NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

JAMES M. GREEN, CECIL M. GREEN, RITA M. GREEN,
Plaintiffs-Appellants

v.

MONROVIA NURSERY COMPANY,
Defendant-Appellee

2020-1742

Appeal from the United States District Court for the Central District of California in No. 2:18-cv-05257-RGK-GJS, Judge R. Gary Klausner.

JUDGMENT

LANCE REICH, Holley Driggs, Las Vegas, NV, argued for plaintiffs-appellants.

DAVID A. DILLARD, Lewis Roca Rothgerber Christie LLP, Glendale, CA, argued for defendant-appellee. Also represented by STEVEN ANDREW WILSON.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (PROST, *Chief Judge*, TARANTO and CHEN, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

January 6, 2021
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:18-cv-05257-RGK-GJS	Date	November 5, 2019
Title	***James M. Green et al. v. Monrovia Nursery Company***		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiff:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS) Order Re: Monrovia Nursery Company's Motion for Summary Judgment (DE 27)**

I. INTRODUCTION

This action arises out of a dispute between James, Cecil, and Rita Green ("the Greens") and Monrovia Nursery Company ("Monrovia") over the origin and ownership of a double-flowering Mandevilla vine named "Monrey," United States Plant Patent No. 14,290. On June 20, 2018, the Greens filed a First Amended Complaint ("FAC") alleging nine claims against Monrovia, including claims for breach of contract, patent infringement, and false designation of origin.

Presently before the Court is Monrovia's Motion for Summary Judgment on all Plaintiffs' claims. For the following reasons, the Court **GRANTS** Monrovia's motion.

II. FACTUAL BACKGROUND

A. The Rita Marie Green and the Monite

The Greens maintain a citrus farm and nursery in central Florida where they cultivate and asexually reproduce plants, including a decorative, flowering vine called a Mandevilla. The widely-propagated "Alice du Pont" Mandevilla produces single flowers with five petals each. In 1996, the Greens discovered a unique branch mutation of the Alice du Pont varietal, which contained a second ring of petaloids within the outer corolla of petals, thus presenting the appearance of a "flower within a flower." The Greens stabilized the double-flowering trait through successive propagations and named the new Mandevilla the "Rita Marie Green."

On September 5, 1997, the Greens entered into an agreement with Monrovia, pursuant to which they sent the company cuttings of the Rita Marie Green variety. On September 10, 1998, the Greens

entered into a superseding royalty agreement ("the Agreement") according to which Monrovia would patent and sell the Rita Marie Green and pay royalties to the Greens. On October 9, 2001, the U.S. Patent Office issued Patent No. 6,300,547 ("'547 Patent"), and on February 7, 2001 it issued Plant Patent No. 11,787 ("'787 Patent"). The 547 Patent lists the Greens as inventors and Monrovia as assignee, and describes the Rita Marie Green as follows in its abstract:

> A new "Double Mandevilla" variety is characterized by double flowers which present an outer corolla and a ring of inner petaloids producing an enhanced decorative appearance for this evergreen vine-like climbing shrub.

The Agreement provides that Monrovia will propagate and sell the Rita Marie Green and pay royalties to the Greens. It further specifies that the Greens "shall own all rights to the genetics of the [Rita Marie Green] Variety, including, but not limited to, any sport or genetic alteration propagated in any way from plants, sports or otherwise from the Variety . . . that is discovered by either party." (Agreement ¶ 8, ECF No. 27-11.)

In the same paragraph, the Agreement also states that Monrovia maintains ownership of its existing double-flowering Mandevilla variety, "Monite:" "As between the parties. Monrovia shall own all rights in any plants not propagated or derived from plants of the [Rita Marie Green] Variety, including, but not limited to, Monrovia's existing Mandevilla variety *(Mandevilla* x *amabills* 'Monte') and sports of this plant including *(Mandevilla x amabilis* 'Monite'). (*Id.*)

Monite is the subject of U.S. Patent No. 12,123 ("'123 Patent"), issued on October 2, 2001. The 123 Patent states that the Monite was discovered by Bruce Sperling in Calabasas, California in 1997, and the abstract describes it as follows:

> A new and distinct selection of *Mandevilla x amabilis* cultivar Monite characterized by its unique combination of pale pink buds and pale pink flowers which display a showy cluster of pink petaloids within the flower throat appearing as a pink flower within a larger pale pink flower.

The Rita Marie Green and the Monite flowers are distinguished by several features. The Rita Marie Green's flowers are typically red-purple in color, while the Monite's are pale pink. Further, while both flowers display an outer corolla of five petals and an inner ring of five petaloids, the inner petaloids of the Rita Marie Green usually extend slightly further outward from the "throat" of the flower, while those of the Monite remain mostly within. This latter point is expressly listed as an item of differentiation between the two flowers on the 123 Patent. Photos of each flower are included below:

Rita Marie Green

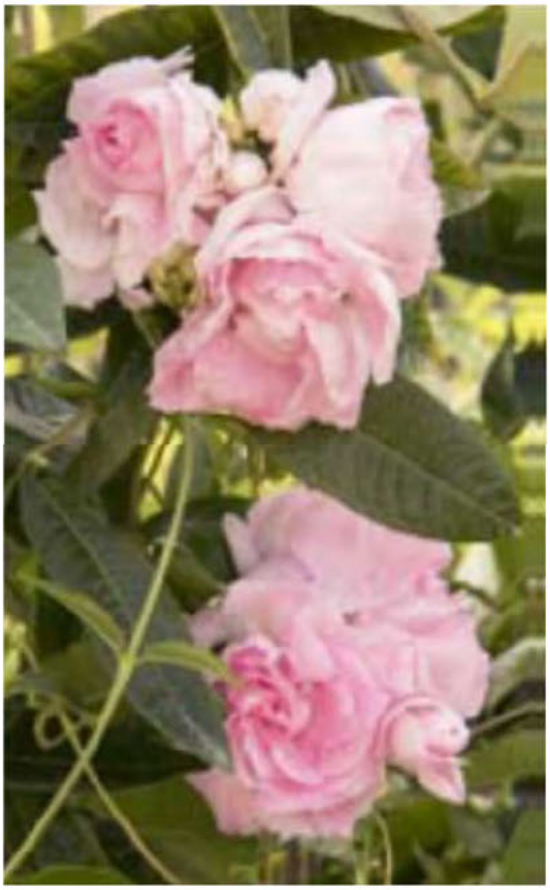
Monite

B. The Monrey

The central issue in this lawsuit is the origin of a third variety of flowering Mandevilla called 'Monrey.' The abstract of U.S. Patent No. 14,290 ("'290 patent"), issued on November 11, 2003, describes the Monrey varietal as follows:

> A distinct cultivar of Mandevilla plant named 'Monrey', characterized by its vining growth habit; glossy, dark green leaves; and double pink-colored flowers with 20 petals per flower.

The Monrey variety is distinct in appearance from both the Rita Marie Green and the Monite. In fact, to a lay-observer, the earlier two varieties look much more like each other than either one looks like the Monrey. The Monrey has large, pink-colored flowers typically displaying 20 petals per flower, whereas the Rita Marie Green and the Monite normally have ten. Further, the flower petals of the Monrey are "unfused," unlike the other two. The result is that whereas the Rita Marie Green and the Monite have a compact and self-contained appearance, the Monrey presents a larger flower with more petals and a "ruffled" aspect, as depicted here:



MONREY

C. The Present Lawsuit

Monrovia sells the Rita Marie Green, Monite and Monrey under the trademarked names of "Pink Parfait," "Moonlight Parfait," and "Tango Twirl," respectively. After Monrovia began selling the Monrey, the Greens became suspicious of the fact that Monrovia had developed another double-flowering Mandevilla after receiving cuttings from which to propagate the Rita Marie Green. The Greens sought an independent genetic comparison to determine the likelihood that the Monrey was either an altered but genetically identical plant to the Rita Marie Green, or alternatively a direct descendent via branch-mutation. For reasons outside the scope of the Court's Order, a genetic

comparison was determined to be impracticable. The Greens then attempted to answer the same question through a statistical analysis of the probability of the double-flowering trait.

Upon obtaining an expert opinion on that subject, the Greens invoked the Notice of Breach provision of the Agreement and demanded that Monrovia pay royalties on sales of the Monrey varietal. When Monrovia did not respond within sixty days, the Greens filed a Complaint asserting nine claims: (1) breach of contract, (2) infringement of the '547 Patent, (3) infringement of the '787 Plant Patent, (4) false designation of origin under the Lanham Act, (5) false advertising under the Lanham Act, (6) misappropriation of trade secrets, (7) common law misappropriation, (8) product disparagement (trade libel), and (9) declaratory judgment of invalidity and/or ownership of the '290 Patent.

D. Undisputed Facts

The Parties are in agreement regarding the facts of the discovery and patenting of the Rita Marie Green, as well as the text of their Agreement, including the paragraph which states that the Greens retain ownership of any genetic derivation of the Rita Marie Green, while Monrovia retains ownership of any derivations of its then existing Mandevillas, including the Monite. (Defs.' Proposed Statement of Uncontroverted Facts ("SUF") ¶¶ 1-8, ECF No. 27-2.) They likewise do not dispute the basic physical characteristics of the Rita Marie Green, Monite, and Monrey as double-flowering Mandevillas typically displaying ten, ten, and twenty petals, respectively. (Def.'s SUF ¶¶ 18, 21, 23, 24).

E. Disputed Facts Regarding the Monrey

Monrovia claims that its employee Bruce Usrey discovered the first Monrey flowers as a branch mutation from a Monite plant on June 29, 2000. It likewise claims that Monrovia subsequently propagated those flowers into the Monrey cultivar, and that the '290 Patent is valid and belongs to Monrovia. (Def.'s SUF ¶¶ 12-17.) The Greens, by contrast, claim that the Monrey is either genetically identical to the Rita Marie Green, or alternatively is genetically derived from the Rita Marie Green, and that the '290 patent is therefore either invalid or belongs to them. (Pl.'s Statement of Genuine Disputes of Material Fact ("SGD") 2:2-9; 4:21-24, ECF No. 31-1.)

III. JUDICIAL STANDARD

Under Federal Rule of Civil Procedure 56(a), a court may grant summary judgment only where "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Facts are "material" only if dispute about them may affect the outcome of the case under applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a

verdict for the nonmovant. *Id.*

To prevail on a summary judgment motion, the movant must show that there are no genuine issues of material fact as to matters on which it has the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Such a showing "must establish beyond controversy every essential element" of the movant's claim or affirmative defense. *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (internal quotation marks omitted). On issues where the moving party does not have the burden of proof at trial, the moving party is required only to show that there is an absence of evidence to support the non-moving party's case. *See Celotex*, 477 U.S. at 325. Upon such showing, the court may grant summary judgment "on all or part of the claim." Fed. R. Civ. P. 56(a)–(b).

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. *See Celotex*, 477 U.S. at 324. Nor may the non-moving party merely attack or discredit the moving party's evidence. *Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). Rather, the non-moving party must affirmatively present specific evidence sufficient to create a genuine issue of material fact for trial. *See Celotex Corp.*, 477 U.S. at 324.

IV. DISCUSSION

The Court first considers Monrovia's Motion for Summary Judgment on Plaintiffs' claims arising from the allegation that the Monrey is descended or otherwise derived from the Rita Marie Green. These claims include: breach of contract, patent infringement, false designation, false advertising, misappropriation of trade secrets, common law misappropriation, and declaratory judgment. All these claims turn on the origin of the Monrey varietal. The Court then addresses Plaintiffs' remaining claims, which include alternate theories for breach of contract and misappropriation of trade secrets, as well as a claim for product disparagement.

A. Claims Pertaining to the Origin of the Monrey

The key question in resolving the above claims is whether the Monrey is descended from the Greens' Rita Marie Green varietal or Monrovia's Monite varietal. Monrovia relies on photos of what it asserts are the first Monrey flowers appearing as a branch mutation on a Monite plant, as well as declarations from the Monrovia employees who Monrovia claims found and propagated the Monrey varietal. The Greens rely on an expert report which finds a high likelihood that the Monrey is a

descendant of the Rita Marie Green based on a statistical analysis of the likelihood that a double-flowering trait will appear in an Alice du Pont Mandevilla, their common ancestor.

As the Defendant and moving party, Monrovia has the burden to show that there is an absence of evidence to support the Greens' claim that the Monrey varietal is either genetically identical to or genetically derived from the Rita Marie Green. The Court finds that it has met that burden.

1. *Dr. Weigel's Report*

Plaintiffs base their claim to a genuine factual dispute on the expert report of Dr. Detlef Weigel, a highly-credentialed scientist currently serving as director of the Department of Molecular Biology at the Max Planck Institute in Tubingen, Germany. Dr. Weigel performed a statistical analysis of the probability of another random appearance of the double-flowering mutation in an Alice du Pont Mandevilla and determined that the likelihood of such a mutation occurring was between 1 in 175 million on the high end and 1 in 13 billion on the low end. The declaration accompanying his report concludes as follows:

> It is therefore my conclusion, based on the probability of the occurrence of the double-flowering trait, that the Tango Twirl [Monrey] is almost certainly either the same Mandevilla as the Rita Marie Green, or the Tango Twirl was genetically derived from the Rita Marie Green.

(Weigel Decl. ¶ 17, ECF No. 31-2.) Ordinarily this would constitute adequate evidence to survive a motion for summary judgment, as the Court would not undertake to evaluate the underlying sufficiency of an expert's report at this stage. In this case, however, relying on the text of Dr. Weigel's declaration and his stated methodology, the Court finds that his analysis pertains to a fundamentally different issue than the one being litigated.

The fact in dispute is whether the Rita Marie Green or the Monite is the parent of the Monrey. Dr. Weigel's report, however, bases its predictive analysis on the likelihood of the double-flowering trait spontaneously appearing in the Alice du Pont:

> [A]nother alternative [to DNA testing] would be to consider the likelihood of the independent occurrence of a double flower mutation in the Alice du Pont cultivar, which is the ancestor to both the Pink Parfait [Rita Marie Green] and Tango Twirl [Monrey]. Alice du Pont has been in controlled propagation worldwide since the 1950s in very significant volumes.

> Once one knows the likelihood of the double-flower mutation trait in an Alice du Pont Mandevilla, then one can determine the likelihood of two of these mutations occurring within a few years of each other (with the first known mutation Rita Marie Green).

(Weigel Decl. ¶¶ 12-13.) Here, however, the double-flowering trait has already been isolated in both the Rita Marie Green and the Monite. Thus, the fact that it is highly unlikely to appear in a first instance in the Alice du Pont does not make either plant's claim to the Monrey's parentage any more or less likely.

Even if the Court considers the Weigel report for the likelihood of whether the double-flowering trait will recur *again* in a descendant of the Alice du Pont, thereby increasing the petal count from ten (on the Rita Marie Green and Monite), to twenty (on the Monrey), it still would not make it any more likely that the trait randomly recurred in one flower rather than the other.

If Monrovia was asserting that the Monrey had appeared as a new branch mutation on one of its single-flowering Alice du Pont Mandevilla, Dr. Weigel's report would be compelling evidence. Likewise, if the Monite was a single, rather than double-flowering Mandevilla, Dr. Weigel's report would be evidence that it was unlikely to produce a double-flowering offspring. Neither of the above is the case, however. The undisputed facts make clear that the double-flowering gene is already isolated in both potential parents. (Def.'s SUF ¶¶ 23, 24.)

Dr. Weigel's report does not address Monrovia's argument that the Monite, rather than the Rita Marie Green, is the Monrey's parent. Paragraphs six and seven of his declaration describe familiarity with the patents for the Rita Marie Green and "Tango Twirl" (Monrey), but do not mention the same familiarity with the patent for the Monite. While the Monite is mentioned once on page two and once on page three, it is to describe commonalities between the three descendants of the Alice du Pont, not to make an assessment of whether the Rita Marie Green is the likelier parent of the Monrey. As Monrovia points out: "Why Plaintiff's expert did not do a statistical analysis of the relationship between the Monrey and Monite . . . is unexplained." (Def.'s Reply at 4:1-4, ECF No. 32.)

However unlikely the double flowering trait is, Plaintiffs' expert report does not establish that the Rita Marie Green is any *more* likely than the Monite to be the Monrey's parent. This is the case even if the Court assumes that everything in the report's analysis is true. For the foregoing reasons, the Court finds that the Greens have failed to present evidence sufficient to create a genuine dispute of material fact regarding whether the Monrey varietal is descended from the Rita Marie Green rather than the Monite. As such, the Court grants summary judgment with regard to following claims: (1) Breach of Contract, (2) Infringement of the '547 Patent, (3) Infringement of the '787 Plant Patent, (4) False Designation of Origin under the Lanham Act, (5) False Advertising under the Lanham Act, (6)

Misappropriation of Trade Secrets, (7) Common Law Misappropriation, and (8) Declaratory Judgment of invalidity and/or ownership of the 290 Patent.

B. Plaintiff's Remaining Claims

Plaintiffs bring additional claims for breach of contract, product disparagement, and misappropriation of trade secrets. The Court addresses each in turn.

1. Breach of Contract: Books and Records

Plaintiffs allege that "Monrovia has breached its obligations to the Greens as set forth in the Agreement by failing to allow inspection by the Greens of all records and books regarding the sales of the Rita Marie Green variety and the Monrey variety by Monrovia." (FAC. ¶ 45). However, Plaintiffs have provided neither any further detail, nor any evidence to substantiate this claim. Even in response to Defendant's interrogatory requesting the factual basis for this allegation, Plaintiffs made only a blanket restatement of the same assertion. (Pls. Resp. to Def.'s Interrog. No. 5, ECF No. 27-5.)

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. *See Celotex*, 477 U.S. at 324. Without evidence in some form, Plaintiffs' claim cannot survive summary judgment, and the court therefore grants Defendant's Motion.

2. Product Disparagement (Trade Libel)

The Greens assert that Monrovia disparaged the quality of the Rita Marie Green (Pink Parfait) in its promotional materials by describing Monrey (Tango Twirl) in comparatively more favorable terms. (FAC ¶ 84.)

"Trade libel is the publication of matter disparaging the quality of another's property, which the publisher should recognize is likely to cause pecuniary loss to the owner." *ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1010 (2001) (internal quotes omitted). "The tort encompasses all false statements concerning the quality of services or product of a business which are intended to cause that business financial harm and in fact do so." *Id*. To constitute trade libel, a statement must be false. *Leonardini v. Shell Oil Co*., 216 Cal. App. 3d 547, 572 (1989). Since mere opinions cannot by definition be false statements of fact, opinions will not support a cause of action for trade libel. *ComputerXpress,*

93 Cal. App. 4th at 1011 *citing Hofmann Co. v. E. I. Du Pont De Nemours & Co.*, 202 Cal. App. 3d 390, 397 (1988).

> Monrovia's allegedly disparaging remarks about the Rita Marie Green are as follows:
>
> Twining evergreen vine displays unusual, double, trumpet-like, vibrant pink flowers. Each flower lasts for several days. A lovely choice for a trellis or arbor. Evergreen in frost-free regions; treat as a summer annual in cooler regions.
>
> This beautiful, evergreen vine displays spectacular, soft pink flowers with multiple layers of petals that form full, double blossoms that look like a flower-within-a-flower. Each blossom lasts for several days, with blooming continuing throughout the summer. Pink Parfait is an exceptionally vigorous grower with large, glossy green leaves. It is a lovely choice for a trellis or arbor as its twining stems can reach 15 to 20 feet long.

(FAC ¶ 84.) Plaintiffs' claim for trade libel rests on the assertion that Monrovia described the Monrey to customers in more glowing terms than it did the Rita Marie Green. However, Plaintiffs fail to allege that anything in the above statements regarding the Rita Marie Green is false. As such, their claim for trade libel fails as a matter of law. The Court therefore grants Monrovia's motion as to this claim.

3. Misappropriation of Trade Secrets: Agricultural Protocols

The Greens assert that Monrovia misappropriated the "agricultural protocols" for the Rita Marie Green, meaning the correct manner in which to plant and grow it. (Pls.' Resp. to Def.'s Interrog. No. 7).

Under California's adoption of the Uniform Trade Secret Act ("CUTSA"), information from which a person derives independent economic value from not being generally known to the public and which is the subject of efforts that are reasonable under the circumstances to maintain its secrecy is entitled to trade secret protection. *Capitol Audio Access, Inc. v. Umemoto*, 980 F. Supp. 2d 1154, 1158 (E.D. Cal. 2013). A claim under CUTSA requires Plaintiff to satisfy two steps: (1) a threshold showing that the information is a trade secret as defined by CUTSA; and (2) a showing that the Defendant misappropriated the trade secret. *Id.*

The Greens have not provided either declarations or any other evidence that the agricultural protocols in question qualify for trade secret protection. In fact, they have not even described what the protocols are or explained how they differ from ordinary nursery practices. As such, they have failed to

make the necessary showing that a disputed issue of material fact exists, and the Court therefore grants Monrovia's Motion with respect to this claim.

V. EVIDENTIARY OBJECTIONS

To the extent the parties have objected to any of the evidence relied upon by the Court, those objections are overruled for purposes of this Order.

VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Monrovia's Motion for Summary Judgment as to all claims.

IT IS SO ORDERED.

_____ : _____

Initials of Preparer _____

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAMES M. GREEN, CECIL M. GREEN, and RITA M. GREEN,

Plaintiffs,

v.

MONROVIA NURSERY COMPANY, a California corporation,

Defendant.

Case No. 2:18-cv-05257-RGK-GJS

JUDGMENT

In accordance with the Court's November 5, 2019 Order, it is **ORDERED, ADJUDGED, and DECREED** that:

Judgment is entered against Plaintiffs James M. Green, Cecil M. Green and Rita M. Green, and in favor of defendant Monrovia Nursery Company. No monetary award is made.

IT IS SO ORDERED.

DATED: November 5, 2019

Hon. R. Gary Klausner