

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
Case Type: 14-Other Civil

Aamodt Apple Farm, Inc.,
Apple Ridge Orchards,
Vince Steffen, Richard Bremer,
Bridal Rock Orchard, Chuck Bremer,
Cenco Farms, Inc., d/b/a/ Afton Apple Orchard,
Croix Farm Orchard, John Leadholm,
Dassel Hillside Farm, Karl Townsend,
Ferguson's Morningside Orchard, LLC,
JQ Fruit Farm and Orchard, Dan Whitcomb,
Minnesota Apple Producers, Inc. d/b/a Nelson's
Apple Farm, Old Hickory Orchard, Fred
Sandvick, Sacia Orchard, Tom Bork,
Southwind Orchard, John Curtis,
Van Lin Orchard, Rick Van Lin,
Wescott Orchards and Agri Products, Inc., and
Mississippi Valley Fruit Company, LLC,

Court File No.: _____

COMPLAINT

Plaintiffs,

v.

Regents of the University of Minnesota,
Pepin Heights Orchard, Inc., Dennis Courtier,
Tim Byrne, David Bedford, Anthony L. Strauss,
Michael F. Moore, and Beverly R. Durgan,

Defendants.

Plaintiffs, for their Complaint against the above-named Defendants, state and allege as follows:

INTRODUCTION

1. Plaintiffs are apple growers located primarily in the State of Minnesota. They bring this action against the Regents of the University of Minnesota ("University"), Pepin Heights Orchard, Inc. ("Pepin"), Dennis Courtier ("Courtier"), Tim Byrne ("Byrne"), David

Bedford (“Bedford”), Anthony L. Strauss (“Strauss”), Michael F. Moore (“Moore”), and Beverly R. Durgan (“Durgan”) relative to an exclusive license agreement for the production, marketing and sales of a new and highly-anticipated apple variety commonly referred to as SweeTango.®

2. Developed through the use of state funding (33%), SweeTango® is a breakthrough apple variety. It is a cross between two popular apples—the Honeycrisp™ and Zestar!™—and it has the marketing advantage of being an early season apple variety. SweeTango® has been released to consumers in a limited fashion and has already generated overwhelming demand.

3. SweeTango® was created by Bedford and the University’s apple breeding program, which was created through the Minnesota Agricultural Experiment Station. This entity is a research center built with funds authorized by the Hatch Act of 1887 – a federal statute that provides research and development funds for the benefit of the State’s citizens.

4. According to the University’s written policy, there are two general principles that guide the management and distribution of University-developed technology, including plant germplasm and related plant materials: (1) “to ensure that the results of University research will have the maximum possible beneficial effect for Minnesotans and the larger public” and (2) “to realize a fair financial return to the University so long as this does not interfere with the first principle.”

5. The University granted Pepin an exclusive license to grow, have others grow on its behalf, and sell SweeTango.® According to the terms of the exclusive license agreement, Minnesota apple growers other than Pepin were granted permission to grow a limited number of Minneiska trees which bear SweeTango® but only if the SweeTango® were sold directly to Minnesota end consumers via on-site at Minnesota apple-grower orchards, or farmer’s markets,

or direct store delivery. The exclusive license agreement eviscerated any right to sell and distribute SweeTango® directly to wholesalers, which is an essential revenue outlet for Minnesota apple growers and the Minnesota apple industry. Likewise, the exclusive license agreement further prevents Minnesota apple growers from pooling or combining their limited production of SweeTango® in order to supply larger retail or wholesale markets.

6. In order for plaintiffs to obtain SweeTango,® they must agree to the terms and conditions of Pepin's non-exclusive license agreement for Minnesota growers. The express terms yield the same result as the exclusive license agreement with the University in that Minnesota apple growers are prohibited from selling or distributing SweeTango® to anyone other than Minnesota end consumers or direct store delivery. The plaintiffs, some of whom are smaller growers, are prohibited from pooling their production of SweeTango® together in order to meet the supply requirements of larger retailers, let alone any wholesaler. Such restrictive limitations on plaintiffs' ability to sell and distribute SweeTango® result in unfair competition likely to force some of plaintiffs out of business and significantly impair efforts of other Minnesota apple growers to remain viable, since they are unfairly limited to producing, marketing and selling apple varieties which are losing market popularity or are no longer in demand due to the introduction of SweeTango.®

7. Due to the growing restrictions (a maximum of 1,000 Minneiska trees per licensed Minnesota apple grower) and the sales and marketing restrictions, plaintiffs and wholesale fruit distributors are unable to compete in the apple marketplace. None of the plaintiffs is permitted to pool or combine any SweeTango® harvests to meet larger wholesale distributor demand required by larger wholesalers. The effect of such restrictions creates unfair competition in the wholesale distribution of apples – both in the Minnesota marketplace and

outside the state of Minnesota. Further, the inability of plaintiffs to provide a complete line of regional varieties, including SweeTango® has and will continue to result in losing entire wholesale accounts.

8. This action seeks a judicial determination as to the plaintiffs' rights and status under the exclusive license agreement and Pepin's non-exclusive license agreement for Minnesota apple growers. Specifically, plaintiffs seek a declaration that both the exclusive license agreement between Pepin and the University and the non-exclusive license agreement issued by Pepin to some of the plaintiffs, are *void ab initio* because these agreements violate public policy, violate state anti-trust laws and the Minnesota State Constitution, promote unfair competition, create consumer confusion, violate federal law prohibiting unfair agricultural-trade practices, contravene the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, and violate plaintiffs' rights guaranteed by 42 U.S.C. § 1983. Plaintiffs also ask the Court to permanently enjoin defendants from engaging in the unlawful and illegal conduct described herein. Finally, this action seeks to recover damages suffered by the plaintiffs as a direct result of the unlawful and inequitable conduct of defendants.

PARTIES AND VENUE

9. Plaintiff Aamodt's Apple Farm, Inc. is a Minnesota corporation with its principal place of business in Stillwater, Minnesota. Aamodt's operates a retail apple orchard.

10. Plaintiff Apple Ridge Orchards is a sole proprietorship with its principal place of business located in Mazeppa, Minnesota. It is owned and operated by plaintiff Vince Steffen, a Minnesota apple grower. Apple Ridge is a 26-acre orchard. It sells a portion of its apple harvest to wholesale distributors, including Plaintiff Wescott Orchards and Agri Products, Inc.

11. Plaintiff Richard Bremer is a Minnesota apple grower who owns and operates a 30-acre apple orchard located in Lake City, Minnesota. Bremer participates in pooling his apple harvest and sells to Plaintiff Wescott Orchards and Agri Products, Inc., a wholesale distributor.

12. Plaintiff Bridal Rock Orchard is a sole proprietorship orchard with its principal place of business located in Lake City, Minnesota. It is owned and operated by plaintiff Charles Bremer, a Minnesota apple grower. Bridal Rock is a 40-acre orchard. It sells a portion of its apple harvest to wholesalers and wholesale distributors, including Plaintiff Wescott Orchards and Agri Products, Inc.

13. Plaintiff Cenco Farms, Inc. is a Minnesota corporation d/b/a Afton Apple Orchard, a 70-acre apple orchard in Hastings, Minnesota. Afton Apple Orchard occasionally sells its harvest to Plaintiff Wescott Orchard and Agri Products, Inc. for wholesale distribution.

14. Croix Farm Orchard is a sole proprietorship with its principal place of business located in Hastings, Minnesota. It is owned and operated by plaintiff John Leadholm, a Minnesota apple grower.

15. Plaintiff Karl Townsend is a Minnesota apple grower who owns and operates Dassel Hillside Farm, a 15-acre apple orchard located in Dassel, Minnesota. With the exception of SweeTango® Dassel Hillside Farm has participated in testing apple varieties for the University for the past 30 years. Prior to the release of SweeTango® in August of 2009, Dassel Hillside Farm sold a portion of its apple harvest to wholesale distributors.

16. Plaintiff Ferguson's Morningside Orchard, LLC is a Wisconsin limited liability corporation with its principal place of business located in Galesville, Wisconsin. It is a 90-acre orchard and retail operation. By reason of the Exclusive License Agreement and the Minnesota Grower Agreement, Ferguson's Morningside Orchard is unable to obtain access to SweeTango®

to grow and produce and also unable to purchase SweeTango from the Minnesota apple grower Plaintiffs for its retail operations. Ferguson's sells approximately 50% of its harvest to Plaintiff Wescott Orchards and Agri Products, Inc.

17. Plaintiff JQ Fruit Farm and Orchard is a sole proprietorship with its principal place of business located in Princeton, Minnesota. It is a six-acre apple orchard owned and operated by plaintiff Dan Whitcomb, a Minnesota apple grower. JQ Fruit Farm and Orchard participates in pooling its harvest and sells a limited portion of its harvest to wholesalers and wholesale distributors.

18. Plaintiff Minnesota Apple Producers, Inc. d/b/a Nelson's Apple Farm is a Minnesota Sub-S corporation with its principal place of business located in Webster, Minnesota.

19. Plaintiff Old Hickory Orchard (n/k/a Hickory Orchards) is a sole proprietorship with its principal place of business located in LaCrescent, Minnesota. It is owned and operated by plaintiff Fred Sandvick, a Minnesota apple grower. Hickory Orchards is an 80-acre orchard. It pools its harvests and sells to Plaintiff Wescott Orchards and Agri Products, Inc.

20. Plaintiff Sacia Orchard is a sole proprietorship with its principal place of business located in Galesville, Wisconsin. It is owned and operated by plaintiff Tom Bork, a Wisconsin apple grower. By reason of the Exclusive License Agreement and the Minnesota Grower Agreement, Sacia Orchard is unable to obtain access to SweeTango® to grow and produce and is also unable to purchase SweeTango® from the Minnesota apple grower Plaintiffs for its retail operations.

21. Plaintiff Southwind Orchard is a sole proprietorship with its principal place of business located in Dakota, Minnesota. It is owned and operated by plaintiff John Curtis, a Minnesota apple grower. Southwind is a 140-acre orchard. It pools its apple harvest with other

Minnesota apple growers to sell apples to wholesale distributors, such as Plaintiff Wescott Orchards and Argi Products, Inc.

22. Plaintiff Van Lin Orchards, is a Minnesota partnership owned and operated by plaintiff Richard Van Lin. Van Lin Orchards principal place of business is located in LaCresent, Minnesota. It produces approximately 18,000 to 22,000 bushels of apples annually. Van Lin Orchards sells 90% of its apple harvest to wholesale distributor Plaintiff Wescott Orchards and Agri Products, Inc.

23. Plaintiff Wescott Orchards and Agri Products, Inc. is a Minnesota corporation, with its principal place of business located in Elgin, Minnesota. Wescott Orchards and Agri Products, Inc. operates Wescott Orchards and Agri Products, Inc. and the fruit packing production facility for most of Southeast Minnesota commercial growers, Plaintiff Mississippi Valley Fruit Company, which is a Minnesota limited liability corporation, with its principal place of business located in Elgin, Minnesota.

24. Defendant University is an institution of higher learning established by the Territorial Laws of the State of Minnesota and perpetuated by the Minnesota Constitution as a constitutional corporation. The Board of Regents is the governing body of the University. The University has its principal place of business in Minneapolis, Minnesota.

25. Defendant Pepin is a Minnesota corporation with its principal place of business located in Lake City, Minnesota. Defendant Courtier is the president of Defendant Pepin.

26. Defendant Byrne is Vice President of Sales for Pepin and president of Next Best Thing, a grower's cooperative.

27. Defendant Bedford is a scientist with the University's Department of Horticultural Science and the individual responsible for development of the MN#1914 variety (commonly referred to as "SweeTango®"). Pursuant to the intellectual property policies of the University, Bedford will receive a percentage of all royalties collected from the production, propagation and sales of SweeTango.® He is being sued in both his official and individual capacities.

28. At all times natural to this action, defendant Strauss was the Acting Assistant Vice President for the University's office of Patents and Technology Marketing. He is being sued in both his official and individual capacities.

29. Defendant Moore is the Director, Health Technologies for the University office of Patents & Technology Marketing. He is being sued in both his official and individual capacities.

30. Defendant Durgan is Director of the Minnesota Agricultural Experiment Station and Dean, University of Minnesota Extension. She is being sued in both her official and individual capacities.

31. The actions by Defendants Courtier, Byrne, Bedford, Strauss, Moore and Durgan, as described herein, were taken under color of state law.

32. Venue is proper in this Court under Minn. Stat. § 542.09 in that the causes of action, or some parts thereof, arose in Hennepin County and the principal place of business for Defendant University is Minneapolis, Hennepin County, Minnesota.

FACTUAL BACKGROUND

A. The University apple breeding program.

33. The University is a land grant university with an Agricultural Experiment Station. The Hatch Act of 1887, 7 U.S.C. § 361a et seq., established experimental stations at every land grant university. That Act provides in relevant part:

