

1 Stuart R. Dunwoody, WSBA No. 13948
2 Davis Wright Tremaine LLP
3 920 Fifth Avenue, Suite 3300
4 Seattle, WA 98104-1610
5 Telephone: 206-757-8034
6 Facsimile: 206-757-7034

7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE EASTERN DISTRICT OF WASHINGTON

9 WASHINGTON STATE UNIVERSITY,

10 Plaintiff,

No. 2:20-cv-00038

11 v.

COMPLAINT FOR PATENT
12 INFRINGEMENT

13 PRO ORCHARD MANAGEMENT,
14 LLC, a Washington limited liability
company, and APPLE KING, LLC, a
Washington limited liability company,

15 Defendants.

16 Plaintiff Washington State University (“WSU”), for its complaint against
17 Defendants Pro Orchard Management, LLC and Apple King, LLC alleges as
18 follows:

19 **NATURE OF THE ACTION**

20 1. This is an action for patent infringement arising under the patent laws
21 of the United States, Title 35 of the United States Code. Defendants have
22 infringed and are continuing to infringe a plant patent that WSU owns, U.S. Plant
23 Patent No. 21,710. Plant Patent No. 21,710 protects an apple cultivar developed
by WSU known as WA 2. Pro Orchard Management, LLC has infringed Plant

1 Patent No. 21,710 by asexually reproducing and growing WA 2 apple trees and by
2 harvesting WA 2 apples and consigning them to Apple King, LLC for sale. Apple
3 King, LLC has infringed Plant Patent No. 21,710 by selling WA 2 apples that
4 unlicensed growers such as Pro Orchard Management, LLC have consigned to it
5 for sale. In addition, Pro Orchard Management, LLC and, on information and
6 belief, Apple King, LLC have induced infringement of Plant Patent No. 21,710 by
7 providing WA 2 budwood to unlicensed persons who have used the budwood to
8 asexually reproduce WA 2 apple trees. WSU seeks redress for Defendants'
9 infringing acts.

10 **THE PARTIES**

11 2. Washington State University is a state university of the State of
12 Washington.

13 3. Pro Orchard Management, LLC is a Washington state limited liability
14 company with its principal place of business at 3581 Mapleway Road, Yakima,
15 WA 98908-9645. The members of Pro Orchard Management, LLC are Patricia
16 Keller, Raymond Keller, the Testamentary Trust of Richard Keller, and J. Michael
17 Saunders. Pro Orchard Management, LLC is an apple grower.

18 4. Apple King, LLC is a Washington state limited liability company with
19 its principal place of business at 3581 Mapleway Road, Yakima, WA 98908-9645.
20 Apple King, LLC has the same members as Pro Orchard Management, LLC:
21 Patricia Keller, Raymond Keller, the Testamentary Trust of Richard Keller, and J.
22 Michael Saunders. Apple King, LLC is an apple packer.

23 **JURISDICTION AND VENUE**

5. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331
and 1338(a) because this action arises under the patent laws of the United States.

1 6. This Court has personal jurisdiction over Defendants because they
2 reside and do business within this judicial district.

3 7. Venue is proper in this judicial district under 28 U.S.C. § 1400(b),
4 because Defendants reside, have regular and established places of business, and
5 have committed acts of infringement within this district.

6 **FACTUAL BACKGROUND**

7 8. WSU began its apple breeding program in 1994 to develop new
8 varieties of apples suited to the unique climate of central Washington and make
9 them available to Washington growers. WSU seeks to breed apple varieties with
10 improved eating quality, particularly focusing on outstanding texture and
11 storability.

12 9. WA 2 is the first apple variety that WSU released to the public from
13 its apple breeding program. WSU Professor Bruce Barritt bred WA 2 in 1994 from
14 a cross of the Splendour and Gala cultivars. Dr. Barritt and his colleagues then
15 spent five years evaluating and developing the cultivar.

16 10. In March 2009, Dr. Barritt assigned his invention of the WA 2 cultivar
17 to WSU and filed an application with the United States Patent & Trademark office
18 seeking a plant patent on it. The United States Patent & Trademark Office issued
19 U.S. Plant Patent No. 21,710, which discloses and claims the WA 2 cultivar, on
20 February 15, 2011. A copy of Plant Patent No. 21,710 is attached to this
21 Complaint as Exhibit A.

22 11. Before Plant Patent No. 21,710 issued, WSU assigned the patent
23 application to Washington State University Research Foundation (“WSURF”), a
non-profit corporation that used to handle technology licensing for WSU. When
Plant Patent No. 21,710 issued, therefore, it was owned by WSURF. WSURF

1 assigned Plant Patent No. 21,710 to WSU on July 1, 2013, and WSU continues to
2 own the patent.

3 12. In February 2011, WSURF began entering into Non-Exclusive
4 License Agreements for WA 2 with Washington growers. These Non-Exclusive
5 License Agreements give the licensed grower a non-exclusive right to “purchase,
6 plant, grow and asexually propagate” WA 2, but only within the “Territory,” and to
7 sell fruit from WA 2 trees anywhere in the world. The Non-Exclusive License
8 Agreements define “Territory” as land identified by the licensed grower in an
9 earlier “Evaluation Agreement” between the licensed grower and WSURF, and any
10 other land owned by the licensed grower. The Non-Exclusive License Agreements
11 explicitly state that a licensed grower was permitted to propagate WA 2 plants only
12 on land that was owned by the licensed grower and under its control. The Non-
13 Exclusive License Agreements also “strictly prohibit[]” licensed growers from
14 “selling Licensed Plants or transferring Licensed Plants outside of the Territory.”

15 13. Neither Pro Orchard Management, LLC nor Apple King, LLC has a
16 license from WSURF or from WSU that grants either of them any rights under
17 Plant Patent No. 21,710 or to use WA 2 in any way.

18 14. One of the growers to whom WSURF granted a Non-Exclusive
19 License Agreement for WA 2 is Keller Fruit, Inc. The shareholders of Keller Fruit,
20 Inc. are identical to the members of Pro Orchard Management, LLC and of Apple
21 King, LLC: Patricia Keller, Raymond Keller, the Testamentary Trust of Richard
22 Keller, and J. Michael Saunders. But Keller Fruit, Inc. is an entity that is separate
23 and distinct from both Pro Orchard Management, LLC and Apple King, LLC, and
the Non-Exclusive License Agreement to Keller Fruit, Inc. did not grant any rights
to Pro Orchard Management, LLC or to Apple King, LLC to propagate, use or sell
WA apple trees or apples. According to J. Michael Saunders, Keller Fruit, Inc.

1 closed down its operations “around 2004, 2005,” long before it was granted a Non-
2 Exclusive License.

3 15. Pro Orchard Management, LLC has asexually reproduced WA 2 apple
4 trees, induced third parties to asexually reproduce WA 2 apple trees by providing
5 WA 2 scionwood to them, grown WA 2 apple trees, harvested WA 2 apples, and
6 induced the sale of WA 2 apples by consigning them for sale.

7 16. Apple King, LLC has sold WA 2 apples that unlicensed growers such
8 as Pro Orchard Management, LLC have consigned to it for sale. Also, on
9 information and belief, Apple King, LLC has induced third parties to asexually
10 reproduce WA 2 apple trees by providing WA 2 scionwood to them.

11 17. On information and belief, Pro Orchard Management, LLC and Apple
12 King, LLC have been aware of Plant Patent No. 21,710 since shortly after it issued
13 on February 15, 2011.

14 **CLAIM FOR RELIEF – PATENT INFRINGEMENT**

15 18. Pro Orchard Management, LLC and Apple King, LLC have directly
16 infringed Plant Patent No. 21,710 through their actions alleged above, in violation
17 of 35 U.S.C. §§ 163 and 271(a).

18 19. Pro Orchard Management, LLC and Apple King, LLC have actively
19 induced infringement of Plant Patent No. 21,710 through their actions alleged
20 above, with knowledge of U.S. Plant Patent No. 21,710 and knowledge that their
21 actions are encouraging infringement, in violation of 35 U.S.C. §§ 163 and 271(b).

22 20. Defendants’ infringing conduct was and continues to be without
23 authority, consent, or license.

21 21. Defendants infringed Plant Patent No. 21,710 despite an objectively
22 high likelihood that their actions constituted infringement. Defendants’
23 infringement of Plant Patent No. 21,710 therefore has been willful.

1 22. WSU has suffered irreparable harm, and will continue to suffer
2 irreparable harm, unless Defendants are permanently enjoined from infringing
3 Plant Patent No. 21,710. WSU has no adequate remedy at law.

4 23. WSU is entitled to recover from Defendants the damages it has
5 sustained as a result of Defendants’ infringing acts in an amount WSU will prove
6 at trial, but in no event less than a reasonable royalty, together with interest and
7 costs, as well as attorneys’ fees, should the Court deem the case exceptional or the
8 infringement willful.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, WSU prays for a Judgment in its favor and against
11 Defendants, and respectfully requests that this Court:

12 1. Award WSU damages adequate to compensate for Defendants’
13 infringement of Plant Patent No. 21,710 (including supplemental damages for any
14 post-verdict patent infringement up until entry of the final judgment with an
15 accounting as needed, together with prejudgment and post-judgment interest on the
16 damages awarded; all of these damages to be enhanced in an amount up to treble
17 the amount of compensatory damages pursuant to 35 U.S.C. § 284);

18 2. Enter a permanent injunction (a) enjoining Defendants, their officers,
19 agents, servants, employees, and attorneys, and other persons who are in active
20 concert or participation with any of the foregoing, from further acts of
21 infringement of Plant Patent No. 21,710, and (b) directing Defendants, their
22 officers, agents, servants, employees, and attorneys, and other persons who are in
23 active concert or participation with any of the foregoing, to destroy or return to
WSU all WA 2 plants and plant material within their possession, custody, or
control;

3. Find this case exceptional under 35 U.S.C. § 285;

- 1 4. Award WSU its costs and attorneys' fees; and
2 5. Grant such other and further relief as it deems just and proper.

3 DATED this 22nd day of January, 2020.

4 Davis Wright Tremaine LLP
5 Attorneys for Washington State University

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7 By: s/ Stuart R. Dunwoody
8 Stuart R. Dunwoody, WSBA No. 13948

9 920 Fifth Avenue, Suite 3300
10 Seattle, WA 98104-1610
11 Telephone: 206-757-8034
12 Facsimile: 206-757-7034
13 stuardunwoody@dwt.com