

No. 11-796

In The
Supreme Court of the United States

—◆—
VERNON HUGH BOWMAN,

Petitioner,

v.

MONSANTO COMPANY, *et al.*,

Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Federal Circuit**

—◆—
**BRIEF FOR *AMICUS CURIAE* CHS INC.
IN SUPPORT OF RESPONDENTS**

—◆—
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INTEREST OF THE *AMICUS CURIAE*¹

CHS Inc. is a global agribusiness owned by farmers, ranchers and cooperatives across the United States. CHS started as a regional cooperative of grain growers in 1929. Today, with diversified businesses in energy, grains and foods, CHS helps its customers, farmer-owners and other stakeholders grow their businesses through its domestic and global operations.

CHS annually moves more than a billion bushels of grain internationally to 60 countries and is the largest cooperative marketer of grain in the United States. CHS's grain business operates in sixteen states and Canada and is comprised of a closely integrated network of elevators, marketing offices and export terminals serving customers on a global scale. CHS is a global leader in efficiently moving, processing and marketing the highest quality grains and grain-based products.

Having a national core of growers allows CHS access to an uninterrupted supply of the finest crops available. A closely coordinated storage and transportation network ensures timely and cost-efficient delivery for the freshest possible food products.

¹ No counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of the brief. No one other than an *amicus* or counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to this Court's Rule 37.3(a), letters of consent were filed by the parties.

CHS is concerned that Petitioner's act of buying commodity grain, then planting that undifferentiated grain as seed falls well outside the normal acquisition and distribution channel for grains. Petitioner's request for relief is premised on the incorrect representation that grain elevators routinely sell and growers routinely buy commodity grain for planting. If the Court were to hold that purchasing undifferentiated commodity grain containing a genetically enhanced trait from a grain elevator would have patent exhaustion implications, it would have unintended and extremely adverse consequences on CHS and the entire U.S. grain industry.



SUMMARY OF THE ARGUMENT

The practice of purchasing undifferentiated “bin run” grain for planting is not common and, if accepted or incentivized, would encourage or even force grain elevators to violate state and federal law governing the labeling of seed. Grain elevators like CHS are in the business of selling harvested grains into domestic and international markets where it can be processed into oils, meals, feed, or food. CHS does not sell commodity grain to growers for planting.

Further, genetically enhanced seed traits, like Monsanto Roundup Ready® trait, provide a benefit to the entire grower-grain dealer distribution channel. Genetically enhanced traits allow growers to increase crop yields, reduce pesticide use and decrease operator

time and interventions. The increase in yield allows grain elevators to buy and sell more volume, export more grain and provide better pricing to their customers. Research and development of genetically enhanced seed traits is costly, requiring seed manufacturers to invest billions of dollars per year. Petitioner's actions take value out of the cycle and, if adopted on a larger scale, would disincentive innovators from investing in the development of new genetically enhanced seed.



ARGUMENT

I. Buying “Commodity Seed” for Planting is Not a Common or Accepted Practice

Petitioner makes several arguments predicated on purported “facts” about commonplace farming practices – none of which are commonplace and all of which would have adverse and unintended consequences on the nation’s grain industry were they accepted as a norm.

A. Growers Buy Seed from a Seller or Re-Seller and Deliver Grain

Separate from CHS’ operations of its integrated network of grain elevators, CHS is also a seed reseller – essentially a retail outlet for farmers to buy seed for planting. As a re-seller, CHS buys seed from seed manufacturers like Monsanto and sells seed to its grower-members. Generally, seed is either packaged

in a bag by the manufacturer or sold in bulk. Bags of seed are sold with a required label or “bag tag” which sets forth a wealth of legally required, important information about the seed, including but not limited to, the variety, maturity, germination, purity, tolerances, traits, and weight.² For bulk seed, it is also labeled by the truck and sorted by variety.

After the seed is purchased, planted, cultivated and harvested, a grower delivers the harvested crop to a grain elevator. The grain elevator tests the grain for weight, moisture, dirt and other impurities. Assuming the load is acceptable, the grain is routinely co-mingled with all other grains of the same kind, for example #2 yellow corn or #1 yellow soybean.³ Once the grain is co-mingled, the grain is commonly referred to as “bin run” grain or commodity grain, and it is no longer labeled or capable of being labeled as to varieties, germination, purity, moisture or other pertinent characteristics of the grain.

B. Grain Elevators Cannot Sell “Commodity Seed” to Growers for Planting

Central to Petitioner’s request for relief is his assertion that U.S. farmers “have been using commodity

² Federal Seed Act, 7 U.S.C. §§ 1551-1611.

³ *See generally* U.S. Grain Standards Act, 7 U.S.C. §§ 71-87(k) *et seq.*; Official U.S. Standards for Grain, 7 C.F.R. § 810.101 *et seq.* The specific kind, type and quality classifications for corn and soybeans are contained in 7 C.F.R. §§ 810.401 – 810.405 and 7 C.F.R. §§ 810.1601 – 810.1605, respectively.

grain from grain elevators as a low-cost seed source for generations.” Pet. Br. at 6 (citing A0627). This is simply not accurate, nor can it be given the various and comprehensive state and federal statutes governing the sale and labeling of seed.

The Federal Seed Act (“FSA”) requires all sellers of seed comply with certain labeling and record-keeping requirements that allow the grower to know exactly what is being planted and permit the seed to be tracked.⁴ In addition to the FSA, most states, including all states essential to CHS’ operations, have enacted similar labeling laws regarding the labeling of seed for planting.⁵

Each state’s seed labeling law prohibits the distribution of seed without a clear label stating at a minimum, the seed variety and germination.⁶ Seed sellers are subject to regulation and inspection by state regulators, who assure that the information contained on the label accurately reflects the contents

⁴ 7 U.S.C. §§ 1571-1572.

⁵ *See, e.g.*, IND. CODE §§ 15-15-1-1 – 15-15-1-43 (2012); MINN. STAT. §§ 21.80 – 21.92 (2012); MONT. CODE ANN. §§ 80-5-120 – 80-5-144 (2011); N.D. CENT. CODE §§ 4.1-53-01 *et seq.* (2013); TEX. AGRIC. CODE ANN. §§ 61.001-61.019; WASH. REV. CODE §§ 15.49.005 – 15.49.950 (2012); WIS. STAT. §§ 94.38 – 94.46 (2012).

⁶ IND. CODE § 15-15-1-32; MINN. STAT. § 21.82; MONT. CODE ANN. § 80-5-123; N.D. CENT. CODE § 4.1-53-13; TEX. AGRIC. CODE ANN. § 61.004; WASH. REV. CODE § 15.49.031; WIS. STAT. § 94.385; WIS. ADMIN. CODE DEP’T AGRIC. TRADE & CONSUMER PROT. § 20.04.

in the bag. Penalties for violating seed labeling laws include civil and administrative fines, revocation of licenses and certifications, and even criminal prosecution.⁷

The Federal government and each state also have seed certification regulations which assure the farmer that the seed contained in the bag is of the variety stated and meets germination and purity standards.⁸ The purpose of seed certification is to preserve genetic purity and identity.⁹ Requirements for producing certified seed of field crops include planting eligible stock, field inspection of the growing crop, conditioning seed in an approved plant, sampling, laboratory analysis and proper labeling of the seed. These requirements provide the buyer with the best possible assurance that the buyer is obtaining good quality seed of known purity and heredity. Seed certification

⁷ See, e.g., 7 U.S.C. § 1596; IND. CODE §§ 15-15-1-39 – 15-15-47; MINN. STAT. § 21.86; MINN. R. 18J.03 – 18J.11; MONT. CODE ANN. § 80-5-134; N.D. CENT. CODE § 4.1-53-54 – 4.1-53-57; TEX. AGRIC. CODE ANN. §§ 61.017 – 61.018; WIS. STAT. § 94.46(4)(b).

⁸ 7 C.F.R. §§ 201.68 – 201.71; N.D. CENT. CODE § 4.1-53-42; TEX. AGRIC. CODE ANN. §§ 62.001 – 62.011; WASH. ADMIN. CODE § 16-302-005 (2012).

⁹ 7 C.F.R. § 201.70; N.D. CENT. CODE § 4.1-53-44; Ass'n of Seed Certifying Agencies, Seed Certification Gen. Principles, http://www.organicseedfinder.org/Page/Seed_Certification.aspx?nt=966 (last visited Jan. 21, 2013); Minn. Crop Improvement Ass'n, *Agronomic Seed Certification Standards*, 3 (March 30, 2012), http://www.mncia.org/assets/documents/pub/seedcert/Agronomic_Seed_Certification_Standards.pdf.

is a limited generation system based on four classifications.¹⁰ Those classifications are as follows:

1. Breeder: Seed that is very limited in amount and is directly controlled and produced by the breeder, owner or public institution. Breeder seed is not sold in ordinary commercial channels.

2. Foundation: Seed that is the progeny of Breeder seed and is generally grown under the supervision of a Foundation Seed Program of the public or private institution controlling the variety.

3. Registered: Seed that is the progeny of Foundation or Breeder seed (depending on the variety). Registered seed is normally required to produce certified seed.

4. Certified: Seed that is the progeny of Registered seed or Foundation seed. Certified seed is the seed genetically available to farmers and sold by manufacturers or re-sellers.¹¹

Pursuant to federal and state seed certification regulations, the progeny of Certified seed must enter the commodity grain market and may not be used for planting.¹² Once grain is harvested and commingled

¹⁰ See, e.g., 7 C.F.R. §§ 201.69 – 201.70.

¹¹ See, e.g., 7 C.F.R. § 201.69; WASH. ADMIN. CODE § 16-302-015.

¹² Federal regulations prohibit selling the progeny of certified seed as seed except in two very limited circumstances, neither of which applies to Petitioner's actions. 7 C.F.R. §§ 201 *et seq.*

(Continued on following page)

with other grain of a like kind and quality, it is impossible to distinguish the variety from which it was grown, and it is not tested for germination rate or other particular characteristics. It would be impossible for a grain elevator to comply with federal or state labeling and certification requirements if bin run grain were sold for planting.

C. Forcing Grain Elevators to Treat Commodity Grain as Seed Would Impose a Completely Different Function on the Grain Marketing System and Substantially Increase Costs

When farmers deliver their crops to a grain elevator, like CHS, they are delivering that crop as a commodity grain, not as seed. This difference is critical to the function grain elevators and warehouses play in both the domestic and international grain markets. CHS's grain business is set up to turn volume on commodity grain, not to act as a receiving station for progeny seed. CHS sorts grain by kind, type and quality and nothing else in the ordinary course of its business.

CHS is not equipped to certify every truck load delivered by every grower in a manner that would

(stating in pertinent part, "[t]he number of generations through which a variety may be multiplied shall be limited to that specified by the originating breeder or owner and shall not exceed two generations beyond the Foundation seed class. . . .").

track the variety, purity, germination, genetic trait, and the host of other pertinent information contained on a seed bag tag at the time of harvest. Grain elevators, generally, are set up to handle mass amounts of grain and to move that grain quickly through distribution channels as grain, not as seed. There is also a large margin difference on grain as compared to seed. Grain is by far less expensive than seed *because* it is undifferentiated, commingled, being used for a different purpose and performs a different function than seed. Seed has a much higher margin than grain *because* it is certified, tested and tracked. It would be impossible for CHS to implement a cost-effective or manageable system for handling a billion bushels of grain per year as if some small portion of that grain were seed to be used for planting.

II. Creating Additional Contract Rights Does Not Solve the Issue for Grain Elevators

Petitioner suggests that contract rights and remedies could adequately protect Monsanto's interest in "self-replicating" soybean technology. But Petitioner fails to explain what those contract rights would look like and how such contracts would impact the grain elevator at the point of delivery. When farmers deliver their harvested crops, grain elevators are not functioning as seed re-sellers as to that grain. Petitioner's contract argument is effectively asking all grain elevators to perform the function of seed labeling and seed certifying re-sellers at the intake point for commodity grain. This is contrary to how the

entire grain industry operates. The type of contract imagined by Petitioner would unreasonably impose on the grain industry all of the costs of seed labeling and seed certification with none of the benefit of increased sales margin. No reasonable elevator could agree to such a contract and no reasonable means of enforcement would exist.

CHS simply could not move a billion bushels of grain through its system and treat that grain as seed on a cost-effective basis. To force grain elevators to perform that function would jeopardize the entire grain marketing system. It is neither reasonable nor practical to ask CHS or any other elevator system to perform a different function, simply to preserve a grower's desire to avoid patents and obtain "low cost" seed for planting.

III. Genetically Enhanced Seed Provides Benefits to Growers, Grain Elevators and Consumers

Seed companies like Monsanto invest billions of dollars annually in the research and development of genetically enhanced seed traits. The innovations and benefits brought about by this investment are significant. For example, the U.S. produces more than 12 billion bushels of corn per year.¹³ The average yield

¹³ USDA Foreign Agricultural Services, Circular Series FG 01-13, Grain: World Markets, 20 (Jan. 2013), <http://www.fas.usda.gov/psdonline/circulars/grain.pdf>. The FAS data is listed in
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for corn per acre has increased from an average of 125 bushels per acre to 145 bushels per acre in the last fifteen years.¹⁴ Genetic enhancements also reduce the use of pesticides and decrease input costs.¹⁵ These benefits allow farmers to grow more with less. The increase in yield allows CHS to invest in its business, infrastructure and the communities in which it is located. Within the last five years CHS has invested over \$150 million in infrastructure and increased capacity by 37 million bushels in order to serve the increasing output of U.S. farmers.

Petitioner's device of buying bin run soybeans containing Monsanto's Roundup Ready® trait takes value out of the cycle. Bin run grain can be purchased at less than half the cost per bag of certified seed. If this practice were incentivized as a legitimate end-run around the seed manufacturer's patents, and adopted on a more widespread basis, the disparity between certified seed sales by licensed retailers and the progeny of commodity seed would grow. In turn, investment in research and development becomes

metric tons, demonstrating that the U.S. has produced in excess of 300 million metric tons of corn per year for the last three years. There are 39.4 bushels per metric ton of corn, meaning the U.S. produces approximately 12 billion bushels of corn per year.

¹⁴ USDA National Agricultural Statistics Service, http://quickstats.nass.usda.gov/results/E5FC7E38-5DCF-3536-9F3E-4F2E74B59902?pivot=short_desc (last visited Jan. 21, 2013).

¹⁵ Br. of *Amicus* Am. Soybean Ass'n, 24.

more costly and innovators are disinclined to making further investments.

Bin run grain is also a mix of different varieties, with different maturation rates and varying genetic traits. In the ordinary course, it is impossible to know what variety or which traits were planted from the commingled commodity grain. Commodity grain also contains a higher level of dirt and contaminants than would be permissible in a bag of certified seed. Over time, planting commodity, undifferentiated grain would result in a reduction in yield and varietal superiority.¹⁶

In sum, Petitioner's position causes a host of problems for other stakeholders in the distribution channel. If accepted, seed retailers would not be able to comply with seed certification laws, and over time, yield productivity and innovation would be impaired.



¹⁶ See Br. of *Amicus Am. Seed Trade Ass'n*, 8-9.

CONCLUSION

For the foregoing reasons, and for those in Respondents' brief, the Federal Circuit's judgment should be affirmed.

Respectfully submitted,

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