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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DAVID AUSTIN ROSES., LTD.,

Plaintiff,

v.

JACKSON & PERKINS WHOLESALE, INC.,

Defendants.

Case No. 09-3027-PA

COMPLAINT

(Patent Infringement, Breach of Contract)

DEMAND FOR JURY TRIAL

For its complaint, plaintiff David Austin Roses, LTD., alleges as follows:

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JURISDICTION.

1. This is an action for breach of contract, and patent infringement in violation of the patent laws of the United States, 35 U.S.C. § 1 *et. seq.* This Court has jurisdiction under 28 U.S.C. §§ 1332(a)(2), 1367(a) and 1338(a).

2. Venue is proper under 28 U.S.C. §§ 1391(a) and (c), and 1400(b) in that, upon information and belief, a substantial part of the events or omissions giving rise to the claim occurred in this judicial district, including execution of the contract now in question and infringement of the patents-in-suit, and defendant resides in this district.

PARTIES.

3. Plaintiff David Austin Roses Ltd. ("David Austin") is a corporation organized and existing under the laws of the England having a place of business at Albrighton, Wolverhampton, England.

4. On information and belief, Defendant Jackson & Perkins Wholesale, Inc. ("Jackson") is a Delaware corporation having a place of business at 2500 South Pacific Highway, Medford, Oregon 97501.

FACTUAL BACKGROUND.

5. Plaintiff David Austin is a well known breeder and grower of roses, and has acquired patent protection on a number of its rose varieties.

6. In approximately December 2004, Plaintiff David Austin entered into a "Licence and Distribution Agreement" ("Agreement") with Defendant Jackson. A true and correct copy of the Agreement is attached as Exhibit 1.

7. This Agreement was and is a valid and enforceable contract between the parties.

8. Pursuant to the Agreement, Plaintiff David Austin granted Defendant Jackson a non-exclusive license to propagate and grow certain roses, within a specified territory, during the subsistence of the Agreement, which roses were covered by plant patent and/or trademark rights.

9. Between July 1, 2007 and the present, Jackson propagated and grew such roses. But for the Agreement, such activities by Jackson would constitute plant patent infringement and/or trademark infringement.

10. Pursuant to the Agreement, Plaintiff David Austin granted Defendant Jackson a non-exclusive license to advertise, offer for sale, distribute and sell certain roses within a specified territory, during the subsistence of the Agreement, which roses were covered by plant patent and/or trademark rights.

11. Pursuant to the Agreement, Plaintiff David Austin also granted Defendant Jackson an exclusive license to propagate, grow and sell certain other roses within a specified territory, during the subsistence of the Agreement, which roses were covered by plant patent and/or trademark rights.

12. Between July 1, 2007 and the present, Jackson propagated, grew, advertised and sold such roses. But for the Agreement, such activities by Jackson would constitute plant patent infringement and/or trademark infringement.

13. Pursuant to the Agreement, Plaintiff David Austin granted Defendant Jackson the right to use the name style and logo “David Austin Roses” in association with the sale of certain roses, during the subsistence of the Agreement.

14. Upon information and belief, between July 1, 2007 and the present, Jackson used the “David Austin Roses” name style and logo in association with the sale of certain roses covered by the Agreement.

15. But for the Agreement, such activities by Jackson would constitute trademark infringement and unfair competition.

16. Pursuant to the Agreement, Defendant Jackson agreed to provide annual records to David Austin regarding the number of roses propagated pursuant to the Agreement.

17. Pursuant to the Agreement, Defendant Jackson agreed to provide annual records to David Austin regarding the number of roses sold pursuant to the Agreement, and further agreed to pay royalties to David Austin based on its sales, in accordance with the royalty rates set out in the Agreement.

18. Pursuant to the Agreement, Defendant Jackson agreed to pay such royalties due to David Austin by July 31st of each year for sales that occurred during the previous 12 months ending on June 30th of such year.

19. Pursuant to the Agreement, Defendant Jackson agreed to pay interest on any late payments in the amount of one percent (1%) per month.

20. For its sales of roses covered by the Agreement from July 1, 2007 to June 30, 2008, Defendant Jackson has not paid royalties to David Austin, in breach of the Agreement.

21. Based on the breach of the Agreement by Defendant Jackson, and pursuant to the terms of the Agreement, David Austin terminated the Agreement on approximately December 1, 2008 due to Defendant Jackson's failure to pay royalties owed.

22. For its sales of roses covered by the Agreement from July 1, 2008 to the present time, Defendant Jackson has not paid royalties to David Austin, in breach of the Agreement.

23. On information and belief, Defendant Jackson continues to grow patented roses despite the termination of the Agreement.

FIRST CAUSE OF ACTION

BREACH OF CONTRACT

24. Plaintiffs refer to and incorporate in this Cause Paragraphs 1 through 23 above, as though restated herein in full.

25. Since 2004, pursuant to the agreement, Defendant Jackson has enjoyed the benefit of propagating, growing and selling certain roses, for which it agreed to pay royalties to Plaintiff David Austin.

26. For roses it sold between July 1, 2007 and June 1, 2008, in accordance with the Agreement, Defendant Jackson owed to David Austin royalties in accordance with the rates in the Agreement, which royalties were due on July 31, 2008.

27. Despite its contractual agreement to pay such royalties, to date, Jackson has not paid such royalties.

28. The Agreement provides for interest at the rate of 1% per month, meaning that as interest has been accruing for more than seven months, and will continue to accrue until the royalties are paid in full by Defendant Jackson.

29. Despite its contractual agreement to pay such interest, to date, Jackson has not paid such interest.

SECOND CAUSE OF ACTION

PATENT INFRINGEMENT

30. Plaintiffs refer to and incorporate in this Cause Paragraphs 1 through 29 above, as though restated herein in full.

31. Pursuant to the Agreement between the parties, Defendant Jackson was authorized to propagate and grow certain roses, within a specified territory, only during the subsistence of the Agreement.

32. Similarly, Defendant Jackson was authorized to advertise, offer for sale, distribute and sell certain roses, within a specified territory, during the subsistence of the Agreement.

33. Upon Defendant Jackson's breach of the agreement, and the subsequent termination of the agreement, Jackson was no longer authorized to propagate and grow certain patented roses.

34. Upon Defendant Jackson's breach of the agreement, and the subsequent termination of the agreement, Jackson was no longer authorized to offer for sale, distribute and sell certain patented roses, unless it paid the royalties due.

35. Defendant Jackson's continued growth and sales of patented roses, without paying the royalties required under the Agreement, are unauthorized, and constitute patent infringement.

36. Upon information and belief, Defendant Jackson has infringed, and will continue to infringe until enjoined by this Court, at least the following patents:

U.S. Plant Pat. No. 7215

U.S. Plant Pat. No. 7220

U.S. Plant Pat. No. 8688

U.S. Plant Pat. No. 8765

U.S. Plant Pat. No. 9527

U.S. Plant Pat. No. 11421

U.S. Plant Pat. No. 13315

U.S. Plant Pat. No. 13484

U.S. Plant Pat. No. 14943

U.S. Plant Pat. No. 16300

U.S. Plant Pat. No. 18713

True and accurate copies of the above-referenced patents are attached hereto as Exhibits 2-12.

Defendant Jackson has direct knowledge of these patents, and its failure to pay royalties, and subsequent patent infringement, constitutes willful infringement.

37. This is an "exceptional case" within the meaning of 35 U.S.C. § 285.

RELIEF REQUESTED.

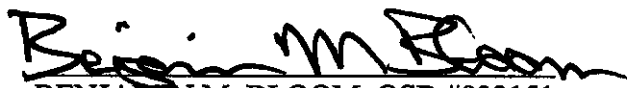
WHEREFORE, Plaintiff David Austin Roses, Ltd. demands judgment against Defendant Jackson & Perkins Wholesale, Inc. as follows:


1. That this Court adjudge and declare:
 - a. That it has jurisdiction of the parties and of the subject matter of this action;
 - b. That Defendant Jackson immediately provide an accounting of Jackson's sales of roses covered by the Agreement from July 1, 2007 through June 30, 2008, to enable a calculation of royalties due for such sales, and that Defendant Jackson owes to Plaintiff David Austin royalties and interest in an amount to be determined at trial for past sales from July 1, 2007 through June 30, 2008;
 - c. That Defendant Jackson immediately provide an accounting of Jackson's sales of roses covered by the Agreement from July 1, 2008 through the date of trial, as well as an inventory of all roses propagated and/or grown by Jackson pursuant to the Agreement during that same time period, to enable a calculation of royalties due for such sales, and that Defendant Jackson owes to Plaintiff David Austin royalties and interest in an amount to be determined at trial for sales from July 1, 2008 through the date of trial;
 - d. That Defendant Jackson immediately provide an accounting of all roses propagated and/or grown by Jackson pursuant to the Agreement which have not yet been sold.
2. That Defendant has committed acts of patent infringement by its propagation and growth of, offer for sale of, and sale of roses which infringe the patents-in-suit;

3. That Defendant, its officers, directors, owners, agents, representatives, employees, assigns and suppliers, and all persons acting in concert or privity with it or any of them, be preliminarily and permanently enjoined from propagating, growing, offering for sale or selling any rose which infringes any of the patents-in-suit;
4. That David Austin be awarded damages covered by the acts of patent infringement of Defendant in an amount not less than a reasonable royalty pursuant to 35 U.S.C. § 284;
5. That the damage award be trebled due to Defendant's willful infringement;
6. That Defendant pay David Austin prejudgment interest;
7. That David Austin Roses Ltd. have and recover its costs in this action, including an award of attorneys' fees pursuant to 35 U.S.C. § 285; and
8. That David Austin Roses Ltd. have such other and further relief as the Court may deem just and proper.

PLAINTIFF DEMANDS A JURY TRIAL.

DATED this 16 day of March, 2009.


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