

D031336

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE**

MYCOGEN PLANT SCIENCE, INC.,

Plaintiff and Respondent,

vs.

MONSANTO COMPANY,

Defendant and Appellant.

APPEAL FROM THE SUPERIOR COURT FOR THE COUNTY OF SAN DIEGO
CASE No. 699882, HERBERT B. HOFFMAN, JUDGE

APPELLANT'S OPENING BRIEF

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APPELLANT’S OPENING BRIEF

INTRODUCTION

This appeal of a \$174,900,000 judgment in an action for breach of contract between two biotechnology companies challenges the largest award of lost future profits in California history. The appeal presents a classic violation of a simple but fundamental rule of civil justice: the law does not allow a plaintiff to sue the same defendant twice for a single wrong in successive lawsuits for cumulative remedies that result in double recovery.

This familiar rule has an arcane Latin name — *res judicata* — but its application here is clear, compelling and above all fair. Plaintiff won a judgment for specific performance of a breached contract to obtain re-engineered plant genes, and then went right back to court seeking hypothetical lost future profits for the identical breach of contract. The resulting jury

verdict of \$174,900,000 would give plaintiff a double recovery: an award of future profits after plaintiff has already obtained a judgment for specific performance enabling plaintiff to realize those same profits through commercial exploitation of the genes. The doctrine of res judicata and the rule against double recovery forbid this result.

Further, the award is grossly speculative because it includes damages based on an accounting fiction called “terminal value” which would give plaintiff a recovery of lost future profits *in perpetuity*. This fiction is based on the dubious notion that, had the contract not been breached, the heretofore spectacularly unprofitable plaintiff would have suddenly achieved commercial success and future profits *until the end of time* in an industry characterized by fierce competition and rapid obsolescence.

This brief begins with res judicata because that is where the appeal should end. Based on res judicata alone, this court should reverse the judgment and remand the cause with directions to the superior court to dismiss the action.

The latter sections of this brief address terminal value and two other issues: error in a directed verdict on everything but damages despite conflicting evidence on causation, and instructional error on the standard of proof for recovering future profits. Each of these points requires reversal independent of the violation of res judicata.

SUMMARY OF THE APPEAL

After a decade of innovative scientific thought and \$89 million spent on research and development, Monsanto Company invented a revolutionary technology to increase dramatically the yield of life-sustaining crops. Monsanto redesigned and built specific new genes (DNA) of crop plants so

that the plants themselves — without application of external chemical agents — are resistant to insect predators and plant-killing herbicides. With this new technology, 20 percent of the world’s corn crop can be saved from pestilence, a feat not feasible with chemical pesticides.

In this case, one of Monsanto’s chief competitors, Dow Chemical Corporation, seeks the California judiciary’s assistance in an attempt to exploit Monsanto’s ideas and labor far beyond any possible entitlement. Dow wants Monsanto’s high-tech genes, and in fact received them in 1996 through an earlier lawsuit — *Mycogen I* — for specific performance of an option contract. But, ignoring *res judicata*, Dow commenced the present lawsuit — *Mycogen II* — seeking the duplicative remedy of money damages for not having received those same genes earlier. Dow obtained an egregiously speculative award of \$174,900,000 for lost future profits.

The judgment in *Mycogen II* cannot stand because under the law it constitutes an inequitable double recovery — both the genes that can produce future profits (obtained through the remedy of specific performance) *and* a monetary award of those very same future profits (obtained through the remedy of damages) — which is prohibited by *res judicata*.

In 1993, Dow’s present subsidiary Mycogen Plant Science, Inc. (MPS), sued Monsanto in *Mycogen I* for specific performance of a 1989 research and development agreement between Monsanto and a company unrelated to MPS in 1989, Lubrizol Genetics, Inc. (LGI). The 1989 agreement granted LGI an option to negotiate rights to license Monsanto’s future re-engineered genes. MPS acquired control of LGI in 1992. When MPS purported to exercise LGI’s option in 1993, Monsanto mistakenly concluded that MPS had no rights under the LGI agreement. The superior court agreed with Monsanto, but this court held otherwise in a 1996 opinion.

On remand, the superior court entered a final judgment granting specific performance, and Monsanto delivered the new genes to MPS. Ostensibly, MPS intended to develop its own corn, cotton and canola plants containing those genes and to sell to farmers commercially the resulting corn, cotton and canola planting seed.

MPS's exercise of the option under the LGI research and development agreement was not, however, a guarantee of commercialization. Even after the *Mycogen I* judgment, the parties still had to negotiate the terms of a genes licensing agreement. MPS, however, has consistently refused to negotiate, even to this day, unless Monsanto also gives MPS something to which it has no right — plant material called “germplasm,” which consists of the new gene introduced into the entire proprietary pool of the tens of thousands of genes for a seed or plant. If MPS obtains germplasm, MPS can skip several expensive and time-consuming steps in the process of producing genetically-enhanced crop seed, which will leap-frog MPS years ahead on the race to commercialize Monsanto's novel gene technology. Without germplasm, it will be very difficult for MPS to achieve commercial success.

In 1996, before *Mycogen I* had even ended, MPS and two of its affiliates filed the present lawsuit — *Mycogen II* — against Monsanto, asserting the same cause of action MPS asserted in *Mycogen I*. In *Mycogen II*, MPS seeks to obtain additional relief in the form of money damages for projected future profits Monsanto's genes can produce for MPS. A jury awarded damages in the sum of \$174.9 million for hypothetical future losses. This vast sum includes an unprecedented \$92 million in “terminal value” damages — net profits that MPS theoretically could earn *after* the year 2007 and into perpetuity.

No appellate court has ever approved “terminal value” as a basis for recovering future profits. It is especially inappropriate in this highly

speculative industry, which is rife with fierce competition, technological failure and rapid obsolescence. The *Mycogen II* judgment is a perpetual net-profit insurance policy, shielding MPS from the real-world risks of competition in the volatile business of emerging biotechnology.

MPS has obtained two inconsistent and duplicative remedies: first, specific performance of the 1989 licensing agreement, which gave MPS the option for genes and required Monsanto to negotiate commercial licenses enabling MPS to exploit those genes; and, second, a jury award for the same future profits that MPS will now make from exploiting the genes. Well-established legal principles prevent such overreaching. The *doctrine of res judicata* precludes repeated piecemeal litigation on the same cause of action for different relief. The *doctrine of reasonable certainty* precludes recovery of future profits that are inherently speculative. Together, these two doctrines make it unlawful for MPS to sue Monsanto twice to protect the same primary right and to obtain hypothetical lost future profits in perpetuity.

Mycogen II should have been dismissed at its inception. It survived demurrer only on a claimed exception to *res judicata* — “continuing breach” — which does not apply here and is utterly at odds with the case MPS presented to the jury. MPS’s damage theory *at trial* was premised on failure to secure genes in connection with the 1993 option exercise, not any *new or continuing breach* after that.

This court should now reverse. Alternatively, the court should remand the cause for a new trial because of prejudicial instructional error on the key concept of future lost profits and, independently, because the judge improperly directed a verdict for MPS on all issues except damages. At the very least, the court should remand the cause with instructions to reduce this excessive judgment by an amount which includes the elimination of the “terminal value” component of \$92 million.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Parties.

1. Monsanto Company.

Monsanto is a multinational corporation which sells agricultural and pharmaceutical products. Monsanto is a leading developer of transgenic plant-seed technology — “transgenic” meaning that a gene is transplanted from one species to another. (RT pp. 154, 876, 1240-1241.) Commercial agricultural seed companies licensed by Monsanto sell farmers crop seed containing Monsanto technology, including seed for corn (also called “maize”), cotton and canola (also called “oilseed rape”). (RT pp. 876-877, 887, 1856-1857.) Additionally, Monsanto produces an environmentally friendly weed-killing herbicide under the brand-name “Roundup.” (RT pp. 743, 795-796, 834, 876, 887-888, 989, 1230.)

2. Mycogen Plant Science, Inc. (MPS), Mycogen Corporation and Agrigenetics, Inc.

Mycogen Plant Science, Inc. (MPS), a subsidiary of Dow Chemical Corporation,^{1/} is likewise a multinational corporation, with facilities throughout North America, South America and Europe. (RT pp. 77, 858, 863-864, 872-873.) MPS sells seed products through a subsidiary called

^{1/} At the time of trial, Dow owned 63 percent of MPS. (RT p. 858.) Dow acquired the rest of MPS in 1998. (See *Dow Chemical To Expand Ownership Of Mycogen To 100%*, N.Y. Times (Sept. 2, 1998) p. C4, col. 1.)

Agrigenetics, Inc., and MPS is itself a subsidiary of an entity called Mycogen Corporation. (RT pp. 857-859, 862, 872, 1312-1313.)

Mycogen Corporation has never had a profitable year since its inception in 1984. From 1984 through 1997, Mycogen Corporation lost a total of \$216 million. (RT pp. 866-867, 1062; Exh. 1393.) Thus, for 13 years, MPS was a huge money loser – an ugly duckling of the biotechnology industry. Now, possessing both Monsanto’s new genes and a judgment for \$174.9 million representing decades of hypothetical future sales, MPS is suddenly the beautiful swan of biotechnology.

MPS is the successor of another biotechnology company, Lubrizol Genetics, Inc. (LGI). Mycogen Corporation acquired control of LGI in 1992 and changed LGI’s name to MPS. (RT pp. 665, 812; CT pp. 77-78.) Monsanto and LGI had entered into a 1989 written agreement which underlies *Mycogen I* and *Mycogen II*.

MPS is the respondent in Monsanto’s present appeal from the final judgment in *Mycogen II*. (No. D031336.) Mycogen Corporation and Agrigenetics, Inc., are the appellants in a coordinated appeal from a pretrial order dismissing them from the action. (No. D031046.) This brief is the opening brief on Monsanto’s appeal from the final judgment in *Mycogen II*.

**B. An Overview Of Transgenic Plant Technology:
Traveling “The Commercial Highway.”**

1. Background.

This litigation involves MPS’s claims for entitlement to Monsanto’s gene technology in three crops: corn, cotton and canola.

Corn is the world's largest crop and exemplifies the importance of Monsanto's gene technology. (RT p. 1387.) The demand for corn production is dramatically increasing as people in developing countries seek more protein in their diets, which in turn requires more corn as feed for livestock. In the next two decades there will be an enormous need for improved productivity. If crop yields per acre are not increased, formerly pristine lands such as rainforests must be brought under cultivation, threatening an environmental disaster. (RT p. 862-863, 879.)

For the biotechnology industry, 1989 (the date of the Monsanto-LGI agreement) was nearly the dawn of time. (See RT pp. 633-634.) Reconfiguring the DNA of plants seemed a promising idea for increasing crop yields, but a long, expensive and perilous road lay ahead for Monsanto, beginning with a scientific concept and ending only in recent years with initial commercial sales of transgenic seed. At the trial of the present action, defense counsel labeled this process "the commercial highway." (See RT p. 763.)

In the early phases of research and development, Monsanto, an industry leader (RT pp. 876, 878), had two goals. The first goal was to engineer a gene that, when inserted into a corn plant's DNA, would cause the plant to "express" into its tissues a protein that is toxic to the plant's most destructive insect predator, the European corn borer. The key was the microorganism "bacillus thuringiensis" — commonly called "Bt" — a life form which is normally found in soil and produces a protein that kills the European corn borer and other insects but is harmless to humans and animals. (RT pp. 741-742, 767, 875, 1613.) Monsanto's idea was to insert the protein-creating Bt gene into the DNA of the corn plant so that, when insects feed on the plant, the insects die and the plant prospers, thus eliminating the need for pesticides. (RT pp. 90, 742, 874-875, 879, 1376-1377, 1613-1614.) Monsanto made the

first successful Bt-protected corn plants. Such transgenic corn plants are called “Bt corn.”

A second goal was to invent a gene that, when inserted into the DNA of crops such as corn, cotton and canola, would result in the plants being resistant to Monsanto’s patented herbicide Roundup. Absent genetic engineering, Roundup would destroy growing plants as well as weeds. Protected by new genes, growing crops denominated “Roundup Ready™” will thrive while weeds are controlled. (RT pp. 52-53, 90, 253, 743-744, 790, 875-877, 1001, 1241, 1707, 1717, 1846.)

The revenue potential for agricultural biotechnology is uncertain but potentially large. The *risk* for biotechnology companies, however, is huge. MPS’s president Carl Eibl conceded, “This is a risky business, competitive business.” (RT p. 1092; see also RT pp. 856-857, 1917.) In a 1996 document filed with the Securities Exchange Commission (SEC), MPS projected that its “trend in losses from operations may continue” because of various “risks and uncertainties” caused by such factors as “[v]arying climatic conditions . . . , market acceptance of products, competition and U.S. and foreign government policies that affect crop acreage and farm income.” (RT pp. 1073-1074; see RT pp. 1067-1068, 1072.) Witnesses on both sides agreed that there is “[v]ery intense competition” among corn seed companies (RT p. 1842), that competition for sales of herbicide-resistant canola seed is “[e]xtremely tough” (RT p. 1734; see also RT p. 1718), and that competition among biotechnology companies is “very intense” (RT p. 1917). Product obsolescence is a constant element. (See RT pp. 1379-1380, 1644-1645, 2058, 2138-2139.) Today’s leading transgenic corn seed will soon be a has-been. As a Monsanto witness explained, corn products “turn over every five or six years because it is such a competitive background.” (RT p. 1644.) Monsanto’s current Bt corn could become obsolete in as little as three to five years. (RT p. 1692-1693.) In fact,

MPS plans to go to market with a new generation of Bt corn seed in 2000 or 2001. (See R.T. pp. 1170-1172.)

2. The process of genetic engineering.

Monsanto's journey down the commercial highway of agricultural biotechnology has been lengthy, rocky and expensive. (RT pp. 56, 1834.) It has required Monsanto to pass the following seven mileposts:

- *Milepost 1: Gene construction.* A portion of deoxyribonucleic acid (DNA) — that is, a Bt gene or a new Roundup resistant gene — containing the desired trait is invented in the laboratory, creating a totally new gene for a new type of plant. (RT pp. 768-769, 1614, 1707.)^{2/}
- *Milepost 2: Transformation into germplasm.* The new gene is inserted into the DNA construct of a living cell of the crop plant to be transformed, using the latest cutting-edge technology. A principal method of insertion is by means of a “gene gun” — literally, a firearm that blasts tiny gene-coated bullets into prepared cells. The new gene must lodge in the cells in such fashion that the gene “works,” i.e., causes “expression” of the desired trait in that cell at a commercially useful level. Thousands of experiments may occur before one is successful. (RT pp. 85, 153-155, 179, 775, 782-783, 836-840, 961, 974, 1108, 1114-1115, 1985.) A transformed cell is called an

^{2/} These genes are what MPS was entitled to obtain under the Monsanto-LGI agreement. (See *post*, pp. 13-14.)

“event.” (RT p. 1210.) An event is not merely a gene, but is “germplasm,” which means transformed plant material (e.g., a growing plant or a seed of that plant) containing both the new gene and all the other genes necessary to constitute a fertile plant. (RT pp. 69, 78, 123, 749, 817, 1825, 1878.)

- *Milepost 3: Regeneration.* Each event (a single transformed cell) must be developed into an entire, whole plant in the laboratory. The plants are then evaluated for the essential “robust” level of expression of the desired new genetic trait. (RT pp. 86, 154, 783, 824, 839-840, 961, 1108-1109, 1619, 1639.) A Bt plant must kill key pests, and a Roundup Ready™ plant must survive commercial applications of the herbicide.
- *Milepost 4: Cross and backcross.* The regenerated plants must be cross-bred into the “elite” (i.e., high yielding) commercial crop varieties desired by farmers, using conventional breeding techniques. Crossing and backcrossing must occur over as many as six or seven generations in order to create strong plants containing the new transgenic traits. (RT pp. 80, 113, 252, 256, 783-784, 820, 824-827, 841-842, 961, 1256.)
- *Mileposts 5, 6 and 7: Field tests, bulk-up and sales.* The cross-bred plants are grown in the field under varying climatic and soil conditions to determine whether all the desired traits are retained under large-scale, real-world cultivation. (RT pp. 784, 842, 961, 1711.) Seed of the successful new plants is then produced in mass quantities to create sufficient inventory to go to market.

(RT pp. 784, 842, 874, 961.) Finally, an effective sales and marketing organization is created. (RT pp. 784, 842, 961, 1724.)

3. Monsanto's experience on the commercial highway.

As of 1993, when *Mycogen I* was filed, Monsanto had not yet progressed very far on the commercial highway for corn seed. Monsanto had invented some new genes ("milepost 1") and had transformed some plants ("milepost 2") to create between 30 and 34 Bt and Roundup Ready™ corn events, but none worked; that is, none expressed the transgenic trait at a commercially viable level. (RT pp. 1619-1621, 1630.)

Monsanto's great breakthrough came in 1995-1996, with the testing of a Bt corn transformation event that Monsanto called "Ezra." (RT pp. 1491, 1625, 1633, 1818-1820, 1992.) Ezra worked, killing European corn borers at a commercially viable level.

After Ezra, Monsanto was able to reach each of the remaining mileposts on the commercial highway for Bt corn, bringing Bt corn seed to market in 1997. (RT pp. 1633-1634, 1850.) Bt corn technology has been very successful, increasing crop yields by 20 percent. (RT pp. 877, 880.) But it took Monsanto seven years and cost Monsanto \$40 million to create Bt corn. (RT p. 1634.)

Monsanto has *not* succeeded in creating commercially viable Roundup Ready™ corn from Monsanto genes, despite a \$20 million effort. (RT pp. 1634-1635.) At trial it was uncontroverted that Monsanto's Roundup Ready™ corn genes *still* did not work. (RT pp. 988, 1028, 1635, 1690, 1945.)

The development of Roundup Ready™ cotton and canola seed also has been difficult but successful. It took ten years for Monsanto to succeed in creating Roundup Ready™ cotton, and it took eight years to succeed in creating Roundup Ready™ canola. (RT pp. 1635-1637.)

C. The LGI Agreement.

In 1989, Monsanto and LGI entered into a written agreement by which Monsanto obtained a license to use in its research certain corn cell materials developed by LGI. (CT pp. 19-34.)

In exchange, Monsanto paid \$150,000 to LGI and gave LGI two options, which the contract called “non-transferable.” The first option, never exercised, has not been the subject of litigation. The second option, the basis of both *Mycogen I* and *Mycogen II*, is contained in paragraph 2.3(c) of the agreement.^{3/} Under paragraph 2.3(c), LGI could obtain a license to use gene technology developed by Monsanto at “milepost 1” on the commercial highway — which the contract called “Monsanto technology,” a defined term. (See CT p. 23; RT p. 168.) Paragraph 2.3(c) permitted LGI to license:

^{3/} Paragraph 2.3(c) fully describes the second option as follows: “A non-transferable option to obtain a non-exclusive, non-transferable, royalty-bearing license to MONSANTO Technology and any improvements relating to glyphosate resistance for use in cotton, maize and oilseed rape and MONSANTO Technology relating to insect resistance (via Genes encoding a toxin protein of B.t.) and any subsequent improvements thereto for use in maize. Any license granted pursuant to exercitation of this paragraph 2.3(c) shall include the right to make, have made, use and sell such plants but shall not include the right to sublicense, and shall have terms as favorable as any other third party licensee; provided, however, that the royalty rate to any improvements to the above described MONSANTO Technology shall be separately negotiated, but shall also have terms as favorable as any third party licensee to such improvements” (CT p. 25.)

- Monsanto’s Bt *genes* (which confer the trait of insect resistance) and later improvements in such genes for use in corn; and
- Monsanto’s Roundup Ready™ *genes* (which confer the trait of resistance to the herbicidal effects of Roundup) and later improvements in such genes for use in corn, cotton and canola. (CT p. 25.)

Paragraph 2.3(c) did not specify the ultimate licensing terms upon which the parties may agree (if they agree at all) after negotiation. (RT p. 1934.) It said only that the license “shall have terms as favorable [to LGI] as any other third party licensee” (if any), and that the royalty rates for “improvements” to the genes would be separately negotiated (again, at rates at least as favorable to LGI as to any other third party licensee). (CT p. 25.)^{4/}

The licensing option was to last ten years, until 1999. (CT p. 25.) The agreement further stated that it “shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.” (CT p. 32.)

^{4/} In the field of licensing, such a provision is called a “most favored nations clause” and is common. (See Milgrim on Licensing (1998) § 26.00, pp. 26-1 to 26-3; RT pp. 93, 471, 748, 889.)

D. MPS's Exercise Of The LGI Option.

1. The written demand for Monsanto technology.

The act triggering this litigation was a letter dated July 16, 1993, a year after Mycogen Corporation acquired control of LGI, in which MPS exercised the option to license "Monsanto technology" granted in paragraph 2.3(c) of the 1989 LGI agreement. Importantly, the letter stated this exercise was "contingent upon the acceptability of the terms for each such item" and representatives of MPS would contact Monsanto to "discuss license terms and conditions." (CT pp. 47-48; RT pp. 886-889.)

Monsanto believed, based on the analysis of its attorneys, that MPS had no right to exercise the option under the LGI agreement because the express terms of the agreement, made between LGI and Monsanto, indicated it was "non-transferable." (CT pp. 53-54; RT p. 1950.) Monsanto thus responded to the MPS letter on August 2, 1993, stating that MPS "has not acquired any rights under Section 2.3(c) of the agreement because the option referred to in that section is 'non-transferable.'" (CT p. 50; Exh. 67; RT pp. 890-893.) MPS wrote back on August 9, 1993, asserting that MPS was "the successor in interest to LGI." (CT pp. 50-51; RT pp. 893-895.) Monsanto replied on August 27, 1993, stating that legal counsel had advised Monsanto that MPS could not exercise LGI's licensing option and enclosing an inter-office memorandum setting forth the analysis leading to that conclusion. (CT pp. 53-54; RT pp. 896-897.)

2. MPS's unjustifiable demand for germplasm.

Upon exercising the LGI option, MPS made clear that its demand was for something MPS has no right to obtain: Monsanto's transgenic germplasm.

MPS wanted *germplasm* because the acquisition of *genes* pursuant to exercise of the LGI option takes MPS only to "milepost 1" on the commercial highway. MPS sought to skip the key hurdle of plant transformation (i.e., actually getting the new gene into the DNA of a plant), avoiding risk of failure and saving MPS millions of dollars and time. (RT pp. 56, 79, 911-912, 955, 990, 1486, 1494-1495, 2061.) As MPS's Carl Eibl testified, "we don't have the capability to transform corn. We never have." (RT p. 80.)

Indeed, on five to ten occasions between mid-1993 and 1997, in conversations between Carl Eibl and Monsanto co-president Robert Fraley, Eibl demanded Monsanto's transformed germplasm. (RT pp. 911, 947, 949-950, 955-956, 1929, 1941, 1949-1950, 1965, 1993.) MPS's then-president Jerry Caulder sought germplasm in a conversation with Fraley toward the end of 1993. (RT pp. 1937-1940; see also RT pp. 893, 985-987.)^{5/}

The fundamental flaw in MPS's demand is that *MPS has no right to obtain germplasm* under the LGI agreement. The superior court so held on October 20, 1997, when the court ruled as a matter of law that the LGI agreement conferred an option to license genes and improvements but *not* germplasm. (CT pp. 1462-1464; see also RT pp. 572, 712, 1934.) MPS was trying to get something it had no right to obtain.^{6/}

^{5/} Counsel for MPS conceded this point in closing argument. (See RT p. 2316 ["I will be the first to tell you that [Eibl] wanted germplasm. And he wanted germplasm back in '93."]; RT p. 2318 ["It is true that Mycogen has pursued germplasm, there's no question about that."].)

^{6/} Because MPS has not challenged the "genes not germplasm" order by
(continued...)

**E. The Specific Performance Judgment For MPS In
*Mycogen I.***

On December 17, 1993, MPS commenced the *Mycogen I* litigation, filing a complaint against Monsanto for specific performance of the LGI agreement. (CT pp. 56-66.) Both parties moved for summary judgment. The judge granted summary judgment for Monsanto, ruling that only LGI, and not MPS, had rights under the LGI agreement. (See CT p. 79.)

MPS successfully appealed the judgment. In an unpublished opinion filed on April 2, 1996, this court reversed the judgment, ruling as follows: “Premised on the language in the license agreement indicating that it inures to the benefit of successors, we hold that MPS — as a successor corporation to LGI — is entitled to the benefits of the licensing agreement. Accordingly, we reverse the summary judgment in favor of Monsanto and direct entry of summary judgment in favor of MPS.” (*Mycogen Plant Science, Inc. v. Monsanto Company* (Apr. 2, 1996) D021481, typed opn. p. 2; see CT p. 75.)

On August 1, 1996, the superior court rendered summary judgment for MPS. (CT pp. 448-450.) The judgment declared, among other things, that MPS was entitled to the benefits of the LGI agreement, that MPS had “validly

6/(...continued)

cross-appeal in *Mycogen II*, the order is final and binding in *Mycogen II* as res judicata on that issue. (*In re Matthew C.* (1993) 6 Cal.4th 386, 393.)

The “genes not germplasm” order was also made applicable to *Mycogen I*, in which MPS filed a notice of appeal from that order as rendered in *Mycogen I* (No. D032171). Monsanto moved to dismiss the appeal on the ground it was untimely. The court summarily denied the motion, but the summary denial is not binding as “law of the case” on the untimeliness issue. In the still-pending appeal from that order (No. D032171), Monsanto will seek “later full consideration” of the untimeliness issue “following review of the entire record and the opportunity for oral argument.” (*Kowis v. Howard* (1992) 3 Cal.4th 888, 900.)

exercised its option rights under paragraph 2.3(c) of the Agreement on or about July 16, 1993,” and that Monsanto was obligated to license Monsanto technology to MPS “upon terms as favorable as any third party licensee” (CT p. 449.) The judgment further ordered that Monsanto “specifically perform the relevant terms of the Agreement” by licensing Monsanto technology to MPS at MPS’s discretion and by disclosing to MPS “the terms of any third party license agreements.” (CT pp. 449-450.)

**F. MPS’s Refusal To Negotiate After Monsanto Delivers
 The Genes.**

Monsanto promptly complied with the judgment for specific performance. In late 1996 Monsanto provided MPS with working Bt and Roundup Ready™ genes, and in early 1997 Monsanto sent MPS draft forms of commercial licenses, complete in all particulars except price terms, which were to be determined by reference to third-party gene licenses. (RT pp. 542, 570, 910-911, 992, 1647-1648, 1805, 1934, 1945-1947, 1967; CT p. 25; see *ante*, p. 14.) But no other third-party *gene* licenses existed. (RT pp. 712-718.) Thus, if the parties were to come to any agreement on commercial licensing terms, it had to be done by negotiation. (RT pp. 1699, 1934.)

Exercise of the LGI option allowed MPS to reach “milepost 1” on the commercial highway. Indeed, the *Mycogen I* judgment required the parties to negotiate licenses for Monsanto’s genes, and MPS was given physical possession of those genes. According to MPS’s president, the tender of the genes assures success. He testified at the present trial that the genes “make us competitive” (RT p. 1081) and “if somebody gives you a gene that works, we have all of the tools to go through that highway.” (RT p. 1038; see also RT p.1029.)

MPS, however, flatly refused to negotiate licensing terms, despite Monsanto's efforts to get negotiations started. (RT pp. 84, 911, 991-993, 1946, 1975, 1978, 1996.) MPS refused to negotiate because Carl Eibl took a gamble — wrongly, it turned out — that MPS could get germplasm in addition to the genes that Monsanto owed and had delivered. (RT pp. 911-914.) Eibl told Monsanto's Robert Fraley that MPS had “absolutely no interest at all in negotiating gene licenses” (RT p. 1996.) Eibl was holding out for germplasm.

G. MPS's Unrelenting Quest For Nothing Less Than Germplasm.

The reason why MPS refused to negotiate genes licenses, and instead gambled on getting germplasm, was that germplasm would give MPS a lucrative free ride past several mileposts on the commercial highway. Working with genes alone, MPS will have to duplicate Monsanto's research and development at the same enormous cost and risk, which might break the back of a company that has already lost \$216 million. But if MPS can get germplasm, MPS will suddenly be a major player in the transgenic seed business — with Monsanto footing most of the bill.

MPS went for broke. Instead of working with the genes Monsanto had delivered, MPS continued its quest for germplasm by initiating a proceeding in *Mycogen I* to hold Monsanto in contempt for not delivering germplasm pursuant to the judgment for specific performance. (See RT pp. 45-270; CT pp. 2797-2800.)

MPS's strategy in the contempt proceeding was to emphasize how crucial it was for MPS to obtain nothing less than germplasm. Carl Eibl testified: “If you are in the business of selling planting seed you must have

germplasm, the plant material, in order to conduct your businesss, without it you don't have a business.” (RT p. 79.) MPS claimed in briefing that the difference in value between genes and germplasm — that is, the value of the free ride sought by MPS — “can easily be worth hundreds of millions of dollars” (CT p. 2899.)

This quixotic strategy failed for the simple reason that the *Mycogen I* judgment did not entitle MPS to germplasm, but only genes. The judge refused to hold Monsanto in contempt. Instead of punishing Monsanto, the judge imposed sanctions against MPS in the sum of \$157,090 for frivolous prosecution of the contempt proceeding. (CT pp. 3114-3119.)

Having failed in its attempt to save “hundreds of millions of dollars” by getting Monsanto’s germplasm, MPS concocted yet another strategy and pressed its jury case in a second lawsuit against Monsanto — the present action, *Mycogen II* — this time seeking a *damages judgment* for hundreds of millions of dollars.

H. *Mycogen II*: MPS Splits Its Cause Of Action And Sues For Damages After Obtaining Specific Performance.

On May 8, 1996, after prevailing on appeal in *Mycogen I* but before the appellate decision became final, MPS and its two affiliates, Mycogen Corporation and Agrigenetics, Inc., filed another complaint against Monsanto — *Mycogen II* — alleging contract and tort causes of action. (CT pp. 1-17.)^{7/}

The cause of action for breach of contract alleged by MPS in *Mycogen II* is the same breach of contract cause of action MPS asserted (and prevailed on) in *Mycogen I*. The *Mycogen II* complaint alleges that “Monsanto has

^{7/} The tort causes of action were later dismissed. (See *post*, fn. 9.)

willfully and materially breached the [LGI] Agreement by repeatedly refusing to allow MPS to exercise its license option rights under the Agreement, which rights have been judicially adjudged to be completely valid.” (CT p. 11.) The *Mycogen I* complaint similarly alleged that “Monsanto has failed and refused, and continues to fail and refuse, to perform the conditions of the [LGI] Agreement requiring Monsanto to license the MONSANTO Technology to MPS.” (CT p. 64.)

The key difference between the two complaints is in the *remedy* sought. In *Mycogen I*, the complaint sought *specific performance* of the LGI agreement, requiring Monsanto to license its genes to MPS pursuant to the agreement. (CT p. 65.) In *Mycogen II*, the complaint seeks the additional remedy of *money damages*, alleging that MPS has lost future sales because of the delay of its entry into the market for genetically-engineered seed resulting from Monsanto’s breach. (CT pp. 11, 16.)^{8/}

Monsanto demurred to the *Mycogen II* complaint on the ground that MPS violated the doctrine of *res judicata* by splitting a cause of action. (CT pp. 96-98.) Judge Barbara T. Gamer sustained the demurrer on that ground but granted leave to amend. (CT p.196.)

MPS then filed a first amended complaint, adding allegations that *since the filing of Mycogen I*, Monsanto “has developed technology subject to the option rights of the License Agreement” and “has refused to allow MPS to exercise its license options to that technology” (CT p. 316.) Monsanto demurred again. (CT pp. 326-328.) This time, in written opposition to the demurrer, MPS asserted a new theory, that the rule against splitting a cause of

^{8/} Ironically, at the same time MPS was complaining that it could not compete in the market for transgenic seed, *MPS had already been doing so*. In 1995, MPS licensed and went to market with the Bt corn seed of another Monsanto competitor, Ciba-Geigy. (See RT pp. 881-882, 1024-1025.)

action does not bar “sequential breach of contract suits in the instance of *continuing breach*.” (CT p. 473, italics added.)

Judge Gamer overruled the demurrer to the first amended complaint, concluding that MPS “has adequately pled the damages result [sic] from a continuing breach, an exception to the rule against splitting causes of action.” (CT pp. 500-503 [order rendered telephonically by Judge Gamer but signed by Judge William J. Howatt].) Monsanto later raised the *res judicata* issue in a motion for judgment on the pleadings before the trial judge, Herbert B. Hoffman, who refused to reconsider Judge Gamer’s ruling. (CT pp. 1173-1189, 1254.)

Thus, at the demurrer stage of *Mycogen II*, MPS’s claim for breach of contract was permitted to go forward not on the *actual* breach underlying *Mycogen I* but on the theory that MPS’s damages proceeded from breaches of contract *subsequent to the original breach*. At trial, however, MPS’s proof reverted to the theory in its first complaint (to which a demurrer had been sustained) that Monsanto committed a single breach of the LGI agreement causing all its losses when Monsanto rejected MPS’s 1993 exercise of the option, allegedly preventing MPS from ever competing in the market for transgenic seed. (See RT pp. 84, 941, 990, 992, 1080-1081, 1258-1259; CT pp. 2451, 2563.)^{9/}

^{9/} In other pretrial proceedings, Judge Hoffman sustained a demurrer without leave to amend as to causes of action alleged by MPS affiliates Mycogen Corporation and Agrigenetics, Inc., for breach of contract, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage. (CT pp. 986-1008.) The judge rendered an order of dismissal as to the two affiliates, who have appealed the dismissal order. (CT pp. 1111-1114, 1906-1907.) That appeal has been coordinated with the present appeal by Monsanto from the final judgment for MPS. The two appeals are separately briefed. This brief addresses Monsanto’s appeal (No. D031336). Monsanto addresses the
(continued...)

I. The Trial Of *Mycogen II*.

1. The judge directs a verdict for MPS on all issues except damages.

The case went to trial on MPS’s claim of continuing breach of contract. At the close of evidence, at Judge Hoffman’s sua sponte suggestion, MPS moved for a directed verdict on the issue of breach. (RT p. 2189.) The judge granted the motion over Monsanto’s strong objection (RT p. 2193) and instructed the jury, “You are directed that the issue of breach of contract is not before you. Accordingly, your task as a juror is only to determine if M.P.S. has been damaged by Monsanto’s breach and, if so, the amount of such damage.” (RT p. 2334.)

In this manner, the judge stripped Monsanto of its defenses on liability and causation, directing a verdict for MPS on all issues except the existence and amount of damages.

2. MPS seeks “terminal value” damages for perpetual lost profits.

The damages sought by MPS were exclusively hypothetical lost future profits. They also included an unprecedented element: “terminal value” damages for lost future profits into perpetuity from Bt corn seed sales. (RT pp. 1423, 1534-1535.)

9/(...continued)
affiliates’ appeal (No. D031046) in a respondent’s brief for that appeal.

MPS's expert witnesses estimated those lost future profits in two steps:

- Lost future profits individually projected year-by-year for the ten-year period between 1998 and 2007. (RT pp. 1395-1396, 1398, 1423.)
- Lost future profits in a single sum for all years after 2007, to the end of time. (RT pp. 1423-1426, 1526-1530.)

MPS's expert witness Dr. David Wheat described the second step as an attempt "to pick some number to stop projecting and incorporate a figure we call the 'terminal value' to represent the additional lost value from the future years." (RT p. 1423.) MPS's expert witness Dr. Brian Wright described terminal value as "a summation of the values that will occur further and further into the future." (RT p. 1528.) He said, "We are assuming profits continue into the future" (RT p. 1530.)

Dr. Wright testified that the terminal value of lost net profits to MPS from future Bt corn seed sales *after* 2007 is \$92 million. (RT p. 1537.)

3. The judge misinstructs the jury on the standard of proof for recovering lost profits.

For recovery of lost future profits, the law imposes a special standard of proof: to a "reasonable certainty." The parties disagreed below as to whether this standard is more demanding than "preponderance of the evidence." (See RT pp. 2217-2218.) The judge agreed with MPS, concluding "I don't think you have to prove anything beyond preponderance of the evidence." (RT p. 2218.)

In closing argument, MPS's counsel argued that "[r]easonable certainty means more probable or more likely than not. That's all reasonable certainty is, more likely than not, preponderance of the evidence." (RT p. 2274.) The judge similarly instructed the jury, "Reasonable certainty means probable or more likely than not." (RT p. 2336.)

4. MPS recovers damages for lost profits despite having obtained the genes that can produce those same profits.

As a result of the rulings described above, MPS, a company which has never been profitable, recovered by a 9-3 verdict the sum of \$174,900,000 as compensatory damages for lost future profits extending to the end of time. The jury awarded \$151,000,000 for Bt corn technology; \$5,000,000 for Monsanto's Roundup Ready™ corn gene technology (which does not even work); \$9,500,000 for Roundup Ready™ cotton gene technology; and \$9,400,000 for Roundup Ready™ canola gene technology. (RT p. 2374.) The judge rendered judgment on the verdict (CT pp. 2301-2302) and subsequently denied posttrial motions by Monsanto for new trial and for judgment notwithstanding the verdict (JNOV). (CT pp. 2566-2577.)

STATEMENT OF APPEALABILITY

This is a timely appeal from a judgment pursuant to Code of Civil Procedure section 904.1, subdivision (a)(1). The judgment finally disposes of all issues between the parties. (Cal. Rules of Court, rule 13; see CT pp. 2301-2302.)

LEGAL DISCUSSION

I.

THE DOCTRINE OF RES JUDICATA PRECLUDES MPS FROM RECOVERING DAMAGES IN *MYCOGEN II* AFTER OBTAINING SPECIFIC PERFORMANCE IN *MYCOGEN I*.

A. MPS Has Violated The Doctrine Of Res Judicata And Its Policies Of Preserving Finality, Curtailing Unfair Multiple Litigation, And Preventing Double Recovery.

MPS’s litigation strategy in this case implicates — and violates — the doctrine of res judicata, which ensures finality of litigation, prohibits multiple lawsuits on the same cause of action, and prevents double recovery. Monsanto has suffered the unfair consequences of repetitive litigation by being burdened with duplicative judgments requiring Monsanto, first, to give MPS the genes that can produce future profits, and then to pay MPS for the projected future profits that MPS might earn from the genes. Even now, MPS is pressing further and seeks Monsanto’s transformed *germplasm* by yet another separate appeal. (See *ante*, fn. 6.)

Res judicata “operates as a bar to maintaining a second suit between the same parties or parties in privity with them on the same cause of action.” (*Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1245, internal quotation marks omitted.) A basic precept of the doctrine is that a plaintiff may not “split” a cause of action in order to recover different relief in successive lawsuits. “Res judicata precludes piecemeal litigation by

splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief.” (*Ibid.*)

The rule against splitting a cause of action is grounded in fundamental notions of fairness and judicial economy. It is not a legal technicality. Once a plaintiff has had an opportunity for a full and fair hearing, “fairness dictates that the controversy in question be put to rest.” (*Ibid.*, internal quotation marks omitted.) Res judicata thus implements a “need for finality” and an end to litigation. (*Dalany v. American Pacific Holding Corp.* (1996) 42 Cal.App.4th 822, 829.) The doctrine “‘seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration.*’” (*In re Joshua J.* (1995) 39 Cal.App.4th 984, 992, quoting 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 188, p. 621, original italics.)

Where the plaintiff has recovered a judgment, res judicata also has the purpose of preventing *double recovery* in a subsequent action. “Whether plaintiff’s splitting has been of theory, or arithmetical, or of relief seems to be unimportant in connection with double recovery. The essential inquiry is whether he has already had redress for a particular element of damages or injury. Any doubt should be resolved against plaintiff, as he could have avoided the raising of the question by including the debated matter in his first action.” (Cleary, *Res Judicata Reexamined* (1948) 57 Yale L.J. 339, 345.)

MPS evaded res judicata by claiming that *after* the original breach Monsanto had committed “continuing breaches” of the LGI agreement. But MPS changed its *theory* of continuing breach as the litigation progressed, taking far different legal positions from demurrer to trial.

At first, in written opposition to the demurrer to the first amended complaint, MPS argued that Monsanto has repeatedly breached a continuing duty to provide “improvements” to Monsanto technology as they are developed. (CT pp. 473-477; see also CT p. 140.) Later, when opposing

Monsanto’s posttrial motion for JNOV, MPS changed its tack and argued that Monsanto has continuously breached the licensing *option* in the LGI agreement by continuously refusing to accede to MPS’s exercise of the continuing offer embodied in the option. (CT pp. 2552-2553.) The trial judge adopted this second argument, stating in a written ruling that an option is a continuing offer and “[t]he rejection of an exercise of a continuing offer is a ‘continuing breach.’” (CT p. 2569.) This is not the law.

We address both of MPS’s continuing breach arguments and demonstrate why each is meritless under the law of contracts, why MPS has violated *res judicata* and why, in the interests of fairness and finality, MPS should not be permitted to sue Monsanto twice in a potentially endless series of actions for so-called continuing breach of the LGI agreement. But in wending through the legal issues on this appeal, one should never lose sight of *why* multiple litigation is so unfair here. It has resulted in double recovery by allowing MPS first to obtain, through the remedy of specific performance in *Mycogen I*, the genes that have put MPS in the business of selling genetically-engineered seed, and then to obtain, through the remedy of damages in *Mycogen II*, an award of the very same future profits that MPS insists it can earn from the genes.

B. Absent Any Continuing Breach, MPS Impermissibly Split Its Single Cause Of Action Under The Primary Rights Doctrine.

For MPS to prevail on this appeal, MPS must avoid *res judicata* – specifically, the underlying principle of “primary rights” – by convincing this court that there was a continuing breach of the LGI research and development agreement after MPS exercised the option to negotiate commercial licenses.

Absent any *continuing* breach of contract, “a single and entire cause of action at once accrues.” (*Abbott v. The 76 Land and Water Co.* (1911) 161 Cal. 42, 49.) Under the doctrine of *res judicata*, a judgment for specific performance on that cause of action “is a bar to any further relief based on the claim of the breach” (*Ibid.*) This is because “an action for specific performance necessarily involves, not only the question of such performance, but also all claim for compensation and *damage on account of the delay in performance.*” (*Ibid.*, italics added.)

Res judicata thus prohibits a plaintiff from splitting a cause of action among different remedies by filing successive lawsuits for specific performance and for damages from the delay in performance. (*Id.* at pp. 49, 51.) That is precisely what MPS has done (see CT pp. 139, 472) — a point even acknowledged by the trial judge in the order denying Monsanto’s posttrial motions. (See CT p. 2570 [stating that in *Mycogen I*, MPS sought specific performance and in *Mycogen II*, MPS sought “additional damages caused by the delay” of performance by Monsanto].)

The key point is that MPS has filed successive lawsuits for different remedies — specific performance and damages caused by delay of performance — in order to enforce its option right to the same Monsanto technology. This invokes the “primary rights” principle of *res judicata*.

“For purposes of identifying a cause of action under the doctrine of *res judicata*, California has consistently applied the ‘primary rights’ theory, under which the invasion of one primary right gives rise to a single cause of action.” (*Weikel v. TCW Realty Fund II Holding Co.*, *supra*, 55 Cal.App.4th at p. 1246, internal quotation marks omitted.) Under this rule, “a cause of action consists of 1) a primary right possessed by the plaintiff, 2) a corresponding primary duty devolving upon the defendant, and 3) a delict or wrong done by the defendant which consists in a breach of such primary right and duty.

[Citations.] Thus, two actions constitute a single cause of action if they both affect the same primary right.” (*Ibid.*) “The ‘cause of action’ is to be distinguished from the ‘remedy’ and the ‘relief’ sought, for a plaintiff may frequently be entitled to several species of remedy for the enforcement of a single right.” (*Id.* at p. 1247; see also *Valentine v. Baxter Healthcare Corp.* (Jan. 11, 1999, A075385) ___ Cal.App.4th ___ [99 Daily Journal D.A.R. 245, 251].)

Here, 1) MPS had a primary right to negotiate licenses for Monsanto technology, 2) Monsanto had a corresponding duty to negotiate, and 3) Monsanto breached that duty by refusing to recognize that MPS had rights under the LGI agreement. This resulted in a single cause of action. MPS could have sought several species of *remedy* (specific performance or damages) to enforce this single right, but remedy is to be distinguished from the cause of action. Serial remedies through multiple actions are prohibited.

Because there was no continuing breach, and because MPS obtained a judgment for the only remedy it sought in *Mycogen I* on its single cause of action for specific performance, MPS may not sue Monsanto again and recover money damages on that identical single cause of action.

C. Because The Contract Was Totally Breached By Nonperformance And Repudiation, There Was No Continuing Breach, And Thus Multiple Causes Of Action Did Not Accrue.

1. Summary of argument.

As explained below, Monsanto had no continuing duty to perform under the breached LGI agreement, and thus there was no continuing breach, because:

- The continuing offer represented by the option to negotiate genes licenses ended and became a *bilateral contract* when MPS exercised the option.
- Monsanto *totally breached* the resulting bilateral contract, through *nonperformance and repudiation*, by refusing to tender genes based on the honest but mistaken belief that MPS had no rights under the LGI agreement.
- As a result of Monsanto's complete nonperformance and repudiation, Monsanto had no continuing duty to perform. Without a continuing duty, there was no continuing breach.
- Monsanto's total breach of contract gave rise to a *single cause of action* which could not be split, so that the judgment for specific performance in *Mycogen I* bars the double recovery of damages in *Mycogen II*.

2. The option contract became a bilateral contract when MPS exercised the option.

The invalidity of MPS's continuing breach theory is plainly demonstrated by examining the nature of paragraph 2.3(c) of the LGI agreement: what it was, and what it became.

In both California and Ohio^{10/} — indeed, as a matter of basic contract law anywhere — paragraph 2.3(c) of the LGI agreement was an option that “ripened” into a bilateral contract upon MPS's exercise of the option. In California, an option has a dual nature as 1) a unilateral contract consisting of an irrevocable and continuing offer, which ripens into 2) a bilateral contract upon exercise of the option. The option “is an irrevocable offer, which upon acceptance ripens into a bilateral contract” (*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal.3d 494, 502.) The rule in Ohio is the same: when an option is accepted it “ripens” or “merges” into “a binding bilateral contract.” (*Rossmann & Co. v. Donaldson* (1994) 1994 Ohio

^{10/} Occasionally in this brief we cite cases from both California and Ohio. The LGI agreement includes a provision that it “shall be governed by and construed and interpreted in accordance with the internal substantive laws of the State of Ohio, disregarding the principles of conflict or choice of laws thereof.” (CT p. 33.) In the proceedings below, the parties sometimes disagreed as to whether the substantive laws of Ohio or the procedural laws of California should apply to particular issues. On Monsanto's appeal, however, these disagreements are largely irrelevant, and we cite cases from both jurisdictions.

App. LEXIS 5535, *23;^{11/} accord *Stanley v. Like* (1962) 22 Ohio Op.2d 274 [190 N.E.2d 697, 704].)

Paragraph 2.3(c) of the LGI agreement, as an option to negotiate a license with terms at least as favorable as for any third party, was thus an irrevocable offer by Monsanto of an opportunity to obtain licensing rights to Monsanto's gene technology and later improvements. In the letter of July 16, 1993, MPS accepted this irrevocable offer by exercising the LGI option. At that moment the option for technology and improvements ripened into something new: it became a standard bilateral contract under which Monsanto and MPS each undertook to negotiate one or more gene licenses. Counsel for MPS conceded this point below, arguing that "an option is treated as an offer. Exercising that option constitutes an acceptance of that offer and creates a contract between the parties." (RT p. 2184.)

This underlying legal concept — that paragraph 2.3(c) became a bilateral contract when MPS exercised the licensing option — is the first of three steps to understanding why there is no continuing breach.

^{11/} The *Rossman & Co.* opinion, like several other Ohio opinions cited in this brief, is unpublished, but in Ohio an unpublished case is "persuasive" (though not "controlling") authority. (Ohio Sup.Ct. Rules For The Reporting Of Opinions, rule 2(G).) Copies of all unpublished Ohio opinions cited herein have been lodged with this court, simultaneously with the filing of this brief, pursuant to rule 977(c) of the California Rules of Court. (See Appendix Of Cited Opinions Available Only In A Computer-Based Source of Decisional Law.)

3. Monsanto repudiated the bilateral contract in the honest but mistaken belief that MPS had no rights under the LGI agreement.

The second step to understanding why there is no continuing breach is to explain, in the language of contract law, Monsanto's response to MPS's exercise of the option.

Monsanto's response was that MPS had no rights under the LGI agreement because it was nontransferable. (CT pp. 53-54.) This was *nonperformance accompanied by repudiation* of the bilateral contract which had been created by MPS's exercise of the licensing option.^{12/} Nonperformance accompanied by repudiation is a *total breach of contract*. (*Gold Min. & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 29; *Fox v. Dehn* (1974) 42 Cal.App.3d 165, 171; Rest.2d Contracts, § 243(2); 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 795, p. 718.)

Monsanto's repudiation was an honest mistake based on the advice of legal counsel. (See CT pp. 53-54; RT pp. 896-897.) Indeed, the superior court judge in *Mycogen I* agreed with Monsanto. But that does not excuse the repudiation or change its legal effect. (*Abbott v. The 76 Land and Water Co.*, *supra*, 161 Cal. at p. 47 [finding repudiation even though "defendant claimed in good faith, and with apparently much ground for its claim, that the contract relied on by plaintiff's assignor did not entitle him to purchase the land"]; *Ernie's Pizza, Inc. v. Myeroff* (1985) 1985 Ohio App. LEXIS 6552, at *7 [contract is repudiated if the renunciation is "clear and unequivocal so that the party will be informed that he need not expect anything further upon the contract from the other side"]; Rest.2d Contracts, § 250, com. d, p. 275 ["a

^{12/} MPS itself has used the word "repudiated" (in the *Mycogen I* complaint) to describe Monsanto's response. (CT p. 62.)

party acts at his peril if, insisting on what he mistakenly believes to be his rights, he refuses to perform his duty”].)

4. Monsanto’s nonperformance and repudiation, resulting in total breach of the bilateral contract, gave rise to a single cause of action which could not be split.

The third step is to understand that because the legal effect of Monsanto’s nonperformance and repudiation was *total breach*, ending any continuing duty of Monsanto to perform, MPS had a *single* cause of action which could not be split. (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 598-599; *Abbott v. The 76 Land and Water Co.*, *supra*, 161 Cal. at p. 49.)

Where a contract is repudiated, the courts have distinguished between *anticipatory* repudiation before performance is due (not the case here) and repudiation *at the same time or after* performance is due.^{13/} If, as here, a bilateral contract is repudiated at the same time or after performance is due, the nonperformance and repudiation results in a *total breach*, and the injured party may *not* demand further performance by the wrongdoer. (*Coughlin v. Blair*, *supra*, 41 Cal.2d at pp. 598-599.) The total breach gives rise to an action to recover *all damages*, past and future, and “absolves the defendant from any duty, *continuing or otherwise*, to perform the contract.” (*Id.* at p. 598, italics added; accord *Abbott v. The 76 Land and Water Co.*, *supra*, 161 Cal. at p. 49.)

^{13/} In the case of anticipatory repudiation, the plaintiff may treat the breach as total and sue for total breach, *or* may choose to continue performing and wait for the wrongdoer’s performance to become due before suing for damages. (See *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 488-490; *Livi Steel, Inc. v. Bank One, Youngstown, NA* (1989) 65 Ohio App.3d 581, 586 [584 N.E.2d 1267, 1269-1270].)

Thus, once Monsanto totally breached the “ripened” bilateral licensing contract by nonperformance and repudiation, MPS had a single cause of action for all relief. Having refused to negotiate genes licenses and to tender its genes at the time performance was due, Monsanto’s repudiation meant it had no continuing duty to perform under the contract.

Absent any continuing duty regarding the 1993 technology sought by MPS’s sole exercise of the option, there cannot be any continuing breaches or successive causes of action. Rather, a party aggrieved by nonperformance and repudiation must file a single lawsuit, or be barred from further recovery in the event of a subsequent breach. This rule — implementing the policy against splitting a cause of action — is set forth in the Restatement of Contracts *and* the Restatement of Judgments as follows:

“An injured party who has a claim for damages for total breach as a result of a repudiation, and who asserts a claim merely for damages for partial breach, runs the risk that if he prevails he will be barred under the doctrine of merger from further recovery, even in the event of a subsequent breach, because he has ‘split a cause of action.’” (Rest.2d Contracts, § 243, com. b, p. 252.) “[I]f the initial breach is accompanied or followed by a ‘repudiation’ [citation], and the plaintiff thereafter commences an action for damages, he is obliged in order to avoid ‘splitting,’ to claim all his damages with respect to the contract, prospectively as well as past, and judgment in the action precludes any further action by the plaintiff for damages arising from the contract.” (Rest.2d Judgments, § 26, com. g, p. 240.)

Likewise, a judgment for *specific performance* precludes any future action for damages. (*Abbott v. The 76 Land and Water Co.*, *supra*, 161 Cal. at p. 49 [where defendant rejected plaintiff’s exercise of option to purchase property, prior judgment awarding specific performance barred subsequent

action for damages].)^{14/}

In short, because of Monsanto's nonperformance and repudiation of the LGI agreement, MPS had a single cause of action which could not be split between *Mycogen I* and *Mycogen II*. That is why *Mycogen II* is barred by res judicata.

5. Neither of MPS's continuing breach theories avoids the rule of total breach by nonperformance and repudiation.

MPS has asserted two novel theories of so-called "continuing breach" in an attempt to avoid the rule of total breach by nonperformance and repudiation.

MPS's primary theory, asserted in opposition to Monsanto's motion for JNOV and adopted by the trial court, was that Monsanto continuously breached the licensing *option* through continuous disavowal of a "continuing offer" embodied in the option. (CT pp. 2552-2553.) This argument is patently meritless and contrary to all authority. MPS exercised the licensing option on July 16, 1993. As a result, the option for Monsanto technology and later improvements "ripened" into a bilateral contract. (*Palo Alto Town & Country Village, Inc. v. BBTC Company, supra*, 11 Cal.3d at p. 502; *Rossman & Co. v. Donaldson, supra*, 1994 Ohio App. LEXIS 5535, *23.) There was no longer an option; rather, it had become a contract for Monsanto and MPS to negotiate genes licenses — and the trial court ruled that the contract was breached. (See

^{14/} This rule is followed throughout the United States. (See, e.g., *Wilson v. Western Alliance Corp.* (1986) 78 Ore.App. 197, 200-201 [715 P.2d 1344, 1345-1346]; *Flora, Flora & Montague, Inc. v. Saunders* (1988) 235 Va. 306, 310-311 [367 S.E.2d 493, 495-496]; *Sanwick v. Puget Sound Title Insurance Co.* (1967) 70 Wash.2d 438, 440-442 [423 P.2d 624, 626-627].)

ante, pp. 32-33.) This means there was no longer any “continuing offer” under the former option agreement, because the continuing offer had been *accepted*. No continuing offer, no continuing breach. ^{15/}

In the effort to evade the fact that there was only a single breach of the LGI agreement, MPS took a different tack in the demurrer proceedings, claiming that Monsanto had a “continuing duty,” once MPS exercised the option, to provide “improvements” to Monsanto technology as they are developed. (CT pp. 473-474.) MPS urged a purported analogy to installment payment cases, such as for monthly payments on a lease (see *Schafer v. Wholesale Frozen Foods, Inc.* (1966) 242 Cal.App.2d 451, 456) and for monthly payments on a contract to purchase a business (see *Zingheim v. Marshall* (1967) 249 Cal.App.2d 736, 744-745), which held that each failure to make a payment was a separate cause of action. (CT p. 473.) Those cases are inapposite, however, because they did not involve *total* breach by nonperformance *and repudiation*, but only *partial* breach of a multiple installment obligation. Nonperformance and repudiation, which occurred here but not in the installment payment cases, is not a partial breach which can result in multiple causes of action, but a total breach which results in a single cause of action.

Another reason why the installment payment case law has no application here is that the provision of gene technology sought by the 1993

^{15/} Consider this hypothetical: For adequate consideration, X grants to Y an option under which X will paint Y’s house for a set sum. Y exercises the option. X subsequently refuses to perform and repudiates the agreement by declaring he will never perform. X clearly has breached the agreement. But has he “continued” to breach it 30 days later if he still has not yet performed? 3,000 days later? The answer is no. Otherwise, among other consequences, no statute of limitations would ever apply to X’s breach. Likewise here, MPS’s theory of endlessly recurring breaches would abrogate the statute of limitations for Monsanto’s 1993 breach.

exercise of the LGI agreement, unlike a monthly lease or installment purchase, is not *severable* into recurring obligations that have independent value despite any prior breaches. At trial, MPS itself argued the nonseverability of Monsanto's breach, claiming that Monsanto's *subsequent* 1996 performance under the LGI agreement was *worthless* because of Monsanto's *initial* 1993 *breach* which, according to MPS, made it *impossible* for MPS to compete in the market for genetically-engineered seed. (See RT pp. 84, 1081; CT pp. 316-317.) Thus, the theory of MPS's case was necessarily that Monsanto's 1993 breach of the LGI agreement so completely impaired the value of that agreement as to constitute a complete nonseverable breach of the *entire contract*. (See Rest.2d Contracts, § 243, com. c, p. 254, & com. e, illus. 6, p. 255 [installment contract is nonseverable if "there is a relationship between installments" such that breach of an installment obligation "substantially impairs the value of the contract . . ."]; *L.A. Gas & Elec. Co. v. Amal. Oil Co.* (1909) 156 Cal. 776, 779 [contract not severable "where the nature and character of the agreement show that it was intended to be entire"]; *Fox v. Dehn, supra*, 42 Cal.App.3d at p. 172; *Jozovich v. Central California Berry Growers Assn.* (1960) 183 Cal.App.2d 216, 224; *DePugh v. Mead Corp.* (1992) 79 Ohio App.3d 503, 513 [607 N.E.2d 867, 873]; 1 Ohio Juris.3d (1998) Actions, § 68.) MPS therefore could assert only the single cause of action for breach which was finally adjudicated in *Mycogen I*.

Indeed, MPS never even claimed that Monsanto breached a separate duty to provide "improvements" independent of its single 1993 demand for Monsanto technology. MPS never made a separate demand for any post-July 1993 "improved" genes. Its entire damages calculation was based on its inability to have access to Monsanto's genes as of July 1993 and the delay in acquiring those genes while MPS's contract rights were adjudicated. (See RT pp. 930, 1126, 1191, 1257-1258, 1392-1393, 1440-1441.)

D. The Trial Judge Failed To Apply Res Judicata Due To Misconstruction Of An Ohio Case.

The trial judge went astray by relying on MPS's misconstruction of a single Ohio case, *South Main Akron, Inc. v. Lynn Realty, Inc.* (Ohio App. 1951) 62 Ohio L.Abs. 103 [106 N.E.2d 325]. In MPS's written opposition to Monsanto's motion for JNOV, MPS cited *South Main Akron* for an erroneous argument that "Monsanto refused to recognize MPS' acceptance of [the] continuing offer" which purportedly emanated from the licensing option, and "[u]nder Ohio law, the rejection of an exercise of a continuing offer is a 'continuing breach.'" (CT p. 2553.) The trial judge said the same thing almost verbatim — and likewise cited *South Main Akron* — in the written ruling denying JNOV: "Monsanto refused to recognize Mycogen's valid acceptance of that offer," and "[t]he rejection of an exercise of a continuing offer is a 'continuing breach.'" (CT p. 2569.)

But *South Main Akron* does not support that proposition. Citing that case was plain error. *South Main Akron* held only that a mere *anticipatory* repudiation (sometimes called "anticipatory breach") is a continuing breach which can be invoked by the aggrieved party at any time, and the aggrieved party may choose to wait for the wrongdoer's performance to become due before suing for damages. (*South Main Akron, Inc. v. Lynn Realty, supra*, 106 N.E.2d at p. 330.) The case does not stand for the proposition, nor did it say, that breach of an *option* contract is a continuing breach. The case did not involve an option contract at all. (See *id.* at p. 327 [portion of judgment at issue on appeal "concerns an anticipatory breach of contract for the leasing of real estate"].)

A critical distinction not appreciated below is that Monsanto's breach — consisting of nonperformance accompanied by repudiation — was not an

anticipatory repudiation but a *total breach of contract*. The legal significance of this distinction is that MPS did *not* have the choice of awaiting performance, but had to sue at that time for all past and future damages. Monsanto had no duty of further performance, and absent such duty there was no continuing breach. (See *ante*, pp. 35-38.)

The law of anticipatory repudiation, as set forth in *South Main Akron*, has nothing to do with this case, and error has occurred by its misapplication.

E. MPS Was Not Without Remedies: MPS Should Have Sought Damages In *Mycogen I* In The Original Complaint, Or Alternatively Could Have Done So In A Supplemental Complaint.

MPS had ample opportunity to pursue damages from the alleged delay in performance without violating *res judicata*. MPS argued below that it “could not have sued in *Mycogen I*” for the delay damages because they did not occur until it was too late for MPS to “amend” the complaint to allege them. (See CT p. 471.) Wrong. Nothing prevented MPS from alleging delay damages in an as-yet undetermined amount at the inception of *Mycogen I*, for even if such damages had not yet occurred they were certainly foreseeable. (See *McFadden v. H. S. Crocker Co.* (1963) 219 Cal.App.2d 585, 589 [rule against splitting cause of action applied to subsequent litigation “even though the plaintiff was not aware of the particular elements of damages therein sought to be recovered at the time of the pendency of the prior action”].) Moreover, by the time MPS filed its complaint in *Mycogen I*, there had already been *five months of delay* since MPS had exercised the option. If there really were any delay damages, they had already begun to accrue, and MPS should have sought them in the original complaint. MPS could have — and should

have — preserved its claim for damages by alleging them at the outset of *Mycogen I*.

Alternatively, MPS could have filed a *supplemental* complaint in *Mycogen I* after remand to the trial court. A supplemental pleading is used to allege relevant facts occurring *after* the original pleading was filed which would affect the rights asserted and the judgment to be rendered. (*Majors v. County of Merced* (1962) 207 Cal.App.2d 427, 436; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (Rutter 1998) ¶ 6:791, p. 6-158.) In contrast, “[a]n amended pleading relates to matters *existing* when the original pleading was filed.” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, at ¶ 6:792, p. 6-158, original italics.) Courts are extremely liberal in permitting supplemental complaints. (*Id.* at ¶¶ 6:818-6.819, p. 6-163.) The authorizing statute prescribes no filing deadline. (See Code Civ. Proc., § 464.) MPS commenced the *Mycogen II* action for delay damages on May 8, 1996, *three months before* the superior court rendered final judgment in *Mycogen I*. Any such damages had obviously occurred well before *Mycogen I* was over. MPS could have pursued such damages by filing a supplemental complaint in that action.

F. The Error Requires Reversal With Directions To Dismiss This Action.

Resolution of this entire dispute in a single lawsuit was demanded by the doctrine of *res judicata*. Instead, MPS split its cause of action and went forward with *Mycogen II* — in an attempt to obtain a profit guarantee insurance policy from the judicial branch of government by recovering hypothetical lost future profits in perpetuity — seeking a *double* recovery of

future profits as well as the profit-producing genes. This dispute should have ended with *Mycogen I*.

The trial court justified its ruling on res judicata on the ground that “the evidence here does not show any *prejudice* resulting from Mycogen’s pursuit of specific performance in *Mycogen I*, and damages caused by the delay in performance in *Mycogen II*.” (CT p. 2570, italics added.) But prejudice is not a necessary element of the rule against splitting a cause of action. “A defendant’s successful invocation of res judicata as a bar does not depend upon a showing of prejudice apart from the prejudice inherent in forcing a party to defend against successive suits involving only matters finally determined.” (*Roybal v. University Ford* (1989) 207 Cal.App.3d 1080, 1087.) In any event, Monsanto is prejudiced by MPS’s recovery of genes *and* profits through successive litigation, because the recovery is duplicative.

This court should reverse the judgment in *Mycogen II* and remand the cause with directions to the superior court to dismiss the action. *Mycogen II* is barred by res judicata.

II.

THE JUDGE ERRONEOUSLY DIRECTED A VERDICT FOR MPS ON CAUSATION.

A. The Judge Directed A Verdict On Everything But Damages.

In reality, MPS could suffer no loss unless genes licenses *would have been successfully negotiated* with Monsanto and accepted by MPS. The hypothetical damages thus depended on MPS proceeding under commercial licenses and were always “one contract away” from the breached LGI

agreement. In the language of contract law, the breach of the duty to negotiate cannot be the *legal cause* of damages absent a factual finding that the negotiations *would have resulted* in a binding contract. Monsanto's trial theory was that MPS never would have entered into binding genes-only licenses, and thus Monsanto's breach of the LGI agreement was not a cause of MPS's damages.

The judge, however, took the issue of causation away from the jurors by instructing them, "You are directed that *the issue of breach of contract is not before you*. Accordingly, your task as a juror is *only* to determine if M.P.S. has been *damaged* by Monsanto's breach and, if so, the amount of such damage." (RT p. 2334, italics added.)

As explained below, the problem with this instruction is that one of the elements of breach is *causation*, and causation was hotly disputed by Monsanto's evidence. The instruction failed to reserve causation for the jury's determination. (Cf. *Castaneda v. Bornstein* (1995) 36 Cal.App.4th 1818, 1828 [proof that act "led to" an injury is not the equivalent of proof that the act was the "legal cause" of the injury].) The timing and effect was catastrophic and infringed Monsanto's right to a jury trial, making a large judgment for MPS a virtual certainty.

B. Whether The Parties Would Have Successfully Negotiated Licenses Had There Been No Breach By Monsanto Was A Causation Issue On Which There Was Conflicting Evidence.

In a breach of contract action, the plaintiff is entitled to recover only those damages (including lost future profits) that are proximately caused by the breach. (*Postal Instant Press, Inc. v. Sealy* (1996) 43 Cal.App.4th 1704, 1709;

Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 Cal.App.3d 442, 457; see Civ. Code, § 3300.) The plaintiff must establish a “causal connection” between the breach and damages. (*Metzenbaum v. R.O.S. Associates* (1986) 188 Cal.App.3d 202, 211.)

Monsanto’s breach was its refusal to negotiate upon MPS’s exercise of the licensing option. MPS’s purported damages were lost future profits. To establish the *causal connection* between the breach and damages requires proof that the parties would have negotiated *successfully* absent the breach — for, without any third-party gene licenses as a reference point, a licensing agreement could *only* have been achieved by negotiation. (See *ante*, pp. 14, 18.) This is classic “but for” causation: MPS must prove it would not have been damaged “but for” Monsanto’s refusal to negotiate, because negotiations would have been successful. (See, e.g., *Akins v. County of Sonoma* (1967) 67 Cal.2d 185, 199.)

Damages for breach of contract are not recoverable unless, “but for” the breach, the plaintiff would have been ready, able and *willing* to perform, so that the breach caused damage. (*Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 625-626.) Thus, if MPS insisted on receiving germplasm and would not have been willing to negotiate a genes-only license, so that the parties would not have negotiated successfully, it follows that Monsanto’s breach caused no damage to MPS.

There was starkly conflicting evidence on this causation issue. On the one hand, MPS’s president Carl Eibl testified at trial that in 1993 he would have “accepted genes” (RT pp. 1040, 1077) — although he testified twice earlier that the genes had virtually no value to MPS. (RT pp. 79-80, 84.) On the other hand, Monsanto presented substantial contrary evidence that the parties would *not* have successfully negotiated genes licenses. Specifically,

Monsanto offered the following strong evidence that would have permitted a jury to draw *inferences* against causation and liability:

- MPS repeatedly demanded germplasm, but Monsanto correctly understood the LGI agreement to concern only genes. (See *ante*, p. 16.) Once the genes were delivered, MPS refused to negotiate licensing terms with Monsanto. (See *ante*, pp. 18-19.) *Inference*: MPS and Monsanto would never have agreed on the essential subject matter of the licenses.
- Monsanto had no Roundup Ready™ corn genes that worked. (RT pp. 988, 1028, 1635, 1690, 1945.) Nor would Monsanto have permitted MPS to genetically alter or “tinker with” Roundup Ready™ genes to attempt to improve their performance. (RT pp. 1030-1031, 1082-1083, 1661-1662, 1703, 1857-1858, 1935.) *Inference*: MPS would not have negotiated for the failed Roundup Ready™ corn genes because they would not have led to commercial success.
- MPS had no meaningful ability to transform corn or canola (“milepost 2” on the commercial highway), a fact repeatedly admitted by Carl Eibl. (RT pp. 80-81, 963, 965-967, 979-980.) *Inference*: That is why MPS insisted on receiving germplasm, and why MPS would not have entered into *genes-only* licenses.
- MPS did not have significant cotton or canola seed businesses. (RT pp. 797, 799-800, 917, 919, 962, 1046-1048, 1051-1052, 1055-1057.) *Inference*: MPS would not have entered into genes

licenses for those crops because MPS did not have the means to sell seed on a large-scale commercial basis.

- Monsanto's Roundup Ready™ gene technology for cotton would have value to MPS only if MPS could combine Roundup Ready™ genes with non-Monsanto Bt genes in a single plant — a process called “stacking.” But Monsanto never would have licensed such actions. (RT pp. 1243, 1251, 1270-1272, 1662-1663, 1704.) *Inference*: MPS would not have negotiated for a cotton license that would have had so limited a value to it.

On the portion of this appeal challenging the directed verdict, the court must view the evidence in the light most favorable to Monsanto. The applicable standard of review prescribes that all evidentiary conflicts must be resolved in Monsanto's favor and *all inferences from the evidence must be drawn in Monsanto's favor*. (*Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 210, 219-220; *Colbaugh v. Hartline* (1994) 29 Cal.App.4th 1516, 1521; *Rotman v. Maclin Markets, Inc.* (1994) 24 Cal.App.4th 1709, 1712-1713.) Accordingly, this court must draw the inference that the parties would not have successfully negotiated genes-only licenses in the form MPS has claimed was essential to its future success — and thus Monsanto's breach did not proximately cause any damage to MPS.

**C. Because The Evidence On Causation Was In Conflict,
The Causation Issue Should Have Gone To The Jury.**

When there is conflicting evidence on point, “the issue of causation is a question of fact for the jury.” (*Metzenbaum v. R.O.S. Associates, supra*, 188 Cal.App.3d at p. 212.) Only if there is no substantial evidence of causation may the judge decide the issue as a matter of law and direct a verdict. (*Ibid.*) On appeal from a judgment on a directed verdict, the judgment will be reversed if there was substantial evidence supporting appellant on the issue decided by directed verdict. (*Brassinga v. City of Mountain View, supra*, 66 Cal.App.4th at pp. 210, 219-220 [conflicting inferences precluded directed verdict]; *Colbaugh v. Hartline, supra*, 29 Cal.App.4th at p. 1521; *Rotman v. Maclin Markets, Inc., supra*, 24 Cal.App.4th at p. 1713.)

Here, the parties presented several *weeks* of conflicting evidence on causation, raising conflicting inferences. The judge should have instructed the jury to decide causation. The erroneous directed verdict had a profound impact on the jury, as demonstrated by the grossly inflated verdict. The judge’s failure to identify causation as a necessary predicate to damages, coupled with the strong message that “the issue of breach of contract is not before you” (RT p. 2334), misled the jurors into thinking that the only issue before them was how much money should be awarded.

Once the judge gave the directed verdict instruction, the harm was done. The judge later gave instructions defining “cause” (RT p. 2335), but he never told the jury that recovery of damages *required a finding* that such damages were legally caused by Monsanto’s breach. (See *Postal Instant Press, Inc. v. Sealy, supra*, 43 Cal.App.4th at p. 1709; *Brandon & Tibbs v. George Kevorkian Accountancy Corp., supra*, 226 Cal.App.3d at p. 457.) Without an instruction explaining to the jurors that they had to find causation in order to

award damages, the instructional definition of cause was meaningless.

Because the directed verdict instruction took the disputed issue of causation from the jury and virtually compelled the exorbitant damages award, the directed verdict was reversible error.

III.

THE JUDGE ERRED IN INSTRUCTING THE JURY ON THE STANDARD OF PROOF FOR RECOVERING FUTURE PROFITS.

A. Recovery Of Future Profits Requires The *Fact Of* Damage To Be Proven With Reasonable Certainty.

It is well-settled that recovery of future profits requires the *fact* (or “existence”) of damage to be proven with “reasonable certainty.” (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1697-1698; *Stephan v. Maloof* (1969) 274 Cal.App.2d 843, 850.) This stringent standard for lost *future* profits, as distinguished from past losses, implements a compelling policy against windfall recovery of unreasonably speculative damages.

Accordingly, in the present case the judge instructed the jury it was required “to find the existence and the amount of lost profits be shown with reasonable certainty.” (RT p. 2336.) However, the judge *defined* reasonable certainty for the jury as follows: “Reasonable certainty means probable or more likely than not.” (RT p. 2336.) As MPS’s counsel asserted in closing argument, this means “preponderance of the evidence.” (RT p. 2274.) But California law, in accord with jurisdictions nationally (see Rest.2d Contracts, § 352, com. a, p. 145), defines reasonable certainty as imposing a higher

standard of proof.

B. Reasonable Certainty Means More Than Preponderance Of The Evidence.

The meaning of reasonable certainty is addressed in *Bruck v. Adams* (1968) 259 Cal.App.2d 585, 588, which said “[t]he burden of proof by ‘reasonable certainty’ . . . suggests a standard somewhere between ‘preponderance of the evidence’ and proof ‘beyond a reasonable doubt’” Other California cases place reasonable certainty squarely within the ambit of a *clear and convincing evidence* standard of proof. (See, e.g., *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1090 [judicial misconduct warranting discipline must be shown by “‘clear and convincing evidence’ to sustain the charges to a reasonable certainty”]; *McCray v. State Bar* (1985) 38 Cal.3d 257, 263 [same rule for attorney misconduct warranting disbarment]; *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856 [same rule for administrative hearing on whether to revoke or suspend doctor’s license].)

Here, the judge defined reasonable certainty in the language of an Ohio case describing reasonable certainty as meaning “probable or more likely than not.” (See *Hacker v. Mail* (1996) 1996 Ohio App. LEXIS 2596, at *9.) However, for litigation in California state courts, the applicable burden of proof is a matter of *procedure* governed by California law. (*Pfingsten v. Westenhaver* (1952) 39 Cal.2d 12, 19; *Sadberry v. Griffiths* (1961) 191 Cal.App.2d 610, 614; see generally Rest.2d Conflict of Laws, § 135.) Thus, the provision on choice of *substantive* law in the LGI agreement (see CT p. 33; *ante*, fn. 10) is irrelevant here, and Ohio law does not apply. Because the reasonable certainty standard for recovery of lost profits is treated in California

as imposing a burden of proof (*Fields v. Riley* (1969) 1 Cal.App.3d 308, 313), the definition of reasonable certainty is governed by California law making it a higher standard of proof akin to clear and convincing evidence. (See 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 96, pp. 163-164 [matters of procedure governed by law of forum state include the method and sufficiency of proof]; see also *Hambrecht & Quist Venture Partners v. American Medical Internat., Inc.* (1995) 38 Cal.App.4th 1532, 1541 [procedural law of forum state will govern].) The instruction was erroneous.

**C. The Erroneous Definition Of Reasonable Certainty
Was Prejudicial Because It Enabled MPS To Prevail
On A Lesser Standard Of Proof.**

The general rule is that the judgment will be reversed if “it appears probable that the improper instruction misled the jury and affected the verdict.” (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1213.) However, “[p]articularly serious forms” of civil instructional error “might ‘almost invariably’ prove prejudicial in fact.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580, italics added.)

The misinstruction on the level of proof required here is within the category of instructional error that is “almost invariably” prejudicial. Courts have consistently found prejudice from instructional errors imposing a *greater* standard of proof than prescribed by law. (See *Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 444-445; *Bruck v. Adams, supra*, 259 Cal.App.2d at p. 588; *Bandoni v. Walston* (1947) 79 Cal.App.2d 178, 184; *Berry v. Maywood Mutual Water Co.* (1936) 11 Cal.App.2d 479, 481; *Bartolini v. Andrioli* (1932) 123 Cal.App. 350, 353; *Soda v. Marriott* (1931) 118 Cal.App. 635, 642; *Galloway v. United Railroads* (1921) 51 Cal.App. 575, 581; *Cooper v. Spring*

Valley Water Co. (1911) 16 Cal.App. 17, 23.) The result should be no different where, as here, an instructional error enabled a plaintiff to prevail on a *lesser* standard of proof than prescribed by law — and, as next shown, on constantly changing legal theories and testimony by MPS.

IV.

THE RULE OF REASONABLE CERTAINTY PRECLUDES MPS FROM RECOVERING TERMINAL VALUE DAMAGES.

A. MPS's Shifting Testimony Produced An Exorbitant Verdict For Lost Future Profits Into Perpetuity.

The verdict in this case would transform MPS, which has done nothing but hemorrhage hundreds of millions in past losses, into an overnight success worth hundreds of millions in future profits. How did this caterpillar become such a handsome butterfly? MPS's shifting testimony, repeatedly changed to suit MPS's changing litigation theories, provides much of the explanation. For example:

- *On MPS's ability to transform:* When MPS president Carl Eibl wanted germplasm, he testified (during the unsuccessful proceeding initiated by MPS to hold Monsanto in contempt in *Mycogen I*) that germplasm was vital because, "We don't have the capability to transform corn. We never have." (RT p. 80.)

But after the trial judge ruled that MPS was not entitled to germplasm, so that Eibl had to establish that genes alone would have value to MPS, he changed his testimony (in *Mycogen II*) and claimed MPS *could* get past transformation: “If somebody gives you a gene that works, we have all of the tools to go through that highway.” (RT p. 1038.)

- *On the value of genes to MPS:* When pursuing germplasm, Eibl testified that a gene alone “doesn’t have much value to us. It’s not what’s going to be significant in the marketplace.” (RT 84.)

But after Eibl failed to get germplasm, he claimed that genes “make us competitive.” (RT p. 1081.)

- *On MPS’s demands for germplasm:* Eibl sometimes denied he had demanded germplasm before the appellate decision in *Mycogen I*: “I don’t recall at any time in any communications with Monsanto of saying to them that we were entitled to transgenic germplasm” (RT p. 946.) When asked whether he had “any conversations with Mr. Fraley about whether Mycogen ought to get germplasm or whether it ought to get genes,” he replied “no.” (RT pp. 2170-2171.)

But other times Eibl admitted that he *had* demanded germplasm. When asked how many times this had occurred between mid-1993 and February 1997, he replied “[l]ess than ten. More than five” (RT p. 956.) He specifically admitted demanding germplasm from Fraley: “I think there were discussions that I

had with Rob Fraley where I communicated to him I thought we were entitled to what they had licensed to others in the industry, which was transgenic germplasm.” (RT p. 947.)

The pernicious impact of this shifting testimony is brought into sharpest focus when considering the portion of the verdict attributable to the nebulous “terminal value” — that is, the \$92,000,000 for lost sales of Bt corn seed after 2007 and to the end of time — an award floating on air, most assuredly not based on evidence to a reasonable certainty. Monsanto should not be burdened with this mythical loss allegedly inflicted by a delay in tendering genes that MPS really never wanted or sought.

B. Future Profits Are Recoverable Only To The Extent They Are Reasonably Certain.

No appellate court has ever approved the terminal value theory as a basis for recovery of future profits. The leading treatise on recovery of damages for lost profits states that “the courts have not yet considered . . . whether ‘terminal value’ can be added to a long-term projection of lost profits damages.” (1 Dunn, *Recovery Of Damages For Lost Profits* (5th ed. 1998) § 6:19, p. 492.) The treatise defines terminal value as “the balance of the claimed damages calculated on a long-term projection after a year-by-year calculation into the future is brought to a close.” (*Ibid.*)

A first-impression issue is squarely presented here. Absent any authority allowing recovery of terminal value damages, this court should be guided by the general rule that “damages may be projected only as far into the future as may be done with *reasonable certainty*.” (1 Dunn, *Recovery of Damages for Lost Profits*, *supra*, §6.19, p. 491, italics added.) As stated in

Schoenberg v. Forrest (Tex.App. 1952) 253 S.W.2d 331, 335, “in case of long term contracts, probability for periods of time in the future may present a more difficult problem of proof, but it nevertheless must be shown. The *rule of certainty* so requires, and if the period of reasonable probability of profits be shorter than the contract term, the recovery of ‘lost profits’ must be limited thereto.” (Italics added.)

The rule of reasonable certainty precludes recovery of damages that are too inherently speculative and too remote in the causal chain. That rule should govern here to preclude any award of terminal value damages.

**C. Perpetual Profits In The Guise Of Terminal Value
Should Not Be Recoverable In A Risky New Industry.**

A key restriction on recovery of lost future profits is that they should not be recoverable in an industry that is “volatile” or experiences “extreme instability” or where the future “is almost uniquely unpredictable.” (*Postal Instant Press, Inc. v. Sealy, supra*, 43 Cal.App.4th at p. 1714, fn. 5.) That is precisely the situation here. As previously discussed, the agricultural biotechnology industry is relatively young, extremely risky and intensely competitive. MPS itself told the SEC in 1996 that the company’s huge losses may continue because of the risks and uncertainties inherent in this new industry. (See *ante*, p. 9; RT pp. 1073-1074, 1092, 1718, 1734, 1842, 1917.) Monsanto has succeeded with Bt corn and Roundup Ready™ cotton and canola, but has failed with Roundup Ready™ corn. That failure has cost Monsanto \$20 million. (RT pp. 1634-1635.)

MPS’s own president, Carl Eibl, agreed that “[t]his is a risky business, competitive business.” (RT p. 1092.) Because product obsolescence is an ever-present constant, with corn products turning over every five or six years

and new generations of Bt corn seed on the horizon (see *ante*, pp. 9-10), technology that is revolutionary today may become obsolete tomorrow. Who still uses an Osborne computer or a Betamax VCR?

It is absurd to speculate that MPS would make profits on Monsanto gene technology in eleven years and thence into perpetuity — despite MPS’s long history of staggering losses — when it is not even certain that today’s biotechnology products and companies will remain in existence a year or two from now. There is tremendous risk in this marketplace. MPS would like the courts to eliminate such risk and guarantee, through an award of damages into perpetuity, that MPS will be profitable forever, despite MPS’s failure *ever* to make a profit since its inception. (See RT pp. 866-867, 1062; Exh. 1393.)

**D. The Law Precludes Recovery Of Future Profits Over
A Period Of Decades.**

The law’s distrust of theoretical long-term profit streams is apparent in analogous authority concerning breach of *long-term leases*, precluding recovery of future profits over a period of decades and commonly limiting recovery to approximately ten years.

The best example is *Palmer v. Connecticut R. & Light. Co.* (1941) 311 U.S. 544 [85 L.Ed. 336, 61 S.Ct. 379]. In *Palmer*, the United States Supreme Court upheld an award of only eight years lost future rents on a 999 year lease with 969 years remaining. The court agreed with the petitioner’s contention that “evidence of rental value for a 40-year period, no matter how certain it may be, is inadequate to enable a court to establish the damages for the entire 969 remaining years.” (*Id.* at p. 556.) However, as for a *limited* recovery the court said, “We see no reason to disagree with the conclusion of the circuit court of appeals that under the evidence presented the damages for eight years

might be predicted with a ‘fair degree of certainty.’” (*Id.* at p. 562.)

In a dissenting opinion arguing that not even eight years future lost rents should be recoverable, Justice Douglas said: “It is plain that any attempted computation of future rental values of this property for the next 969 years would at best be a mere flight ‘into the realm of pure speculation’ From our point in history 969 years hence is perpetuity. It covers a longer span [than] that from 1941 A.D. to 500 years before Columbus discovered America. To project past earnings of a present enterprise through such vicissitudes of time would be to assume a static quality in society which even a decade of history would disprove.” (*Id.* at pp. 564-565.) Justice Douglas could have said the same of the present verdict.

Other cases have similarly restricted recovery of lost future profits from long-term leases, generally to ten years. (See *S. Jon Kredman & Co. v. Meyers Bros. Parking-Western Corp.* (1976) 58 Cal.App.3d 173 [26-year lease with option for additional 25 years; lost profits recovered for ten-year period]; *Hawkinson v. Johnston* (8th Cir. 1941) 122 F.2d 724 [99-year lease with 67 years remaining; future rents recovered for ten years].) In the present case, terminal value damages in addition to the ten years of lost profits calculated for the years 1998 through 2007 should be no more recoverable than were the rent losses in excess of ten years in the long-term lease cases. Both are far too speculative.

The United States Supreme Court said in *Palmer* that no company can reasonably expect to last forever. Common sense says the same of MPS — a persistently unprofitable company in a highly speculative industry rife with fierce competition and rapid obsolescence.

MPS sought Bt corn damages in the sum of \$211 million, despite the fact it was already in the Bt corn business with its own product. (RT pp. 1441, 2242, 2270, 2279; see *ante*, fn. 8.) Of this claim, \$92 million was for terminal

value. (RT p. 1537.) The jury awarded total Bt corn damages in the sum of \$151 million. (CT 2302.) Thus, a substantial portion of the jury verdict was for terminal value. The total award of \$174.9 million clearly cannot stand, and it is impossible to determine precisely how much of the award included terminal value damages. The only fair appellate remedy is an unqualified reversal.

CONCLUSION

In *Mycogen II*, MPS obtained a huge jury verdict for hypothetical future profits that are truly a windfall, since MPS already has the genes — through the full performance required by *Mycogen I* — that supposedly enable MPS to make those same future profits. This is unfair to Monsanto and is prohibited by the doctrines of res judicata and reasonable certainty. Because the law precludes MPS from recovering damages in *Mycogen II* after obtaining specific performance in *Mycogen I*, this court should reverse the judgment and remand the cause with directions to the superior court to dismiss the action.

Alternatively, if this court determines that the action is not barred by res judicata, the court should reverse the judgment and remand the cause for a new trial because the judge erred in directing a verdict, because the jury was prejudicially misinstructed on the standard of proof for recovering lost future profits, and because the judgment includes non-recoverable terminal value damages.

At a minimum, even if this court does not order either dismissal or a new trial, the court should order a reduction of the judgment to eliminate the portion attributable to terminal value damages.

Respectfully submitted.

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