No. 19-1147

In The
Supreme Court of the United States

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

v.

SYNGENTA CROP PROTECTION, LLC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Steven E. Tiller
Counsel of Record
WHITEFORD TAYLOR PRESTON LLP
Seven Saint Paul Street, Suite 1500
Baltimore, Maryland 21202
(410) 347-9425
stiller@wtplaw.com

Barry E. Bretschneider
WHITEFORD TAYLOR PRESTON LLP
3190 Fairview Park Drive, Suite 800
Falls Church, Virginia 22042
(703) 280-9086
bretschneider@wtplaw.com

Barry S. Neuman
6620 Landon Lane
Bethesda, Maryland 20817

Counsel for Petitioners

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THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

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Petitioners Willowood, LLC, Willowood USA, LLC, Willowood Azoxystrobin, LLC and Willowood Limited (collectively, "Willowood") respectfully file this Rebuttal to the Opposition Brief filed by Syngenta Crop Protection, LLC ("Syngenta").

A. The Patent Issue

In opposing Willowood's assertion that the Federal Circuit erred in its interpretation of 35 U.S.C. §271(g), Syngenta focuses solely on the acts of importing, offering to sell, and selling a product in the United States made by a patented process while side stepping Willowood's central assertion that the Federal Circuit's interpretation opens the door for the possibility (and indeed, the reality in this case) that the importer of a product may be held liable for patent infringement even when the method by which that product was made did not infringe the asserted patent upon which infringement is based. This, Willowood contends, cannot be a correct outcome under the Patent Act because it would impermissibly afford method patent owners broader rights under Sec. 271(g) than the statute provides or Congress intended, *and* with broader rights than is provided by any other provision of the Patent Act for direct or indirect infringement. As such, for the reasons set forth in Willowood's Petition for Certiorari, the Federal Circuit's holding should be reversed.

I. This Court May Consider Willowood's Argument That the Federal Circuit's Decision Impermissibly Extends Syngenta's Patent Monopoly.

In its Petition for Certiorari, Willowood argued that the Federal Court's ruling impermissibly extends Syngenta's patent monopoly beyond the expiration of the patents claiming the azoxystrobin products to which they apply. (Pet. at 19-21). Syngenta contends that this argument should not be considered here as it was not raised below. (Op. at 23).

Willowood does not, however, raise new facts or issues on appeal when raising this argument. Rather, Willowood simply asserts a new perspective on an issue raised below. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992) ("a party can make any argument in support of [a] claim; parties are not limited to the precise arguments … made below"). The scope and interpretation of Sec. 271(g) was firmly established as an issue in contention in the record below (Pet. at 12-25), and therefore, Willowood is permitted to raise any argument in support of its interpretation before this Court.[1]

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[1] Even if Willowood were bringing forth a new matter as Willowood asserts, this Court could still consider it. *See Hormel v. Helvering*, 312 U.S. 552, 557 (1941) (there are cases "which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed [below]").

B. The Copyright Issue

As with the patent issue, Syngenta's opposition to Willowood's assertion that the Federal Circuit incorrectly construed FIFRA completely sidesteps Willowood's primary argument. In its Petition for Certiorari, Willowood argued that because FIFRA permits generic pesticide labels to be "identical or substantially similar" to previously-approved labels, it necessarily precludes copyright infringement claims as to those labels. (Pet. at 25-35). Syngenta has no answer to the question of how a multi-page, complex pesticide label could be "identical or substantially similar" to a previously approved label unless it were copied – and therefore, how Congress could have authorized "identical or substantially similar" labels without also permitting copying. For the reasons set forth in Willowood's Petition for Certiorari, the Federal Circuit's interpretation of FIFRA adopting this position effectively repeals FIFRA's explicit authorization of labels that are "identical or substantially similar" to registered labels, and should be reversed.

I. The Federal Circuit's Interpretation of FIFRA is Ripe for this Court's Review.

Syngenta claims that the Federal Circuit's decision as to its copyright claim is interlocutory, and therefore, should not be reviewed by this Court. (Op. at 25). This assertion, however, is incorrect, as this Court has often reviewed procedurally similar matters before. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (where this Court reviewed the reversal of summary judgment by a court of appeals prior to underlying factual issues being

determined on remand); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (same); *U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 481 U.S. 1301 (1987)(same).

For example, in *Anderson*, *supra.*, the trial court granted summary judgment in a libel suit brought by a public official, holding that the defendants' investigation, research, and reliance on numerous sources precluded a finding of actual malice necessary to support the libel claim. *Id.*, 477 U.S. at 246. The Court of Appeals reversed, holding that the requirement that actual malice be proven by clear and convincing evidence need not be considered at the summary judgment stage, and that, with respect to the defendants' level of malice, summary judgment had been improperly granted because a jury could reasonably have concluded that the allegations were defamatory, false, and made with actual malice. *Id.*, 477 U.S. at 247. Notwithstanding the fact that the Court of Appeals remanded the matter for trial, this Court nonetheless heard the issue, ultimately reversing the Court of Appeals for applying the incorrect standard in reviewing the trial court's grant of summary judgment. *Id.*, 477 U.S. at 248-257.

Here, Syngenta can only seek to characterize the copyright issue as "interlocutory" in nature because of the Federal Circuit' erroneous construction of FIFRA. Had the Federal Circuit properly construed FIFRA as authorizing the copying of pesticide labels, there would have been no need to send the case back to the trial court for any further findings as to whether any portions of the original label are copyrightable and, if so, whether any defenses would be available to those copyright claims. Willowood's

petition presents this pure question of law regarding statutory interpretation -- whether, as the trial court held, FIFRA's express authorization for follow-on applications to submit labels that are "identical or substantially similar" to the labels submitted and used by the original registrant precludes copyright claims by the original registrant. (Pet. at 25-35). In seeking this Court's review of the Federal Circuit' reversal of the trial court on that issue, Willowood's petition presents purely an issue of statutory construction. It is therefore appropriate for this Court to review that issue now, making the copyright issue ripe for review.

C. Review By This Court Is The Proper Vehicle By Which These Issues Should Be Addressed.

Finally, Syngenta argues that because certain of the Petitioners - Willowood USA, LLC, Willowood, LLC, and Willowood Azoxystrobin, LLC – filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Act in the District of Colorado, review by this Court is a "poor vehicle" for interpretation of these issues. (Op. at 34-35). While it is unclear exactly what Syngenta means by a "poor vehicle," Syngenta presumably means that the bankruptcy proceedings may address some or all of Syngenta's claims, and this Court should delay any review until the bankruptcy proceedings are completed.[2]

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[2] Syngenta also raises a question as to why Generic Crop Science, LLC has agreed to fund Willowood's professional fees and expenses in connection with this appeal. (Op. at 34-35). Simply put, as a generic manufacturer and distributor of pesticide products, Generic Crop Science, LLC has an interest in clarifying both of these legal issues which have long been relevant to the pesticide industry.

This is nothing but a red herring. Every case for which *certiorari* is sought can become moot before review by this Court by way of settlement or any host of reasons. That possibility, by itself, need not be a justification for not hearing a case.

CONCLUSION

For the reasons set forth in their original Petition for Certiorari, as well as those reasons raised in this Rebuttal Brief, Willowood respectfully requests that Certiorari be granted.

Respectfully submitted,

Steven E. Tiller
Counsel of Record
WHITEFORD TAYLOR PRESOTN LLP
Seven Saint Paul Street, Suite 1500
Baltimore, Maryland 21202-1626
Telephone: (410) 347-9425
Facsimile: (410) 223-4325
stiller@wtplaw.com

Barry E. Bretschneider
WHITEFORD TAYLOR PRESTON LLP
3190 Fairview Park Drive, Suite 800
Falls Church, Virginia 22042-4510
Telephone: (703) 280-9086
Facsimile: (703) 280-9130
bretschneider@wtplaw.com

Barry S. Neuman
6620 Landon Lane
Bethesda, Maryland 20817

Attorneys for Petitioners