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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DELANO FARMS COMPANY; FOUR STAR FRUIT, INC.; GERAWAN FARMING, INC., Plaintiffs, vs. THE CALIFORNIA TABLE GRAPE COMMISSION; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF AGRICULTURE; TOM VILSACK, SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE (IN HIS OFFICIAL CAPACITY), Defendants.	Case No.1:07-cv-01610-LJO-JLT **THIRD AMENDED COMPLAINT** DEMAND FOR JURY TRIAL

McKool Smith Hennigan, P.C.
Los Angeles, California

For their third amended complaint against Defendant The California Table Grape Commission ("the Commission") and Defendants the United States of America ("U.S."), the United States Department of Agriculture ("USDA") and Tom Vilsack, Secretary of the United States Department of Agriculture (in his official capacity) ("Secretary Vilsack"), Plaintiffs Delano Farms Company; Four Star Fruit, Inc.; and Gerawan Farming, Inc. (collectively "Plaintiffs") allege as follows:

PRELIMINARY STATEMENT

1. Plaintiffs bring this Third Amended Complaint ("TAC") challenging the USDA action in granting exclusive licenses to the Commission on certain grapevine varieties that the government has patented, and the licenses that the Commission has required each Plaintiff to enter into in order to acquire the grapevine varieties. Plaintiffs contend that the licenses should be nullified because, among other things, the patents that are the subject of the licenses are invalid and (for one variety) unenforceable. In granting the licenses, the government has allowed the Commission to charge significant royalties for use of the grapevines, limited distribution of the grapevines to three hand-picked nurseries (at least one with family ties to Commission board members), and prohibited the replacement of the grapevines from existing plants. These restrictions discriminate against who may distribute the grapevines at issue and what growers can afford to produce and sell table grapes from the patented vines. Moreover, the licensing provisions are completely unnecessary for funding to bring the patented grapevines (and fruit produced from the grapevines) to market or otherwise promote the use of the patented grapevines (and fruit produced) by the public. To the contrary, the same farmers who must now pay significant royalties and fees to plant and reproduce the patented varieties already pay for a substantial portion of developing the patented grapevine varieties through a tax charged by the Commission on each box of table grapes sold. For this reason, prior to licensing the grapevine patents to the Commission, and allowing the Commission to impose royalty and distribution restrictions, the USDA distributed newly-developed grapevine varieties to growers free of charge, allowing unlimited distribution and reproduction.

2. Besides alleging that the patents subject to the licenses are invalid and unenforceable, Plaintiffs TAC seeks recession of the grower license agreements, restitution of royalties received by

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the Commission, and disgorgement by the Commission of wrongfully obtained royalties on invalid patents.

JURISDICTION AND VENUE

3. This is a civil action arising under the Patent Act, 35 U.S.C. § 1 *et seq.,* and the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq*., This Court has federal jurisdiction of such federal question claims pursuant to 28 U.S.C. §§ 1331, 1337 and 1338(a). This Court has jurisdiction over the claims for declaratory judgment of invalidity pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

4. This Court has supplemental jurisdiction over the claims in this Complaint against the Commission that arise under statutory and common law of the State of California pursuant to 28 U.S.C §1367(a), because the state law claims are so related to the federal claims that they form part of the same case or controversy and derive from a common nucleus of operative facts.

5. The acts and transactions complained of herein were conceived, carried out, made effective, and had effect within the State of California and within this district, among other places. Venue is proper under 28 U.S.C. §§1391(b) and 1391(c) in that Plaintiffs reside in this District, Defendant the California Table Grape Commission resides in this District and has a regular and established place of business in this District and in that a substantial part of the events or omissions giving rise to the claims and the threatened and actual harm to Plaintiffs occurred in this District by reason of Defendants' conduct as alleged below.

THE PARTIES

6. Plaintiff Delano Farms Company is a corporation duly organized and existing under the laws of the State of Washington, with its principle place of business at 815 Eighth Street, P.O. Box 240, Hoquiam, Washington 98550.

7. Plaintiff Four Star Fruit, Inc. is a corporation duly organized and existing under the laws of the State of California, with its principle place of business at 13830 Avenue 24, Delano, California 93215.

8. Plaintiff Gerawan Farming, Inc. is a corporation duly organized and existing under the laws of the State of California, with its principle place of business at 15749 East Ventura,

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1 Sanger, California 93657.

2 9. Plaintiffs are engaged in the business, *inter alia*, of growing, harvesting and selling
3 table grapes.

4 10. Defendant The California Table Grape Commission is a corporation of the State of
5 California, established by the 1967 Ketchum Act. Cal. Food & Agric. Code §§65550 – 65551.
6 Defendant's principle place of business is at 392 W. Fallbrook, Suite 101, Fresno, California 93711.

7 11. The stated purpose of the Commission is to expand and maintain the market for
8 California table grapes for the benefit of the State of California as well as the State's over five
9 hundred California table grape growers. The Commission is funded primarily by assessments levied
10 on each shipment of California table grapes and paid by the State's table grape shippers. No general
11 revenues of the State fund the Commission.

12 12. Defendant the United States of America is a sovereign nation organized and existing
13 under the Constitution of the United States. Pursuant to Fed. R. Civ. P. 4(i), the United States may
14 be served through the United States Attorney for the Eastern District of California – Lawrence
15 Brown, United States Attorney's Office, 501 I Street, Suite 10-100, Sacramento, CA 95814.
16 Additionally, under Rule 4(i), a copy of the summons and complaint must be sent by registered or
17 certified mail to the Attorney General of the United States, Office of the Attorney General, U.S.
18 Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001.

19 13. Defendant the United States of America and its representative, the United States
20 Department of Agriculture, reside and conduct business within the territorial jurisdiction of this
21 Court.

22 14. Defendant United States Department of Agriculture is a United States federal
23 executive department, established by 7 U.S.C. § 2201. Defendant USDA's headquarters are located
24 at 1301 Independence Avenue, S.W., Washington, D.C. 20004.

25 15. The stated purpose of the USDA is to provide leadership on food, agriculture, natural
26 resources, and related issues based on sound public policy, the best available science, and efficient
27 management.

28 16. Defendant Tom Vilsack, Secretary of the United States Department of Agriculture,

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has overall responsibility for the United States Department of Agriculture. He is named in his official capacity and may be served at the Department of Agriculture at 1301 Independence Avenue, S.W., Washington, D.C. 20004.

FACTS

Overview

17. For years, California table grape growers and shippers have funded a research program under the USDA to develop new table grape varieties. Growers and shippers fund the USDA research program through the Commission by an assessment on each box of table grapes shipped in California. Prior to 2002, the USDA provided the new varieties under development to area growers for evaluation of growing potential and commercial marketability. Once new varieties appeared commercially viable, the USDA "released" the variety, and distributed plant material of the variety to area growers free-of-charge. The USDA did not charge California growers for the new varieties since California growers and shippers already paid for a large portion of the development.

18. In the late 1990s, the Commission developed a secret scheme by which it and a few select nurseries could profit from the new varieties that the USDA distributed for free. At the urging of the Commission during a series of privately-held meetings, the USDA agreed to begin patenting new table grape varieties. Although California shippers already funded much of the development, the USDA secretly agreed to give the Commission an exclusive license to all new patented varieties, and to allow the Commission to charge royalties when growers wished to obtain the new varieties. The USDA also agreed to give the Commission exclusive enforcement powers over its new patent rights.

19. Under the Commission's "patent and licensing" scheme, the Commission hand-selected three nurseries, without public notice, to exclusively sell all new patented table grape varieties. Unlike the prior free distribution, the hand-selected nurseries would be allowed to sell new varieties to growers at a charge. Additionally, the nurseries would be required to pay a royalty to the Commission for each plant sold, which the nursery could pass onto the growers. One of the hand-selected nurseries now able to profit from newly developed varieties previously distributed

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without charge is owned by the son of a long-standing Commission member.

20. When a grower seeks to obtain a new variety from a nursery, it is required to enter a "Domestic Grower License Agreement" with the Commission. Under the terms of the Agreement, the grower cannot propagate the variety beyond the plant purchased. Accordingly, to replace any grapevine, a grower must purchase another plant from one of the three nurseries and pay a patent royalty. If the Commission believes the grower has violated the License Agreement in any way, it can void the Agreement and order that all purchased plants be destroyed.

21. The first three varieties that the Commission identified to the USDA for patenting had been under development for years. Indeed, at least one of the varieties had been distributed to growers for wide-scale commercial evaluation and sale.

22. Recognizing that at least one of the new varieties identified for patenting (and perhaps all three) had been in the public domain for years, the Commission created a so-called "amnesty program" to extort funds from growers already in possession of the varieties. Under the amnesty program, the Commission widely disseminated notices to growers and shippers stating that they were in violation of the law if they possessed the varieties intended for patenting, even though no patents had yet been granted. The notices also offered confidential "settlements" to any growers who, within a narrow window, agreed to license the varieties, pay a "penalty" to the Commission, and accept the Commission's license restrictions on further propagation. Growers and shippers who refused the "amnesty" were threatened with lawsuits, including money damages and injunctions. On information and belief, the U.S, through the USDA, knew of and authorized the amnesty program.

23. At least 17 growers confirmed possession of the varieties and agreed to pay the penalties demanded by the Commission.

The Patented Varieties

Sweet Scarlet

24. On February 20, 2003, the USDA filed patent application No. 371,512 (the "'512 Application") on a grapevine denominated "Sweet Scarlet." The application listed David W. Ramming and Ronald E. Tarallo as co-inventors. On July 26, 2005, the '512 Application issued as

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1 U.S. Patent No. PP15,891, entitled "Grapevine Denominated Sweet Scarlet" (the "'891 patent").

2 25. The United States of America, as represented by the Secretary of Agriculture, is the
3 owner by assignment of the '891 patent.

4 26. On information and belief, the Commission is the exclusive licensee of the '891
5 patent pursuant to a license agreement entered into between the United States Government, as
6 represented by the United States Department of Agriculture, Agricultural Research Services, and the
7 Commission. The exclusive license includes the right to license the '891 patent and to enforce the
8 '891 patent against alleged infringers.

9 ***Autumn King***

10 27. On September 28, 2004, the USDA filed patent application No. 953,387 (the "'387
11 Application") on a grapevine denominated "Autumn King." The application listed David W.
12 Ramming and Ronald E. Tarallo as co-inventors. On February 21, 2006, the '387 Application
13 issued as U.S. Patent No. PP16,284, entitled "Grapevine Denominated Autumn King" (the "Autumn
14 King or '284 patent").

15 28. The United States of America, as represented by the Secretary of Agriculture, is the
16 owner by assignment of the '284 patent.

17 29. On information and belief, the Commission is the exclusive licensee of the '284
18 patent pursuant to a license agreement entered into between the United States Government, as
19 represented by the United States Department of Agriculture, Agricultural Research Services, and the
20 Commission. The exclusive license includes the right to license the '284 patent and to enforce the
21 '284 patent against alleged infringers.

22 ***Scarlet Royal***

23 30. On September 28, 2004, the USDA filed patent application No. 953,124 (the "'124
24 Application") on a grapevine denominated "Scarlet Royal." The application listed David W.
25 Ramming and Ronald E. Tarallo as co-inventors. On January 31, 2006, the '124 Application issued
26 as U.S. Patent No. PP16,229, entitled "Grapevine Denominated Scarlet Royal" (the "Scarlet Royal
27 or '229 patent").

28 31. The United States of America, as represented by the Secretary of Agriculture, is the

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owner by assignment of the '229 patent.

32. On information and belief, the Commission is the exclusive licensee of the '229 patent pursuant to a License Agreement entered into between the United States Government, as represented by the United States Department of Agriculture, Agricultural Research Services, and the Commission. The exclusive license includes the right to license the '229 patent and to enforce the '229 patent against alleged infringers.

The Patent and Licensing Program

33. The Commission requires that California grape shippers pay an assessment of approximately $0.13 per box of table grapes. The Commission operates at an annual surplus from these assessments, but does not return any of the assessment money back to the California growers or shippers.

34. Dr. Ramming, the co-inventor of the patented Autumn King, Sweet Scarlet and Scarlet Royal varieties, is a researcher at the Agriculture Research Center ("ARC") of the USDA located in Fresno, California. For at least 20 years, Dr. Ramming has operated a research program at the ARC relating to the development of new table grape varieties. Since the early 1980s, the Commission has funded a significant portion of Dr. Ramming's grapevine breading program with funds collected through the shipper assessments. In many years, the Commission's funding has amounted to over one-third of the total table grape research budget at the ARC, excluding employee salaries.

35. Prior to 2003, the USDA had never sought patent protection for any new table grape variety developed at the ARC. Instead, for nearly two decades, new grape varieties developed by the ARC with California table grape shipper assessment revenues were distributed freely to California growers by the USDA. Specifically, once Dr. Ramming and his researchers developed a new variety that had commercial potential, a number of growers would be selected to produce the new variety as part of a "grower trial." If the grower trials appeared successful, then the results would be made publicly available and the variety would be "released" for distribution. Releasing a new variety was not an "official" act; rather, the USDA would announce the availability of the new variety, and any grower (or any other person) could obtain "sticks" (i.e., plant material) of the new

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variety without cost from the USDA ARC facility in Fresno, California. Once a grower obtained the sticks, the grower could plant the new variety at its sole discretion, and reproduce and distribute plant material of the new variety without restriction. In other words, the commercial risk associated with producing and selling table grapes from new USDA-developed varieties rested solely with growers (who had already funded much of the development costs).

36. Growers participating in the "trials" were given plant material for the new variety, and allowed to reproduce the variety as needed, grow the new variety at their discretion, sell the fruit produced, and retain any profits. While certain growers were selected for the trials, the USDA provided no mechanism for preventing other growers from accessing and reproducing the varieties as well. Accordingly, when a variety under development appeared commercially successful, it was not uncommon for many growers to have reproduced and commercially sold the variety prior to an "release" by the USDA. For example, when the USDA developed the "Princess" variety, it was well known that growers throughout the central valley had been reproducing Princess grapevines and selling Princess fruit for years.

37. Neither the USDA nor the Commission had any incentive to restrict the distribution of new grapevines prior to a release, and never sought to do so. Widespread reproduction and sales of new varieties allowed greater customer acceptance prior to release. Additionally, growers and shippers contributed substantially to the development of new varieties in Dr. Ramming's grapevine breeding program. Moreover, even after release, the USDA provided plant material from which growers could reproduce the variety free of charge. For years, this system allowed for the successful commercialization of grapevine varieties developed by the USDA that were funded by California growers.

38. The USDA, Dr. Ramming, and the Commission knew that plant material for varieties under development frequently entered the public domain prior to release.

39. In the late 1990s, the Commission formed a plan to change this procedure. Specifically, the Commission adopted a plan to request that the USDA seek patent protection on all new table grape varieties developed prior to general release. Initially, the patents were intended to control competition from foreign growers. In the past, foreign growers frequently obtained new

1 table grape varieties developed through assessments on California growers, then competed with
2 California growers in market for the new varieties. Under the Commission's plan, the distribution
3 of new table grape varieties would operate as follows: (1) USDA would seek patent protection for
4 all new varieties, (2) the USDA would grant an exclusive license to the Commission to administer
5 the distribution of new patented varieties, (3) California table grape growers would be provided
6 patented varieties free of charge, and (4) the new patented varieties would either be excluded from
7 foreign growers or provided to foreign growers at high royalty rates.

8 40. After several secret meetings between the Commission and the USDA, the USDA
9 ultimately agreed to seek patent protection as requested by the Commission. The USDA further
10 agreed that the Commission could serve as the exclusive licensee for patented varieties in the
11 collection of royalties and enforcement against infringers. However, unknown to Plaintiffs, the
12 USDA told the Commission that it could not, under U.S. trade agreements, refuse to provide the
13 new patented varieties to foreign growers, block foreign growers from importing table grapes from
14 the new patented varieties, or discriminate against foreign growers in charging royalties.

15 41. Even though the USDA barred the Commission from implementing the original goals
16 behind the patenting program – namely, to control foreign competition – the Commission decided to
17 proceed with a patent and licensing plan. The Commission secretly decided that it could effectively
18 increase its powers without any action from the California State Legislature, if the USDA would
19 patent all new varieties, and give the Commission exclusive control over how the varieties were
20 distributed. In effect, such a plan would give the Commission a new source of revenue beyond that
21 allowed under California law, and would place with the Commission complete power over the sale,
22 reproduction, and distribution of new table grape varieties – powers that the Commission lacked
23 under the USDA's prior distribution program. For example, the Commission recognized that if it
24 charged royalties to all growers of the new patented varieties, the Commission could effectively
25 collect an additional tax on table grape growers beyond the $0.13 per box of table grapes allowed
26 under California law. Further, the Commission, which is controlled by a number of large growers,
27 recognized that it could limit access to new varieties, particularly by smaller growers, through the
28 amount of royalties it charged for obtaining the patented varieties, and through the terms of its

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sublicense agreements. Finally, the Commission recognized that it could control the reproduction and distribution of new patented varieties by granting distribution rights to a few entities that it would hand-select.

42. In or about August 2001, the Commission entered into a secret Memorandum of Understanding ("MOU") with the USDA, outlining the framework under which the USDA would seek patent protection for new grapevine varieties and grant exclusive licenses to the Commission. The MOU made clear that the Commission would be obligated to grant rights to foreign growers. Neither the USDA nor the Commission provided notice of the MOU, and the existence and terms of the MOU were not published in the Federal Register for notice and comment.

43. Separate from the MOU, the Commission and the USDA secretly agreed that, in exchange for seeking patent protection, and providing an exclusive license to the Commission, the Commission would limit the number of entities licensed to distribute, reproduce, and sell the new patented varieties. Although the USDA indicated that it was not interested in obtaining payments for, or profiting from, any patents on new varieties, the USDA agreed that the Commission could collect royalties on the sale of each patented grapevine plant and that the Commission would share the royalty revenue with the USDA. The USDA further agreed to eliminate "grower trials" and place stricter controls on the access to new varieties prior to an official "release." These "side" terms were not disclosed publicly or published in the Federal Register for notice and comment.

The Commission's Licenses to Nurseries and Plaintiffs

44. Ultimately, the Commission, with permission from the USDA, hand-select three nurseries to reproduce, distribute and sell the patented varieties. The section of these nurseries was not disclosed publicly or published in the Federal Register for notice and comment. The three selected nurseries are: Sunridge Nurseries, Vintage Nurseries, and Casa Crystal Nurseries (the "Licensed Nurseries"). Casa Crystal Nursery is owned by Andrew Zaninovich. Andrew's father is Marco Zaninovich, who has been a long-time and active board member of the Commission.

45. Each Licensed Nursery is authorized to sell Autumn King, Sweet Scarlet and Scarlet Royal vines to growers who execute a "Domestic Grower License Agreement" with the Commission. In accordance with the agreement between the Commission and the USDA, the

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Commission charges nurseries who distribute patented varieties a $5,000 participation fee per patented variety and an additional $1 per production unit royalty. These costs are then passed on by the nurseries to the California grape growers who purchase the patented plant material from the nurseries, including Plaintiffs who purchased the Patented Varieties. These payment terms, including the permission to allow the nurseries to charge the royalties to growers, who must also purchase the plant material, were not disclosed publicly or published in the Federal Register for notice and comment prior to their adoption.

46. The Domestic Grower Agreements prohibit growers who purchase the Patented Varieties from propagating the vines or distributing the vines to third parties. Under the Domestic Grower Agreements, the Commission may revoke the patent sub-license of any grower who violates the terms, and require the grower to destroy all Patented Varieties purchased. The terms of the Domestic Grower Agreements, created by the Commission with the approval of the USDA, were not disclosed publicly or published in the Federal Register for notice and comment prior to their adoption.

47. All royalties are paid to the Commission. On information and belief, the Commission pays approximately one-half of the collected royalties to the USDA.

48. The California table grape growers who bear the ultimate costs of the royalty fees imposed by the Commission are the same California table grape growers who bear the cost of the per box assessment charged by the Commission, which funds much of Dr. Ramming's breeding program. Thus, California table grape growers essentially pay for the development of patented varieties, then pay again to obtain the varieties.

49. The Commission's Research Committee and Board oversee and administer the patent and licensing program. Specifically, the Board sets the royalty rates on patented plants, determines penalties for infringement, and establishes enforcement policy. The Research Committee oversees Dr. Ramming's breeding program and makes recommendations regarding which new varieties should be patented and released. To date, the USDA has only patented new varieties that the Commission has recommended for patenting, and has only applied for patents after receiving a recommendation from the Commission to do so.

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Release of the Patented Varieties

50. Development of the Patented Varieties began in about 1993. Prior to 2003, the Dr. Ramming had reproduced each of the Patented Varieties, produced fruit from each of the Patent Varieties, and had evaluated the potential commercialization of each Patented Variety.

51. By 2001, the Commission's Research Committee was actively evaluating the Sweet Scarlet, Autumn King, and Scarlet Royal varieties (among others) for USDA release. In 2002, the Commission recommended that Sweet Scarlet be released. The Commission also recommended that the USDA seek patent protection on Sweet Scarlet as the first variety for patenting under the Commission's new patent and licensing program. After receiving the Commission's recommendation, the UDSA proceeded with the release of Sweet Scarlet and filed a patent application on the Sweet Scarlet variety in February 2003.

52. Although the Commission recommended proceeding with the release of Sweet Scarlet, the Commission decided to delay any release and patenting of Autumn King and Scarlet Royal. Instead, the Commission recommended that Autumn King and Sweet Scarlet undergo further evaluation prior to release. Approximately two years later, in 2004, the Commission finally recommended release of Autumn King and Scarlet Royal. At that time, the Commission further recommended that the UDSA seek patent protection for Autumn King and Scarlet Royal.

53. On information and belief, the Sweet Scarlet, Autumn King, and Scarlet Royal varieties were already in the public domain prior to the time the USDA applied for patent protection on each respective variety.

54. For example, the Sweet Scarlet variety and its fruit was used, distributed, offered for sale and sold by growers and shippers prior to February 20, 2002, including uses by growers who were not part of grower trials. Both the Commission and USDA knew of at least some non-grower-trial uses. In May 2004, the Commission sent a notice to all California table grape growers and shippers stating that the UDSA had applied for a patent on the Sweet Scarlet variety. Although no enforceable patent had yet issued, the Commission offered "amnesty" for any grower who had previously reproduced Sweet Scarlet. Under its so-called "amnesty" program, a grower with Sweet Scarlet could keep the vines reproduced, so long as the grower (i) admitted to possession prior to

1 July 2004, (ii) paid $2 per vine reproduced, (iii) paid $2 per box of Sweet Scarlet grapes previously
2 shipped, and (iv) agreed to no further propagation of the Sweet Scarlet variety from the plants
3 possessed.

4 55. In July 2004, the Commission sent another notice to all California table grape
5 growers and shippers extending the "amnesty" time period for one month, and extending the
6 "amnesty" to include Autumn King and Scarlet Royal varieties.

7 56. In both notices, the Commission threatened to sue growers who did not come
8 forward, and to seek money damages and injunctions. Yet, at the time of the second notice, the
9 USDA patent application on Sweet Scarlet not only remained un-issued, but had been rejected by
10 the USPTO. Moreover, the USDA had not even applied for a patent on either Autumn King or
11 Scarlet Royal.

12 57. On April 29, 2003, the USDA published notice in the Federal Register of its intent to
13 grant an exclusive license to the Commission for the Sweet Scarlet patent. The Federal Register
14 notice did not state the terms of the license, and provided no information on whether growers would
15 be authorized to reproduce or distribute the Sweet Scarlet variety, whether growers would incur any
16 costs to obtain the Sweet Scarlet variety, or whether growers would incur any royalty expenses for
17 the Sweet Scarlet variety. Indeed, the Federal Register notice contained no information whatsoever
18 regarding the exclusive licensing terms and conditions that the Commission had secretly negotiated
19 with the USDA. In or about 2003, the USDA entered into an exclusive license with the Commission
20 for the Sweet Scarlet patent.

21 58. On December 23, 2004, the USDA published notice in the Federal Register of its
22 intent to grant an exclusive license to the Commission for the Autumn King and Scarlet Royal
23 patents. The Federal Register notice did not state the terms of the license, and provided no
24 information on whether growers would be authorized to reproduce or distribute the Autumn King
25 and Scarlet Royal varieties, whether growers would incur any costs to obtain the Autumn King and
26 Scarlet Royal varieties, or whether growers would incur any royalty expenses for the Autumn King
27 and Scarlet Royal varieties. Indeed, the Federal Register notice contained no information
28 whatsoever regarding the exclusive licensing terms and conditions that the Commission had secretly

negotiated with the USDA. In or about June, 2005, the USDA entered into an exclusive license with the Commission for the Autumn King and Scarlet Royal patents.

Plaintiffs' Purchase of the Patented Varieties

59. Plaintiffs are in possession of the Autumn King, Sweet Scarlet and Scarlet Royal varieties, which they purchased through Licensed Nurseries. Plaintiffs paid the royalties on each purchased plant imposed by the Commission.

60. Plaintiffs have entered into a Domestic Grower License Agreement with the Commission for the '891 patent. In consideration for this limited, nonexclusive license, Plaintiffs have paid a license fee to a Licensed Nursery. Under the terms of this Agreement, Plaintiffs have a limited, nonexclusive license to the '891 patent to grow the Sweet Scarlet variety plants that they purchased, and sell the fruit produced from those plants. Plaintiffs cannot propagate the grapevines or distribute the vines to third parties. Furthermore, Plaintiffs are obligated to destroy all Sweet Scarlet plant material upon termination of the agreement.

61. Plaintiffs have entered into a Domestic Grower License Agreement with respect to the '284 patent. In consideration for this limited, nonexclusive license, Plaintiffs have paid a license fee to a Licensed Nursery. Under the terms of this Agreement, Plaintiffs have a limited, nonexclusive license to the '284 patent to grow the Autumn King variety plants that they purchased, and sell the fruit produced from those plants. Plaintiffs cannot propagate the grapevines or distribute the vines to third parties. Furthermore, Plaintiffs are obligated to destroy all Autumn King plant material upon termination of the agreement.

62. Plaintiffs have entered into a Domestic Grower License Agreement with respect to the '229 patent. In consideration for this limited, nonexclusive license, Plaintiffs have paid a license fee to a Licensed Nursery. Under the terms of this Agreement, Plaintiffs have a limited, nonexclusive license to the '229 patent to grow the Scarlet Royal variety that they purchased, and sell the fruit produced from those plants. Plaintiffs cannot propagate the grapevines or distribute the vines to third parties. Furthermore, Plaintiffs are obligated to destroy all Scarlet Royal plant material upon termination of the agreement.

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FIRST CLAIM FOR RELIEF

(Declaration of Invalidity of '891 Patent Against All Defendants)

63. Plaintiffs reallege and incorporate by reference all paragraphs 1-62 as if fully set forth herein.

64. This claim arises under the patent laws of the United States, Title 35 of the United States Code, and the Declaratory Judgment provisions of §§ 2201 and 2202 of Title 28 of the United States Code and the APA at 5 U.S.C. §§702, *et seq*.

65. The U.S., USDA, and Secretary Vilsack engaged in a discrete and final agency actions by licensing and enforcing the '891 patent. The acts complained of herein constitute final agency actions by the U.S., USDA and Secretary Vilsack subject to review under the APA. These acts mark the consummation of the U.S.'s, USDA's and Secretary Vilsack's decision-making process. These acts are not interlocutory, interim or tentative in nature. These acts are those by which rights or obligations have been determined or from which legal consequences will flow. Specifically, the acts complained of herein have directly determined the rights and obligations of Plaintiffs and the Commission with respect to the growing, distribution, sale, reproduction, propagation and otherwise free use of the plant material and fruit of the Sweet Scarlet grapevine, and the right to collect royalties and the right to exclude thereof. These acts are arbitrary, capricious, and otherwise not in accordance with applicable laws and regulations, including 35 U.S.C. §102(b).

66. The Commission, as the exclusive licensee of the '891 patent, has demanded that Plaintiffs enter a license agreement to plant and harvest fruit from Sweet Scarlet grapevines.

67. Plaintiffs have paid for and obtained a license to the '891 patent, and possess Sweet Scarlet grapevines.

68. Plaintiffs assert that the '891 patent is invalid under at least 35 U.S.C. §102(b), and that they should not be required to license the '891 patent from the Commission or pay royalties therefor.

69. An actual case and controversy exists between Plaintiffs and the Commission, the U.S., the USDA and Secretary Vilsack concerning the '891 patent.

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1 70. The action of the U.S., USDA and Secretary Vilsack in procuring the '891 patent was
2 unlawful under 35 U.S.C. §102(b).
3 71. Plaintiffs have been harmed directly by the U.S.'s, USDA's and Secretary Vilsack's
4 actions, have suffered a legal wrong because of the U.S.'s, USDA's and Secretary Vilsack's actions
5 and have been adversely affected and aggrieved by the U.S.'s, USDA's and Secretary Vilsack's
6 actions. The U.S.'s, USDA's and Secretary Vilsack's actions have directly impacted Plaintiffs' day-
7 to day business. As a result of the U.S.'s, USDA's and Secretary Vilsack's actions, Plaintiffs have
8 been (1) restricted from growing, selling, distributing, reproducing, propagating or otherwise freely
9 using plant material for the Sweet Scarlet grapevine, (2) restricted from growing, selling,
10 reproducing, distributing, propagating or otherwise freely using the fruit for the Sweet Scarlet
11 grapevine, and (3) forced to license and pay royalties to the Commission and its agents with respect
12 to the Sweet Scarlet grapevine plant material.
13 72. Plaintiffs are entitled to declaratory judgment from this Court that the '891 patent is
14 invalid pursuant to at least 35 U.S.C. §102(b).
15 73. This Court may and should hold unlawful and invalid the '891 patent pursuant to 5
16 U.S.C. §706(2)(A), (C), and (D).
17 **SECOND CLAIM FOR RELIEF**
18 **(Declaration of Invalidity of '284 Patent Against All Defendants)**
19 74. Plaintiffs reallege and incorporate by reference all paragraphs 1-74 as if fully set
20 forth herein.
21 75. This claim arises under the patent laws of the United States, Title 35 of the United
22 States Code, and the Declaratory Judgment provisions of §§ 2201 and 2202 of Title 28 of the United
23 States Code and the APA at 5 U.S.C. §§702, et seq.
24 76. The U.S., USDA, and Secretary Vilsack engaged in a discrete and final agency
25 actions by licensing and enforcing the '284 patent. The acts complained of herein constitute final
26 agency actions by the U.S., USDA and Secretary Vilsack subject to review under the APA. These
27 acts mark the consummation of the U.S.'s, USDA's and Secretary Vilsack's decision-making
28 process. These acts are not interlocutory, interim or tentative in nature. These acts are those by

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which rights or obligations have been determined or from which legal consequences will flow. Specifically, the acts complained of herein have directly determined the rights and obligations of Plaintiffs and the Commission with respect to the growing, distribution, sale, reproduction, propagation and otherwise free use of the plant material and fruit of the Sweet Scarlet grapevine, and the right to collect royalties and the right to exclude thereof. These acts are arbitrary, capricious, and otherwise not in accordance with applicable laws and regulations, including 35 U.S.C. §102(b).

77. The Commission, as the exclusive licensee of the '284 patent, has demanded that Plaintiffs enter a license agreement to plant and harvest fruit from Sweet Scarlet grapevines.

78. Plaintiffs have paid for and obtained a license to the '284 patent, and possess Sweet Scarlet grapevines.

79. Plaintiffs assert that the '284 patent is invalid under at least 35 U.S.C. §102(b), and that they should not be required to license the '284 patent from the Commission or pay royalties therefor.

80. An actual case and controversy exists between Plaintiffs and the Commission, the U.S., the USDA and Secretary Vilsack concerning the '284 patent.

81. The action of the U.S., USDA and Secretary Vilsack in procuring the '284 patent was unlawful under 35 U.S.C. §102(b).

82. Plaintiffs have been harmed directly by the U.S.'s, USDA's and Secretary Vilsack's actions, have suffered a legal wrong because of the U.S.'s, USDA's and Secretary Vilsack's actions and have been adversely affected and aggrieved by the U.S.'s, USDA's and Secretary Vilsack's actions. The U.S.'s, USDA's and Secretary Vilsack's actions have directly impacted Plaintiffs' day-to day business. As a result of the U.S.'s, USDA's and Secretary Vilsack's actions, Plaintiffs have been (1) restricted from growing, selling, distributing, reproducing, propagating or otherwise freely using plant material for the Sweet Scarlet grapevine, (2) restricted from growing, selling, reproducing, distributing, propagating or otherwise freely using the fruit for the Sweet Scarlet grapevine, and (3) forced to license and pay royalties to the Commission and its agents with respect to the Sweet Scarlet grapevine plant material.

1 83. Plaintiffs are entitled to declaratory judgment from this Court that the '284 patent is
2 invalid pursuant to at least 35 U.S.C. §102(b).
3 84. This Court may and should hold unlawful and invalid the '284 patent pursuant to 5
4 U.S.C. §706(2)(A), (C), and (D).

5 **THIRD CLAIM FOR RELIEF**

6 **(Declaration of Invalidity of '229 Patent Against All Defendants)**

7 85. Plaintiffs reallege and incorporate by reference all paragraphs 1-84 as if fully set
8 forth herein.
9 86. This claim arises under the patent laws of the United States, Title 35 of the United
10 States Code, and the Declaratory Judgment provisions of §§ 2201 and 2202 of Title 28 of the United
11 States Code and the APA at 5 U.S.C. §§702, et seq.
12 87. The U.S., USDA, and Secretary Vilsack engaged in a discrete and final agency
13 actions by licensing and enforcing the '229 patent. The acts complained of herein constitute final
14 agency actions by the U.S., USDA and Secretary Vilsack subject to review under the APA. These
15 acts mark the consummation of the U.S.'s, USDA's and Secretary Vilsack's decision-making
16 process. These acts are not interlocutory, interim or tentative in nature. These acts are those by
17 which rights or obligations have been determined or from which legal consequences will flow.
18 Specifically, the acts complained of herein have directly determined the rights and obligations of
19 Plaintiffs and the Commission with respect to the growing, distribution, sale, reproduction,
20 propagation and otherwise free use of the plant material and fruit of the Sweet Scarlet grapevine,
21 and the right to collect royalties and the right to exclude thereof. These acts are arbitrary,
22 capricious, and otherwise not in accordance with applicable laws and regulations, including 35
23 U.S.C. §102(b).
24 88. The Commission, as the exclusive licensee of the '229 patent, has demanded that
25 Plaintiffs enter a license agreement to plant and harvest fruit from Sweet Scarlet grapevines.
26 89. Plaintiffs have paid for and obtained a license to the '229 patent, and possess Sweet
27 Scarlet grapevines.
28 90. Plaintiffs assert that the '229 patent is invalid under at least 35 U.S.C. §102(b), and

that they should not be required to license the '229 patent from the Commission or pay royalties therefor.

91. An actual case and controversy exists between Plaintiffs and the Commission, the U.S., the USDA and Secretary Vilsack concerning the '229 patent.

92. The action of the U.S., USDA and Secretary Vilsack in procuring the '229 patent was unlawful under 35 U.S.C. §102(b).

93. Plaintiffs have been harmed directly by the U.S.'s, USDA's and Secretary Vilsack's actions, have suffered a legal wrong because of the U.S.'s, USDA's and Secretary Vilsack's actions and have been adversely affected and aggrieved by the U.S.'s, USDA's and Secretary Vilsack's actions. The U.S.'s, USDA's and Secretary Vilsack's actions have directly impacted Plaintiffs' day-to day business. As a result of the U.S.'s, USDA's and Secretary Vilsack's actions, Plaintiffs have been (1) restricted from growing, selling, distributing, reproducing, propagating or otherwise freely using plant material for the Sweet Scarlet grapevine, (2) restricted from growing, selling, reproducing, distributing, propagating or otherwise freely using the fruit for the Sweet Scarlet grapevine, and (3) forced to license and pay royalties to the Commission and its agents with respect to the Sweet Scarlet grapevine plant material.

94. Plaintiffs are entitled to declaratory judgment from this Court that the '229 patent is invalid pursuant to at least 35 U.S.C. §102(b).

95. This Court may and should hold unlawful and invalid the '229 patent pursuant to 5 U.S.C. §706(2)(A), (C), and (D).

FOURTH CLAIM FOR RELIEF

(Declaration of Unenforceability for Inequitable Conduct Regarding '891 Patent Against All Defendants)

96. Plaintiffs reallege and incorporate by reference all paragraphs 1-95 as if fully set forth herein.

97. The Sweet Scarlet variety was in public use through reproduction, and fruit from the Sweet Scarlet variety was publicly sold, prior to February 2002.

98. The prior possession and reproduction of the Sweet Scarlet variety, particularly by

growers who admitted to such possession and reproduction under the Commission's "amnesty" program, was material to the patentability of the Sweet Scarlet variety.

99. On information and belief, the USDA and Dr. Ramming knew of the prior possession and reproduction of the Sweet Scarlet variety by growers who admitted to such possession and reproduction under the Commission's "amnesty" program. Additionally, on information and belief, Margaret A. Conner, John D. Fado, and/or Lesley Shaw, who prosecuted the application on the Sweet Scarlet variety before the USPTO, knew of the prior possession and reproduction of the Sweet Scarlet variety by growers who admitted to such possession and reproduction under the Commission's "amnesty" program.

100. Prior to issuance of the '891 patent, neither the USDA, nor Dr. Ramming, nor Ms. Conner, Mr. Fado, and/or Ms. Shaw notified the USPTO of the prior possession and reproduction of the Sweet Scarlet variety by growers who admitted to such possession and reproduction under the Commission's "amnesty" program.

101. The failure of the USDA, Dr. Ramming, and Ms. Conner, Mr. Fado, and/or Ms. Shaw to fully disclose to the USPTO the prior possession and reproduction of the Sweet Scarlet variety by growers who admitted to such possession and reproduction under the Commission's "amnesty" program breached the duty of candor owed to the USPTO in applying for a patent on the Sweet Scarlet variety. On information and belief, this breach of the duty of candor was done with an intent to deceive the USPTO and constitutes inequitable conduct. Without the intentional withholding of this material information from the PTO, the PTO would not have issued the '891 patent.

102. The inequitable conduct described in the above paragraphs renders the '891 unenforceable.

103. The U.S., USDA, and Secretary Vilsack engaged in a discrete and final agency actions by licensing and enforcing the '891 patent. The acts complained of herein constitute final agency actions by the U.S., USDA and Secretary Vilsack subject to review under the APA. These acts mark the consummation of the U.S.'s, USDA's and Secretary Vilsack's decision-making process. These acts are not interlocutory, interim or tentative in nature. These acts are those by

1 which rights or obligations have been determined or from which legal consequences will flow.
2 Specifically, the acts complained of herein have directly determined the rights and obligations of
3 Plaintiffs and the Commission with respect to the growing, distribution, sale, reproduction,
4 propagation, and otherwise free use of the plant material and fruit of the Sweet Scarlet grapevine,
5 and the right to collect royalties and the right to exclude thereof. These acts are arbitrary,
6 capricious, and otherwise not in accordance with applicable laws and regulations, including the duty
7 of candor before the USPTO.

8 104. The action of the U.S., USDA and Secretary Vilsack in procuring the '891 patent was
9 arbitrary, capricious and otherwise not in accordance with applicable laws and regulations, because
10 in doing so the U.S., USDA and Secretary Vilsack breached the duty of candor before the USPTO.

11 105. Plaintiffs have been harmed directly by the U.S.'s, USDA's and Secretary Vilsack's
12 actions, have suffered a legal wrong because of the U.S.'s, USDA's and Secretary Vilsack's actions
13 and have been adversely affected and aggrieved by the U.S.'s, USDA's and Secretary Vilsack's
14 actions. The U.S.'s, USDA's and Secretary Vilsack's actions have directly impacted Plaintiffs' day-
15 to day business. As a result of the U.S.'s, USDA's and Secretary Vilsack's actions, Plaintiffs have
16 been (1) restricted from growing, selling, distributing, reproducing, propagating, or otherwise freely
17 using plant material for the Sweet Scarlet grapevine, (2) restricted from growing, selling,
18 reproducing, distributing, propagating or otherwise freely using the fruit for the Sweet Scarlet
19 grapevine, and (3) forced to license and pay royalties to the Commission and its agents with respect
20 to the Sweet Scarlet grapevine plant material.

21 106. An actual case and controversy exists between Plaintiffs and the Commission, the
22 U.S., the USDA and Secretary Vilsack concerning enforceability of the '891 patent.

23 107. Plaintiffs are entitled to judgment from this Court that the '891 patent is
24 unenforceable for inequitable conduct during the prosecution of the '891 patent application and that
25 the U.S's, USDA's and Secretary Vilsack's actions in prosecuting, procuring, accepting issuance,
26 maintaining and exclusively licensing to the Commission the '891 patent are final agency actions
27 that are arbitrary, capricious and not otherwise in accordance with applicable laws and regulations at
28 least under the duty of candor before the USPTO.

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1 108. This Court may and should hold unenforceable the '891 patent pursuant to 5 U.S.C.
2 §706(2)(A), (C), and (D).

3 **FIFTH CLAIM FOR RELIEF**

4 **(Restitution After Rescission Against the Commission)**

5 109. Plaintiffs reallege and incorporate by reference all paragraphs 1-108 as if fully set
6 forth herein.

7 110. Plaintiffs are entitled to unilaterally rescind the Domestic Grower License
8 Agreements for the plaint varieties covered by the '891, '284, and '299 patents on the basis of the
9 invalidity and unenforceability of the patents.

10 111. Once rescinded, Plaintiffs are entitled to recover all funds and other consideration
11 provided by Plaintiffs to nurseries that sold to Plaintiffs the plaint material covered by the Domestic
12 Grower License Agreement, and received by the Commission in the form of royalty payments,
13 which funds and consideration have been wrongfully retained by the Commission.

14 **SIXTH CLAIM FOR RELIEF**

15 **(Unjust Enrichment Against the Commission)**

16 112. Plaintiffs reallege and incorporate by reference all paragraphs 1-111 as if fully set
17 forth herein.

18 113. By virtue of the acts described above, including the receipt of royalties on patents
19 that were knowingly issued though intentionally false and misleading statements to the PTO, and
20 then subsequently licensing, enforcing, and collecting royalties on the resulting patents, the
21 Commission engaged in a course of wrongful and unjust conduct.

22 114. In connection with this wrongful and unjust conduct, the Commission received
23 monies paid by Plaintiffs in the form of royalties. As a result of the Commission's wrongdoing, the
24 Commission was unjustly enriched.

25 115. As a direct result of their improper acts, Plaintiffs suffered losses, and the
26 Commission has been unjustly enriched in an amount to be determined according to proof.
27 Plaintiffs are entitled and hereby seek restitution and disgorgement of the benefits acquired by the
28 Commission as a result of their wrongful and unjust conduct.

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PRAYER FOR RELIEF

Wherefore, Plaintiffs prays for the following relief against Defendants:

A. Declaring that the '284, '891 and '229 patents are invalid;

B. Declaring that the '891 patent is unenforceable;

C. Declaring that the Commission and the USDA committed inequitable conduct in the prosecution and procurement of the '891 patent;

D. Rescission of the Domestic Grower License Agreement between Plaintiffs and the Commission for the plaint varieties covered by the '891, '284, and '299 patents.

E. Restitution and disgorgement of all royalty fees obtained by the Commission in connection with the Patented Varieties;

F. That Plaintiffs recover the costs of this suit together with reasonable attorneys' fees;

G. That Plaintiffs have such other and further relief as the nature of this case may require and as the Court may deem just and proper.

DATED: May 23, 2012

McKOOL SMITH HENNIGAN, P.C.

By *_/s/ Lawrence M. Hadley_*
Lawrence M. Hadley

Attorney for Plaintiffs
DELANO FARMS COMPANY; FOUR STAR FRUIT, INC.; GERAWAN FARMING, INC.

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LOS ANGELES, CALIFORNIA

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury as to all issues so triable.

DATED: May 23, 2012

MCKOOL SMITH HENNIGAN, P.C.

By: */s/ Lawrence M. Hadley*
Lawrence M. Hadley

Attorney for Plaintiffs
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