

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

KANSAS WHEAT ALLIANCE, INC.

Plaintiff,

vs.

CLAYTON FISHER

Defendant.

Case No. _____

COMPLAINT FOR DAMAGES AND EQUITABLE RELIEF

Comes now Plaintiff Kansas Wheat Alliance, Inc., a Kansas Not-For-Profit organization (“KWA”), by and through its undersigned counsel, and for its *Complaint* against Clayton Fisher (“Defendant”), states:

JURISDICTION AND VENUE

1. Subject matter jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331, in that one or more of KWA’s claims arise under the laws of the United States, including 28 U.S.C. § 1338, which grants district courts original jurisdiction over any civil action regarding plant variety protection. Additionally, supplemental jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1367 over all of KWA’s non-federal question claims, such that they form part of the same case or controversy.

2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391, in that a substantial part of the events giving rise to the claims occurred in this district.

PARTIES

3. Plaintiff, KWA, is a not-for-profit corporation organized and existing under the laws of the State of Kansas, with its principal place of business at 2005 Research Park Circle, Suite 105, Manhattan, KS 66502-5020.

4. Defendant Clayton Fisher is a resident of Okeene, Blaine County, Oklahoma and does business under his own name.

5. Defendant has sold and offered for sale KWA's federally protected wheat variety in violation of KWA's intellectual property rights, as set forth in more detail below.

FACTS

6. KWA is in the business of researching, developing, producing, marketing, licensing, and controlling its good quality wheat varieties in concert and connection with Kansas State University, in the United States through a variety of licensing agreements and independent dealers. In the course of achieving its not-for-profit purposes, including to fund additional investment into research and scientific promotion at Kansas State University, and only after the investment of substantial research, time, and expense, KWA or its predecessor in licensing interest developed novel varieties of wheat that have favorable traits, including one variety in particular, known and identified as FULLER wheat variety. The Kansas Wheat Alliance is a not-for-profit organization formed with the goal of maximizing value for wheat farmers from new wheat varieties developed by Kansas State University and other wheat-breeding programs. The Kansas Wheat Alliance delivers modern genetic technology that is not otherwise showing up in wheat varieties, a real economic benefit to the wheat producers and end-users of the crop.

7. The costs of breeding new wheat varieties continue to increase, and public funds available to support the program have been level or declining for years. The Kansas Wheat Alliance offers a way for wheat-breeding and related research programs to receive additional support in

proportion to the value they add to the wheat industry. Income from licensed varieties will be invested in the Kansas Wheat Research and Education Fund, an important new source of support for wheat improvement.

8. The primary purpose of the Plant Variety Protection Act, 7 U.S.C. §§ 2321 *et seq.*, is to encourage the research, development, and marketing of new and beneficial crop varieties by issuing intellectual property rights to those who breed, develop, or discover such varieties, thereby promoting progress in agriculture in the public interest.

9. In order to protect its interest and investment in the novel plant varieties it develops, KWA or its predecessor in interest applies to the United States Secretary of Agriculture for plant variety protection under the Plant Variety Protection Act. The Varieties owned or exclusively licensed by KWA include: FULLER, JAGGER, OVERLEY, RONL, and DANBY.

10. As but one example, KWA's licensed variety known and identified as FULLER is protected under a certificate issued by the Plant Variety Protection Office. The FULLER variety bears Plant Variety Protection Certificate No. 200800130. The rights violated by Defendant are not limited to this variety; however, on information and belief, this particular variety has been the subject of infringing acts perpetrated by Defendant. The discussion of this particular variety is not intended to limit the scope of the potential infringement attributable to Defendant; rather, it serves as an example to illustrate KWA's intellectual property rights involved in this lawsuit.

11. In connection with all applications made to the Plant Variety Protection Office, KWA makes what is known as a "Title V election," which means that all varieties owned by KWA may be sold in the United States only as a class of certified seed. All wheat seed products sold by KWA or with KWA's permission must bear a seed certification tag that is approved by KWA.

12. Authorized seed dealers are required to provide notice that each protected variety is protected by the Plant Variety Protection Act. The PVPA mandates that all sales of a protected variety must bear the variety's name. All wheat seed products sold by KWA or with KWA's permission bear the variety name of the protected seed being sold.

13. By virtue of KWA's ownership or exclusive license to the certificate of plant variety protection, KWA's proprietary wheat varieties can legally be grown, marketed, licensed, and sold only as a class of certified seed by KWA or with KWA's permission.

14. The process of research, development, and marketing of a new plant variety takes at least a decade and costs both taxpayers and the Kansas State University Research System in excess of one million dollars. KWA recoups this substantial investment at discrete stages of the process. Furthermore, in order to maintain the quality and control of the wheat variety, KWA requires its members and authorized seed sellers to execute a Master Wheat License Agreement. In such Master Wheat License Agreement, KWA grants the Licensee only the right to grow under the limited terms and restrictions contained therein.

15. Defendant is not an authorized Licensee, yet he marketed, dispensed, offered for sale, and sold one or more of KWA's protected wheat varieties as "brown-bagged wheat," "bin run seed," "FULLER," or "seed wheat" or the like without authority from KWA. Upon information and belief, Defendant is perpetrating such transfers of KWA's protected wheat varieties without legal authority from KWA, without written notice that the varieties are protected under the PVPA, without properly labeling the varieties with the legal variety name, and without subjecting the seed to inspection processes intrinsic to the certification process.

16. Defendant acknowledges having received notice the variety was protected under the PVP laws due, in part, to the fact that Defendant identified for its potential customers that the wheat

seed is actually one of KWA's protected varieties by stating the variety name in connection with the sale and offer for sale. This information is given to inform the potential customers of the good reputation and characteristics of the wheat seed and to charge a higher price for the brown-bagged KWA Fuller wheat than Defendant could otherwise charge for use of the grain wheat as grain intended for food processing.

17. Defendant's sales to the general public are with notice and knowledge of KWA's intellectual property rights, yet such sales were made without permission, were unrestricted in any way, and were made with the understanding that the purchaser would plant the product as seed. This unrestricted release of a self-propagating seed unit can in turn be increased to create exponentially more illegal seed, and then again increased to create exponentially more illegal seed. For example, just one fifty-pound bag of Fuller seed that yields just forty bushels per acre (a very conservative yield estimate) will produce over four million fifty-pound bags of seed in just five generations. Thus, the ability of seed to reproduce itself with the input of just soil and water creates an extreme potential harm for the unrestricted release of even a small amount of KWA's protected wheat seed varieties.

18. Defendant's course of conduct was willfully undertaken with full knowledge and with notice that such activities were in violation of KWA's plant variety protection rights and trademark rights.

19. KWA has not granted permission to Defendant to sell, condition, or market any wheat seed varieties, including the Fuller variety.

20. KWA has not granted permission to Defendant to use the trademark KWA in connection with the sale or marketing of KWA's wheat seed products.

COUNT I – INFRINGEMENT OF THE PLANT VARIETY PROTECTION ACT

21. Each and every allegation set forth in the above-numbered paragraphs is hereby incorporated by reference just as if it were explicitly set forth hereunder.

22. Under 7 U.S.C. §§ 2541 *et seq.*, KWA has exclusive legal rights to sell, market, and distribute certain wheat varieties, including the variety specifically known and identified as Fuller, although on information and belief, Defendant ' unlawful conduct may extend to other wheat varieties owned by KWA as well.

23. Defendant was on actual notice that the seed forming the subject matter of this lawsuit was federally protected by the PVPA.

24. Defendant has infringed upon KWA's rights in violation of 7 U.S.C. § 2541 by selling, marketing, distributing, and dispensing protected varieties without authorization, without restrictions on replanting, sold not as a class of certified seed in violation of the Federal Seed Act, and without notice that the varieties are protected under the PVPA.

25. Pursuant to 7 U.S.C. § 2564, KWA is entitled to damages adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the variety by Defendant, together with interest and costs. Further, KWA's damages should be increased up to three times the amount determined owing to Defendant's full knowledge and notice that such activities constituted infringement. Pursuant to 7 U.S.C. § 2565, KWA is entitled to an award of reasonable attorneys' fees in light of the exceptional circumstances of this case.

26. Pursuant to 7 U.S.C. § 2563, KWA is entitled to have an injunction entered against Defendant to prevent further infringement of KWA's rights under the Plant Variety Protection Act, to monitor Defendant's activities both in the present and in the future for a period of not less than four (4) years, and to ensure that all of KWA's wheat varieties now in the custody or control of

Defendant are not diverted into the seed market but are instead sold by the Defendant through legal grain channels.

WHEREFORE, KWA respectfully requests this Court to grant the following relief:

- A. Preliminarily and permanently enjoin Defendant and all successors, assigns, officers, agents, employees, representatives, and all other entities or persons in active concert or participation with Defendant from further infringement of the Plant Variety Protection Act with respect to KWA's protected varieties, including but not limited to Fuller;
- B. Preliminary, until a trial on the merits is completed and resolved, enjoin Defendant from selling his current inventory of wheat as seed but rather to permit Defendant to sell his current grain inventory as grain upon the open market in a commercially reasonable manner;
- C. Award KWA damages, together with interest and costs, in an amount adequate to compensate KWA for the infringement of the Plant Variety Protection Act, but in no event less than a reasonable royalty for Defendant's use of Fuller, among other varieties;
- D. Grant trebling of damages awarded for willful infringement of the Plant Variety Protection Act, together with reasonable attorneys' fees;
- E. Award damages sufficient to compensate KWA for Defendant's conversion of KWA's property rights, together with interest and costs;
- F. Award such other relief KWA may be entitled as the Court may deem appropriate.

Dated November 12, 2008
Kansas Wheat Alliance, Inc.



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