Pairwise, you see that in our counterclaims, who's a
8 direct competitor, co-equity owned with Bayer; hence,
9 according to us, the outreach to Bayer with respect to
10 Corteva seeds -- or sorry -- Bayer seeds acquired from ATCC
11 by Inari. So our allegation is not just well, there happens
12 to be some connection to Massachusetts because Inari lives
13 there, that's that the whole scheme is targeted at Inari,
14 that's targeted at Massachusetts.

15 Now 12(b)(6), we're talking about have we pled
16 enough to establish that connection. We believe we have.
17 And we believe the case law that indicates that, at the
18 12(b)(6) stage, pleading injury in Massachusetts is
19 sufficient. Now we think we do more. Their cases are at the
20 extreme, where you know, the -- there's really no evidence of
21 any connection to Massachusetts or simply bare bones
22 pleadings, nothing like the kind of scheme that we have pled.

23 So, Your Honor, I think we've done enough there.
24 And again, I'm happy to answer any questions, but I don't
25 necessarily -- I know Corteva -- you've not heard from

1 Corteva on certain issues, and you're giving me the last
2 word.

3 THE COURT: No, that's okay. I believe that -- I
4 know I have made some requests of you all in this past almost
5 two hours for asking to talk about certain things. But I
6 also believe that, if there was something you really wanted
7 to tell me, you would tell me, and you're content to sit on
8 the briefing on some other issues. I defer to your
9 discretion on that.

10 MR. GANDESHA: Yeah --

11 THE COURT: That's fine.

12 MR. GANDESHA: -- on certain other issues. Well, I
13 -- you know, I would like to use some of the time for slides.

14 (Participants confer)

15 THE COURT: I'll give you one more -- I'll give you
16 -- I'll give you one more minute and then I'm going to --

17 MR. GANDESHA: Okay.

18 THE COURT: -- hear from --

19 MR. GANDESHA: Sounds good.

20 THE COURT: -- Corteva.

21 MR. GANDESHA: Jason, if you could pull up Slide
22 24, please. There's one thing we -- sorry. 24. I'm sorry
23 14.

24 One thing you heard from Corteva on, but you
25 haven't heard from us on, is this whole issue about Corteva's

1 outreach to ATCC, right? The story we tell in our
2 counterclaims is that, after Corteva learned -- partly
3 because we disclosed it to them; partly because they learned
4 from ATCC -- pursuant to that agreement that we saw earlier,
5 that Inari had purchased Corteva's seeds, what we see from
6 discovery -- and this came from Corteva's own files, we
7 didn't know about this until quite recently -- was that
8 Corteva tried to pressure -- that's how we characterized it -
9 - tried to pressure ATCC to amend its procedures to prevent
10 foreign entities from being able to buy seeds; i.e., Inari.

11 But then, more specifically, they even provided
12 text, written text, to ATCC to use in a telephone call or in
13 a letter, demanding that Inari destroy the seeds. Okay?

14 THE COURT: Which --

15 MR. GANDESHA: This all --

16 THE COURT: Which counts does that factor in --

17 MR. GANDESHA: So --

18 THE COURT: -- most strongly?

19 MR. GANDESHA: So this factors into, in part, the
20 sham litigation theory here, right? They -- because ATCC was
21 not amenable, right? ATCC disagreed. Again, our whole -- a
22 large tenor of our argument here is based on the facts. ATCC
23 sees the world very differently than Corteva. And they
24 refused to agree, even though Corteva kept saying we're one
25 of your biggest patent pausers [sic], right?

1 THE COURT: Yeah.

2 MR. GANDESHA: Making these threats about what
3 they're going to do if ATCC doesn't accede.

4 Our view is that this shows that ATCC takes its
5 obligations as an international patent depository under the
6 Budapest Treaty very seriously, and it knows that, if it
7 imposes restrictions on foreign entities' access -- which, by
8 the way, is the whole point of the Budapest Treaty, to allow
9 a patent owner -- it's supposed to benefit the patent owner -
10 - to make a deposit in one place and everyone can access it
11 around -- all around the world. Corteva doesn't have to make
12 deposits everywhere it has patents. But now, here, we have
13 Corteva saying don't let foreign entities get our stuff.

14 THE COURT: Okay.

15 MR. GANDESHA: Okay.

16 THE COURT: Let me -- thank you. Let me hear one
17 more time from Corteva. And let me ask you to limit your
18 topics to what you just heard, don't introduce anything new -
19 -

20 MR. BICKS: Yeah.

21 THE COURT: -- if you would.

22 MR. BICKS: So, Your Honor, Mr. Raphel is going to
23 bring us home.

24 THE COURT: Good. I'm really glad that Inari
25 brought up 93A, so that we could have that.

1 (Laughter)

2 THE COURT: Go ahead.

3 MR. RAPHEL: Thank you, Your Honor. I'll be very
4 brief.

5 THE COURT: And I guess the key thing you need to
6 address was the argument that the whole scheme, meaning
7 Corteva's scheme, is targeted in Massachusetts.

8 MR. RAPHEL: Understood.

9 I have yet to hear a single allegation, factual
10 allegation, of any action in support of that purported scheme
11 that actually occurred in Massachusetts. Massachusetts law
12 is crystal-clear that simply the fact that Inari is located
13 in Massachusetts isn't enough.

14 Counsel tries to say that's based on extreme cases.
15 It's not. That's the standard the District of Massachusetts
16 has said in Evergreen; Massachusetts Superior Court said in
17 Welch Foods; the first has said it in Zyla and Garshman.
18 That is the standard. You have to plead something other than
19 just the location of the allegedly injured party.

20 Every single case that they cite, where they say it
21 was only the injured party was there, includes allegations of
22 additional conduct in Massachusetts. I'm happy to go through
23 literally any one in their brief. I'll just give you the one
24 they cite first.

25 THE COURT: I believe you.

1 MR. RAPHEL: The Back Bay case, that is about
2 selling horses to Massachusetts. It was a contract signed
3 with Massachusetts parties, to be performed in Massachusetts,
4 and it was brought because the horses were not the
5 represented quality. Every case they cite involves more than
6 just saying a party was injured in Massachusetts.

7 The only conduct they allege against us here, in
8 this claim, is that we filed a complaint in Delaware, that we
9 issued a press release from Indiana, and that we made
10 representations to the U.S. Patent Office in Virginia. They
11 have this whole amorphous idea that there's a scheme going on
12 in Massachusetts involving their customers.

13 They knew who their customers are and they can
14 speak to their customers. If any of them had anything to say
15 that we did something in Massachusetts relevant to this
16 claim, it would be in their complaint; it wouldn't -- they
17 wouldn't need discovery on that. It's not there because they
18 just don't have that. And there's no reason for further
19 discovery at this point to support that claim.

20 THE COURT: Okay. Very good. Well done. Thank
21 you for that.

22 All right, everyone. Gosh, you know, we could talk
23 about that for another two hours, but I'm glad I put this at
24 the end of the day, so that we can't.

25 (Laughter)

1 THE COURT: I will be working on this. You know, I
2 have some -- I have some case -- obviously, you know, like
3 we've been alluding to in different respects here, I have
4 some case management concerns. I don't know what to tell
5 you, other than continue doing all of the hard work and doing
6 your best with all the things you can do. I will work on
7 this as fast as I can get this out and then we will talk
8 again. Okay

9 MR. BICKS: Can I ask, Your Honor? Just do you --
10 would it be helpful for me to supply to you some of the
11 materials that I mentioned that had responded to this so-
12 called "new evidence." I don't -- I'm not --

13 THE COURT: No, I think I'm best off --

14 MR. BICKS: Okay.

15 THE COURT: -- just focusing on what I have.

16 MR. BICKS: Understood. Thank you.

17 THE COURT: It's a -- it's more than enough.

18 MR. BICKS: Understood.

19 THE COURT: Okay. Any urgent matters to address or
20 can we break up?

21 MR. BICKS: We're fine on our side. Thank you.

22 MR. GANDESHA: Yeah, that -- nothing urgent from
23 us.

24 THE COURT: Okay. Very good, everyone. Thank you
25 very much.

1 MR. BICKS: Thank you.

2 MR. FRISCHLING: Thank you, Your Honor.

3 THE COURT OFFICER: All rise.

4 (Proceedings concluded at 4:50 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter to the best of my knowledge and ability.

A handwritten signature in cursive script, appearing to read "Coleen Rand", is written over a horizontal line.

March 2, 2025

Coleen Rand, AAERT Cert. No. 341
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