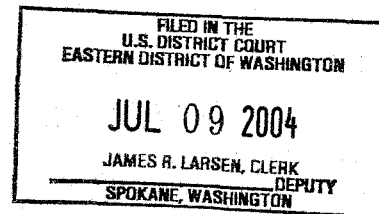


ORIGINAL

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Attorneys for Plaintiffs



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

VAN WELL NURSERY, INC., a
Washington corporation, HILLTOP
NURSERIES, LLC, a Michigan limited
liability company,

Plaintiffs,

v.

MONY LIFE INSURANCE COMPANY,
a New York corporation; A/B HOP
FARMS, INC., a Washington corporation;
BENNETT G. BRULOTTE and TRACY
A. BRULOTTE, individually and their
marital community, WALLA WALLA
PARCEL NO. 31-07-23-11-00-02;

Defendants.

CV-04-0245-RHW
CAUSE NO.

COMPLAINT FOR
TRADEMARK
COUNTERFEITING AND
INFRINGEMENT, FALSE
DESIGNATION OF ORIGIN,
PLANT PATENT
INFRINGEMENT AND UNFAIR
COMPETITION

DEMAND FOR JURY

Plaintiffs allege:

NATURE OF THE ACTION

1. Plaintiffs' claims arise under the Patent Act of the United States, 35 U.S.C. § 101 *et seq.*, for statutory plant patent infringement; under the Trademark Act of July 5, 1946, 15 U.S.C. § 1501 *et seq.*, (commonly referred to as the Lanham Act) for trademark infringement and false designation of origin; and

1 unfair business acts and practices under the Washington Consumer Protection Act,
2 RCW 19.86.010. *et seq.* Plaintiffs seek equitable relief, damages, enhanced
3 damages, costs of suit and reasonable attorney's fees as allowed under federal and
4 state law.
5

6 **PARTIES**

7 2. Plaintiffs are all members of the National Licensing Association - US
8 LLC (the "NLA"). Plaintiffs are:
9

10 2.1. Van Well Nursery, Inc. (*Van Well*) is a Washington corporation
11 having a principal place of business at Wenatchee, Washington. Van Well is the
12 owner of all right, title and interest of the patented apple variety "Snipes cultivar"
13 or "Snipes cv." – Plant Patent No. 4,839 ('839 Plant Patent). The '839 Plant Patent
14 expired on May 9, 2000. Van Well is the exclusive owner of all trademark rights
15 in the United States for the Scarlet Spur® trademark, including U.S. Trademark
16 Reg. No. 1,952,536 for the trademark SCARLET SPUR® for use with "live apple
17 trees" (the '536 Reg.)
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19

20 2.2. Hilltop Nurseries LLC (*Hilltop*) is a Michigan limited liability
21 company having a principal place of business at Hartford, Michigan. Hilltop is the
22 exclusive licensee of all trademark rights in the United States for the Smoothee®
23 trademark, including U.S. Trademark Reg. No. 1,241,362 for the trademark
24 SMOOTHEE® for use with "live apple trees" (the '362 Reg.)
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1 3. Each Plaintiff is an owner or exclusive licensee of the patent and/or
2 trademark rights that are infringed by defendants.

3
4 4. Defendant MONY Life Insurance Company (**MONY**) is a New York
5 corporation with its principal place of business in San Francisco, California.
6 MONY owns interests in orchard properties within this judicial district having
7 infringing fruit trees planted thereon.
8

9 5. Defendant A/B Hop Farms, Inc. (**A/B Hop Farms**) is a Washington
10 corporation with its principal place of business in Prosser, Washington. A/B Hop
11 Farms is the former owner of certain orchard properties planted with infringing
12 fruit trees located within this judicial district, and is a predecessor-in-interest of
13 real properties planted with infringing trees owned by MONY.
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16 6. Defendants Bennett and Tracy Brulotte are individuals residing within
17 this judicial district. Bennett and Tracy Brulotte are the former owners of certain
18 orchard properties planted with infringing fruit trees located within this judicial
19 district, and are the predecessors-in-interest of the real property planted with
20 infringing trees owned by MONY. Bennett Brulotte is an officer, director, and an
21 employee of A/B Hop Farms. All acts alleged herein were undertaken individually
22 and on behalf of the marital community.
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1 7. Walla Walla County Parcel No. 31-07-23-11-00-02, real property
2 situated in Walla Walla County, Washington. This action seeks *in rem* equitable
3 relief against infringing trees growing on said real property.
4

5 **JURISDICTION AND VENUE**

6 8. Plaintiffs' claims arise under the laws of the United States related to
7 plant patents (35 U.S.C. § 101, et seq. and 35 U.S.C. § 161 *et seq.*), trademarks (15
8 U.S.C. 1051 *et seq.*), the Federal Declaratory Judgment Act (28 U.S.C. §§ 2201
9 and 2202), and Washington state unfair competition laws (R.C.W. 19.86.010 *et*
10 *seq.*). This court has original jurisdiction of this action under Title 28 U.S.C., §§
11 1331, 1338(a), and 1338(b) and supplemental or pendant jurisdiction over the
12 remaining claims under 28 U.S.C. § 1367(a). This Court has personal jurisdiction
13 over Defendants by reason of their residing within this judicial district, transaction
14 of business in the State of Washington and this judicial district and the commission
15 of acts of infringement, within or without the State of Washington and within this
16 judicial district, having consequences within the State of Washington and this
17 judicial district. The claims for relief under Washington State law are joined as
18 substantial and related claims; accordingly, subject matter jurisdiction for these
19 claims for relief is conferred on this Court pursuant to the doctrines of pendant,
20 ancillary, and supplemental jurisdiction.
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1 9. Venue is proper in this District under 28 U.S.C. §§ 1391(b) and (c),
2 28 U.S.C. § 1400(b), and RCW 4.28.185(1)(a) and (b).
3

4 **FACTS COMMON TO ALL CLAIMS**

5 10. Plaintiff Van Well owns United States Plant Patent No. 4,839 (*the*
6 *'839 Plant Patent*), entitled SPUR-TYPE RED DELICIOUS APPLE TREE. This variety
7 of apple tree is commonly known as the "Snipes cultivar" or "Snipes cv."
8

9 11. Plaintiff Van Well owns U.S. Trademark Registration No. 1,952,536,
10 for the trademark SCARLET SPUR® for use with "live apple trees."
11

12 12. Plaintiff Hilltop is the exclusive U.S. licensee for U.S. Trademark
13 Registration No. 1,241,362 for the trademark SMOOTHEE® for use with "apple
14 trees.
15

16 13. Due to the successful efforts to commercially exploit the Snipes cv.
17 and the SCARLET SPUR® trademark, the commercial fruit industry recognizes the
18 trademark SCARLET SPUR®, or simply "SCARLET" as identifying the exclusive
19 source of the Snipes cv. variety of patented apple trees.
20

21 14. During the term of U.S. Plant Patent No. 2,803, (the '803 plant patent)
22 for the Gibson cv. variety of Golden Delicious trees, and due to successful efforts
23 to commercially exploit the Gibson cv. and the SMOOTHEE® trademark, the
24 commercial fruit industry recognized the trademark SMOOTHEE® as identifying
25 the exclusive source of Gibson cv. patented apple trees. Following expiration of
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1 the '803 plant patent on April 16, 1985, the SMOOTHEE® trademark has
2 continued to be recognized as identifying the source of high quality Gibson cv.
3 apple trees.
4

5 15. Bennett Brulotte is, or was at all times alleged herein, an officer and
6 director in control of A/B Hop Farms, and managed the day-to-day activities of
7 A/B Hop Farms, and has direct liability for A/B Hops' acts of infringement, and
8 indirect liability for inducement and contributory infringement.
9

10 16. Upon information and belief, in the spring of 1994, 1995 and 1996,
11 A/B Hop Farms, under the direction and control of Bennett Brulotte, engaged in
12 the asexual propagation, commercial use, offer for sale, or sale of at least 76,610
13 SCARLET SPUR® Snipes cv. patented apple trees planted at the A/B Hop's
14 Wallula Orchard Property, in Walla Walla County, without permission, license or
15 authorization from the owner of the '839 Plant Patent. These activities constitute
16 infringement of the '839 Plant Patent.
17
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19 17. Upon information and belief, A/B Hop Farms and Bennett Brulotte,
20 without permission, authorization, or license, used the SCARLET SPUR®
21 trademark, or used the infringing designation "SCARLET," in connection with
22 those 76,610 trees during their commercial activities with respect to the Wallula
23 Orchard Property.
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1 18. A/B Hops and Bennett Brulotte were not licensed to use the SCARLET
2 SPUR® trademark, or the mark "SCARLET," with Snipes cv. patented apple trees
3 that were unlawfully propagated or planted. These activities constitute trademark
4 infringement, trademark counterfeiting, false designation of origin, and unfair
5 competition.
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8 19. Upon information and belief, in the spring of 1995 or 1996, A/B Hop
9 Farms, under the direction and control of Bennett Brulotte, planted at least 36,920
10 Golden Delicious trees on the Wallula Properties.
11

12 20. Upon information and belief these trees were propagated by A/B Hop
13 Farms under the direction and control of Bennett Brulotte.
14

15 21. Upon information and belief, A/B Hop Farms and Bennett Brulotte,
16 without permission, authorization, or license, used the SMOOTHEE® trademark,
17 or used the infringing designation "SMOOTHIE Goldens," in connection with
18 these 36,920 Golden Delicious trees during their commercial activities with respect
19 to the Wallula Orchard Property.
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21 22. A/B Hop Farms and Bennett Brulotte were not licensed to use the
22 SMOOTHEE® trademark, or the infringing designation SMOOTHIE, with apple
23 trees. These activities constitute trademark infringement, trademark counterfeiting,
24 false designation of origin, and unfair competition.
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1 23. Upon information and belief, defendant MONY, either directly or
2 through its agents and representatives, used the SMOOTHEE® trademark, or used
3 the infringing designation SMOOTHIE Goldens, during their commercial activities
4 with respect to the 36,920 Golden Delicious trees propagated and planted on the
5 Wallula property, including offers to sell, and the sale of interests in that property.
6

7 24. Prior to May 9, 2000, MONY had loaned monies and/or extended
8 credit to A/B Hop Farms and Bennett and Tracy Brulotte, secured by trees planted
9 on A/B Hop's Wallula Orchard Property, that infringe the intellectual property in
10 suit in this litigation.
11

12 25. The taking and perfection of security interests in trees that infringe the
13 intellectual property which is the subject matter of this litigation constitutes a sale
14 and use in commerce by MONY and an act of direct infringement under the patent
15 and trademark laws of the United States.
16

17 26. The claim of an interest by MONY through the recorded mortgage and
18 perfected security interest in trees that infringe intellectual property in suit herein,
19 and the use of those trees to accomplish the purpose of securing the debts to
20 MONY of A/B Hop Farms and Bennett and Tracy Brulotte, and the use of those
21 trees as collateral for loans or other extensions of credit, constitute a use in
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1 commerce and, therefore, an act of direct infringement under the patent and
2 trademark laws of the United States.

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4 27. MONY has fostered, promoted and preserved the continuation of
5 infringement by A/B Hop Farms and Bennett and Tracy Brulotte of the intellectual
6 property in suit herein by providing financing to farm the infringing trees. MONY
7 thereby has aided, abetted, contributed to and induced the continuing infringement
8 of plant patents and trademarks issued by the United States of America in violation
9 of 35 U.S.C. § 271 and 15 U.S.C. § 1114 and of the state of Washington in
10 violation of RCW 19.86.020.
11
12

13 28. On November 27, 2001, by means of a Quit Claim Deed in Lieu of
14 Foreclosure, MONY acquired ownership of the Wallula Orchard Property from
15 A/B Hop Farms and Bennett and Tracy Brulotte.
16

17 29. Upon information and belief, MONY, using a real estate broker and
18 agent, offered for sale, and sold, the Wallula Orchard Property to third parties, and
19 has designated part or all of the trees growing thereon as "Scarlet Red Delicious"
20 trees or "Smoothie Golden Delicious" trees.
21

22 30. At the time MONY made such representations as to the source of the
23 trees being grown on the Wallula Orchard Property, MONY had no license or
24 authorization to use the SCARLET SPUR® trademark or the SMOOTHIE®
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1 trademark on or in connection with any trees unlawfully propagated by A/B Hops
2 or Bennett Brulotte. MONY's acts constitute trademark infringement, trademark
3 counterfeiting, false designation of origin, and unfair competition.
4

5 31. Plaintiffs seek to recover MONY's profits from their commercial use
6 of the infringing trees as permitted by the Lanham Act, 15 U.S.C. § 1051 *et. seq.*
7

8 **FIRST CLAIM FOR RELIEF**
9 **Infringement of the '839 Plant Patent**

10 32. Each Defendant infringed directly, contributorily, and/or by
11 inducement, the claims of the '839 Plant Patent, during the term of that patent, by
12 asexually propagating, using, offering for sale, selling, or importing plants
13 embodying patented plants.
14

15 33. Plaintiff Van Well has been and continues to be damaged by the acts
16 of each Defendant in such amounts as may be proven at trial, but in no event less
17 than \$6.50 per tree for each infringing tree.
18

19 34. The acts of patent infringement by Defendants are willful.

20 35. Plaintiff Van Well is entitled to an award of lost profits and, where
21 appropriate, injunctive relief in the form of destruction of infringing trees.
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Trademark Counterfeiting, Infringement and False Designation of Origin

36. Defendants have used and continue to use the registered trademarks SCARLET SPUR® or SCARLET, and SMOOTHIE®, or the infringing designation “SMOOTHIE”, or other registered or common trademarks, on or in connection with the offer for sale, and sale or assignment of interests in infringing trees, fruit and orchards planted with unlicensed, and therefore infringing and counterfeit trees, which trademark use falsely designates that those trees are duly licensed by and originated from or are approved, authorized by, or associated or affiliated with the owner of the trademarks in violation of 15 U.S.C. §§ 1114 and 1125(a).

37. The Defendants' acts of counterfeiting, infringement, and false designation of origin have caused, and will continue to cause Plaintiffs damages in such amount as shall be proven at trial.

38. Defendants' acts of trademark infringement, counterfeiting, and false designation of origin are willful.

39. Plaintiffs are entitled to an award of lost profits, the profits of Defendants attributable to the infringement, counterfeiting, and false designation of origin, and injunctive relief in the form of destruction of infringing trees.

1 **THIRD CLAIM FOR RELIEF**
2 **Washington Consumer Protection Act Violation**

3 40. The unfair acts and practices of all the Defendants have impacted and
4 will continue to impact the public interest, constitute repeated violations of
5 intellectual property rights of the owner thereof, have a great likelihood of future
6 repetition, and constitute a violation of the Washington Consumer Protection Act,
7 RCW § 19.86.010 *et seq.*
8

9 41. Defendants' unfair acts and practices entitle Plaintiffs to all of the
10 remedies permitted by law including enhanced damages and attorneys fees as
11 allowed by RCW 19.86.090.
12

13 **PRAYER**

14 Plaintiff prays that judgment be entered as follows:
15

16 1. Pursuant to 35 U.S.C. § 283, 15 U.S.C. § 1116 and RCW 19.86.090, a
17 preliminary and permanent injunction, with respect to the properties and trees at
18 suit in this case, enjoining Defendants, and their agents, employees and all other
19 persons in active concert or participation with them, from infringement of the '839
20 Plant Patent, or any other plant patent, and from infringement of the SCARLET
21 SPUR® trademark, the SMOOTHEE® trademark, or the use of any other mark
22 similar in nature to cause confusion and thereby infringe the registered marks in
23 suit.
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1 2. A money judgment pursuant to 35 U.S.C. §§ 284 and 285 for damages
2 in an amount of at least \$6.50 for each tree that infringes a patent in suit, or any
3 other patent, or in such additional amount as may be proven at trial adequate to
4 compensate Plaintiff for each Defendant's infringements of each plant patent in
5 suit, together with treble damages and lost profits, prejudgment interest thereon,
6 and statutory costs;
7

8
9 3. A money judgment pursuant to 15 U.S.C. § 1117 and RCW 19.86.090
10 for damages in an amount of not less than \$6.50 for each tree that infringes the
11 trademark in suit, or any other trademark, or in such amount as may be proven at
12 trial; or, in lieu thereof, statutory damages for the use of counterfeit marks in an
13 amount up to \$1,000,000 for each mark infringed, and each Defendants' profits
14 attributable to the infringement, together with enhanced damages for willful
15 misappropriation as permitted by 15 U.S.C. § 1117 and RCW 19.86.090 and
16 prejudgment interest thereon;
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20 4. For an award of Plaintiff's attorneys fees and costs against each
21 Defendant, jointly and severally, under applicable statutes, including 35 U.S.C. §
22 285, 15 U.S.C. § 1117 and R.C.W. 19.86.090; and
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1 5. For such other and further relief as the court deems just and equitable.

2 DATED this 9th day of July, 2004

3
4 Respectfully submitted,

5 STRATTON BALLEW PLLC
6 Attorneys for Plaintiffs

7
8 By: 

9 Wes L. Gano, WSBA No. 19606