Court File No. A-248-22

FEDERAL COURT OF APPEAL

B E T W E E N:

AGRACITY CROP & NUTRITION LTD.

Appellant

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- and –

UPL NA INC., ARYSTA LIFESCIENCE NORTH AMERICA, LLC and UPL AGROSOLUTIONS CANADA INC.

Respondents

NOTICE OF APPEAL

TO THE RESPONDENTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(*Date*) 18-NOV-2022

Issued by: Jena Russell
(*Registry Officer*)

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Solicitors for the Respondents

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the order of the Honorable Justice Aylen dated October 19, 2022 (the "Judgment") in which the Honourable Justice Aylen (the "Trial Judge") declared, inter alia, that certain claims of Canadian Patent No. 2,246,021 (the "021 Patent") are valid and were infringed by the appellant. T-604-19

THE APPELLANT ASKS that:

1. This appeal be allowed;
2. Paragraphs 1, 2, 4, 5 and 6 of the Judgment be set aside;
3. This court declare that the claims of the 021 Patent were always invalid;
4. The action of the respondents be dismissed;
5. The appellant be awarded its costs of this appeal and of the action below;
6. All sums paid or to be paid by the appellant to the respondents in respect of monetary relief and costs be returned, with interest; and
7. This court grant such further and other relief as deemed just.

THE GROUNDS OF APPEAL are as follows:

Errors in construing the 021 Patent

8. The Trial Judge erred in the interpretation and characterization of the 021 Patent.

9. The Trial Judge erred in fact and in law in holding that the 021 Patent related to a new use of the compounds now known as flucarbazone and flucarbazone sodium. Those compounds and their use as herbicides had already been

disclosed in the prior art patents (the “486 Patent” and the “636 Patent”). The Trial Judge erred in law and in fact in holding that the 021 Patent related to a “distinct use” of those previously known compounds.

10. In addition, the respondents (plaintiffs below) only raised the issue of a “new use” in their closing argument at trial. The Trial Judge erred in considering an argument that had not been raised in the pleadings or in the joint statement of issues submitted by the parties.

11. The prior patents have many passages that are very similar, if not identical, to passages in the 021 Patent. Both prior patents claimed the compounds flucarbazone and flucarbazone sodium. The 636 Patent claimed a method of combatting weeds comprising applying to the weeds, or a habitat thereof, a herbicidally effective amount of flucarbazone sodium.

12. Further, having acknowledged that no party was asserting that the 021 Patent was a selection patent, the Trial Judge erred in fact and in law by referring repeatedly to the 021 Patent and the alleged invention as a selection of flucarbazone and flucarbazone sodium from the other compounds in the 486 Patent. The Trial Judge erred in fact and in law in the characterization of the nature of the 021 Patent, particularly as no party was asserting that the 021 Patent was a selection patent.

Errors in finding claims valid

13. The Trial Judge erred in finding that claims 1, 3 and 6-10 of the 021 Patent are valid.

14. As set out above, the prior art patents disclosed flucarbazone, flucarbazone sodium and the use of those compounds as herbicides. Having found that what makes a herbicide selective is the chemical structure of the compound, the Trial Judge erred in law in finding that there was any invention in the 021 Patent.

15. The Trial Judge erred in holding that the prior 486 Patent and the 636 Patent do not anticipate the subject matter of the claims of the 021 Patent. The Trial Judge did not apply the correct test for the disclosure element of anticipation, choosing instead to apply the test set out in superseded jurisprudence. The Trial Judge failed to consider whether the prior patents disclosed subject matter which, if performed, would necessarily result in infringement of the claims of the 021 Patent.

16. Further, the Trial Judge erred in fact and in law in holding that the prior patents did not meet the enablement element. The Trial Judge did not apply the correct test for the enablement element of anticipation. The Trial Judge failed to consider whether the person skilled in the art would have been able to perform or work the invention.

17. Applying the correct legal tests, both the disclosure and enablement elements of anticipation are met. The claims of the 021 Patent ought to have been held anticipated by the 486 Patent and by the 636 Patent.

18. The Trial Judge erred in law and in fact in finding that the claims of the 021 Patent were not invalid for obviousness. As set out above, the Trial Judge erred in the determination of the nature and characterization of the 021 Patent, thereby leading to an erroneous basis for the analysis of obviousness.

19. The Trial Judge failed to perform the mandated claim-by-claim analysis for the allegation of obviousness. Contrary to binding jurisprudence, the Trial Judge considered the inventive concept of a combination of all claims of the 021 Patent asserted in the action, rather than each claim on an individual basis.

20. The Trial Judge erred in law in the analysis of the “obvious to try” test. Again, the Trial Judge erroneously used a combination of the subject matter of the claims of the 021 Patent in the analysis. Further, the Trial Judge erred in law and in fact in the assessment of “whether it is more or less self evident that what is being tried ought to work.”

21. The Trial Judge erred in fact and in law in the assessment of the effort required to achieve the supposed invention of the 021 Patent. The Trial Judge did not apply the correct test, namely whether the work (if any) was of a routine nature to the skilled person. Further, the Trial Judge made reviewable errors in the analysis of the evidence on whether the work (if any) was of a routine nature.

22. Applying the correct legal tests to the evidence, the subject matter of the claims of the 021 Patent was obvious to the skilled person.

Provisions Relied On

23. The appellant will rely on:

(a) the provisions of the *Patent Act*, R.S.C. 1985, c.P-4, including sections 2, 27, 28.2, and 28.3; and

(b) the provisions of the *Federal Courts Act*, R.S.C. 1985, c.F-7, including section 52.

November 18, 2022

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