

The Honorable Stanley A. Bastian

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HER MAJESTY THE QUEEN IN RIGHT
OF CANADA AS REPRESENTED BY
THE MINISTER OF AGRICULTURE
AND AGRI-FOOD. a Canadian
governmental authority,

Plaintiff,

VAN WELL NURSERY, INC. a
Washington Corporation, MONSON
FRUIT COMPANY, INC., a Washington
Corporation, GORDON GOODWIN, an
individual, and SALLY GOODWIN, an
individual

Defendants.

No. 2:20-CV-00181-SAB

DEFENDANTS' MOTION FOR
LEAVE TO AMEND THE
ANSWER

Hearing Date: April 20, 2021
With Oral Argument: 1:30 pm
(By Video Conference)

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I. INTRODUCTION

Defendants, Van Well Nursery, Inc. (“Van Well”), Monson Fruit Company, Inc. (“Monson”), and Gordon and Sally Goodwin (“Goodwins”) (collectively “Defendants”) hereby request leave to amend their respective answers to add counterclaims of invalidity, unenforceability, and unlawful restraint of trade against the plaintiff, Her Majesty the Queen in Right of Canada as represented by the Minister of Agriculture and Agri-Food (“AAFC”) and its exclusive licensee, Summerland Varieties Corporation formerly known as the Okanagan Plant Improvement Company (“SVC/PICO”). Discovery has revealed that both AAFC and SVC/PICO withheld material information from the Patent Office during prosecution of the application giving rise to the patent-in-suit, U.S. Patent No. PP20,551 (“the ’551 Patent”) which covers a sweet cherry variety known as “Staccato” or 13S2009.

As alleged in the proposed amended counterclaims,¹ both AAFC and SVC/PICO withheld material information from the Patent Office. Specifically, the Examiner requested information pursuant to 37 C.F.R. § 1.105, asking for any information indicating that Staccato was “publicly available prior to the filing date of the instant application,” including “information available regarding the first sale or other public distribution of the claimed plant variety anywhere in the world, including the date(s) of any sale or other public distribution.” (*See* PACC, ¶35.) Instead of disclosing what they knew about Staccato, i.e., that it had been widely used and sold within the United States at least as early as 2000, and that it had been described in printed publications as early as 1999 and 2000, AAFC and SVC/PICO

¹ The proposed amended counterclaims (“PACC”) are attached to the Declaration of Mark P. Walters (“Walters Decl.”) as Exhibit A.

1 withheld this information because they understood that disclosure would eliminate
2 any chance at patent protection.

3
4 Patent protection for Staccato met a critical need for both AAFC and
5 SVC/PICO because without it, Canadian growers would lose an important
6 competitive edge in the lucrative late-harvest market for sweet cherries. In the
7 twenty seasons since Staccato fruit was first sold in the United States, AAFC and its
8 exclusive licensee have used the threat of intellectual property litigation to
9 systematically reduce competition in service of a program known as “Canada First.”
10 (*See* PACC, ¶8.) These improper enforcement activities protect an unlawful
11 monopoly by ensuring that the only sweet cherries sold into the late-harvest market
12 are owned or controlled by AAFC and SVC/PICO.

13
14 Based on these recently discovered facts, which together support claims for
15 invalidity, unenforceability, and unlawful restraint of trade, the Court should grant
16 Defendants’ motion for leave to amend.

17 II. FACTS

18 A. The Development and Testing of Staccato

19
20 AAFC and SVC/PICO waited until March 13, 2002² to file a patent
21 application in the United States on Staccato, however, the original seedling was
22 produced twenty years earlier and the variety was assigned the reference number
23 13S-20-09 in 1991. (Dkt. No. 1, the ’551 Patent at 2:19-25.) By 1992, “[t]he resulting
24 [Staccato] trees were stable in their horticultural traits and no off-types or variants
25

26
27 ² As explained *infra* at §III.B.1, SVC failed to properly identify its March 13,
2002 provisional application during prosecution and thus, the earliest priority date
to which the ’551 Patent is entitled is March 6, 2003.

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