

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

SOUTH DAKOTA BOARD OF REGENTS as
governing board for South Dakota Agricultural
Experiment Station and South Dakota State
University,

Plaintiff,

v.

DISCOUNT SEEDS, INC., and JOHN DOES 1-
25,

Defendants.

CASE NO. 5:20-cv-4115

COMPLAINT

Plaintiff South Dakota Board of Regents (the “Board of Regents”) as governing board for the South Dakota Agricultural Experiment Station (“SDAES”) and South Dakota State University (“SDSU”) brings this action for damages and permanent injunctive relief against Defendants Discount Seeds, Inc., for their unauthorized sale, conditioning, stocking, and dispensing without proper notice, of Plaintiff’s proprietary oat varieties, as well as instigating and actively inducing violations of one or more prohibited acts by others, all in violation of Plaintiff’s rights under the Plant Variety Protection Act, 7 U.S.C. § 2321 *et seq.* (“PVPA”). Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, as Plaintiff’s claims arise under the laws of the United States, and 28 U.S.C. § 1338, which provides that district courts have original jurisdiction over any civil action arising under any Act of Congress relating to plant variety protection.

2. Venue is proper in this district pursuant to 28 U.S.C. § 1391, as a substantial part of the events giving rise to the claims occurred in this district, and most of the Defendants reside in this district.

THE PARTIES

3. The Board of Regents was created to implement the requirements of Section 3, Article XIV of the South Dakota Constitution, that publicly funded postsecondary institutions be governed by a board of regents. SDCL § 13-49-1. Constituted as a corporation, or body corporate, the Board of Regents enjoys the “power to sue and be sued, to hold, lease, and manage, for the purposes for which they were established, any property belonging to the educational institutions under its control, collectively or severally, of which it shall in any manner become possessed.” SDCL § 13-49-11.

4. The Board of Regents controls SDAES and SDSU. SDCL §§ 13-58-11 and 13-58-1, respectively. The Board of Regents encourages institutions under its control to pursue research, to protect intellectual properties arising from such research and to enter into such agreements as may be necessary and proper to license or otherwise to provide for the commercial application of research results. To such ends, it delegated to institutional officers the authority to secure intellectual property protection in the name of the institution that conducted the research. Board of Regents Policies 1:6, Section 3.6, and 4:34, Section 7.

5. Created in 1887 to implement the Hatch Act as part of South Dakota’s land-grant institution, SDAES has a mission to conduct research to enhance quality of life in South Dakota through the beneficial use and development of human, economic, and natural resources. As part of this effort, SDAES assists oat producers, seedsmen, and researchers to strengthen the oat industry by creating an oat variety delivery system that promotes stewardship of varieties and

traits, provides new funds for oat research, and ensures availability of improved oat varieties to benefit farmers and consumers. SDAES has its principal place of operations in Brookings, South Dakota. SDCL § 13-58-11.

6. Founded in 1881 as a land-grant university, SDSU has been committed to the academic and professional advancement of all citizens in the state. As part of this effort, SDSU has a goal to promote, encourage and aid research in the agricultural arena and to provide the means, methods, and agencies by which inventions and discoveries at SDSU may be patented, commercialized, or otherwise disposed of for the benefit of the people of South Dakota and society as a whole. SDCL § 13-58-1.

7. Defendant Discount Seeds, Inc. (“Discount”) is an incorporated entity pursuant to the laws of South Dakota. The registered agent is Heidi A. Fiechtner, 2411 9th Ave. SW, Watertown, SD 57201. This corporation has the following principal officers and directors: President Dean Minnerath, Vice President Karen Minnerath, Secretary Heidi Fiechtner, and Treasurer Jeff Fiechtner. On information, all directors and officers are aware of the conduct alleged in this lawsuit for infringement of Plaintiff’s federally protected varieties by diversion of grain for use a seed, sales of unauthorized seed for planting, and widespread illegal and unauthorized transfers of seed oats between farmers in the region. By virtue of such knowledge and direction, each officer and director shares individually in the infringement liability. Additional officers and directors are likely John Does, but out of an abundance of caution, Plaintiff has not named them without additional discovery in this first complaint.

8. Defendants John Doe 1-25 are (i) downstream customers who purchased unauthorized PVPA-protected seed from or through Discount or other distributors connected to Defendant; (ii) conditioners who cleaned unauthorized PVPA-protected oats for Discount or

others; and (iii) other persons otherwise acting in concert with Discount in the illegal operations and diversion.

STATEMENT OF CLAIM
PLANT VARIETY PROTECTION REGISTRATION

9. This action arises under the Plant Variety Protection Act, 7 U.S.C. § 2321 *et seq.*, which provides patent-like protection to breeders of certain varieties, and their assignees, who may acquire the right to prevent others from selling the variety or offering the variety for sale for a period of twenty (20) years. 7 U.S.C. § 2483.

10. On December 29, 2015, SDAES made application to the Plant Variety Protection Office pursuant to 7 U.S.C. § 2421 for protection of another novel variety of oat it had developed known as the “Hayden” oat variety.

11. On November 28, 2016, a PVP Certificate for the Hayden variety was issued to SDAES pursuant to 7 U.S.C. § 2482 under the seal of the Plant Variety Protection Office and was recorded in the Plant Variety Protection Office. Certificate No. 201600054 is not scheduled to lapse until November 28, 2036. The PVP Certificate for Hayden is attached as Exhibit 1.

12. On March 1, 2013, SDAES made application to the Plant Variety Protection Office pursuant to 7 U.S.C. § 2421 of the PVPA for protection of another novel variety of oat it had developed known as the “Horsepower” oat variety.

13. On March 30, 2015, a PVP Certificate for the Horsepower variety was issued to SDAES pursuant to 28 U.S.C. § 2482 under the seal of the Plant Variety Protection Office and was recorded in the Plant Variety Protection Office. Certificate No. 201300160 is not scheduled to lapse until March 30, 2035. The PVP Certificate for Horsepower is attached as Exhibit 2.

14. Plaintiff additionally has PVP rights to many other varieties including Natty, Goliath, Shelby 427, among others. All such certificates of protection are valid and subsisting.

15. The PVP Certificates for Plaintiff's oat varieties, including the Hayden, Horsepower, Goliath, Natty, Shelby 427 and Stallion varieties, all specified that the seed of the respective varieties could only be sold in the United States as a class of certified seed, meaning that before sale for planting purposes, the seed had to be certified by an approved governmental or private agency as to variety and purity. This added step is known as a Title V election under the Federal Seed Act, 7 U.S.C. § 1611. *See also* 7 U.S.C. § 2483(a)(2)(A).

16. The PVP Certificates for each of Plaintiff's oat varieties at issue in this lawsuit were and remain in full force and effect during the time period of alleged infringement of each respective variety. Additional varieties may be revealed in discovery when identifying the John Doe upstream providers, downstream purchasers, and contributors to the illegal operation and diversion of grain for planting.

17. At all times relevant herein, each Defendant had actual notice and knowledge that Plaintiff's oat varieties were federally protected by the PVPA.

18. Title 7, Section 2541 of the United States Code provides that it is an infringement of the owner's rights in a protected variety, *inter alia*, to sell the variety without authorization of the owner or to dispense the variety to another in a form that can be propagated without notice that it is a protected variety. Section 2541 also provides that it is an infringement to use the variety for propagation without the owner's authorization; to stock, condition, ship, or consign the protected variety without authority; or to instigate or actively induce any act that constitutes an infringement.

19. Title 7, United States Code Section 2563 provides that a court may grant an injunction to prevent violations of rights under the PVPA. Section 2564 provides that upon a finding of infringement, the court shall award damages adequate to compensate for the infringement, but in no event less than a reasonable royalty together with interest and costs.

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