

2. As set forth in detail below, Defendants have threatened that the unlicensed propagation or sale of certain tree and plant varieties (which Defendants falsely purport to be protected by patent) is prohibited by law.

3. Moreover, certain defendants have improperly imposed royalties on the sale of certain tree and plant varieties by fraudulently leveraging expired and non-existent patent rights.

4. All Defendants have violated 35 U.S.C. § 292(a) by falsely marking and advertising various tree and plant varieties as protected by expired plant patents for the purpose of deceiving competitors, growers, orchardists, gardeners, and the public into believing that tree and plant varieties are protected by plant patents when they are not so that defendants can, among other things, unlawfully a) prohibit others from propagating tree and plant varieties and b) collect patent royalties from purchasers of defendants' tree and plant varieties when those tree and plant varieties are no longer protected by patents.

5. By threatening and purporting to prohibit the unlicensed propagation of the relevant tree and plant varieties, and/or by marking and continuing to mark materials with expired patent numbers, Defendants made communications to competitors, distributors, direct purchasers, and end-users that they may not sell, purchase, grow or propagate the relevant tree and plant varieties from anyone but licensed nurseries

6. Defendants' anticompetitive conduct, including without limitation, the unlawful and unenforceable royalties, have increased the cost to American consumers of healthy food in the nationwide markets for the fruit varieties grown from the trees and plants described herein.

PARTIES, JURISDICTION AND VENUE

7. Plaintiff Broom Orchard, Inc. is located at 12803 Broom Road, Carlinville, Illinois 62626 and is a corporation existing under the laws of Illinois, and is lawfully engaged in the business of growing fruit trees and selling fruit.

8. In the ordinary course of its business, for at least the last five years, Broom Orchard has purchased fruit trees that Defendants have represented as being protected by patent, when in fact, they are not. In addition, Broom Orchard has suffered competitive injuries as a result of Defendants' conduct described below, including costs and post-expiration royalties.

9. Upon information and belief, defendant the Regents of the University of Minnesota ("the University" or "the University of Minnesota") is a non-profit corporation organized and existing under the laws of Minnesota, having its principal place of business in Minneapolis, Minnesota.

10. Upon information and belief, the University of Minnesota maintains one or more policies of insurance in accordance with M.S.A. § 3.736(8), and has no sovereign immunity defense.

11. The University of Minnesota has waived any purported sovereign immunity defense at a minimum by its continuing blanket threats to invoke U.S. Plant Patent No. 7,197 (the "Honeycrisp patent" or the "Honeycrisp plant patent") against anyone who propagates the Honeycrisp apple, despite the fact that the patent that covers the Honeycrisp apple expired in 2008.

12. This Court has personal jurisdiction over the University of Minnesota because the University, through its "licensed nurseries" has circulated products, advertising, catalogues, brochures, price lists, invoices, and/or packaging of at least one falsely marked tree variety

within this District. The University of Minnesota also maintains a Web site displaying at least one falsely marked tree variety, the Honeycrisp, which is accessible to residents of Missouri and of this District.

13. Upon information and belief, Adams County Nursery, Inc. (“Adams County Nursery”) is a corporation organized and existing under the laws of Pennsylvania, having its principal place of business at 26 Nursery Road, P.O. Box 108, Aspers, Pennsylvania 17304.

14. This Court has personal jurisdiction over Adams County Nursery because Adams County Nursery has sold and continues to sell falsely marked products (as describe in greater detail below) and has circulated products, advertising, catalogues, brochures, price lists, invoices, and/or packaging of falsely marked products in Missouri and in this District and/or in the stream of commerce with knowledge that they would be sold and used in Missouri and in this District.

15. This Court also has personal jurisdiction over Adams County Nursery because Adams County Nursery maintains a Web site displaying falsely marked products, which is accessible to residents of Missouri and residents of this District.

16. Upon information and belief, Columbia & Okanogan Nursery Co. (“C&O Nursery”) is a corporation organized and existing under the laws of Washington State, having its principal place of business at 1700 N. Wenatchee Ave, P.O. Box 116, Wenatchee, Washington 98801.

17. This Court has personal jurisdiction over C&O Nursery because C&O Nursery has sold and continues to sell falsely marked products (as describe in greater detail below) and has circulated products, advertising, catalogues, brochures, price lists, invoices, and/or packaging of falsely marked products in Missouri and in this District and/or in the stream of commerce with knowledge that they would be sold and used in Missouri and in this District.

18. This Court also has personal jurisdiction over C&O Nursery because C&O Nursery maintains a Web site displaying falsely marked products, which is accessible to residents of Missouri and residents of this District.

19. Upon information and belief, Dave Wilson Nursery, Inc. (“Dave Wilson Nursery”) is a corporation organized and existing under the laws of California, having its principal place of business at 19701 Lake Road, Hickman, California 95323.

20. This Court has personal jurisdiction over Dave Wilson Nursery because Dave Wilson Nursery has sold and continues to sell falsely marked products (as describe in greater detail below) and has circulated products, advertising, catalogues, brochures, price lists, invoices, and/or packaging of falsely marked products in Missouri and in this District and/or in the stream of commerce with knowledge that they would be sold and used in Missouri and in this District.

21. This Court also has personal jurisdiction over Dave Wilson Nursery because Dave Wilson Nursery maintains a Web site displaying falsely marked products, which is accessible to residents of Missouri and residents of this District.

22. Upon information and belief, Lawyer Nursery, Inc. (“Lawyer Nursery”) is a corporation organized and existing under the laws of Montana, having its principal place of business at 6625 Montana Highway 200, Plains, Montana, 59859.

23. This Court has personal jurisdiction over Lawyer Nursery because Lawyer Nursery has sold and continues to sell falsely marked products (as describe in greater detail below) and has circulated products, advertising, catalogues, brochures, price lists, invoices, and/or packaging of at least one falsely marked products in Missouri and in this District and/or in the stream of commerce with knowledge that the variety would be sold and used in Missouri and in this District.

24. This Court also has personal jurisdiction over Lawyer Nursery because Lawyer Nursery maintains a Web site displaying at least one falsely marked products, which is accessible to residents of Missouri and residents of this District.

25. Upon information and belief, Stark Bro's Nurseries & Orchards Co. ("Stark Bro's Nurseries") is a corporation organized and existing under the laws of Illinois, having its principal place of business at 11523 Highway NN, Louisiana, Missouri 63353.

26. This Court has personal jurisdiction over Stark Bro's Nurseries because Stark Bro's Nurseries' principal place of business is within this District.

27. This Court also has personal jurisdiction over Stark Bro's Nurseries because Stark Bro's Nurseries has sold and continues to sell falsely marked products (as describe in greater detail below) and has circulated products, advertising, catalogues, brochures, price lists, invoices, and/or packaging of falsely marked products in Missouri and in this District and/or in the stream of commerce with knowledge that they would be sold and used in Missouri and in this District.

28. This Court also has personal jurisdiction over Stark Bro's Nurseries because Stark Bro's Nurseries maintains a Web site displaying falsely marked products, which is accessible to residents of Missouri and residents of this District.

29. Upon information and belief, Van Well Nursery, Inc. ("Van Well Nursery") is a corporation organized and existing under the laws of Washington State, having its principal place of business at P.O. Box 1339, Wenatchee, Washington 98807.

30. This Court also has personal jurisdiction over Van Well Nursery because Van Well Nursery has sold and continues to sell falsely marked products (as describe in greater detail below) and has circulated products, advertising, catalogues, brochures, price lists, invoices,

and/or packaging of falsely marked products in Missouri and in this District and/or in the stream of commerce with knowledge that they would be sold and used in Missouri and in this District.

31. This Court also has personal jurisdiction over Van Well Nursery because Van Well Nursery maintains a Web site displaying falsely marked products, which is accessible to residents of Missouri and residents of this District.

32. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a). This Court has supplemental jurisdiction over Broom Orchard's state law claims for relief pursuant to 28 U.S.C. § 1367(a) as they form part of the same case or controversy as the federal claims asserted herein.

33. Venue is proper under 28 U.S.C. §§ in that a substantial part of the events giving rise to Broom Orchard's claims occurred in the Eastern District of Missouri and each defendant is subject to personal jurisdiction in the Eastern District of Missouri (and thus for purposes of venue each defendant resides in the Eastern District of Missouri).

DEFENDANTS' ROYALTIES AND FALSELY MARKED PRODUCTS

34. Defendants license, grow, sell, and/or collect royalties (or licensed, grew, sold, and/or collected royalties) from the sale of a variety of trees and plants which they mark or cause to be marked with various plant patents for sale to distributors, retailers, and the general consuming public.

35. Defendants mark or marked products, advertising, catalogues, brochures, Web sites, price lists, invoices, and/or packaging of the falsely marked tree and plant varieties with at least one expired patent number.

THE HONEYCRISP APPLE TREE

36. Defendant University of Minnesota is the assignee of the Honeycrisp patent (before its expiration). Allegedly, the Honeycrisp patent covers the Honeycrisp apple tree (“the Honeycrisp”).

37. The Honeycrisp patent expired no later than November 2008.

38. Through advertising, public relations campaigns, and exclusive licensing agreements with apple growers, the University made millions of dollars with its Honeycrisp apple. In fact, the Honeycrisp is one of the five all-time highest earning inventions at the University.

39. The Honeycrisp apple is also one of the most expensive apple varieties, if not the most expensive apple variety, offered for sale in grocery stores and markets today, exceeding other comparable apple varieties in price by two dollars or more per pound.¹

40. As early as October 21, 2007, the University knew that the Honeycrisp patent was set to expire the following year.

41. In an article entitled “With Honeycrisp’s patent expiring, U of M looks for new apple,” David Bedford, co-inventor of the Honeycrisp and scientist with the University of Minnesota’s apple breeding program, publicly acknowledged that the Honeycrisp would lose patent protection in 2008. Ex. 1.

42. In another article entitled “Honeycrisp losing its patent protection but not its appeal,” Jay Shrankler, the director of the University of Minnesota’s office of technology

¹ On the date of filing, a Honeycrisp apple in Webster Groves, Missouri cost \$3.99 per pound. Comparatively, eleven other apples for sale were either \$1.99 or \$1.89 per pound. These apples were the Jazz, Pinata, Golden Delicious, Red Rome, Braeburn, Jonagold, Jumbo Red Delicious, Jumbo Fuji, Macintosh MCI, Jonathan, and Red Delicious.

commercialization, publicly acknowledged that the Honeycrisp patent would expire in 2008 and, when it did, the University would lose a significant revenue stream. Ex. 2.

43. Notwithstanding its knowledge of the Honeycrisp patent's expiration, the University still marks the Honeycrisp with the expired Honeycrisp patent.

44. The University also, after the Honeycrisp patent expired and currently, expressly prohibits the unlicensed propagation and sale of Honeycrisp trees.

45. On the University of Minnesota's Web site, copyrighted 2011, Honeycrisp co-creators David Bedford and James Luby, as well as the University of Minnesota, falsely state that "Honeycrisp is protected under the U.S. Plant Patent Act (Plant Patent No. 7197)" and that the Honeycrisp "may be propagated only by licensed parties."

Availability

Honeycrisp is protected under the U.S. Plant Patent Act (Plant Patent No. 7197). It may be propagated only by licensed parties. Firms or individuals desiring to propagate and sell trees of Honeycrisp must apply for a license from the University of Minnesota, Office of Patents and Licensing, Suite 201, 1100 Washington Ave. S., Minneapolis, MN 55415-1226. A list of licensed nurseries is available at <http://fruit.coafes.umn.edu/> or <http://www.apples.umn.edu/> or by contacting the Department of Horticultural Science, Fruit Breeding Program, University of Minnesota, St. Paul, MN 55108.

Ex. 3.

46. Within another University of Minnesota Web page (last modified November 3, 2010) entitled "Licensed Nurseries," the University of Minnesota falsely claims patent protection and purports to prohibit the public from propagating the Honeycrisp:

SnowSweet®, Zestar!®, and Honeycrisp Apple Trees are varieties developed by the University of Minnesota and protected by United States Plant Patents or Plant Variety Rights in other countries. Propagation of these trees without a license is prohibited, even if you want to propagate or topwork only one tree.

If you are an Orchardist that would like to place a large quantity order, please contact one of the fine Licensed Wholesale Nurseries listed below.

If you are a Gardener or Consumer looking for a small quantity of apple trees, please contact one of the listed Retail Nurseries or your favorite local garden center.

Ex. 4.

47. As of the date of this action, the “Licensed Nurseries” Web page includes the Nursery Defendants named in this suit. *Id.*

48. Although the “Licensed Nurseries” Web page was created years before the Honeycrisp’s plant patent expired, the University of Minnesota did not add the above prohibitory language until August 2008—mere months before its Honeycrisp monopoly was to expire and after Bedford and Shrankler’s statements were made in Paragraphs 41 and 42 above. *Compare* Group Exhibit 5, Web Archive print outs of Licensed Nurseries Web Page from 2006 and 2008 (located at

<http://web.archive.org/web/20060511090132/http://www.apples.umn.edu/nurseries/nurseries.html>,

<http://web.archive.org/web/20080106212613/http://www.apples.umn.edu/nurseries/nurseries.html>

and

<http://web.archive.org/web/20080822154207/http://www.apples.umn.edu/nurseries/nurseries.html>).

As of the date of filing this lawsuit, the prohibitory language is still published on the Web page.

49. Yet another University of Minnesota Web page still falsely claims patent protection and falsely states that “Nurseries must be licensed to propagate and sell...Honeycrisp Apple trees.”

SnowSweet®, Zestar!® and Honeycrisp Apples are protected under the US Plant Patent Act and by Plant Breeders Rights in several other countries.

Nurseries must be licensed to propagate and sell SnowSweet®, Zestar!® and Honeycrisp Apple trees

...

Honeycrisp tech i.d. #88106

Ex. 6.

50. In view of at least the above non-limiting examples, the University of Minnesota is now and has in the past knowingly marked and marketed the Honeycrisp tree with expired patents intending to deceive the public and competitors into believing that the Honeycrisp tree is protected by plant patent when in fact it is not.

51. Intent is also clear in that despite acknowledging in 2007 that the Honeycrisp patent would expire, the University changed its Web pages to include statements that the Honeycrisp patent was still in force so that it could continue collecting royalties and limit competitors from topworking Honeycrisp trees (and therefore limited competition).

52. Given that the Honeycrisp patent has expired, anyone may grow or sell the Honeycrisp without penalty and without need to pay the University of Minnesota or its licensees, a licensing fee.

53. In addition to the University of Minnesota, a number of the University of Minnesota's "licensed" nurseries currently and in the past, falsely mark the Honeycrisp with an expired plant patent number.

54. Given that these University of Minnesota "licensed" nurseries work closely with the University of Minnesota regarding the Honeycrisp, and the University of Minnesota knows that the Honeycrisp patent is expired, the "licensed" nurseries also know that the Honeycrisp apple is expired.

55. For example, in an article published by the Fruit Growers News, entitled "Honeycrisp patent expiration not expected to change sales," both Phil Baugher, the marketing vice president for Adams County Nursery and Bedford, discussed the expiration of the Honeycrisp patent, acknowledging Adams County Nursery's knowledge of the Honeycrisp's patent expiration. Ex. 104.

56. Adams County Nursery, a University of Minnesota “Licensed Wholesale Nursery,” falsely marked the Honeycrisp apple tree as patented with the language “PP#7197” on the invoice submitted to Broom Orchard dated March 11, 2010. Ex. 7.

5	10AHCPA36A98Honeycrisp™(MN1711)PP#7197	EMLA 7	7/16-1/2"	1.50	6.050	30.25
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57. In addition to falsely representing the Honeycrisp apple tree as patented, Adams County Nursery also collected \$1.50 per Honeycrisp tree in post-expiration royalties based on the expired Honeycrisp patent (as indicated on the invoice). Ex. 7. Defendant Adams County Nursery, Inc. was also aware that at least the Honeycrisp patent was expired when it prepared and sent the invoice attached as Exhibit 7.

58. Adams County Nursery is a sophisticated business entity with extensive experience in the procurement and acquisition of plant patents in the United States. Adam’s County Nursery claims to own, or have licenses under, a substantial number of patents and patent applications.

59. As a sophisticated business entity Adams County Nursery knows or reasonably should have known of the requirements and provisions of 35 U.S.C. § 292.

60. Upon information and belief, Defendant Adams County Nursery has collected significant post-expiration royalties based on sales of the Honeycrisp tree.

61. In addition, by representing that the certain tree and plant varieties are patented when they are not (beyond the Honeycrisp), and representing that the propagation of patented varieties for personal use or for sale in the United States is prohibited, Adams County Nursery erects false market barriers in the nationwide market for tree and plant varieties, including the Honeycrisp tree. Adams County Nursery engages in this behavior at least through statements in its catalogue, including:

Patents and Trademarks: Many of the varieties offered by Adams County Nursery are the subject of United States Plant Patents and/or Registered Trademarks. U.S. Plant Patent laws prohibit the propagation of patented varieties for personal use or for sale or selling the plant or any of its parts, including the fruit throughout the United States or importing the plant so reproduced, or any of its parts into the United States. Permission must be obtained in writing from Adams County Nursery prior to topworking or propagating any patented varieties assigned to Adams County Nursery. The use of Trademarks owned or licensed to Adams County Nursery without authorization is prohibited. The purchase of trees from Adams County Nursery bearing a Trade Name label constitutes authorization for use of Trade Name in the sale and distribution of the fruit produced from those trees.

Ex. 8.

62. C&O Nursery, a University of Minnesota “Licensed Wholesale Nursery,” falsely marks the Honeycrisp apple tree as patented with the language “U.S. Plant Patent No. 7,197” on its Web site. Ex. 9.

63. C&O Nursery’s Spring 2011 Menu & Planner falsely marks the Honeycrisp as patented with the language “USPP #7197.” It also states that the the Honeycrisp “USPP #7197” is “[o]ffered under a license agreement with the University of Minnesota.” Ex. 10.

64. C&O Nursery is a sophisticated business entity with extensive experience in the procurement and acquisition of plant patents in the United States. C&O Nursery claims to own, or have licenses under, a substantial number of patents and patent applications.

65. As a sophisticated business entity C&O Nursery knows or reasonably should have known of the requirements and provisions of 35 U.S.C. § 292.

66. In addition to falsely representing the Honeycrisp apple tree as patented, C&O Nursery also lists the Honeycrisp tree as one of its “Patented & Special Varieties,” with the language “add to correct price table” an additional charge of \$1.50 per Honeycrisp apple tree.” Upon information and belief, this additional charge represents a post-expiration royalty. Exhibit 10.

67. Upon information and belief, Defendant C&O Nursery has collected significant post-expiration royalties based on sales of the Honeycrisp tree.

68. Dave Wilson Nursery, a University of Minnesota retail nursery, falsely marks the Honeycrisp apple tree as patented with the language “Patent # 7197” on its Web site, copyrighted 2010. Ex. 11.

69. Dave Wilson Nursery is a sophisticated business entity with extensive experience in the procurement and acquisition of plant patents in the United States. Dave Wilson Nursery claims to own, or have licenses under, a substantial number of patents and patent applications.

70. In fact, Dave Wilson Nursery’s CEO, Dennis Tarry, provided clarification to an amateur fruit grower providing instruction on how to calculate patent expiration dates on January 6, 2009, acknowledging Dave Wilson Nursery’s knowledge of patent expirations. Ex. 105.

71. As a sophisticated business entity Dave Wilson Nursery knows or reasonably should have known of the requirements and provisions of 35 U.S.C. § 292.

72. In addition to falsely representing the Honeycrisp apple tree as patented, and upon information and belief, Dave Wilson Nursery demands from customers a higher price per tree which represents a post-expiration royalty.

73. Upon information and belief, Defendant Dave Wilson Nursery has collected significant post-expiration royalties based on sales of the Honeycrisp tree.

74. In addition, by representing that the certain tree and plant varieties are patented when they are not, and representing that a royalty surcharge and written authorization must be obtained before field grafting all proprietary, i.e. “patented,” varieties, Dave Wilson Nursery erects false market barriers in the nationwide market for tree and plant varieties, including the Honeycrisp tree. Dave Wilson Nursery engages in this behavior at least through statements on its Web site, including:

Royalty Surcharge for Grafting of Patented Varieties

...

Regardless of the source of the understock, **written authorization** for all field grafting of proprietary varieties must be obtained from Dave Wilson Nursery before trees are grafted. **An additional \$1.00 per tree royalty surcharge will apply to grafting done without first obtaining written authorization.** Prior authorization is very important, even if the understock is purchased from Dave Wilson Nursery. Prior authorization enables us to keep track of grafting and also gives us a chance to provide growers with up-to-date information concerning variety performance and pollenization requirements.

Ex. 12.

75. Lawyer Nursery, a University of Minnesota wholesale nursery, falsely marks the Honeycrisp apple tree as patented with the language “add \$1.35 per tree for patent royalty” in its 2009-2010 Master Catalogue. Ex. 13.

76. Lawyer Nursery is a sophisticated business entity with extensive experience in the procurement and acquisition of plant patents in the United States. Lawyer Nursery claims to own, or have licenses under, a substantial number of patents and patent applications.

77. As a sophisticated business entity Lawyer Nursery knows or reasonably should have known of the requirements and provisions of 35 U.S.C. § 292.

78. In addition to falsely representing the Honeycrisp apple tree as patented, and upon information and belief, Lawyer Nursery demands from customers a higher price per tree which represents a post-expiration royalty.

79. Upon information and belief, Defendant Lawyer Nursery has collected significant post-expiration royalties based on sales of the Honeycrisp tree.

80. Stark Bro’s Nurseries, a University of Minnesota “Licensed Wholesale Nursery,” falsely marks the Honeycrisp apple tree as patented with the language “U.S.P.P. #7197” on its Web site, copyrighted 2011. Ex. 14.

81. Stark Bro’s Nurseries also represented the Honeycrisp apple tree as patented when charging a royalty amounting to \$1.30 per Honeycrisp tree, as set forth on the invoice submitted to Broom Orchard dated March 9, 2009.

27	8466	1/2 in. Honeycrisp™ Apple Bud 118	\$1.30	\$7.30	\$232.20
27	8306	3/8 in. Honeycrisp™ Apple M 7	\$1.30	\$6.30	\$205.20

Ex. 15.

82. Defendant Stark Bro’s Nurseries was aware that at least the Honeycrisp patent was expired when it prepared and sent the invoice attached as Exhibit 15.

83. Stark Bro’s Nurseries is a sophisticated business entity with extensive experience in the procurement and acquisition of plant patents in the United States. Stark Bro’s Nurseries claims to own, or have licenses under, a substantial number of patents and patent applications.

84. As a sophisticated business entity Stark Bro’s Nurseries knows or reasonably should have known of the requirements and provisions of 35 U.S.C. § 292.

85. For example, and as Stark Bro’s Nurseries showed knowledge of U.S. patent laws and its own patent portfolio when it Stark Bro’s Nurseries publicly represented on its Web site that it owns or has in the past owned over 750 varieties, and that its own namesake, Paul Stark Sr. “was instrumental in writing U.S. legislation creating plant patents” (and that Stark Bro’s Nurseries continues to utilize those laws today).

By carefully selecting and propagating only the best varieties, James Stark started a tradition in horticultural excellence. This work of quality and excellence led to an association with famed plant wizard Luther Burbank. He personally selected Stark

Bro's to carry on his work and willed over 750 varieties to the company. Today, Stark Bro's holds exclusive propagation rights to many patented varieties of fruit. Paul Stark Sr., in fact, was instrumental in writing U.S. legislation creating plant patents in the 1930s., and Stark Bro's continues to utilize those laws in developing their own new varieties. Through a dedication to quality, Stark Bro's has gained world leadership as a developer and promoter of outstanding fruit varieties. The most famous of these are the Stark Red Delicious Apple from 1893 and the Stark Golden Delicious Apple from 1914.

Ex. 16.

86. In addition to falsely representing the Honeycrisp apple tree as patented, and upon information and belief, Stark Bro's Nurseries demands from customers a higher price per tree which represents a post-expiration royalty.

87. Upon information and belief, Defendant Stark Bro's Nurseries has collected significant post-expiration royalties based on sales of the Honeycrisp tree.

88. In addition, by representing that the certain tree and plant varieties are patented when they are not, and representing that the propagation of patented varieties purchased from Stark Bro's is strictly prohibited and that those doing so are subject to litigation, Stark Bro's Nurseries erects false market barriers in the nationwide market for tree and plant varieties, including the Honeycrisp tree. Stark Bro's Nurseries engages in this behavior at least through statements on its catalogue, including:

Important Information on Stark Bro's Patented Varieties

Rights to asexually propagate patented varieties are clearly protected under the Plant Patent Law. No patented variety purchased from Stark Bro's may be used to asexually reproduce another growing plant by grafting, budding, layering, division, cuttings, top-working or by any other means. Asexual reproduction of patented varieties is strictly prohibited without written license and anyone so doing is subject to litigation.

Ex. 17.

89. Van Well Nursery, a University of Minnesota "Licensed Wholesale Nursery," falsely marks the Honeycrisp apple tree as patented with the language "U.S. Plant Patent No. 7,197" on its Web site, copyrighted 2004-2011. Exhibit 18.

90. Van Well Nursery is a sophisticated business entity with extensive experience in the procurement and acquisition of plant patents in the United States. Van Well Nursery claims to own, or have licenses under, a substantial number of patents and patent applications.

91. As a sophisticated business entity Van Well Nursery knows or reasonably should have known of the requirements and provisions of 35 U.S.C. § 292.

92. In addition to falsely representing the Honeycrisp apple tree as patented, Van Well Nursery also lists the Honeycrisp tree as one of its "Apple Patented and Premium Varieties," which demand a higher price per tree than its "Apple Non Patented Varieties." Upon information and belief, this additional charge represents a post-expiration royalty. Exhibit 19.

93. Pursuant to the policy and pricing schedule set forth in its catalogue set forth in Exhibit 19, Van Well Nursery included a post-expiration patent royalty in the price of each Honeycrisp tree sold to Broom Orchard in its March 21, 2011 invoice submitted to Broom Orchard. Ex. 20.

94. Van Well Nursery also falsely marked at least one tag affixed to the shipment of Honeycrisp trees received by Broom Orchard in March of 2011 with the language “U.S.P.P. #7197”. Ex. 21.

95. Upon information and belief, Defendant Van Well Nursery has collected significant post-expiration royalties based on sales of the Honeycrisp tree.

96. In addition, by representing that the certain tree and plant varieties are patented when they are not, and representing that the propagation of patented varieties is prohibited, Van Well Nursery erects false market barriers in the nationwide market for tree and plant varieties, including the Honeycrisp tree. Van Well Nursery engages in this behavior at least through statements in its catalogue, including:

PLANT PATENT RIGHTS

...

Reproduction of patented varieties for any purpose, or use of trademarks for those varieties, without a written license from Van Well Nursery, Inc. is prohibited.

Ex. 19.

THE SUPER CHIEF APPLE TREE

97. Defendant Van Well Nursery was assignee of United States Plant Patent No. 6,190 (“the Super Chief patent” or “the Super Chief plant patent”) (before its expiration). The Super Chief patent was directed to the Super Chief apple tree (“the Super Chief”).

98. The Super Chief patent expired no later than April 6, 2006.

99. An instance of the false marking of this product and royalty collections from the sale of the falsely marked product by defendant Adams County Nursery, Inc. is in the form of an invoice and is attached hereto as Exhibit 8 to this Complaint. The invoice displays the product

name (“Super Chief”) with plant patent number (“PP#6190”), and the royalty rate charged per tree sold (“.75”):

32	10ASPCA44335Super Chief@(Sandidge)PP#6190	EMLA 111	5/8-3/4"	.75	6.950	222.40
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Ex. 7.

100. This invoice shows an order date March 11, 2010, nearly 4 years after the expiration of the Super Chief patent (April, 16, 2006).

101. Defendant Adams County Nursery, Inc. was aware that the Super Chief patent was expired when it prepared and sent the invoice attached as Exhibit 7. Defendant Adams County Nursery, Inc. was also aware that the Super Chief patent was expired when it collected \$.75 per Super Chief tree in post-expiration royalties based on the expired 6190 plant patent (as indicated on the invoice).

102. Upon information and belief, Defendant Adams County Nursery, Inc. has prepared and sent numerous invoices to customers which mark the Super Chief apple tree as protected by the Super Chief patent.

103. According to its Web site, Defendant Adams County Nursery, Inc. currently represents that there is a royalty fee of \$0.40 associated with the sale of the Super Chief tree. Exhibit 22.

104. Upon information and belief, Defendant Adams County Nursery, Inc. has collected significant post-expiration royalties based on sales of the Super Chief tree.

105. Adams County Nursery also erects false marked barriers in the nationwide market for Super Chief trees as set forth in paragraph 61, just as it does for the Honeycrisp tree.

106. Van Well Nursery falsely marks the Super Chief apple tree as patented with the language “U.S. Plant Patent No. 6,190” in its catalogue. Ex. 18.

107. In addition to falsely representing the Super Chief apple tree as patented, Van Well Nursery also lists the Super Chief tree as one of its “Apple Patented and Premium Varieties,” which demand a higher price per tree than its “Apple Non Patented Varieties.” Upon information and belief, this additional charge represents a post-expiration royalty. Exhibit 19.

108. Upon information and belief, Defendant Van Well Nursery has collected significant post-expiration royalties based on sales of the Super Chief tree.

109. Van Well Nursery also erects false market barriers in the nationwide market for Super Chief trees as set forth in paragraph 96.

GENERAL

110. Each false marking and/or limitation on propagation by Defendants, is likely to, or at least has the potential to discourage or deter persons and companies from growing or selling the same, similar or competing products.

111. By working collectively and independently to falsely mark products with plant patents that are expired and/or by purporting to limit the propagation of trees to only licensed nurseries (and threatening that all other forms of propagation are “prohibited), the defendants have benefitted commercially and financially, and have limited competition.

112. The Defendants are sophisticated entities with extensive experience in the procurement, acquisition, licensing and/or litigation of patents in the United States.

113. Upon information and belief, the University of Minnesota has an in-house legal department and a technology transfer office, both of which are responsible for the University of Minnesota’s intellectual property, ensuring compliance with marketing, labeling and advertising law, and monitoring royalty collection.

114. Several of the University of Minnesota licensed nurseries actively seek and maintain a number of plant patents, including but not limited to Adam's County Nursery, Dave Wilson Nursery, Stark Bro's Nurseries, and Van Well Nursery.

115. As sophisticated entities, which purport to have significant knowledge of the universe of plant patents and plant varieties, the marking of plant patents, and the legal ramifications of violation of plant patents, the Defendants know the requirements and provisions of 35 U.S.C. § 292. The University of Minnesota, moreover, knows that United States District Courts have exclusive subject matter jurisdiction for actions involving patents under 28 U.S.C. § 1338(a), and knew the same when it purported to prohibit the unlicensed sale or propagation of the Honeycrisp.

116. Thus, by marking and continuing to mark articles with an expired plant patent number, without a reasonable belief that such articles were covered by the plant patent, and by threatening free propagation of the unpatented Honeycrisp tree, Super Chief tree, and other tree and plant varieties, Defendants have injured the sovereign interest of the United States as well as the public interest of at least those who have purchased Honeycrisp tree, Super Chief tree, and other tree and plant varieties, and have discouraged competition and innovation in competing products. Additionally, certain defendants identified below have directly injured Plaintiff through the imposition of improper royalties and supracompetitive prices.

THE EXPIRED PLANT PATENTS

117. The Honeycrisp patent, entitled, "Apple Tree: Honeycrisp," was filed on November 7, 1988. A true and correct copy of this patent is attached as Exhibit 23 to this complaint.

118. The Honeycrisp patent expired no later than November 7, 2008.

119. The Super Chiefpatent, entitled, "Apple Tree: Sandidge Variety," was filed on April 16, 1986. A true and correct copy of this patent is attached as Exhibit 24 to this complaint.

120. The Super Chief patent expired no later than April 16, 2006.

121. The 3556 plant patent, entitled, "Apple Tree," was filed on December 26, 1972. A true and correct copy of the patent is attached as Exhibit 25 to this complaint.

122. The 3556 plant patent expired no later than December 26, 1992.

123. The 4332 plant patent, entitled, "Apple Tree (Coop 13)," was filed on August 4, 1997. A true and correct copy of the patent is attached as Exhibit 26 to this complaint.

124. The 4332 plant patent expired no later than August 4, 1997.

125. The 4633 plant patent, entitled, "Coop 22," was filed on August 29, 1979. A true and correct copy of the patent is attached as Exhibit 27 to this complaint.

126. The 4633 plant patent expired no later than August 29, 1999.

127. The 4819 plant patent, entitled, "Early Coloring Spur-Type Red Delicious Apple Tree," was filed on March 12, 1979. A true and correct copy of the patent is attached as Exhibit 28 to this complaint.

128. The 4819 plant patent expired no later than March 12, 1999.

129. The 4820 plant patent, entitled, "Apple Tree," was filed on November 13, 1979. A true and correct copy of the patent is attached as Exhibit 29 to this complaint.

130. The 4820 plant patent expired no later than November 3, 1999.

131. The 4839 plant patent, entitled, "Spur-Type Red Delicious Apple Tree," was filed on May 9, 1980. A true and correct copy of the patent is attached as Exhibit 30 to this complaint.

132. The 4839 plant patent expired no later than May 9, 2000.

133. The 6224 plant patent, entitled, "Columnar Apple Tree-Telamon Variety," was filed on April 15, 1986. A true and correct copy of the patent is attached as Exhibit 31 to this complaint.

134. The 6224 plant patent expired no later than April 15, 2006.

135. The 6225 plant patent, entitled, "Columnar Apple Tree-Tuscan Variety," was filed on April 15, 1986. A true and correct copy of the patent is attached as Exhibit 32 to this complaint.

136. The 6225 plant patent expired no later than April 18, 2006.

137. The 6226 plant patent, entitled, "Columnar Apple Tree-Trajan Variety," was filed on April 15, 1986. A true and correct copy of the patent is attached as Exhibit 33 to this complaint.

138. The 6226 plant patent expired no later than April 15, 2006.

139. The 6406 plant patent, entitled, "Apple Tree-Higred Cultivar," was filed on October 27, 1986. A true and correct copy of the patent is attached as Exhibit 34 to this complaint.

140. The 6406 plant patent expired no later than October 27, 2006.

141. The 6519 plant patent, entitled, "Apple Tree Sansa," was filed on March 12, 1987. A true and correct copy of the patent is attached as Exhibit 35 to this complaint.

142. The 6519 plant patent expired no later than March 12, 2007.

143. The 6689 plant patent, entitled, "Apple Tree: Arlet," was filed on September 15, 1987. A true and correct copy of the patent is attached as Exhibit 36 to this complaint.

144. The 6689 plant patent expired no later than September 15, 2007.

145. The 7063 plant patent, entitled, “Apple Tree, Ginger Gold,” was filed on December 7, 1988. A true and correct copy of the patent is attached as Exhibit 37 to this complaint.

146. The 7063 plant patent expired no later than December 7, 2008.

147. The 7328 plant patent, entitled, “Apple Tree: Early Spur Rome,” was filed on January 23, 1989. A true and correct copy of the patent is attached as Exhibit 38 to this complaint.

148. The 7589 plant patent expired no later than January 23, 2009.

149. The 7589 plant patent, entitled, “Apple Tree-Fulford Variety,” was filed on September 21, 1989. A true and correct copy of the patent is attached as Exhibit 39 to this complaint.

150. The 7589 plant patent expired no later than August 21, 2009

151. The 7590 plant patent, entitled, “Apple Tree-Rubinstar Variety,” was filed on December 20, 1989. A true and correct copy of the patent is attached as Exhibit 40 to this complaint.

152. The 7590 plant patent expired no later than December 20, 2009

153. The 7820 plant patent, entitled, “Apple Cultivar Teeple red Empire,” was filed on January 9, 1990. A true and correct copy of the patent is attached as Exhibit 41 to this complaint.

154. The 7820 plant patent expired no later than January 9, 2010.

155. The 7880 plant patent, entitled, “Apple Tree Cripps Pink Cultivar,” was filed on October 18, 1990 . A true and correct copy of the patent is attached as Exhibit 42 to this complaint.

156. The 7880 plant patent expired no later than October 18, 2010.

157. The 8049 plant patent, entitled, "Apple Variety Jonagold De Coster," was filed on November 29, 1990. A true and correct copy of the patent is attached as Exhibit 43 to this complaint.

158. The 8049 plant patent expired no later than November 29, 2010.

159. The 4195 plant patent, entitled, "Flowering-Fruiting Peach Tree," was filed on February 10, 1977. A true and correct copy of the patent is attached as Exhibit 44 to this complaint.

160. The 4195 plant patent expired no later than February 10, 1997.

161. The 4572 plant patent, entitled, "Peach Cultivar," was filed on March 28, 1979. A true and correct copy of the patent is attached as Exhibit 45 to this complaint.

162. The 4572 plant patent expired no later than March 28, 1999.

163. The 4780 plant patent, entitled, "Dwarf Peach W-114," was filed on May 1, 1980. A true and correct copy of the patent is attached as Exhibit 46 to this complaint.

164. The 4780 plant patent expired no later than May 1, 2000.

165. The 4865 plant patent, entitled, "Freestone Peach," was filed on October 10, 1980. A true and correct copy of the patent is attached as Exhibit 47 to this complaint.

166. The 4865 plant patent expired no later than October 10, 2000.

167. The 6410 plant patent, entitled, "Peach Tree ("Double Jewel")," was filed on January 20, 1987. A true and correct copy of the patent is attached as Exhibit 48 to this complaint.

168. The 6410 plant patent expired no later than January 20, 2007.

169. The 7065 plant patent, entitled, "Peach Tree "Artic Gem,"" was filed on December 23, 1988. A true and correct copy of the patent is attached as Exhibit 49 to this complaint.

170. The 7065 plant patent expired no later than December 23, 2008.

171. The 7432 plant patent, entitled, "Peach Tree (Rich May)," was filed on January 8, 1990. A true and correct copy of the patent is attached as Exhibit 50 to this complaint.

172. The 7432 plant patent expired no later than January 8, 2010.

173. The 7532 plant patent, entitled, "Peach Tree ("Sugar Lady")," was filed on July 10, 1989. A true and correct copy of the patent is attached as Exhibit 51 to this complaint.

174. The 7532 plant patent expired no later than July 10, 2009.

175. The 7751 plant patent, entitled, "Peach Tree "Eva's Pride,"" was filed on October 29, 1990. A true and correct copy of the patent is attached as Exhibit 52 to this complaint.

176. The 7751 plant patent expired no later than October 29, 2010.

177. The 5245 plant patent, entitled, "Nectarine Tree-May Glo," was filed on December 14, 1982. A true and correct copy of the patent is attached as Exhibit 53 to this complaint.

178. The 5245 plant patent expired no later than December 14, 2002.

179. The 6283 plant patent, entitled, "Nectarine Tree, (Necta Zee)," was filed on March 26, 1986. A true and correct copy of the patent is attached as Exhibit 54 to this complaint.

180. The 6283 plant patent expired no later than March 26, 2006.

181. The 7402 plant patent, entitled, "Nectarine Tree (Earliglo)," was filed on December 18, 1989. A true and correct copy of the patent is attached as Exhibit 55 to this complaint.

182. The 7402 plant patent expired no later than Dember 18, 2009.

183. The 7305 plant patent, entitled, "Nectarine Tree "April Glo," was filed on August 2, 1989. A true and correct copy of the patent is attached as Exhibit 56 to this complaint.

184. The 7305 plant patent expired no later than August 2, 2009.

185. The 7475 plant patent, entitled, "Nectarine Tree "Zee Grand," was filed on January 29, 1990. A true and correct copy of the patent is attached as Exhibit 57 to this complaint.

186. The 7475 plant patent expired no later than January 29, 2010.

187. The 7884 plant patent, entitled, "Nectarine Tree "Artic Glo," was filed on December 10, 1990. A true and correct copy of the patent is attached as Exhibit 58 to this complaint.

188. The 7884 plant patent expired no later than December 10, 2010.

189. The 7889 plant patent, entitled, "Nectarine Tree "Artic Rose," was filed on December 5, 1990. A true and correct copy of the patent is attached as Exhibit 59 to this complaint.

190. The 7889 plant patent expired no later than December 5, 2010.

191. The 7890 plant patent, entitled, "Nectarine Tree "Eastern Glo," was filed on December 21, 1990. A true and correct copy of the patent is attached as Exhibit 60 to this complaint.

192. The 7890 plant patent expired no later than December 21, 2010.

193. The 7920 plant patent, entitled, "Nectarine Tree "Artic Show," was filed on February 5, 1991. A true and correct copy of the patent is attached as Exhibit 61 to this complaint.

194. The 7920 plant patent expired no later than February 5, 2011.

195. The 5243 plant patent, entitled, "Pear Tree, Golden Russet Bosc," was filed on May 28, 1982. A true and correct copy of the patent is attached as Exhibit 62 to this complaint.

196. The 5243 plant patent expired no later than May 28, 2002.

197. The 6194 plant patent, entitled, "Columbia Red Anjou Pear Tree," was filed on March 31, 1986. A true and correct copy of the patent is attached as Exhibit 63 to this complaint.

198. The 6194 plant patent expired no later than March 31, 2006.

199. The 6392 plant patent, entitled, "Kalanchoe Plant named La Paz," was filed on January 23, 1987. A true and correct copy of the patent is attached as Exhibit 64 to this complaint.

200. The 6392 plant patent expired no later than January 23, 2007.

201. The 6763 plant patent, entitled, "Interspecific Tree (Flavor Supreme)," was filed on December 18, 1987. A true and correct copy of the patent is attached as Exhibit 65 to this complaint.

202. The 6763 plant patent expired no later than December 18, 2007.

203. The 7420 plant patent, entitled, "Interspecific Tree, Flavor Queen," was filed on October 27, 1989. A true and correct copy of the patent is attached as Exhibit 66 to this complaint.

204. The 7420 plant patent expired no later than October 27, 2009.

205. The 7035 plant patent, entitled, "Apricot Tree PA 7221-1," was filed on July 21, 1988. A true and correct copy of the patent is attached as Exhibit 67 to this complaint.

206. The 7035 plant patent expired no later than July 21, 2008.

207. The 7045 plant patent, entitled, "Apricot Tree PA 7201-1," was filed on July 21, 1988. A true and correct copy of the patent is attached as Exhibit 68 to this complaint.

208. The 7045 plant patent expired no later than July 21, 2008.

209. The 7054 plant patent, entitled, "Carnation Plant Named Milly," was filed on October 18, 1988. A true and correct copy of the patent is attached as Exhibit 69 to this complaint.

210. The 7054 plant patent expired no later than October 18, 2008.

211. The 4405 plant patent, entitled, "Walnut Tree," was filed on April 21, 1978. A true and correct copy of the patent is attached as Exhibit 70 to this complaint.

212. The 4405 plant patent expired no later than April 7, 1999.

213. The 5897 plant patent, entitled, "Strawberry Jewel," was filed on July 2, 1985. A true and correct copy of the patent is attached as Exhibit 71 to this complaint.

214. The 5897 plant patent expired no later than July 2, 2005.

215. The 7062 plant patent, entitled, "Flowering Crab Appled Tree Named Sutyzam," was filed on October 18, 1988. A true and correct copy of the patent is attached as Exhibit 72 to this complaint.

216. The 7062 plant patent expired no later than October 18, 2008.

217. The 6520 plant patent, entitled, "Royal Burgundy," was filed on December 8, 1986. A true and correct copy of the patent is attached as Exhibit 73 to this complaint.

218. The 6520 plant patent expired no later than December 8, 2006.

219. The 7090 plant patent, entitled, "Interspecific Tree, Flavor Delight," was filed on January 23, 1989. A true and correct copy of the patent is attached as Exhibit 74 to this complaint.

220. The 7090 plant patent expired no later than January 23, 2009.

COUNT I

FALSE PATENT MARKING OF PRODUCTS WITH HONEYCRISP PATENT BY THE UNIVERSITY OF MINNESOTA

221. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-220 of this Complaint.

222. Defendant licenses, grows, sells, have made and have sold, and/or collects royalties from the sale of a number of products which it marks or cause to be marked with the Honeycrisp patent.

223. Such products include, but are not limited to, the Honeycrisp apple tree.

224. Instances of false marking of the Honeycrisp apple tree and/or royalty collections from the sale of the falsely marked product by defendant University of Minnesota are set forth in paragraphs 36-96 above. Exs. 3-17.

225. Defendant University of Minnesota was aware that the Honeycrisp patent was expired when it maintained and copyrighted with Web sites shown in Exhibits 3-6.

226. Defendant University of Minnesota was also aware that the Honeycrisp patent was expired when, upon information and belief, it collected significant post-expiration royalties based on the expired Honeycrisp patent.

227. Defendant University of Minnesota was aware that the Honeycrisp patent were expired when it maintained, published, and/or copyright edits various Web site and made representations to the press. Exs.1, 2.

228. Upon information and belief, Defendant University of Minnesota currently charges post-expiration royalties and/or has collected significant post-expiration royalties based on at least the Honeycrisp patent.

229. The instances of false marking shown in Exhibits 3-17 are representative and not exhaustive.

230. Defendant knew that the articles it marked and continued to mark with the Honeycrisp patents are not covered by the expired patent marked thereon because expired patents have no monopoly rights, yet defendant still intentionally marks the products with the hopes of preventing others from making products that fall within the scope of the falsely marked patent(s) on its products.

231. Defendant knows that representing that the articles marked with the Honeycrisp plant patent as patented when they are not, in conjunction with representing that the propagation of patented varieties for personal use or for sale in the United States is prohibited, further prevents consumers and others from making products that fall within the scope of the falsely marked patent(s).

COUNT II

VIOLATION OF THE ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT BY THE UNIVERSITY OF MINNESOTA

232. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-231 of this Complaint.

233. 815 ILCS 505/2 provides, in relevant part:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely

upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5 (a) of the Federal Trade Commission Act.

234. As set forth in the above non-limiting examples, the University of Minnesota has engaged in one or more unfair and/or deceptive acts and practices, including without limitation:

- a. Deceptively stating that the Honeycrisp tree is protected by United States plant patent;
- b. Marking and using in advertising the Honeycrisp's expired patent number;
- c. Threatening and prohibiting the unlicensed sale or propagation or topworking of Honeycrisp trees post-patent expiration;
- d. Upon information and belief, accepting post-expiration royalties for Honeycrisp trees under false pretenses of patent leveraging.

235. Broom Orchard is a consumer within the meaning of the Illinois Consumer Fraud Act given that the University of Minnesota's acts and practices were addressed to the market generally, and implicate consumer protection concerns including limited competition, supracompetitive prices, and attempted (if not perfected) restraints on trade.

236. The University of Minnesota intended that Plaintiff rely on the material misrepresentations, royalties under false pretenses, unfair practices, and omissions as alleged herein.

237. As a proximate result of the foregoing deceptive and/or unfair practices, Plaintiff suffered damages in the form of improper royalties, and supracompetitive prices directly paid for Honeycrisp trees.

COUNT III

COMMON LAW FRAUDULENT MISREPRESENTATION BY THE UNIVERSITY OF MINNESOTA

238. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-237 of this Complaint.

239. As set forth in the above non-limiting examples, the University of Minnesota has made one or more false statements of material fact:

- a. Falsely stating that the Honeycrisp tree is protected by United States plant patent;
- b. Marking and using in advertising the Honeycrisp's expired patent number;
- c. Threatening and prohibiting the unlicensed sale or propagation or topworking of Honeycrisp trees post-patent expiration;
- d. Upon information and belief, accepting post-expiration royalties for Honeycrisp trees under false pretenses of patent leveraging.

240. The University of Minnesota knew or believed that the above false statements were false.

241. The University of Minnesota intended that Plaintiff rely on the above false statements.

242. Plaintiff relied on the material misrepresentations alleged herein.

243. Plaintiff was damaged as a result of its reliance on the material misrepresentations.

COUNT IV

COMMON LAW NEGLIGENT MISREPRESENTATION BY THE UNIVERSITY OF MINNESOTA

244. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-243 of this Complaint.

245. As set forth in the above non-limiting examples, the University of Minnesota has made one or more false statements of material fact:

- a. Falsely stating that the Honeycrisp tree is protected by United States plant patent;
- b. Marking and using in advertising the Honeycrisp's expired patent number;
- c. Threatening and prohibiting the unlicensed sale or propagation or topworking of Honeycrisp trees post-patent expiration;
- d. Upon information and belief, accepting post-expiration royalties for Honeycrisp trees under false pretenses of patent leveraging.

246. As the self-proclaimed exclusive licensor of Honeycrisp apple trees, the University of Minnesota owed Plaintiff, other orchardists, gardeners, nurseries, and the consuming public a duty to relate accurate information regarding the sale or propagation or topworking of Honeycrisp apple trees.

247. The University of Minnesota should have known that the above false statements were false.

248. The University of Minnesota intended that Plaintiff rely on the above false statements.

249. Plaintiff relied on the material misrepresentations alleged herein.

250. Plaintiff was damaged as a result of its reliance on the material misrepresentations.

COUNT V

REQUEST FOR DECLARATORY RELIEF AGAINST THE UNIVERSITY OF MINNESOTA

251. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-250 of this Complaint.

252. There is a real and actual controversy between Plaintiff and the University of Minnesota regarding the unlicensed sale or propagation or topworking of Honeycrisp apple trees, as well the validity of the imposed post-patent royalties.

253. As set forth in the above non-limiting examples, the University of Minnesota has made one or more false statements of material fact:

- a. Falsely stating that the Honeycrisp tree is protected by United States plant patent;
- b. Marking and using in advertising the Honeycrisp's expired patent number;
- c. Threatening and prohibiting the unlicensed sale or propagation or topworking of Honeycrisp trees post-patent expiration;
- d. Upon information and belief, accepting post-expiration royalties for Honeycrisp trees under false pretenses of patent leveraging.

254. Broom Orchard, therefore, requests that the Court adjudge and decree that the University has made false statements of fact, marked and/or used in advertising expired patent numbers, violated 35 U.S.C §292(a), falsely threatened to enforce non-existent patent rights and imposed post-expiration royalties, and further declare that Broom Orchard, and persons similarly situated to Broom Orchard, may freely sell, propagate, and/or topwork Honeycrisp apple trees.

COUNT VI

FALSE PATENT MARKING OF PRODUCTS WITH HONEYCRISP, SUPER CHIEF, 7063, 7589, 7820, 7880, 8049, 7884, 7890, 7432, AND 7420 PLANT PATENTS BY ADAMS COUNTY NURSERY, INC.

255. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-254 of this Complaint.

256. Defendant licenses, grows, sells, have made and have sold, and/or collect royalties from the sale of a number of products which it marks or causes to be marked with the Honeycrisp, Super Chief, 7063, 7589, 7820, 7880, 8049, 7884, 7890, 7432, and 7420 plant patents.

257. Such products include, but are not limited to, the Honeycrisp, Super Chief, Ginger Gold, Fulford Gala, Royal Empire, Pink Lady (Cripps), and Jonagold DeCoster apple trees; the Rich May peach tree; the Arctic Gold and Eastern Glo nectarine trees; and the Flavor Queen pluot tree.

258. Instances of the false marking of the Honeycrisp, Super Chief and Ginger Gold apple trees and post-expiration royalty collections from the sale of the falsely marked Honeycrisp, Super Chief and Ginger Gold apple trees by defendant Adams County Nursery, Inc. are set forth in paragraphs 56 and 57 of this complaint is in the form of an invoice and is attached hereto as Exhibit 7 to this Complaint.

259. In addition, Adams County Nursery, Inc.'s 2011-2012 Fruit Tree Catalogue shows false marking of the Super Chief, Ginger Gold, Fulford Gala, Royal Empire Pink Lady (Cripps), and Jonagold DeCoster apple trees; the Rich May peach tree; the Arctic Gold (Glo) and Eastern Glo nectarine trees; and the Flavor Queen pluot tree. Ex. 8.

260. The Adams County Nursery, Inc.'s 2011-2012 Fruit Tree Catalogue also shows post-expiration royalty collection from the sale of the falsely marked Super Chief, Ginger Gold, Fulford Gala, Royal Empire Pink Lady (Cripps), and Jonagold DeCoster apple trees; the Rich May peach tree; the Eastern Glo nectarine tree; and the Flavor Queen pluot tree. Ex. 8.

261. Finally the Adams County Nursery, Inc. Web site falsely marks the Ginger Gold, Fulford Gala, Royal Empire, Pink Lady (Cripps), and Jonagold DeCoster apple trees; the Rich May peach tree; the Arctic Gold (Glo) and Eastern Glo nectarine trees; and the Flavor Queen pluot tree. Exs. 75-83.

262. Defendant Adams County Nursery, Inc. was aware that the Honeycrisp, Super Chief, 7063, 7589, 7820, 7880, 8049, 7884, 7890, 7432, and 7420 plant patents were expired when it maintained, published, circulated and/or copyrighted the Web site and catalogue displaying the products with expired patent numbers. Ex. 104.

263. Defendant Adams County Nursery, Inc. was also aware that at least the Honeycrisp, Super Chief, and 7063 plant patents were expired when it prepared and sent the invoice attached as Exhibit 7. Defendant Adams County Nursery, Inc. was also aware that at least the Honeycrisp, Super Chief, and 7063 plant patents were expired when it collected \$49.50 in post-expiration royalties based on the expired Honeycrisp, Super Chief, and 7063 plant patents (as indicated on the invoice).

264. Upon information and belief, Defendant Adams County Nursery, Inc. has prepared and sent numerous invoices to customers which mark the Honeycrisp, Super Chief, and Ginger Gold apple trees as protected by at least the Honeycrisp, Super Chief, and 7063 plant patents.

265. Upon information and belief, Defendant Adams County Nursery, Inc. currently charges post-expiration royalties and/or has collected significant post-expiration royalties based on the Honeycrisp, Super Chief, and 7063 plant patents.

266. Upon information and belief, Defendant Adams County Nursery, Inc. currently charges post-expiration royalties and/or has collected significant post-expiration royalties based on at least the 7589, 7820, 7880, 8049, 7884, 7890, 7432, and 7420 plant patents.

267. The instances of false marking shown in Exhibits 7-8, 75-83 are representative and not exhaustive.

268. Defendant knows that the articles it marked and continues to mark with the Honeycrisp, Super Chief, 7063, 7589, 7820, 7884, 7880, 8049, 7890, 7432, and 7420 plant patents are not covered by the expired patent marked thereon because expired patents have no monopoly rights, yet defendant still intentionally marks the products with the hopes of preventing others from making products that fall within the scope of the falsely marked patent(s).

269. Defendant knows that representing the articles marked with the Honeycrisp, Super Chief, 7063, 7589, 7820, 7884, 7880, 8049, 7890, 7432, and 7420 plant patents as patented when they are not, in conjunction with representing that the propagation of patented varieties for personal use or for sale in the United States is prohibited, further prevents consumers and others from making products that fall within the scope of the falsely marked patent(s).

COUNT VII

VIOLATION OF THE ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT BY ADAMS COUNTY NURSERY

270. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-269 of this Complaint.

271. As required by Adams County Nursery on tree purchase invoices, Broom Orchard paid improper royalties for the Honeycrisp, Super Chief, and 7063 plant patents.

272. 815 ILCS 505/2 provides, in relevant part:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5 (a) of the Federal Trade Commission Act.

273. As set forth in the above non-limiting examples, Adams County Nursery has engaged in one or more unfair and/or deceptive acts and practices, including without limitation:

- a. Deceptively representing that tree and plant varieties are protected by United States plant patents;
- b. Marking and using in advertising expired patent numbers;
- c. Threatening and prohibiting the unlicensed sale or propagation or topworking of post-patent expiration trees and/or plants;
- d. Upon information and belief, accepting post-expiration royalties for expired tree and plant varieties under false pretenses of patent leveraging.

274. Broom Orchard is a consumer within the meaning of the Illinois Consumer Fraud Act given that Adams County Nursery's acts and practices were addressed to the market

generally, and implicate consumer protection concerns including limited competition, supracompetitive prices, and attempted (if not perfected) restraints on trade.

275. Adams County Nursery intended that Plaintiff rely on the material misrepresentations, royalties under false pretenses, unfair practices, and omissions as alleged herein.

276. As a proximate result of the foregoing deceptive and/or unfair practices, Plaintiff suffered damages in the form of improper royalties, and supracompetitive prices directly paid for unprotected trees and/or plants.

COUNT VIII

COMMON LAW FRAUDULENT MISREPRESENTATION BY ADAMS COUNTY NURSERY

277. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-276 of this Complaint.

278. As set forth in the above non-limiting examples, Adams County Nursery has made one or more false statements of material fact:

- a. Deceptively representing that tree and plant varieties are protected by United States plant patents;
- b. Marking and using in advertising expired patent numbers;
- c. Threatening and prohibiting the unlicensed sale or propagation or topworking of post-patent expiration trees and/or plants;
- d. Upon information and belief, accepting post-expiration royalties for expired tree and plant varieties under false pretenses of patent leveraging.

279. Adams County Nursery knew or believed that the above false statements were false.

280. Adams County Nursery intended that Plaintiff rely on the above false statements.

281. Plaintiff relied on the material misrepresentations alleged herein.

282. Plaintiff was damaged as a result of its reliance on the material misrepresentations.

COUNT IX

COMMON LAW NEGLIGENT MISREPRESENTATION BY ADAMS COUNTY NURSERY

283. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-282 of this Complaint.

284. As set forth in the above non-limiting examples, Adams County Nursery has made one or more false statements of material fact:

- a. Deceptively representing that tree and plant varieties are protected by United States plant patents;
- b. Marking and using in advertising expired patent numbers;
- c. Threatening and prohibiting the unlicensed sale or propagation or topworking of post-patent expiration trees and/or plants;
- d. Upon information and belief, accepting post-expiration royalties for expired tree and plant varieties under false pretenses of patent leveraging.

285. As a purported licensed seller of trees and plants, Adams County Nursery owed Plaintiff, other orchardists, gardeners, nurseries, and the consuming public a duty to relate accurate information regarding the sale or propagation or topworking of its trees and plants.

286. Adams County Nursery should have known that the above false statements were false.

287. Adams County Nursery intended that Plaintiff rely on the above false statements.

288. Plaintiff relied on the material misrepresentations alleged herein.

289. Plaintiff was damaged as a result of its reliance on the material misrepresentations.

COUNT X

REQUEST FOR DECLARATORY RELIEF AGAINST ADAMS COUNTY NURSERY

290. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-289 of this Complaint.

291. There is a real and actual controversy between Plaintiff and Adams County Nursery regarding the unlicensed sale or propagation or topworking of the tree and plant varieties above, as well the validity of the imposed post-patent royalties.

292. As set forth in the above non-limiting examples, Adams County Nursery has made one or more false statements of material fact:

- a. Deceptively representing that tree and plant varieties are protected by United States plant patents;
- b. Marking and using in advertising expired patent numbers;
- c. Threatening and prohibiting the unlicensed sale or propagation or topworking of post-patent expiration trees and/or plants;
- d. Upon information and belief, accepting post-expiration royalties for expired tree and plant varieties under false pretenses of patent leveraging.

293. Broom Orchard, therefore, requests that the Court adjudge and decree that Adams County Nursery has made false statements of fact, marked and/or used in advertising expired patent numbers, falsely threatened to enforce non-existent patent rights and imposed post-expiration royalties, and further declare that Broom Orchard, and persons similarly situated to Plaintiff, may freely sell or propagate or topwork post-patent expiration trees and plants.

COUNT XI

ALTERNATIVE COMMON LAW CLAIM FOR PARTIAL RESCISSION FOR MUTUAL MISTAKE AGAINST ADAMS COUNTY NURSERY

294. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-293 of this Complaint, except to the extent they conflict with the allegations of this alternative count.

295. As indicated on tree purchase invoices, Broom Orchard had valid and enforceable contracts with Adams County Nursery.

296. The invoices had discrete and severable charges for post-patent royalties.

297. Broom Orchard fully performed its obligations.

298. By reason of a mutual mistake of fact, Broom Orchard paid at least \$49.50 in post-expiration royalties based on the expired Honeycrisp, Super Chief, and 7063 plant patents (as indicated on the invoice). Ex. 7.

299. As a result of the mutual mistake, Broom Orchard has been damaged in an amount at least equal to post-expiration royalties paid to Adams County Nursery.

COUNT XII

FALSE PATENT MARKING OF PRODUCTS WITH HONEYCRISP, 4820, 4839, 7328, 7590, 7820, 7880, 5423, AND 7485 PLANT PATENTS BY C&O NURSERY CO.

300. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-299 of this Complaint.

301. Defendant licenses, grows, sells, has made and have sold, and/or collects royalties from the sale of a number of products which it marks or causes to be marked with the Honeycrisp, 4820, 4839, 5243, 7328, 7590, 7820, 7880, 5423, and 7485 plant patents.

302. Such products include, but are not limited to, the Honeycrisp, EarliGold, Scarlet Spur II, Early Spur Rome, Jonagold Rubinstar, Royal Empire, and Pink Lady (Cripps) apple trees; and the Golden Russet Bosc and Bronze Beauty pear trees.

303. Columbia & Okanogan Nursery Co.'s Spring 2011 Menu & Planner shows false marking of the Honeycrisp, Earligold, Early Spur Rome, Jonagold Rubinstar, Royal Empire, Pink Lady (Cripps) apple trees; and Golden Russet Bosc pear tree. The Spring 2011 Menu & Planner also shows a patent royalty charge for the Scarlet Spur II. Ex. 10.

304. Columbia & Okanogan Nursery Co.'s Web site shows false marking of Honeycrisp, EarliGold, Jonagold Rubinstar, and Pink Lady (Cripps) apple trees; and the Gold Russet Bosc and Bronze Beauty pear tree. Exs. 84,85.

305. Defendant Columbia & Okanogan Nursery Co.'s currently charges post-expiration royalties and/or has collected significant post-expiration royalties based on at least the Honeycrisp, 4820, 4839, 7590, 7820, 7880, 5423, and 7485 plant patents. Ex. 10.

306. Defendant Columbia & Okanogan Nursery Co. was aware that the Honeycrisp, 4820, 4839, 7328, 7590, 7880, and 7485 plant patents were expired when it maintained, published, and/or copyrighted the Web site displaying the products with expired patent numbers.

307. The instances of false marking shown in Exhibits 10, and 84-85 are representative and not exhaustive.

308. Defendant knows that the articles it marked and continues to mark with the Honeycrisp, 4820, 4839, 7328, 7590, 7880, and 7485 plant patents are not covered by the expired patent marked thereon because expired patents have no monopoly rights, yet defendant still intentionally marks the products with the hopes of preventing others from making products that fall within the scope of the falsely marked patent(s) on its products.

COUNT XIII

FALSE PATENT MARKING OF PRODUCTS WITH HONEYCRISP, 7880, 7305, 7402, 5245, 7402, 5245, 7475, 7889, 7920, 6283, 7884, 7420, 6763, 4405, 6283, 7884, 7532, 4780, 4865, 6410, 7751, AND 4195 PLANT PATENTS BY DAVE WILSON NURSERY

309. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-307 of this Complaint.

310. Defendant licenses, grows, sells, has made and have sold, and/or collects royalties from the sale of a number of products which it marks or causes to be marked with the Honeycrisp, 7880, 7305, 7402, 5245, 7402, 5245, 7475, 7889, 7920, 6283, 7884, 7420, 6763, 4405, 6283, 7884, 7532, 4780, 4865, 6410, 7751, and 4195 plant patents.

311. Such products include, but are not limited to, the Honeycrisp and Pink Lady (Cripps) apple trees; April Glo, Earliglo, Mayglo, Zee Grand, Arctic Rose, Arctic Snow, Necta Zee Miniature, and Arctic Glo nectarine trees; Sugar Lady, Eldorado Miniature, Champagne, Double Jewel, Eva's Pride, and Red Baron peach trees; Flavor Queen and Flavor Supreme pluot trees; and Howard walnut tree.

312. Dave Wilson's Web site shows false marking of the Honeycrisp and Pink Lady (Cripps) apple trees; April Glo, Earliglo, Mayglo, Zee Grand, Arctic Rose, Arctic Snow, Necta Zee Miniature, and Arctic Glo nectarine trees; Sugar Lady, Eldorado Miniature, Champagne,

Double Jewel, Eva's Pride, and Red Baron peach trees; Flavor Queen and Flavor Supreme pluot trees; and Howard walnut tree. Exs. 86-92.

313. Defendant Dave Wilson Nursery currently charges post-expiration royalties and/or has collected significant post-expiration royalties based on at least the Honeycrisp, 7880, 7305, 7402, 5245, 7402, 5245, 7475, 7889, 7920, 6283, 7884, 7420, 6763, 4405, 6283, 7884, 7532, 4780, 4865, 6410, 7751, and 4195 plant patents. Ex. 12.

314. Defendant Dave Wilson was aware that the Honeycrisp, 7880, 7305, 7402, 5245, 7402, 5245, 7475, 7889, 7920, 6283, 7884, 7420, 6763, 4405, 6283, 7884, 7532, 4780, 4865, 6410, 7751, and 4195 plant patents were expired when it maintained, published, and/or copyrighted the Web site displaying the products with expired patent numbers. Ex. 105.

315. The instances of false marking shown in Exhibits 12 and 86-92 are representative and not exhaustive.

316. Defendant knows that the articles it marked and continues to mark with the Honeycrisp, 7880, 7305, 7402, 5245, 7402, 5245, 7475, 7889, 7920, 6283, 7884, 7420, 6763, 4405, 6283, 7884, 7532, 4780, 4865, 6410, 7751, and 4195 plant patents are not covered by the expired patent marked thereon because expired patents have no monopoly rights, yet defendant still intentionally marks the products with the hopes of preventing others from making products that fall within the scope of the falsely marked patent(s) on its products.

317. Defendant knows that representing the articles marked with the Honeycrisp, 7880, 7305, 7402, 5245, 7402, 5245, 7475, 7889, 7920, 6283, 7884, 7420, 6763, 4405, 6283, 7884, 7532, 4780, 4865, 6410, 7751, and 4195 plant patents as patented when they are not, in conjunction with representing that the propagation of patented varieties for personal use or for

sale in the United States is prohibited, further prevents consumers and others from making products that fall within the scope of the falsely marked patent(s).

COUNT XIV

FALSE MARKING OF PRODUCTS WITH HONEYCRISP PATENT BY LAWYER NURSERY

318. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-317 of this Complaint.

319. Defendant licenses, grows, sells, has made and has sold, and/or collects royalties from the sale of a number of products which it marks or causes to be marked with the Honeycrisp plant patent.

320. Such products include, but are not limited to, the Honeycrisp apple tree.

321. Lawyer Nursery's catalogue shows false marking of the Honeycrisp apple tree. Ex. 13.

322. Defendant Lawyer Nursery currently charges post-expiration royalties in the amount of \$1.35 per tree and/or has collected significant post-expiration royalties based on at least the Honeycrisp patent. Ex. 13.

323. Defendant Lawyer Nursery was aware that the Honeycrisp patent was expired when it maintained, published, and/or copyrighted the Web site displaying the products with expired patent numbers.

324. The instance of false marking shown in Exhibit 13 is representative and not exhaustive.

325. Defendant knows that the articles it marked and continues to marks with the Honeycrisp patent were not covered by the expired patent marked thereon because expired

patents have no monopoly rights, yet defendant still intentionally marks the products with the hopes of preventing others from making products that fall within the scope of the falsely marked patent(s) on its products.

COUNT XV

FALSE MARKING OF PRODUCTS WITH HONEYCRISP, 6406, 7820, 7880, 6225, 6224, 6226, 5897, 7062, 6520, AND 7090 PLANT PATENTS BY STARK BRO'S NURSERIES

326. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-325 of this Complaint.

327. Defendant licenses, grows, sells, have made and have sold, and/or collect royalties from the sale of a number of products which it marks or causes to be marked with the Honeycrisp, 6406, 7820, 7880, 6225, 6224, 6226, 5897, 7062, 6520, and 7090 plant patents.

328. Such products include, but are not limited to, the Honeycrisp, Royal Empire, Pink Lady (Cripps), Stark Emerald Spire Collonade, Stark Ultra Spire Collonade, and Stark Scarlet Spire Collonade apple trees; Jewel strawberry plants; Sugartyme crabapple tree; Royal Burgundy cherry tree; and Flavor Delight aprium tree.

329. Stark Bro's Nurseries' 2009-2010 Commercial Catalogue shows false marking of the Honeycrisp, Stark Ultrared Jonathan, Royal Empire, and Pink Lady (Cripps) apple trees; Sugartyme crabapple tree; Royal Burgundy cherry tree; and Flavor Delight aprium tree. Ex. 17.

330. Stark Bro's Web site shows false marking of the Honeycrisp, Stark Ultrared Jonathan, Pink Lady (Cripps), Stark Emerald Spire Collonade, Stark Ultra Spire Collonade, and Stark Scarlet Spire Collonade apple trees; and Jewel strawberry plants. Exs. 93-97.

331. An instance of post-expiration royalty collection from the sale of the Honeycrisp, apple tree by defendant Stark Bro's Nurseries is set forth in paragraphs 80 and 81 of this complaint in the form of an invoice and is attached hereto as Exhibit 15 to this Complaint.

332. Defendant Stark Bro's Nurseries was aware that the Honeycrisp, 6406, 7820, 7880, 6225, 6224, 6226, 5897, 7062, 6520, and 7090 plant patents were expired when it maintained, published, circulated and/or copyrighted the Web site and catalogue displaying the products with expired patent numbers.

333. Defendant Stark Bro's Nurseries was also aware that at least the Honeycrisp patent was expired when it prepared and sent the invoice attached as Exhibit 15. Defendant Stark Bro's Nurseries was also aware that at least the Honeycrisp patent was expired when it collected \$16.00 in post-expiration royalties based on the expired Honeycrisp patent (as indicated on the invoice).

334. Upon information and belief, Defendant Stark Bro's Nurseries has prepared and sent numerous invoices to customers which mark at least the Honeycrisp, apple tree as protected by the Honeycrisp patent.

335. Upon information and belief, Defendant Stark Bro's Nurseries currently charges post-expiration royalties and/or has collected significant post-expiration royalties based on at least the Honeycrisp, 6406, 7820, 7880, 6225, 6224, 6226, 5897, 7062, 6520, and 7090 plant patents. *See e.g.*, ex. 15.

336. The instances of false marking shown in Exhibits 15, 17, 93-97 are representative and not exhaustive.

337. Defendant knows that the articles it marked and continues to mark with the Honeycrisp, 6406, 7820, 7880, 6225, 6224, 6226, 5897, 7062, 6520, and 7090 plant patents are

not covered by the expired patent marked thereon because expired patents have no monopoly rights, yet defendant still intentionally marks the products with the hopes of preventing others from making products that fall within the scope of the falsely marked patent(s) on its products.

338. Defendant knows that representing the articles marked with the Honeycrisp, 6406, 7820, 7880, 6225, 6224, 6226, 5897, 7062, 6520, and 7090 plant patents as patented when they are not, in conjunction with representing that the propagation of patented varieties for personal use or for sale in the United States is prohibited, further prevents consumers and others from making products that fall within the scope of the falsely marked patent(s).

COUNT XVI

VIOLATION OF THE ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT BY STARK BRO'S NURSERIES

339. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-338 of this Complaint.

340. As required by Stark Bro's Nurseries on tree purchase invoices, Broom Orchard paid improper royalties for expired the Honeycrisp patent.

341. 815 ILCS 505/2 provides, in relevant part:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5 (a) of the Federal Trade Commission Act.

342. As set forth in the above non-limiting examples, Stark Bro's Nurseries has engaged in one or more unfair and/or deceptive acts and practices, including without limitation:

- a. Deceptively representing that tree and plant varieties are protected by United States plant patents;
- b. Marking and using in advertising expired patent numbers;
- c. Threatening and prohibiting the unlicensed sale or propagation or topworking of post-patent expiration trees and/or plants;
- d. Upon information and belief, accepting post-expiration royalties for expired tree and plant varieties under false pretenses of patent leveraging.

Broom Orchard is a consumer within the meaning of the Illinois Consumer Fraud Act given that Stark Bro's Nurseries' acts and practices were addressed to the market generally, and implicate consumer protection concerns including limited and controlled competition, supracompetitive prices, and attempted (if not perfected) restraints on trade.

343. Stark Bro's Nurseries intended that Plaintiff rely on the material misrepresentations, royalties under false pretenses, unfair practices, and omissions as alleged herein.

344. As a proximate result of the foregoing deceptive and/or unfair practices, Plaintiff suffered damages in the form of improper royalties, and supracompetitive prices directly paid for unprotected trees and/or plants.

COUNT XVII

COMMON LAW FRAUDULENT MISREPRESENTATION BY STARK BRO'S NURSERIES

345. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-344 of this Complaint.

346. As set forth in the above non-limiting examples, Stark Bro's Nurseries has made one or more false statements of material fact:

- a. Deceptively representing that tree and plant varieties are protected by United States plant patents;
- b. Marking and using in advertising expired patent numbers;
- c. Threatening and prohibiting the unlicensed sale or propagation or topworking of post-patent expiration trees and/or plants;
- d. Upon information and belief, accepting of patent royalties for expired tree and plant varieties under false pretenses of patent leveraging.

347. Stark Bro's Nurseries knew or believed that the above false statements were false.

348. Stark Bro's Nurseries intended that Plaintiff rely on the above false statements.

349. Plaintiff relied on the material misrepresentations alleged herein.

350. Plaintiff was damaged as a result of its reliance on the material misrepresentations.

COUNT XVIII

COMMON LAW NEGLIGENT MISREPRESENTATION BY STARK BRO'S NURSERIES

351. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-350 of this Complaint.

352. As set forth in the above non-limiting examples, Stark Bro's Nurseries has made one or more false statements of material fact:

- a. Deceptively representing that tree and plant varieties are protected by United States plant patents;
- b. Marking and using in advertising expired patent numbers;
- c. Threatening and prohibiting the unlicensed sale or propagation or topworking of post-patent expiration trees and/or plants;
- d. Upon information and belief, accepting post-expiration royalties for expired tree and plant varieties under false pretenses of patent leveraging.

353. As a purported licensed seller of trees and plants, Stark Bro's Nurseries owed Plaintiff, other orchardists, gardeners, nurseries, and the consuming public a duty to relate accurate information regarding the sale or propagation or topworking of its trees and plants.

354. Stark Bro's Nurseries should have known that the above false statements were false.

355. Stark Bro's Nurseries intended that Plaintiff rely on the above false statements.

356. Plaintiff relied on the material misrepresentations alleged herein.

357. Plaintiff was damaged as a result of its reliance on the material misrepresentations.

COUNT XIX

REQUEST FOR DECLARATORY RELIEF AGAINST STARK BRO'S NURSERIES

358. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-357 of this Complaint.

359. There is a real and actual controversy between Plaintiff and Stark Bro's Nurseries regarding the unlicensed sale or propagation or topworking of the tree and plant varieties above, as well the validity of the imposed post-patent royalties.

360. As set forth in the above non-limiting examples, Stark Bro's Nurseries has made one or more false statements of material fact:

- a. Deceptively representing that tree and plant varieties are protected by United States plant patents;
- b. Marking and using in advertising expired patent numbers;
- c. Threatening and prohibiting the unlicensed sale or propagation or topworking of post-patent expiration trees and/or plants;
- d. Upon information and belief, accepting post-expiration royalties for expired tree and plant varieties under false pretenses of patent leveraging.

361. Broom Orchard, therefore, requests that the Court adjudge and decree that Stark Bro's Nurseries has made false statements of fact, marked and/or used in advertising expired patent numbers, falsely threatened to enforce non-existent patent rights and imposed post-expiration royalties, and further declare that Broom Orchard, and persons similarly situated to Plaintiff, may freely sell or propagate or topwork post-patent expiration trees and plants.

COUNT XX

ALTERNATIVE COMMON LAW CLAIM FOR PARTIAL RESCISSION FOR MUTUAL MISTAKE AGAINST STARK BRO'S NURSERIES

362. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-361 of this Complaint, except to the extent they conflict with the allegations of this alternative count.

363. As indicated on tree purchase invoices, Broom Orchard had valid and enforceable contracts with Stark Bro's Nurseries.

364. The invoices had discrete and severable charges for post-patent royalties.

365. Broom Orchard fully performed its obligations.

366. By reason of a mutual mistake of fact, Broom Orchard paid at least \$16.00 in post-expiration royalties based on the expired Honeycrisp patent (as indicated on the invoice).

Ex. 15.

367. As a result of the mutual mistake, Broom Orchard has been damaged in an amount at least equal to post-expiration royalties paid to Stark Bro's Nurseries.

COUNT XXI

FALSE MARKING OF PRODUCTS WITH HONEYCRISP, SUPER CHIEF, 3556, 4322, 4633, 4819, 4839, 7063, 6519, 7820, 7880, 6689, 7035, 7045, 7054, 4572, 7065, 5243, 6194, 7884 AND 6392 PLANT PATENTS BY VAN WELL NURSERY, INC.

368. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-367 of this Complaint.

369. Defendant licenses, grows, sells, have made and have sold, and/or collect royalties from the sale of a number of products which it marks or causes to be marked with the Honeycrisp, Super Chief, 3556, 4322, 4633, 4819, 4839, 7063, 6519, 7820, 7880, 6689, 7035, 7045, 7054, 4572, 7065, 5243, 6194, 7884 and 6392 plant patents.

370. Such products include, but are not limited to, the Honeycrisp, Super Chief, Early Red One, Red Free, Jonafree, Scarlet Spur II, Ginger Gold, Sansa, Royal Empire, Pink Lady (Cripps), Swiss Gourmet, and Oregon Spur II Red apple trees; Goldstrike, Goldbar, and Tomcat apricot trees; Arctic Gem and Encore peach trees; Golden Russet Bosc and Columbia Red Anjou pear trees; Arctic Glo nectarine tree; and OHxF pear rootstock.

371. Van Well Nursery's Catalogue No. 56 shows false marking of the Honeycrisp, Super Chief, Red Free, Jonafree, Ginger Gold, Sansa, Royal Empire, Pink Lady (Cripps), Swiss Gourmet, and Oregon Spur II Red apple trees; Goldstrike, Goldbar, and Tomcat apricot trees; Arctic Gem peach tree; Columbia Red Anjou pear tree; Arctic Glo nectarine tree; and OHxF pear rootstock. Ex. 19.

372. Van Well Nursery's Web site shows false marking of the Honeycrisp, Super Chief, Early Red One, Red Free, Jonafree, Scarlet Spur II, Ginger Gold, Sansa, Royal Empire, Pink Lady (Cripps), Swiss Gourmet, and Oregon Spur II Red apple trees; Goldstrike, Goldbar, and Tomcat apricot trees; Arctic Gem and Encore peach trees; Golden Russet Bosc and Columbia Red Anjou pear trees; Arctic Glo nectarine tree; and OHxF pear rootstock. Exs. 18 and 98-102.

373. Van Well Nursery also falsely marked at least one tag affixed to the shipment of Honeycrisp trees received by Broom Orchard in March of 2011 with the language "U.S.P.P. #7197". Ex. 21.

374. Defendant Van Well Nursery was aware that the Honeycrisp, Super Chief, 3556, 4322, 4633, 4819, 4839, 7063, 6519, 7820, 7880, 6689, 7035, 7045, 7054, 4572, 7065, 5243, 6194, 7884 and 6392 plant patents were expired when it maintained, published, circulated and/or copyrighted the Web site and catalogue displaying the products with expired patent numbers.

375. As set forth in paragraphs 92 and 93 herein, defendant Van Well Nursery was also aware that at least the Honeycrisp patent was expired when it prepared and sent the invoice attached as Exhibit 20. Defendant Van Well Nursery was also aware that at least the Honeycrisp patent was expired when it collected post-expiration royalties based on at least the expired Honeycrisp patent (as indicated on the invoice and in the catalogue). Exs. 19,20.

376. Upon information and belief, Defendant Van Well Nursery has prepared and sent numerous invoices to customers which, coupled with the pricing schedule in its catalogue, charge a higher price to customers for at least the Honeycrisp apple tree, so as to represent that it is protected by patent, when it is not.

377. Upon information and belief, Defendant Van Well Nursery currently charges post-expiration royalties and/or has collected significant post-expiration royalties based on at least the Honeycrisp, Super Chief, 4839, 7063, 6519, 7820, 7880, 6689, 7035, 7045, 7054, 4572, 7065, 5243, 7884, and 6392 plant patents. Ex. 19.

378. The instances of false marking shown in Exhibits 18-21 and 98-103 are representative and not exhaustive.

379. Defendant knows that the articles it marked and continues to mark with Honeycrisp, Super Chief, 3556, 4322, 4633, 4819, 4839, 7063, 6519, 7820, 7880, 6689, 7035, 7045, 7054, 4572, 7065, 5243, 6194, 7884 and 6392 plant patents are not covered by the expired patent marked thereon because expired patents have no monopoly rights, yet defendant still intentionally marks the products with the hopes of preventing others from making products that fall within the scope of the falsely marked patent(s) on its products.

380. For example, and as set forth in the excerpt below, Defendant admitted that “[t]he ’839 Plant Patent expired on May 9, 2000,” when it unsuccessfully filed suit to enforce an associated trademark on July 9, 2004.

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
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Ex. 104. Defendant continues to represent the 4839 plant patents, and others, as patented, despite knowledge of their expiration.

381. Defendant knows that representing the articles marked with the Honeycrisp, Super Chief, 4839, 7063, 6519, 7820, 7880, 6689, 7035, 7045, 7054, 4572, 7065, 5243, 7884, and 6392 plant patents as patented when they are not, in conjunction with representing that the propagation of patented varieties for personal use or for sale in the United States is prohibited, further prevents consumers and others from making products that fall within the scope of the falsely marked patent(s).

COUNT XXII

VIOLATION OF THE ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT BY VAN WELL NURSERY

382. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-381 of this Complaint.

383. As required by Van Well Nursery on tree purchase invoices, Broom Orchard paid improper royalties for expired the Honeycrisp patent.

384. 815 ILCS 505/2 provides, in relevant part:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of

any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5 (a) of the Federal Trade Commission Act.

385. As set forth in the above non-limiting examples, Van Well Nursery has engaged in one or more unfair and/or deceptive acts and practices, including without limitation:

- a. Deceptively representing that tree and plant varieties are protected by United States plant patents;
- b. Marking and using in advertising expired patent numbers;
- c. Threatening and prohibiting the unlicensed sale or propagation or topworking of post-patent expiration trees and/or plants;
- d. Upon information and belief, accepting post-expiration royalties for expired tree and plant varieties under false pretenses of patent leveraging.

Broom Orchard is a consumer within the meaning of the Illinois Consumer Fraud Act given that Van Well Nursery's acts and practices were addressed to the market generally, and implicate consumer protection concerns including limited and controlled competition, supracompetitive prices, and attempted (if not perfected) restraints on trade.

386. Van Well Nursery intended that Plaintiff rely on the material misrepresentations, royalties under false pretenses, unfair practices, and omissions as alleged herein.

387. As a proximate result of the foregoing deceptive and/or unfair practices, Plaintiff suffered damages in the form of improper royalties, and supracompetitive prices directly paid for unprotected trees and/or plants.

COUNT XXIII

COMMON LAW FRAUDULENT MISREPRESENTATION BY VAN WELL NURSERY

388. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-385 of this Complaint.

389. As set forth in the above non-limiting examples, Van Well Nursery has made one or more false statements of material fact:

- e. Deceptively representing that tree and plant varieties are protected by United States plant patents;
- f. Marking and using in advertising expired patent numbers;
- g. Threatening and prohibiting the unlicensed sale or propagation or topworking of post-patent expiration trees and/or plants;
- h. Upon information and belief, accepting of patent royalties for expired tree and plant varieties under false pretenses of patent leveraging.

390. Van Well Nursery knew or believed that the above false statements were false.

391. Van Well Nursery intended that Plaintiff rely on the above false statements.

392. Plaintiff relied on the material misrepresentations alleged herein.

393. Plaintiff was damaged as a result of its reliance on the material misrepresentations.

COUNT XXIV

**COMMON LAW NEGLIGENT MISREPRESENTATION
BY VAN WELL NURSERY**

394. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-393 of this Complaint.

395. As set forth in the above non-limiting examples, Van Well Nursery has made one or more false statements of material fact:

- a. Deceptively representing that tree and plant varieties are protected by United States plant patents;
- b. Marking and using in advertising expired patent numbers;
- c. Threatening and prohibiting the unlicensed sale or propagation or topworking of post-patent expiration trees and/or plants;
- d. Upon information and belief, accepting post-expiration royalties for expired tree and plant varieties under false pretenses of patent leveraging.

396. As a purported licensed seller of trees and plants, Van Well Nursery owed Plaintiff, other orchardists, gardeners, nurseries, and the consuming public a duty to relate accurate information regarding the sale or propagation or topworking of its trees and plants.

397. Van Well Nursery should have known that the above false statements were false.

398. Van Well Nursery intended that Plaintiff rely on the above false statements.

399. Plaintiff relied on the material misrepresentations alleged herein.

400. Plaintiff was damaged as a result of its reliance on the material misrepresentations.

COUNT XXV

**REQUEST FOR DECLARATORY RELIEF AGAINST
VAN WELL NURSERY**

401. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-400 of this Complaint.

402. There is a real and actual controversy between Plaintiff and Van Well Nursery regarding the unlicensed sale or propagation or topworking of the tree and plant varieties above, as well the validity of the imposed post-patent royalties.

403. As set forth in the above non-limiting examples, Van Well Nursery has made one or more false statements of material fact:

- a. Deceptively representing that tree and plant varieties are protected by United States plant patents;
- b. Marking and using in advertising expired patent numbers;
- c. Threatening and prohibiting the unlicensed sale or propagation or topworking of post-patent expiration trees and/or plants;
- d. Upon information and belief, accepting post-expiration royalties for expired tree and plant varieties under false pretenses of patent leveraging.

404. Broom Orchard, therefore, requests that the Court adjudge and decree that Van Well Nursery has made false statements of fact, marked and/or used in advertising expired patent numbers, falsely threatened to enforce non-existent patent rights and imposed post-expiration royalties, and further declare that Broom Orchard, and persons similarly situated to Plaintiff, may freely sell or propagate or topwork post-patent expiration trees and plants.

COUNT XXVI

**ALTERNATIVE COMMON LAW CLAIM FOR PARTIAL RESCISSION FOR
MUTUAL MISTAKE AGAINST VAN WELL NURSERY**

405. Broom Orchard realleges and incorporates herein by reference the allegations stated in paragraphs 1-404 of this Complaint, except to the extent they conflict with the allegations of this alternative count.

406. As indicated on tree purchase invoices, Broom Orchard had valid and enforceable contracts with Van Well Nursery.

407. The invoices had discrete and severable charges for post-patent royalties.

408. Broom Orchard fully performed its obligations.

409. By reason of a mutual mistake of fact, Broom Orchard paid at least \$93.00 in post-expiration royalties based on the expired Honeycrisp patent (as indicated on the invoice).
Ex. 20.

410. As a result of the mutual mistake, Broom Orchard has been damaged in an amount at least equal to post-expiration royalties paid to Van Well Nursery.

PRAYER FOR RELIEF

WHEREFORE, Broom Orchard respectfully requests that the Court enter judgment in its favor and against Defendants as follows:

- A. Enter a declaration that each Defendant has violated 35 U.S.C. §292, and that Defendants the University of Minnesota, Adams County Nursery, C&O Nursery, Dave Wilson Nursery, Lawyer Nursery, Stark Bro's Nurseries, and Van Well Nursery have made false statements of fact, falsely threatened to enforce non-existent patent rights and imposed post-expiration royalties, and further declare that Broom Orchard, and persons similarly

situated to Plaintiff, may freely sell or propagate or topwork post-patent expiration trees and plants.

- B. Enter an injunction prohibiting Defendants, and their agents, servants, employees, attorneys, licensees, successors, and assigns, and those in active concert or participation with any of them, from further violation 35 U.S.C. §292 and/or imposing post-patent royalties;
- C. Award Broom Orchard its actual damages;
- D. Order each Defendant to pay a civil monetary fine of \$500.00 per false marking offense, or an alternative amounts as determined by the Court, one-half of which shall be paid to the United States;
- E. Order each Defendant to provide an accounting for any falsely marked products;
- F. Order Defendants to pay all costs, attorneys' fees pursuant to 35 U.S.C. §285, or as applicable pursuant to the Illinois Consumer Fraud Act, and applicable interests;
- G. Grant Broom Orchard such further relief as deemed appropriate.

Respectfully submitted,
PLAINTIFF BROOM ORCHARD, INC.

By its attorneys,
SIMMONS BROWDER GIANARIS
ANGELIDES & BARNERD

Dated: April 1, 2011

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