

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

KANSAS WHEAT ALLIANCE, INC.,)
KANSAS STATE UNIVERSITY)
RESEARCH FOUNDATION,)
and WESTBRED, LLC,)

Plaintiffs,)

vs.)

STEVE RIFFEL,)
RANDALL E. "RANDY" RIFFEL,)
RIFFEL FARMS, INC. and)
JOHN DOES 1-50,)

Defendants.)

Case No. 09-cv-1121-MLB-DWB

**Designated Place of Trial:
Wichita, Kansas**

COMPLAINT

COME NOW Plaintiffs Kansas Wheat Alliance, Inc. ("KWA"), Kansas State University Research Foundation ("KSURF") and WestBred, LLC ("WestBred") (collectively, the "Plaintiffs") and bring this action for damages and injunctive relief against defendants Randy Riffel, Steve Riffel, Riffel Farms, Inc., (collectively, "Defendants Riffel") and John Does 1-50 for unauthorized use of Plaintiffs' proprietary wheat varieties in violation of Plaintiffs' rights under the Plant Variety Protection Act, 7 U.S.C. § 2481 et seq. (hereinafter "PVPA"). Plaintiffs allege as follows:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, as Plaintiffs' claims arise under the laws of the United States, and 28 U.S.C. § 1338, which provides that district courts have original jurisdiction over any civil action arising under any Act of Congress relating to plant variety protection.

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

THE PARTIES

3. Plaintiff Kansas Wheat Alliance, Inc. was founded by Kansas wheat producers, seedsmen, and researchers to strengthen the wheat industry by creating a wheat variety delivery system that promotes stewardship of varieties and traits, provides new funds for wheat research, and ensures availability of improved wheat varieties to benefit farmers and consumers. KWA is a not-for-profit corporation incorporated under the laws of Kansas with its principal place of business at Manhattan, Kansas.

4. Involuntary plaintiff Kansas State University Research Foundation, a non-profit corporation organized under the laws of Kansas, with its principal place of business at 2005 Research Park Circle, Suite 105, Manhattan, KS 66502, was established to promote, encourage and aid research at Kansas State University to provide the means, methods, and agencies by which inventions and discoveries at Kansas State University may be patented, commercialized, or otherwise disposed of for the benefit of the people of Kansas and society as a whole.

5. Plaintiff WestBred, LLC is a corporation organized under the laws of Arizona with its principal place of business at Bozeman, MT. WestBred is in the business of developing, producing, and selling agricultural seed through authorized representatives and dealers to farmers for use in growing commercial crops.

6. Upon information and belief, Defendant Steve Riffel is and at all material times has been a resident of Rooks County, Kansas, and may be served at 2175 E. Road,

Stockton, Kansas 67669. He is a wheat producer and is alleged herein to have infringed the intellectual property rights of both listed plaintiffs.

7. Upon information and belief, Defendant Randal E. "Randy" Riffel is and at all material times has been a resident of Rooks County, Kansas, and may be served at 955 20 Road, Stockton, Kansas 67669. He is also a wheat producer and is alleged herein to have infringed the intellectual property rights of both listed plaintiffs. Defendant Randy Riffel was in active participation with Defendant Steve Riffel and knew or should have known the seed Randy Riffel was producing in his joint farming operations with Steve Riffel was being sold in violation of the plaintiffs' intellectual property rights.

8. Defendant Riffel Farms, Inc., is a corporation organized and existing under the laws of the State of Kansas, and may be served with process on its Resident Agent, Randal E. "Randy" Riffel, at 955 20 Road, Stockton, Kansas 67669. The corporation is owned and controlled by Steve and Randy Riffel and is used primarily as a legal entity to maximize Steve and Randy Riffel's receipt of federal farm subsidies rather than as a proper, duly recognized and respected corporate entity. The corporation is the alter ego of Steve and Randy Riffel, and the willfully infringing conduct by the sole governing individuals is imputed to the corporation.

9. Defendant John Does 1-50 are producers who sold unauthorized PVP protected wheat to Defendants Riffel, seed conditioners, or are producers who purchased unauthorized PVPA protected wheat from Defendants. On information and belief, most John Doe defendants reside within Kansas, although some are believed to reside in Colorado.

STATEMENT OF CLAIM

PLANT VARIETY PROTECTION REGISTRATION

10. This action arises under the Plant Variety Protection Act, 7 U.S.C. § 2481 *et seq.*, which provides patent-like protection to breeders of certain varieties, and their assignees, who may acquire the right to prevent others from selling the variety for a period of twenty years. On September 25, 1995, Kansas State University through its Kansas State University Agricultural Experiment Station made application to the Plant Variety Protection Office pursuant to § 2481 of the PVPA for protection of a novel variety of wheat it had developed known as the “Jagger” hard red winter wheat variety. On January 30, 1996, a Plant Variety Protection (PVP) Certificate was issued to the Kansas Agricultural Experiment Station pursuant to 28 U.S.C. § 2482 in the name of the United States of America under the seal of the Plant Variety Protection Office and was recorded in the Plant Variety Protection Office. The duration of a PVP Certificate is twenty (20) years from the date of issuance, and Certificate No. 9500324 is not scheduled to lapse until January 21, 2016. Effective July 1, 2007, Kansas State University, through its Kansas Agricultural Experiment Station assigned all rights, title, and interest to the Jagger variety to the Kansas State University Research Foundation. On March 23, 2008, KSURF granted the Kansas Wheat Alliance an exclusive license to make, have made, use, sell, and offer for sale, the Jagger variety. This license included the right to grant sublicenses.

11. The PVP Certificate for Jagger specified that the seed of the Jagger variety could only be sold in the United States as a class of certified seed, meaning that before sale the seed had to be certified by an approved governmental or private agency as to variety and purity.

12. At all times relevant herein the PVP Certificate for the Jagger wheat variety was in full force and effect.

13. At all times relevant herein, Defendants Riffel had actual notice and knowledge that the Jagger wheat variety was federally protected by the PVPA.

14. On August, 8, 2005, WestBred, LLC made application to the Plant Variety Protection Office pursuant to § 2481 of the PVPA for protection of a novel variety of wheat it had developed known as the “Santa Fe” hard red winter wheat variety. On January 20, 1996, a Plant Variety Protection (PVP) Certificate was issued to WestBred pursuant to 28 U.S.C. § 2482 in the name of the United States of America under the seal of the Plant Variety Protection Office and was recorded in the Plant Variety Protection Office. The duration of a PVP Certificate is twenty (20) years from the date of issuance, and Certificate No. 200500319 is not scheduled to lapse until July 6, 2016.

15. At all times relevant herein the PVP Certificate for the Santa Fe wheat variety was in full force and effect.

16. At all times relevant herein, Defendants Riffel had actual notice and knowledge that the Santa Fe wheat variety was federally protected by the PVPA.

17. Section 2541 of the PVPA provides that it is an infringement of the owner’s rights in a protected variety, inter alia, to sell the variety without authorization of the owner or to dispense the variety to another in a form that can be propagated without notice that it is a protected variety. Section 2541 also provides that it is an infringement to instigate or induce any act that constitutes an infringement.

18. The PVPA provides in § 2561 that an owner shall have a remedy by civil action for infringement of plant variety protection and that if the variety is sold under the name of the variety shown in the certificate, there is a prima facie presumption that the seed in the bag

or lot is the protected variety. Under § 2562 of the PVPA, a certificate of plant variety protection is presumed to be valid.

19. Section 2563 of the PVPA provides that a court may grant an injunction to prevent violations of rights under the PVPA. Section 2564 of the PVPA provides that upon a finding of infringement the court shall award damages adequate to compensate for the infringement, but in no event less than a reasonable royalty together with interest and costs. Section 2564 also provides that the court may increase the damages up to three times the amount determined and, in exceptional cases, the court may award reasonable attorney's fees to the prevailing party.

20. Section 2543 of the PVPA provides a crop exemption for growers and other persons that permits a bona fide sale of a protected variety into normal grain channels, but § 2543 does not exempt from PVPA protection the sale of grain of a protected variety for use as seed for reproductive purposes without the authorization of the owner. Section 2543 further provides that if a purchaser diverts grain from normal grain channels for use for reproductive purposes, that purchaser is deemed to have notice under § 2567 that its actions constitute an infringement of § 2541 for purposes of a damages action by the owner.

DEFENDANT'S UNAUTHORIZED USES OF PVP

PROTECTED WHEAT

21. On information and belief, the Defendants Riffel purchased uncertified wheat from a grower or growers who identified the grain as either the Jagger or the Santa Fe variety of wheat, and the Defendants Riffel planted said wheat as seed for reproductive purposes without Plaintiffs' authorization. The foregoing purchase of uncertified wheat from other growers constitutes an illegal use and, subsequently, illegal planting of the Jagger or Santa Fe varieties.

22. On information and belief, the Defendants Riffel thereafter harvested said illegal planting and sold or offered for sale the harvest without restriction to other growers without proper authority from Plaintiffs. The foregoing acts of harvesting and reselling constitutes an illegal sale or offer of sale of the Jagger or Santa Fe varieties.

23. On information and belief, the Defendants Riffel sold or offered for sale the harvest to other growers without proper labeling. The foregoing refusal to properly mark the Jagger or Santa Fe varieties in connection with transfers to growers constitutes a separate violation of the PVPA.

24. Defendants Riffel have, in the past, obtained the Jagger or Santa Fe varieties with proper authority from authorized dealer(s); however, instead of planting, harvesting, and selling such legally obtained seed to a grain elevator for traditional grain purposes such as for use in flour, baking, or commodity channels (the “normal grain channels”), Defendants Riffel diverted the Jagger or Santa Fe variety in question from normal grain channels for use as seed for reproductive purposes within the meaning of Section 2543 of the PVPA. The foregoing diversion of the Jagger or Santa Fe varieties from normal grain channels constitutes a separate violation of the PVPA.

25. Defendants Riffel sold or offered for sale the grain they had diverted from normal grain channels through a practice known as brown bagging, in which a person or entity uses grain grown from proprietary seed and prepares it for use as seed without authorization of the owner of the proprietary seed. In some areas of the country, the grain is repackaged in seed bags, often brown, and the infringer sells the grain under the name of the variety from which the grain was grown. In Kansas, it is more typical to make an unauthorized sale of the grain in bulk, but the overarching practice of selling the harvest of a protected variety without authority of the

original variety owner is still understood in the industry as brown bagging. Defendants Riffel identity-preserved the harvest from their fields and thereafter sold or offered for sale the protected Jagger or Santa Fe wheat grain for use as seed to other growers.

26. At no time were Defendants Riffel authorized to sell Jagger wheat grain or Santa Fe wheat grain for reproductive purposes as described above.

27. At all times relevant to the complaints herein, Plaintiffs only sold Jagger or Santa Fe wheat variety seed with written notice containing statutorily designated language signifying that the seed was protected under the PVP, that unauthorized propagation or multiplication of the seed was prohibited, and that the use of the seed by the purchaser was authorized only for purposes of growing a commercial crop of grain. Plaintiffs placed such notice on all bags of Jagger or Santa Fe wheat seed they sold and on notices accompanying all bulk sales of their Jagger or Santa Fe wheat seed. Copies of the notices are appended hereto as Exhibit 1. In addition, Plaintiffs also placed PVP notices on their marketing and promotional materials for the Jagger and Santa Fe wheat varieties.

28. Defendants Riffel resold the grain without notice that the seed was subject to PVP protection, the identity of the PVP certificate holder or licensee, or any other restrictions to prevent purchasers of the seed from using the seed to further replicate the seed for grain crop purposes.

29. Upon information and belief, Defendants Riffel sold a substantial quantity of Jagger and Santa Fe grain for seed purposes over the past several years. Defendants Riffel's unrestricted sale of the protected Jagger and Santa Fe wheat put Plaintiffs at great risk of harm since each bushel of seed sold by Defendants Riffel can be planted, harvested, and replanted to produce over four million fifty-pound bags of seed in just five generations.

30. Defendants Riffel's sales also placed the reputation of the protected variety at risk since it was sold without the rigorous production standards employed by Plaintiffs and without the certification by a governmental or private entity, which is required for Jagger PVP protected seed for sale as seed.

31. Defendants Riffel are deemed under § 2543 of the PVPA to have had notice that their acts in diverting the Jagger and Santa Fe grain from normal grain use for use as seed for reproductive purposes constituted an infringement of Plaintiffs' rights under the PVPA.

32. Upon information and belief, Defendants Riffel knew that the majority of wheat seed sold legitimately in Kansas was subject to PVP protection, and they had ready access to information as to the PVP status of the Jagger variety.

33. Upon information and belief, Defendants Riffel knew firsthand the Jagger and Santa Fe varieties were federally protected by law yet willfully disregarded the law and sold the varieties without restriction.

COUNT I

DAMAGES FOR INFRINGEMENT OF § 2541(A) OF THE PVP

34. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 to 33.

35. Without authorization from Plaintiffs, Defendants purchased the Jagger and Santa Fe varieties for reproductive purposes in violation of the PVPA.

36. Without authorization from Plaintiffs, Defendants sold and offered for sale protected Jagger and Santa Fe varieties which they had diverted from normal grain channels for sale for reproductive purposes or which they had induced or instigated others to divert from normal grain channels.

37. Defendants' actions constitute an infringement of Plaintiffs' rights under § 2541 of the PVPA for which all Defendants are accountable in damages.

38. As the result of Defendants' actions, Plaintiffs have suffered harm for which they are entitled to damages, including without limitation:

- a) Defendants' profits from the unauthorized sale of the Jagger variety or a reasonable royalty, whichever is greater;
- b) Defendants' profits from the unauthorized sale of the Santa Fe variety or a reasonable royalty, whichever is greater;
- c) Plaintiffs' lost profits as a result of sales diverted from their authorized dealers;
- d) Damage to the Plaintiffs' reputation or the reputation of the Jagger and Santa Fe varieties by the sale of said varieties which are not produced in accordance with Plaintiffs' practices and standards; and
- e) Expenses incurred or reasonably expected to be incurred as a direct result of Plaintiffs' actions to recover seed or grain grown from Defendants Riffel's unauthorized purchase, sale of seed, and/or expenses incurred in identifying and notifying persons who purchased Santa Fe or Jagger variety seed from the Defendants that such seed was not produced by or in accord with the standards of Plaintiffs and that any grain grown from such seed is protected by the PVPA, cannot be grown for any purpose other than as commercial crop, and cannot be held out as Jagger or Santa Fe wheat.

COUNT II

INJUNCTION PURSUANT TO § 2563 OF THE PVPA

39. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 to 38 herein.

40. Plaintiffs are entitled to injunctive relief pursuant to § 2563 of the PVPA as follows:

- a) Preliminarily enjoining Defendants from selling any of Plaintiffs' protected varieties pending litigation;

- b) Permanently enjoining any further sales or other disposition by Defendants of grain grown from Plaintiffs' PVPA protected varieties, including the Jagger and Santa Fe varieties, for reproductive purposes;
- c) Requiring the ultimate destruction of all Jagger and Santa Fe wheat in Defendants' possession or control to prevent future illegal harvest from being replanted;
- d) Allowing for immediate access to the facility and the premises, including leased lands, to identify the scope of the infringing conduct at a time when the crops remain in the field, thereafter permitting the crop to grow, harvest, and then store in constructive trust while the suit proceeds;
- e) Requiring the immediate disclosure of the names and addresses of all persons or entities who purchased Jagger or Santa Fe wheat seed from Defendants to allow the parties to identify the scope of the illegal replanting and allow the parties sufficient time to give adequate notice to those John Doe defendants of their opportunity to be heard, with the ultimate goal to allow the crop, once identified, to be harvested and stored in constructive trust while the suit proceeds; and
- f) Requiring an accounting of all sales for reproductive purposes and profits derived from such sales by Defendants of Plaintiffs' protected varieties, including Jagger or Santa Fe wheat.

COUNT III

TREBLE DAMAGES AND ATTORNEYS' FEES

41. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 to 39 herein.

42. Defendants Riffel knew or recklessly disregarded the fact that by brown bagging the grain in question and selling it for reproductive purposes they were infringing federal intellectual property rights.

43. Defendants Riffel knowingly sold the brown-bagged seed at a substantial discount to what authorized dealers charged for legitimate seed. Defendants Riffel intentionally set their pricing to divert sales from authorized dealers for its own profit.

44. Defendants Riffel knowingly and intentionally caused substantial damage to Plaintiffs and recklessly placed Plaintiffs at substantial risk of further misuse of their seed by placing the seed in commerce without notice of its protected status.

45. As the result of Defendants Riffel's actions, Plaintiffs have incurred substantial damages, attorney's fees, and costs and will in the future incur additional costs and damages.

46. Defendants Riffel's actions constitute an exceptional case for which the award of attorney's fees and costs are recoverable pursuant to § 2564 of the PVPA.

47. Treble damages are appropriate pursuant to § 2564 of the PVPA.

TRIAL DESIGNATIONS

48. Pursuant to D. Kan. R. 40.2, Plaintiffs desire that the trial be held in Wichita, Kansas.

49. Plaintiffs do not seek a jury trial.

RELIEF DEMANDED

WHEREFORE, Plaintiffs pray for relief and judgment, as follows:

- a) Awarding Plaintiffs' damages in the form of defendants' profits, Plaintiffs' lost profits, or a reasonable royalty, whichever is greater;
- b) Ordering preliminary and permanent injunctive relief:
 - i. Directing defendants to make no further sales for reproductive purposes of any seed for which Plaintiffs holds PVP protection without express authorization from Plaintiffs;
 - ii. Directing defendants to identify all fields on which they are cultivating a current wheat crop to allow Plaintiffs to identify the extent of the infringement and prior to when the defendants harvest and permanently remove the harvest, thereby spoliating evidence as to the true extent of infringement; and
 - iii. Account for all sales of all PVP protected seed of Plaintiffs, including the names and addresses of all purchasers, the quantity

so purchased, and the names and addresses of all seed conditioners associated with such seed.

- c) Awarding prejudgment and post-judgment interest;
- d) Awarding Plaintiffs their attorneys' fees, costs, and expenses incurred in this action; and
- e) Awarding such other and further relief as the Court may deem just and proper.

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