

RACHEL KREVANS (CA SBN 116421)
RKrevans@mofo.com
WESLEY E. OVERSON (CA SBN 154737)
WOverson@mofo.com
MATTHEW A. CHIVVIS (CA SBN 251325)
MChivvis@mofo.com
JACOB P. EWERDT (CA SBN 313732)
JEwerdt@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
Facsimile: 415.268.7522

DAVID D. SCANNELL (*pro hac vice*)
DScannell@mofo.com
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
Telephone: 202.887.1500
Facsimile: 202.887.0763

Attorneys for Plaintiff and Cross-Defendant
THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, a corporation,

Plaintiff,

v.

CALIFORNIA BERRY CULTIVARS, LLC,
DOUGLAS SHAW, AND KIRK LARSON

Defendants.

CALIFORNIA BERRY CULTIVARS, LLC

Cross-Complainant,

v.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, a corporation,

Crossclaim Defendants.

Case No. 3:16-cv-02477-VC

**THE UNIVERSITY'S MOTION IN
LIMINE NO. 6 RE: THE IMPACT
OF THE COURT'S SUMMARY
JUDGMENT RULING ON
EVIDENCE AND ARGUMENT
RELATED TO CBC'S IMPLIED
COVENANT CLAIM AND THE
UNIVERSITY'S BREACH OF
CONTRACT CLAIM**

1 Pursuant to the Court's Standing Order for Civil Trials, p.4, ll. 5-10, Plaintiff and
2 Crossclaim Defendant The Regents of the University of California ("the University") submit this
3 collated set of the moving papers and opposition to the University's Motion *In Limine* No. 6.
4

5 Dated: May 1, 2017

RACHEL KREVANS
WESLEY E. OVERSON
MATTHEW A. CHIVVIS
JACOB P. EWERDT
DAVID D. SCANNELL
MORRISON & FOERSTER LLP

9
10 By: /s/ Matthew A. Chivvis
MATTHEW A. CHIVVIS
11 Attorneys for Plaintiff and Cross-
12 Defendant
13 THE REGENTS OF THE
14 UNIVERSITY OF CALIFORNIA
15
16
17
18
19
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21
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24
25
26
27
28

RACHEL KREVANS (CA SBN 116421)
RKrevans@mofo.com
WESLEY E. OVERSON (CA SBN 154737)
WOverson@mofo.com
MATTHEW A. CHIVVIS (CA SBN 251325)
MChivvis@mofo.com
JACOB P. EWERDT (CA SBN 313732)
JEwerdt@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: 415.268.7000
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DAVID D. SCANNELL (*pro hac vice*)
DScannell@mofo.com
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
Telephone: 202.887.1500
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I. INTRODUCTION

Per the Court's order allowing an "additional motion in limine per side," if the April 27, 2017, Summary Judgment Order "generates questions or disagreement about what may be presented to the jury" on the University's breach of contract claim and CBC's breach of implied covenant of good faith and fair dealing claim, the University submits this Motion *in Limine*.

A. CBC's Breach of Implied Covenant Claim is Limited to the CSG Patent Application Issue.

Given the Court's April 27, 2017, Summary Judgment Order, the scope of CBC's remaining breach of implied covenant claim is very narrow. While CBC alleged five grounds for its implied covenant claim, the Court granted summary judgment on all of those grounds other than CBC's allegations that the University improperly filed a patent application on the Core Strawberry Germplasm ("CSG") to prompt assignments from Drs. Shaw and Larson. (ECF No. 240 at 3, 17-18.) The Court also granted summary judgment that the University owned the tangible property rights in the CSG and TCs currently in its possession," dismissed CBC's conversion claim for that material, and held that CBC has no rights in the CSG or TCs because it is not a bona fide purchaser for value. (*Id.* at 2, 5.) Further, the Court held that, while no one presently holds patent rights to the CSG and TCs, the University has "an equitable interest in the title to patents on Shaw and Larson's inventions." (*Id.* at 11.) The Court explicitly rejected CBC's argument that any rights the inventor may have to use the invention include the right to the "possession and use of the tangible plant itself." (*Id.* at 4.) Instead, the Court made clear that, regardless of whether there are any employee rights prior to assignment, the University's "employees may not convert to themselves the tangible property ownership of any plant in which they have identified and reproduced protectable, patentable characteristics." (*Id.* at 4.)

Despite the Court's summary judgment ruling, CBC nevertheless states in portion of the current draft Pretrial Order that it intends to pursue, for the first time, a breach of implied covenant claim for the University's purported destruction of "the sole embodiment of Drs Shaw and Larson's intellectual property rights [in] the [Transition Cultivars]." Evidence or argument relating to this purported claim is precluded by CBC's pleadings and the Court's Summary

1 Judgment Order, and it is also irrelevant to any remaining claim or defense. As described above,
2 CBC pled breach of implied covenant on specific grounds, none of which were based on any
3 purported destruction of the Transition Cultivars (“TCs”) or any intellectual property rights in
4 same. (ECF No. 2-2 ¶¶ 61-71.) CBC therefore may not raise such an argument at this late stage of
5 proceedings. Even if CBC argues that this destruction claim was somehow also implied in its
6 claim, the University moved for summary judgment on CBC’s implied covenant claim, and the
7 Court granted the University summary judgment on “all [] respects” of this claim, apart from the
8 patenting issue. (ECF Nos. 162 at 14-15; 240 at 3.) Accordingly, this purported “destruction”
9 ground for breach of implied covenant is foreclosed.

10 Because the Court granted summary judgment for the University as to CBC’s conversion
11 claim and declared that the University owns all of the tangible property rights to the CSG and
12 TCs in its possession (ECF No. 240 at 2, 5), any conversion theory CBC might have based on
13 alleged destruction of the TCs is also foreclosed. Moreover, as noted above, the Court has found
14 that Drs. Shaw and Larson themselves had no “inventors rights” to access the tangible plants in
15 order to practice their invention, and thus could have transferred none to CBC even setting aside
16 the fact that CBC was not a bona fide purchaser for value. (*Id.* at 4.) Accordingly, any evidence
17 or argument regarding the University improperly “destroying” the TCs is thus irrelevant, and the
18 only purpose for offering such evidence would be to confuse and prejudice the jury against the
19 University. Such irrelevant, prejudicial evidence should be excluded. Fed. R. Evid. 403.

20 Because the Court granted summary judgment to the University on “all other respects” of
21 CBC’s implied covenant claim, the only evidence or argument that is relevant to CBC’s
22 remaining implied covenant claim is evidence that relates directly to the University’s decision to
23 seek a patent on the CSG and request an assignment of rights. (ECF No. 240 at 3.) This evidence
24 includes a November 2013 disclosure by Drs. Shaw and Larson of the collection of 180
25 strawberry varieties that make up the CSG to the University as a possibly patentable “invention.”
26 (*See, e.g.*, ECF Nos. 156-1; 155-7; 145-15; 160-3 at 100:10-101:1, 172:19-173:4.) It will also
27 include evidence regarding the University’s decision-making process with respect to its response
28 to this disclosure, including the attempt by the breeders to have the University simply release all

1 180 CSG varieties to the public as TRP, and the University's decision not to do that to preserve
 2 its rights in the disclosed inventions by seeking patent protection and requesting the assignment.
 3 The evidence on this claim will also include: the University's good faith efforts to obtain more
 4 information about the CSG varieties from Dr. Shaw and his refusal to provide this information,
 5 (*see, e.g.*, ECF No. 160-3 at 193:6-194:22); evidence and argument regarding the University's
 6 request for assignment of the disclosed CSG and Drs. Shaw and Larson's breach of their
 7 contractual duty to do so (*see, e.g.*, ECF Nos. 158-4, 158-5, 156-12, 155-3); and letters sent to
 8 Drs. Shaw and Larson regarding the University's reasons for the patent application and other
 9 evidence regarding the University's good faith submission of the application. (*See, e.g.*,
 10 Declaration of Matthew Chivvis in Support of Motion *in Limine* No. 6 ("Chivvis Declaration")
 11 Ex. 1 at CBC_DS_00026599.) Evidence and argument regarding the twelve strawberry varieties
 12 that were broken out of the 180 disclosed CSG varieties and separately patented would also be
 13 relevant, along with evidence of the royalties paid to Drs. Shaw and Larson related to them. (*See,*
 14 *e.g.*, ECF No. 158-2; Chivvis Decl. Ex. 2.)

15 In contrast, any evidence or argument that does not relate directly to the disclosure,
 16 assignment, or patent application on the CSG should not be presented to the jury based on the
 17 implied covenant claim. Examples of this irrelevant and prejudicial evidence include any
 18 evidence or argument relating to the University's alleged poor maintenance of the CSG and TCs
 19 in its possession. (ECF No. 240 at 2, 5.) Similarly, any peripheral evidence of the University's
 20 alleged "unfairness" or "poor treatment" of Drs. Shaw and Larson should be excluded. The only
 21 purpose for such evidence or argument would be to bias and confuse the jury, by attempting to
 22 focus their attention on issues that have already been resolved by the Court in the University's
 23 favor and are unrelated to the claims and defenses remaining in this case. This type of confusing,
 24 misleading, and prejudicial evidence should be excluded. Fed. R. Evid. 403.

25 The evidence and arguments that CBC may present to the jury regarding its alleged
 26 damages are similarly circumscribed. After the Court's ruling, CBC may not present evidence or
 27 argument to the jury regarding any damages it has purportedly suffered based on its inability to
 28 use the CSG or TCs in its private breeding program. The only harms identified by CBC's

1 damages expert purportedly arose from CBC's lack of access to the physical CSG or TCs in the
2 University's possession. (Chivvis Decl. Ex. 3; ECF No. 240 at 2, 5, 17.) However, as described
3 above, the Court has determined that CBC had no tangible property rights to these plants, and has
4 also determined that the University had no obligations to license the CSG and TCs. (ECF No.
5 240 at 4, 17.) As such, that expert testimony, and any similar testimony or argument, should be
6 excluded as irrelevant to the claims at issue and prejudicial.

7 In theory, evidence about harm to CBC arising solely from the alleged bad-faith
8 application for the CSG might remain relevant. However, CBC has not offered any expert
9 opinion identifying any such harm (*see* Chivvis Decl. Ex. 3), and no facts support any such
10 hypothetical testimony, in any event, because CBC could not have been monetarily damaged by
11 the University's decision to patent the CSG. Drs. Shaw and Larson disclosed all 180 CSG
12 varieties to the University as possibly patentable inventions. (ECF Nos. 145-15; 160-3 at 100:10-
13 101:1, 172:19-173:4.) If the University had elected not to pursue a patent on the CSG, these
14 varieties would have been merely "tangible property," and solely owned by the University under
15 the Court's ruling. (ECF Nos. 155-6; 144-17.) By pursuing a patent on the CSG, the University
16 preserved the priority date of Drs. Shaw and Larson's inventions against third parties and ensured
17 that Drs. Shaw and Larson will have the opportunity to receive royalties as the inventors of these
18 varieties, if successfully patented. (ECF Nos. 156-1; 155-7; Chivvis Decl. Ex. 1 at
19 CBC_DS_00026599.)

20 The University therefore respectfully requests that the Court limit the presentation of
21 evidence and argument to the jury regarding the University's purported breach of the implied
22 covenant of good faith and fair dealing to evidence and argument directly relating to the
23 University's patent application and the request for assignment. Any other evidence or argument
24 regarding CBC's implied covenant claims has been foreclosed by summary judgment, is
25 irrelevant to the remaining claims at issue, and would be prejudicial.

26 **B. Evidence Underlying the University's Breach of Contract Claim May**
27 **Be Presented to the Jury Because it is Relevant to Other Claims.**

28 The Court granted summary judgment to the University on its breach of contract claim,

1 and held that (1) Drs. Shaw and Larson breached their employment contracts by failing to assign
2 their rights to the CSG and (2) Dr. Shaw breached by failing to provide complete information
3 regarding the CSG. (ECF No. 240 at 2.) CBC obviously may not present evidence or argument
4 to the jury that would contradict the Court's summary judgment rulings.

5 Although the University is requesting specific performance for its breach of contract for
6 failure to assign claim, the evidence underlying Drs. Shaw and Larson's failure to assign is
7 relevant to other claims, which the University intends to try to the jury. For example, the
8 University has maintained a claim for tortious interference with contract against the Defendants
9 for CBC's intentional interference with the contractual relationship between the University and
10 Drs. Shaw and Larson, based on acts intended to induce breach or disrupt of the University's
11 contract with Drs. Shaw and Larson. (ECF No. 102-1 ¶ 114.) Evidence regarding Drs. Shaw and
12 Larson's breach of their contractual duties to the University is relevant to this claim and should be
13 presented to the jury.

14 Evidence and argument regarding Dr. Shaw's breach of his contractual duty to provide
15 complete information regarding the CSG is also appropriate for presentation to the jury. The lack
16 of that information impacted the patenting process, as noted above, and also forced the University
17 to incur expenses and delay to try to recreate the information. These damages could have been
18 avoided had Dr. Shaw not breached his contractual duties. The facts underlying this breach are
19 also relevant to the University's other claims, such as conversion and breach of fiduciary duty.
20 (ECF No. 102-1 ¶¶ 132, 137.) Accordingly, notwithstanding the Court's summary judgment
21 rulings, this evidence remains relevant and admissible.

22 II. CONCLUSION

23 The University respectfully requests that the Court grant this Motion *in Limine* and (1)
24 limit evidence or argument regarding CBC's purported breach of the implied covenant of good
25 faith and fair dealing to CBC's only remaining theory, based on the patenting of the CSG, and (2)
26 continue to permit presentation of evidence and argument regarding the breaches of their
27 employment agreements, because such evidence remains relevant to the University's damages
28 and other claims that will be presented to the jury.

1
2 Dated: April 30, 2017

RACHEL KREVANS
WESLEY E. OVERSON
MATTHEW A. CHIVVIS
JACOB P. EWERDT
DAVID D. SCANNELL
MORRISON & FOERSTER LLP

3
4
5
6 By: /s/ Matthew A. Chivvis
7 MATTHEW A. CHIVVIS
8 Attorneys for Plaintiff and Cross-
9 Defendant
10 THE REGENTS OF THE
11 UNIVERSITY OF CALIFORNIA
12
13
14
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16
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20
21
22
23
24
25
26
27
28

Tharan Gregory Lanier (SBN 138784)
 tglanier@jonesday.com
 Greg L. Lippetz (SBN 154228)
 glippetz@jonesday.com
 Nathaniel P. Garrett (SBN 248211)
 ngarrett@jonesday.com
 Paul C. Hines (SBN 294428)
 phines@jonesday.com
 JONES DAY
 555 California Street, 26th Floor
 San Francisco, CA 94104
 Telephone: +1.415.626.3939
 Facsimile: +1.415.875.5700

Rick L. McKnight (SBN 55183)
 fmcknight@jonesday.com
 Alexis Adian Smith (SBN 274429)
 asmith@jonesday.com
 JONES DAY
 555 South Flower Street
 Fiftieth Floor
 Los Angeles, CA 90071.2300
 Telephone: +1.213.489.3939
 Facsimile: +1.213.243.2539

Sharyl A. Reisman (Admitted *Pro Hac Vice*)
 sareisman@JonesDay.com
 JONES DAY
 250 Vesey Street
 New York, NY 10281.1047
 Telephone: +1.212.326.3939
 Facsimile: +1.212.755.7306

Attorneys for Cross-Complainant and
 Defendant CALIFORNIA BERRY
 CULTIVARS, LLC and Defendants
 DOUGLAS SHAW and KIRK LARSON

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Case No. 3:16-cv-02477-VC

**OPPOSITION TO THE
 UNIVERSITY'S MOTION IN
 LIMINE # 6: IMPACT OF THE
 COURT'S RULING ON SUMMARY
 JUDGMENT**

Date: May 8, 2017
 Time: 10:00 am
 Courtroom: 4
 Judge: Hon. Vince Chhabria

1 **I. INTRODUCTION**

2 In its summary judgment order, the Court invited the parties to file an additional motion in
3 limine “to the extent this ruling generates questions or disagreement about what may be presented
4 to the jury on” two claims: UC’s claim for breach of contract and CBC’s claim for breach of the
5 implied covenant of good faith and fair dealing. ECF No. 240 at 19 n.7. UC takes the Court’s
6 invitation and runs with it, but its far-reaching arguments are either premature or misstate the
7 Court’s ruling. The motion should be denied, and the Court should address the proper scope of
8 evidence as it comes in at trial.

9 **II. ARGUMENT**

10 **A. UC’S MOTION TO CABIN CBC’S BREACH OF IMPLIED COVENANT**
11 **CLAIM SHOULD BE DENIED.**

12 1. UC argues, first, that CBC should be precluded from demonstrating that UC breached
13 the implied covenant by destroying the Transition Cultivars, which represented the sole
14 embodiment of the Doctors’ intellectual property rights in the TCs, because that claim has never
15 been pled.

16 To begin, CBC’s Complaint is broad enough that, when fairly read, UC cannot be heard to
17 complain. The Complaint alleges that UC has “endangered the Breeders’ material” and “risked
18 the loss *and destruction* of the varieties,” that UC “is failing to maintain the Plant Material¹ in a
19 healthy viable condition” thereby “threatening the very survival of the genetic code of the
20 affected plants,” and that—based on these allegations—CBC was asserting a claim for breach of
21 the implied covenant due to UC’s “interfere[ence] with the rights of the Breeders to receive the
22 benefits of the Patent Agreements.” ECF No. 2-2 ¶¶ 4, 47, 58, 60.

23 Moreover, if the Court finds that CBC’s Complaint is impermissibly vague on this score,
24 CBC should be permitted to amend its complaint to conform with the proof. *See* Fed. R. Civ. P.
25 15(b). Evidence that UC had unilaterally decided to destroy Transition Cultivars, without
26 notifying the intellectual property owners or offering to make the material available to them, only

27 ¹ Plant Material is defined to include *both* the Core Strawberry Germplasm and the
28 Transition Cultivars. ECF No. 2-2 at ¶¶ 22-24.

1 came out recently in discovery. Ex. D to the Decl. of Smith in Support of CBC, Shaw, and
 2 Larson’s Opposition to UC’s Motion to Exclude David Nolte at 242:1-19. Amendments to
 3 conform to proof are “freely permit[ted].” Fed. R. Civ. P. 15(b). UC should not be permitted to
 4 avoid liability for its destruction of over 400 Transition Cultivars without the knowledge or
 5 permission of the owners of the intellectual property contained in each of the unique plants
 6 destroyed. Certainly, the issue should not be resolved without this Court’s assessment merely
 7 because UC failed to disclose such information until after the Complaint was filed.

8 **2.** The University next goes beyond the invitation extended by this Court, arguing that
 9 any conversion theory CBC might have based on the destruction of Transition Cultivars is also
 10 foreclosed by the Court’s ruling. Yet CBC’s claim is consistent with the Court’s summary
 11 judgment order.

12 Although the Court held that UC owns the tangible property rights in the Transition
 13 Cultivars in its possession, *see* ECF No. 240 at 5, the Court has not similarly ruled with respect to
 14 CBC’s intellectual property rights in the Transition Cultivars. Dr. Shaw possessed the Transition
 15 Cultivars until UC demanded he turn them over on their wrongful assertion that he possessed no
 16 intellectual property rights in the Transition Cultivars. The Court, however, has expressed its
 17 position that neither statutory law, common law, policies, nor contract have divested Drs. Shaw
 18 and Larson of their “the intellectual property” in the Transition Cultivars. Tr. of Hearing at 4:5-15
 19 (Mar. 30, 2017); *see also* ECF No. 240 at 5-7. The UC’s demand to for Dr. Shaw to turn over
 20 copies of the Transition Cultivars containing his intellectual property was wrong.

21 Because Drs. Shaw and Larson have intellectual property rights in the Transition
 22 Cultivars—rights assigned to CBC—they are entitled to prove to the jury that UC caused millions
 23 in dollars of damage by acting in bad faith and destroying the varieties necessary to practice their
 24 intellectual property rights. Just as an employer cannot destroy the schematics for a valuable
 25 semiconductor chip without violating the inventor’s intellectual property rights, UC’s unilateral
 26 decision to destroy the only remaining copies of valuable Transition Cultivars violates the
 27 Doctors’ intellectual property rights. *See, e.g., WesternGeco v. Ion Geophysical Corp.*, No.
 28 CIV.A. 09-CV-1827, 2009 WL 3497123, at *3 (S.D. Tex. Oct. 28, 2009) (“courts have

1 recognized that intangible intellectual property can be reduced to tangible forms which are
 2 thereby subject to conversion”); *see also Calabrese Found., Inc. v. Inv. Advisors, Inc.*, 831 F.
 3 Supp. 1507, 1515 (D. Colo. 1993) (“tangible objects which are highly important to the exercise of
 4 an intangible right” are subject to conversion claim). Accordingly, evidence of UC’s unilateral
 5 destruction of Transition Cultivars should be admitted as relevant to CBC’s conversion claim.

6 **3.** UC also moves *in limine* for a broad order, before any evidence has come in, limiting
 7 CBC to particular pieces of information and excluding “any evidence or argument that does not
 8 relate directly to the disclosure, assignment, or patent application on the CSG.” Contrary to UC’s
 9 assertion, however, evidence of how UC “treat[ed]” Drs. Shaw and Larson is highly relevant to
 10 their implied covenant claim. CBC is permitted to contextualize its claim by explaining to the
 11 jury the parties’ relationship and *why* UC was inclined to deprive the Doctors of their intellectual
 12 property rights and the consequences of doing so. Put otherwise, evidence of a “larger campaign”
 13 to undermine the Doctors’ property interests in the strawberry varieties they invented is probative
 14 to UC’s “‘motive’ to breach” and “direct evidence of its alleged bad faith generally in violation of
 15 the implied covenant of good faith and fair dealing.” *Onyx Pharm., Inc. v. Bayer Corp.*, 863 F.
 16 Supp. 2d 894, 898 (N.D. Cal. 2011)

17 **4.** Finally, UC makes the meritless argument that CBC may not present any evidence or
 18 argument regarding damages it has suffered based on its inability to use the full range of the CSG
 19 or TCs in which the Doctors had an intellectual property interest. Nowhere in CBC’s expert
 20 report does the expert limit his analysis to damages flowing from CBC’s lack of access “to the
 21 physical CSG or TCs in the University’s possession,” as UC maintains. Rather, the expert opines
 22 that if the Doctors had been permitted to exploit their intellectual property interests—interests the
 23 Doctors would have maintained if UC did not file an improper patent application on the CSG or
 24 destroy 400 of the TCs—CBC would have earned millions of dollars in revenue. UC is free to
 25 cross-examine CBC’s expert on the impact of the Court’s ruling on his opinion; but there is no
 26 merit to UC’s suggestion that the expert’s opinion is irrelevant.

27 Likewise, UC’s argument—a belated summary judgment argument—that UC’s breach
 28 caused no damage because Shaw and Larson will have the opportunity to receive royalties is a

1 question for the jury. CBC, obviously, believes that any prospect of royalties are limited (at best)
2 when there is no evidence the CSG is patentable (which is so far proving to be the case, at least as
3 UC is pursuing the application). And UC's suggestion that CBC could not develop the CSG even
4 if it had not filed the patent application is plainly wrong; nothing in the Court's order calls into
5 doubt the Doctors' rights to lawfully acquire and exploit unpatented varieties they invented, and
6 to establish the damages flowing therefrom.

7 **B. The Court Should Decide What Evidence Related to UC's Equitable Contract**
8 **Claim is Admissible At Trial.**

9 UC's breach of contract claim is not for the jury because its Third Amended Complaint is
10 limited to a request for equitable relief. In its claim for breach of contract, UC alleged that "the
11 University has suffered and will continue to suffer harm for which the only remedy is specific
12 performance." ECF No. 104 ¶ 48. As the Ninth Circuit has recognized, an action to specifically
13 enforce a contract "without a claim for damages is purely equitable and historically has always
14 been tried to the court." *Adams v. Johns-Manville Corp.*, 876 F.2d 702, 709 (9th Cir. 1989).
15 Accordingly, such a claim amounts to "an equitable proceeding not giving rise to a right to a jury
16 trial." *Id.* at 710; *see also Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*,
17 430 U.S. 442, 459 (1977) ("specific performance was a remedy unavailable in a court of law and
18 where such relief was sought the case would be tried in a court of equity with the facts as to
19 making and breach to be ascertained by the court"); 9 Fed. Prac. & Proc. Civ. § 2309 (3d ed.
20 2017) ("An action for specific performance of a contract historically is equitable in nature.").

21 UC nonetheless argues that evidence regarding breach of contract may be relevant to other
22 claims, such as its claim for tortious interference with contract. To be sure, evidence relevant to
23 UC's equitable claims might also be relevant to its jury triable claims, and thus may be admitted
24 provided there are no other evidentiary defects. It is premature at this point, however, for either
25 party to seek an order conclusively deeming evidence relevant or irrelevant. As the trial evidence
26 comes in, CBC will object where appropriate based on settled rules of evidence. But UC's
27 request to deem certain evidence relevant before the trial has even started and evidence has begun
28 to come in is premature and should be denied.

1 **III. CONCLUSION**

2 For these reasons, the University's Motion in Limine # 6 should be denied.

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4 Dated: May 1, 2017

Respectfully submitted,

Jones Day

5
6 By: /s/ Tharan Gregory Lanier
Tharan Gregory Lanier

7 Counsel for Cross-Complainant and
8 Defendant CALIFORNIA BERRY
9 CULTIVARS, LLC and Defendants
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RACHEL KREVANS (CA SBN 116421)
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MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
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DAVID D. SCANNELL (*pro hac vice*)
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MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
Telephone: 202.887.1500
Facsimile: 202.887.0763

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**DECLARATION OF MATTHEW
CHIVVIS IN SUPPORT OF THE
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OF THE COURT'S SUMMARY
JUDGMENT RULING ON
EVIDENCE AND ARGUMENT
RELATED TO CBC'S IMPLIED
COVENANT CLAIM AND THE
UNIVERSITY'S BREACH OF
CONTRACT CLAIM**

1 I, Matthew A. Chivvis, do hereby declare as follows:

2 1. I am a partner with the law firm of Morrison & Foerster LLP and an attorney of
3 record for Movant The Regents of the University of California (the “University”) in the above-
4 captioned matter. I am admitted to practice law in the State of California and before this Court. I
5 submit this declaration in support of The Regents of the University of California’s Motion *in*
6 *Limine* No. 6: Re: The Impact of the Court’s Summary Judgment Ruling on Evidence and
7 Argument Related to CBC’s Implied Covenant Claim and The University’s Breach of Contract
8 Claim. I have personal knowledge of the facts stated in this declaration, and I could and would
9 competently testify to them if called as a witness.

10 2. Attached as Exhibit 1 is a true and correct copy of CBC_DS_00026598, a
11 November 3, 2014, letter from Michael Ward to Patrick Nielson.

12 3. Attached as Exhibit 2 is a true and correct copy of United States Plant Patent No.
13 27,830 entitled “Strawberry Plant Called ‘Cabrillo’.”

14 4. Attached as Exhibit 3 is a true and correct copy of excerpts from the
15 January 21, 2017, expert report of David Nolte.

16
17 I declare under penalty of perjury that the foregoing is true and correct.

18 Executed on April 30, 2017, in San Francisco, CA.

19
20 _____
21 */s/ Matthew A. Chivvis*

22 MATTHEW A. CHIVVIS
23
24
25
26
27
28

EXHIBIT 1

MORRISON | FOERSTER

425 MARKET STREET
SAN FRANCISCO
CALIFORNIA 94105-2482

TELEPHONE: 415.268.7000
FACSIMILE: 415.268.7522

WWW.MOFO.COM

MORRISON & FOERSTER LLP
BEIJING, BERLIN, BRUSSELS, DENVER,
HONG KONG, LONDON, LOS ANGELES,
NEW YORK, NORTHERN VIRGINIA,
PALO ALTO, SACRAMENTO, SAN DIEGO,
SAN FRANCISCO, SHANGHAI, SINGAPORE,
TOKYO, WASHINGTON, D.C.

Writer's Direct Contact
+1 (415) 268.6237
MWard@mofo.com

PRIVILEGED AND CONFIDENTIAL -- SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

November 3, 2014

Mr. Patrick Nielson
23263 Park Corniche
Calabasas, CA 01302-2821

Re: Provisional Patent Applications Naming Dr. Douglas Shaw as Inventor
Our Reference: 51411-3

Dear Mr. Nielson:

We are counsel to The Regents of the University of California (the University). We have been asked to respond on behalf of the University to certain issues raised in an email sent by Dr. Douglas Shaw on September 19, 2014 to Michael Carriere of UC Davis Innovation Access. We understand that Dr. Shaw has some questions regarding provisional patent applications 61/997,548 and 61/999,632 which we filed on behalf of the University naming Dr. Shaw as an inventor.

We would normally correspond directly with Dr. Shaw as an inventor of the patent applications. Such correspondence would be privileged and confidential.

However, we understand that you represent Dr. Shaw in matters related to the patent applications. We therefore cannot directly correspond with Dr. Shaw but instead direct our letter to Dr. Shaw to your attention. This letter is privileged and confidential.

As a preliminary matter we note that that the provisional patent applications 61/997,548 and 61/999,632 are the subject of litigation between the University and the California Strawberry Commission. As such, we cannot disclose the litigation strategy, if any, related to those filings. Subject to that, we have general comments as set forth below.

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Mr. Patrick Nielson
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PRIVILEGED AND CONFIDENTIAL -- SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

While the University typically makes a non-provisional patent application filing as the initial step in seeking plant patent protection, it is accepted procedure to initially make a provisional patent application filing and then to subsequently (e.g., at the one-year anniversary of the provisional filing) make a non-provisional plant patent filing based on the provisional filing. Under these circumstances, the provisional patent applications serve as priority patent applications to any subsequently filed non-provisional plant patent applications filed within one year of the provisional patent applications. Any such subsequently filed non-provisional plant patent applications that claim priority to these provisional patent applications will have as their effective filing dates the filing dates of the provisional filings.

It is also accepted procedure to disclose and claim multiple varieties in a non-provisional plant patent filing (or in one or more prior provisional filings to which the non-provisional plant patent application filing claims priority), with the understanding that the individual varieties can be subsequently pursued on a variety-by-variety basis in separate non-provisional plant patent filings. In this instance, the provisional filings 61/997,548 and 61/999,632 do not interfere or conflict with the planned subsequent non-provisional plant patent filing for CN 236 (8.181-1), or with non-provisional plant patent filings for any future-released varieties disclosed in the provisional patent applications. The provisional patent applications serve as priority applications for a non-provisional plant patent filing for CN 236 (8.181-1) and thereby provide an earlier filing date for the non-provisional plant patent filing for CN 236 (8.181-1).

Regarding assignments, it is the University's typical practice to obtain an assignment for both provisional filings and non-provisional filings, with the assignments reflecting the applicable respective serial numbers for each.

Regarding information to supplement the provisional patent filings, in accordance with plant patent application practice, additional information can be added to the non-provisional plant patent applications at a subsequent stage (to the extent such information becomes available), if the Patent and Trademark Office so requests or if the decision is otherwise made to do so.

Finally, Dr. Shaw refers several times to his request for filing a utility model patent application. There is no such thing as a utility model patent application in the United States: http://www.wipo.int/sme/en/ip_business/utility_models/utility_models.htm

We presume that Dr. Shaw is referring to a utility patent application and not a utility model patent application. With that understanding, we provide the following on the choice between plant patents and utility patents for protecting strawberry varieties in the U.S. In the U.S., strawberry varieties can, in theory, be protected by plant patents or utility patents, but in practice are protected by plant patents. The University has consistently used plant patents

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Mr. Patrick Nielson
November 3, 2014
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PRIVILEGED AND CONFIDENTIAL -- SUBJECT TO ATTORNEY-CLIENT PRIVILEGE

rather than utility patents to protect strawberry varieties. We are not aware of any utility patents that have issued to anyone for strawberry varieties.

One reason that strawberry varieties are protected by plant patents rather than utility patents is that plant patents do not require a deposit of plant material. By contrast, in order to obtain a utility patent for a strawberry variety, an enabling patent deposit is necessary. There are a limited number of depositories worldwide that accept plant material deposits in support of patent filings. For strawberry, the deposit would need to be a tissue culture deposit. It is not clear whether a tissue culture deposit of strawberry could be maintained in a way sufficient to satisfy the enablement requirement of a utility patent.

We hope that this provides Dr. Shaw with the explanations that he is requesting.

Sincerely,

/Michael R. Ward/

Michael R. Ward

MRW:kds

EXHIBIT 2

(12) **United States Plant Patent**
Shaw et al.

(10) **Patent No.:** **US PP27,830 P3**
(45) **Date of Patent:** **Apr. 4, 2017**

(54) **STRAWBERRY PLANT NAMED 'CABRILLO'**

(50) Latin Name: *Fragaria~~x~~ananassa* Duch.
Varietal Denomination: **Cabrillo**

(71) Applicant: **The Regents of the University of California**, Oakland, CA (US)

(72) Inventors: **Douglas V. Shaw**, Davis, CA (US);
Kirk D. Larson, Santa Ana, CA (US)

(73) Assignee: **The Regents of the University of California**, Oakland, CA (US)

(*) Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 126 days.

(21) Appl. No.: **14/544,658**

(22) Filed: **Jan. 30, 2015**

(65) **Prior Publication Data**

US 2016/0227687 P1 Aug. 4, 2016

(51) **Int. Cl.**
A01H 5/08 (2006.01)

(52) **U.S. Cl.**
USPC **Plt./209**

(58) **Field of Classification Search**
USPC Plt./209
See application file for complete search history.

Primary Examiner — Keith Robinson

(74) *Attorney, Agent, or Firm* — Kilpatrick Townsend & Stockton LLP

(57) **ABSTRACT**

'Cabrillo' is a day-neutral strawberry cultivar that is moderate to strong in expressing the day-neutral character. 'Cabrillo' will be of special interest for winter plantings and in summer plantings where 'San Andreas', 'Portola', and 'Albion' have been successful.

3 Drawing Sheets

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Genus and species: The strawberry cultivar of this invention is botanically identified as *Fragaria~~x~~ananassa* Duch.

Variety denomination: The variety denomination is 'Cabrillo'.

BACKGROUND OF THE INVENTION

This invention relates to a new and distinctive day-neutral type cultivar designated as 'Cabrillo', which resulted from a cross performed in 2008 between two unreleased germplasm accessions Cal 3.149-8 (unpatented) and Cal 5.206-5 (unpatented).

'Cabrillo' was first fruited at the University of California Wolfskill Experimental Orchard, near Winters, Calif. in 2009, where it was selected, originally designated Cal 8.181-1, and propagated asexually by runners. Following selection and during testing the plant of this selection was designated 'CN236'. With the decision that this plant was to be released, this plant was given the name 'Cabrillo' for purposes of introduction into commerce and for international registration and recognition. Asexual propagules from this original source have been tested at the Watsonville Strawberry Research Facility, the South Coast Research and Extension Center, and to a limited extent in grower fields starting in 2010.

BRIEF SUMMARY OF THE INVENTION

'Cabrillo' is a day-neutral (ever-bearing) strawberry cultivar similar to 'Albion' (U.S. Plant Pat. No. 16,228), but with higher yield. It is also similar to 'San Andreas' (U.S. Plant Pat. No. 19,975), but with higher yield, better flavor, and larger fruit. 'Cabrillo' is moderate to strong in expressing the day-neutral character and 'Cabrillo' will be of special interest for winter plantings and in summer plantings where 'San Andreas', 'Portola' (U.S. Plant Pat. No. 20,552), and 'Albion' have been successful. Fruiting plants of 'Cabrillo'

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are similar in morphology to 'Albion' or 'San Andreas', although slightly larger and more erect. The fruit shape for 'Cabrillo' is typically a short and either symmetrical or slightly flattened conic. It is easily distinguished by fruit shape from 'Albion' (long conic), 'San Andreas' (long conic with a slight neck) or 'Portola' (short and rounded conic). Subjectively, 'Cabrillo' has outstanding flavor. The fruit will be exceptional for both fresh market and processing, and will be useful for home garden purposes.

BRIEF DESCRIPTION OF THE DRAWINGS

The Figures depict various characteristics of the 'Cabrillo' cultivar. Plants were planted in November.

FIG. 1 shows the general flowering and fruiting characteristics of the plant in a field planting.

FIG. 2 shows a typical leaf at mid-season.

FIG. 3 shows representative mid-season fruit.

DETAILED DESCRIPTION OF THE INVENTION

'Cabrillo' is typical of day-neutral strawberry cultivars and produces fruit regardless of day length when treated appropriately in arid, subtropical climates. 'Cabrillo' is moderate to strong in expressing the day-neutral character, being stronger in flowering response than 'San Andreas' and 'Albion', and less so than 'Portola' or 'Irvine' (U.S. Plant Pat. No. 7,172). The fruit of 'Cabrillo' is firmer and larger than that of unreleased parent Cal. 3.149-8; and larger and darker in color than the fruit of unreleased parent variety Cal. 5.206-5. 'Cabrillo' will be of special interest for winter plantings and in summer plantings where 'San Andreas', 'Portola', and 'Albion' have been successful.

Plants and Foliage:

Fruiting plants of 'Cabrillo' are similar in morphology to 'Albion' or 'San Andreas' although slightly larger and much

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more erect. The growth habit of the plant is upright. The inflorescence is at the same level in relation to foliage. Blistering of the leaf is absent or weak. Glossiness of the leaf is strong. The terminal leaflet is obtuse in shape. Comparative statistics for foliar characters near mid-season (November plantings) are given for 'Cabrillo' and the three comparison cultivars in Table 1. Individual leaflets for 'Cabrillo' are slightly smaller than for the comparison cultivars, and are much more concave. Leaves (including petioles) for 'Cabrillo' are slightly shorter than those for the comparison cultivars, mostly due to leaflet size. Petioles are generally thinner than those of the comparison cultivars. The adaxial (upper) and abaxial (lower) surfaces of leaves for 'Cabrillo' are similar in color to the comparison cultivars at mid-season.

TABLE 1

Foliar and plant characteristics for 'Cabrillo', 'Albion', 'San Andreas', and 'Portola'.				
Characteristic	Cultivar			
	'Albion'	'San Andreas'	'Portola'	'Cabrillo'
Plant height (mm)				
mean	285	302	300	313
range	270-300	280-320	290-320	290-340
Plant spread (mm)				
mean	390	444	433	452
range	335-430	370-535	410-445	390-505
Mid-tier leaflet Length (mm)				
mean	88	88	98	85
range	80-100	80-100	90-100	70-100
Width				
mean	84	82	89	79
range	75-95	70-90	80-100	70-80
Mid-tier leaf Length (mm)				
mean	132	135	134	126
range	110-150	130-150	150-180	120-140
Width (mm)				
mean	164	154	170	160
range	150-180	130-160	150-180	140-180
Leaf components				
Petiole length (mm)				
mean	205	220	223	218
range	180-220	200-260	190-260	200-240
Petiole diameter (mm)				
mean	5.2	4.7	4.9	3.9
range	4-6	4-6	4-6	3-5
Petiolule length (mm)				
mean	6.1	6.0	10.7	11.4
range		5-9	10-12	8-14
# leaflets/leaf	3	3	3	3
Leaf convexity	some flat, most slight concave	some flat, most slight concave	some flat, most slight concave	mostly concave
Serrations				
number/leaf	24.2	21.8	24.6	20.5
range	22-26	19-24	21-28	18-24

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TABLE 1-continued

Foliar and plant characteristics for 'Cabrillo', 'Albion', 'San Andreas', and 'Portola'.				
Characteristic	Cultivar			
	'Albion'	'San Andreas'	'Portola'	'Cabrillo'
shape	semi- pointed	semi- pointed	semi- pointed	semi- pointed
Leaf pubescence	moderate- heavy	moderate	moderate	light- moderate
Petiole pubescence	heavy	heavy	moderate	heavy
density				
direction	perpen- dicular	perpen- dicular	perpen- dicular	perpen- dicular
Petiole color (Munsell)		5 GY 8/8	7.5 GY 8/7	5 GY 8/8
Stipule length (mm)				
mean	33.0	32.0	29.4	30.0
range	30-35	25-35	24-37	24-40
Stipule color (Munsell)				
core margins	7 G 9/4 7 GY 8/7	2.5 GY 8/9 5 GY 8/7	2.5 GY 8/9 5 GY 8/8	5 GY 7/10 5 GY 8/8
Stolon base diameter (mm)	2.7	1.8	1.4	1.5
Stolons per nursery mother plant	15.8	21.5	20.3	22.0
Venation				
pattern	pinnate	pinnate	pinnate	pinnate
color (Munsell)	5 GY 6/8	2.5 GY 6/8	2.5 GY 6/8	10 GY 8/7

Disease and Pest Reaction:

'Cabrillo' is moderately resistant to powdery mildew (*Sphaerotheca macularis*), and moderately susceptible to Anthracnose crown rot (*Colletotrichum acutatum*). It is moderately resistant to Verticillium wilt (*Verticillium dahliae*), Phytophthora crown rot (*Phytophthora cactorum*) and common leaf spot (*Ramularia tulasnei*) (Table 2). When treated properly, it has tolerance to two-spotted spider mites (*Tetranychus urticae*) equal to that for the comparison cultivars. 'Cabrillo' is tolerant to strawberry viruses encountered in California.

TABLE 2

Disease resistance scores for 'Cabrillo' and three comparison cultivars; scores were obtained in evaluations conducted in 2012-2014.			
Genotype	<i>Phytophthora</i> Resistance Score (5 = best)	<i>Verticillium</i> Resistance Score (5 = best)	<i>Colletotrichum</i> Resistance Score (5 = best)
'Albion'	4.6	4.0	2.9
'San Andreas'	4.3	4.4	2.9
'Portola'	4.4	3.2	7.4
'Cabrillo'	4.2	3.4	1.8

Flowering, Fruiting, Fruit, and Production Characteristics:

'Cabrillo' is similar to other California day-neutral cultivars (e. g. 'San Andreas' and 'Albion') in that it will flower independently of day length, given appropriate temperature and horticultural conditions. The petals are arranged in the flower are touching. The achenes are level with the surface. The fruit is firm. Flowering occurs early. Comparative statistics for flower and fruit characters near mid-season (November plantings) are given for 'Cabrillo' and the three

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comparison cultivars in Table 4. The primary flowers for ‘Cabrillo’ are similar in size to the comparison cultivars with a calyx that is distinctly larger relative to the corolla on primary fruit. The calyx for ‘Cabrillo’ varies in position but is usually more indented than for ‘Albion’ or ‘San Andreas’, similar to ‘Portola’. The fruit shape for ‘Cabrillo’ can vary, but is typically a short and either symmetrical or slightly flattened conic. It is easily distinguished by fruit shape from ‘Albion’ (long conic), ‘San Andreas’ (long conic with a slight neck) or ‘Portola’ (short and rounded conic). ‘Cabrillo’ usually has a greater proportion of symmetrical fruit than the comparison cultivars. External fruit color for ‘Cabrillo’ is lighter and has greater shine than that of ‘Albion’ or ‘San Andreas’ and is distinctly darker than that of ‘Portola’. Internal color is somewhat lighter with less red pigment than for ‘Albion’ (Table 3). Achenes vary from yellow to dark red, but are frequently more yellow than the comparison cultivars, and are usually slightly indented.

TABLE 3

Foliar and fruit color characteristics for ‘Cabrillo’ and three comparison cultivars.				
Color Character	Cultivar			
	‘Albion’	‘San Andreas’	‘Portola’	‘Cabrillo’
Leaf color (CIELAB) Adaxial L*				
mean range	36.3 32.2-40.8	36.9 34.1-39.2	37.7 36.2-38.7	36.2 35.0-38.7
a*				
mean range	-9.8 -6.7--12.8	-9.7 -8.5--10.9	-9.4 -6.9--10.8	-9.8 -6.7--12.5
b*				
mean range	13.7 12.1-18.1	13.1 12.8-15.5	13.2 10.8-14.3	12.9 10.1-15.8
Munsell Abaxial L*	5 GY 4/3	5 GY 4/3	5 GY 3/2	5 GY 4/3
a*				
mean range	50.2 48.7-60.0	49.4 37.8-51.3	48.7 45.8-50.0	51.1 49.2-53.1
b*				
mean range	-13.1 -11.5--14.0	-12.6 -9.9--13.8	-12.2 -11.2--12.7	-13.1 -12.5--14.0
Fruit color (CIELAB) External L*				
mean range	20.1 16.8-22.9	20.6 13.2-21.6	18.7 18.1-19.1	20.4 19.5-21.0
Munsell	10 GY 7/8	10 GY 7/8	7.5 GY 5/7	5 GY 5/5
a*				
mean range	37.6 34.6-41.5	40.3 37.7-44.9	40.1 37.2-42.5	39.2 35.4-41.6
b*				
mean range	34.2 29.9-38.4	35.7 33.2-37.8	35.1 33.9-36.9	32.0 30.8-32.8

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TABLE 3-continued

Foliar and fruit color characteristics for ‘Cabrillo’ and three comparison cultivars.				
Color Character	Cultivar			
	‘Albion’	‘San Andreas’	‘Portola’	‘Cabrillo’
b*				
mean range	19.3 12.9-20.9	23.2 18.6-30.0	22.5 15.2-27.2	70.5 18.5-23.2
Munsell Internal L*	5 R 3/7	5 R 4/12	2.5 R 4/10	7.5 R 4/11
a*				
mean range	49.4 37.2-54.4	56.2 54.2-59.1	52.8 48.6-57.6	54.4 50.0-56.0
b*				
mean range	19.2 16.7-23.1	18.5 12.8-20.8	18.4 13.5-21.8	14.9 9.8-20.5
a*				
mean range	23.1 20.0-27.9	25.2 22.0-28.1	27.6 23.4-30.3	22.1 18.2-29.4
Munsell Achene color	5 R 4/12	7.5 R 4/11	5 R 5/13	5 R 5/13
Munsell	2.5 R 8/12	10 Y 7/9	7.5 Y 7/9	10 Y 8/11

TABLE 4

Flower and fruit characters for ‘Cabrillo’ and three comparison cultivars.				
Character	Cultivar			
	‘Albion’	‘San Andreas’	‘Portola’	‘Cabrillo’
Petal number				
mean range	5.5 5-7	6.4 6-7	6.0 5-7	5.3 5-7
Petal shape				
apex	truncate to slightly obtuse	truncate to slightly obtuse	truncate to slightly obtuse	truncate to slightly obtuse
base margin	attenuate entire	attenuate entire	attenuate entire	attenuate entire
Petal length (mm)				
mean range	9.4 8-10	9.1 7-11	10.3 9-12	10/7 9-13
Petal width (mm)				
mean range	8.9 8-10	9.1 8-11	11.2 10-12	12.2 10-13
Flower position (relative to foliage)	most even some exposed	most even some internal and exposed	most exposed, some even	most exposed
Calyx diam.(mm)				
mean range	31.3 25-35	32.7 27-38	29.1 27-32	35.2 32-38
Corolla diam. (mm)				
mean range	26.0 25-30	30.8 28-34	24.2 22-26	26.3 24-28

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TABLE 4-continued

Flower and fruit characters for 'Cabrillo' and three comparison cultivars.				
Character	Cultivar			
	'Albion'	'San Andreas'	'Portola'	'Cabrillo'
Sepal length (mm)				
mean	15.0	10.1	10.4	10.9
range	8-20	7-12	9-12	9-15
Sepal width (mm)				
mean	6.5	6.4	6.9	6.7
range	5-8	5-10	6-8	5-8
Sepal color (Munsell)	5 GY 5/6	5 GY 5/6	5 GY 5/6	5 GY 5/6
Pedicel length (mm)				
mean	261	301	266	243
range	240-280	260-350	220-300	230-270
Pedicel diameter (mm)				
mean	4.5	4.9	3.9	5.0
range	4-5	4-7	3-5	4-6
Pedicel color	2.5 GY 6/8	2.5 GY 9/8	5 GY 6/8	2.5 GY 9/8
Fruit shape				
Fruit length (mm)				
mean	54.1	52.1	46.7	53.0
range	47-57	44-58	43-55	48-61
Fruit width (mm)				
mean	45.7	44.2	47.4	47.7
range	42-48	42-55	42-52	43-57
Length/width				
ratio	1.2	1.2	1.0	1.1
range	1.0-1.4	1.0-1.3	0.8-1.1	1.1-1.3
subjective	medium to long conic	medium to long conic	most short conic	medium conic
Primary/secondary fruit comparison				
size (subjective) shape	70-80% shorter conic	60-70% shorter conic	60-70% similar shape	70-80% similar shape
Extent/size of hollow core	small-medium	small-medium	small-absent	small-absent
Calyx position	even to indented	even-slight neck	even-indented	indented-even
size relative to fruit	equal or greater than fruit diameter	equal or greater than fruit diameter	equal or greater than fruit diameter	equal or greater than fruit diameter

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TABLE 4-continued

Flower and fruit characters for 'Cabrillo' and three comparison cultivars.				
Character	Cultivar			
	'Albion'	'San Andreas'	'Portola'	'Cabrillo'
Seed position	even-indented	even	even	even-indented
Adherence of Calyx to Fruit	weak	weak	weak	intermediate

Flower measurements and fruit measurements obtained May 1-Jun. 1, 2013, subjective observations obtained May 28, 2014.

'Cabrillo' has been tested under a variety of cultural regimes, and optimal performance is obtained when nursery treatments and nutritional programs similar to those for 'Albion', 'San Andreas', and 'Portola' are used. In general, 'Cabrillo' is more vigorous than the comparison cultivars and is more flexible to planting and chilling treatments. 'Cabrillo' retains excellent fruit quality in summer planting systems.

When treated with appropriate planting regimes, 'Cabrillo' has larger fruit and produces greater individual-plant yield than any of the comparison cultivars (Table 5). 'Cabrillo' has a similar production pattern to 'Albion' with most cultural treatments, although it is substantially more adapted to later-season winter planting and spring planting. Commercial appearance ratings have been similar to or better than those for all of the comparison cultivars, especially 'Portola'; these superior appearance scores translate directly into a larger fraction of marketable fruit than is produced by the comparison cultivars. Fruit for 'Cabrillo' is substantially firmer than fruit from the comparison cultivars. Subjectively, 'Cabrillo' has outstanding flavor. The fruit will be exceptional for both fresh market and processing, and will be useful for home garden purposes.

TABLE 5

Performance of 'Cabrillo' and three comparison cultivars evaluated at the Watsonville Research Facility in 2012-13. All plants for these trials were harvested from a commercial nursery near Macdoel, CA on October 15-16, and transplanted after 18-21 days supplemental storage. Fruit harvest was initiated in early April and continued through the first week of October. (52" 2-row beds, 17,300 plants/acre).

Cultivar	Yield (g/plant)	Appearance Score (5 = best)	Fruit Size (g/fruit)	Firmness
'Albion'	2,632	4.1	32.6	12.2
'San Andreas'	3,090	4.3	32.0	12.2
'Portola'	2,900	3.4	31.7	11.4
'Cabrillo'	3,669	4.3	32.0	12.2

What is claimed is:

1. A new and distinct cultivar of strawberry plant having the characteristics substantially as described and illustrated herein.

* * * * *

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U.S. Patent

Apr. 4, 2017

Sheet 1 of 3

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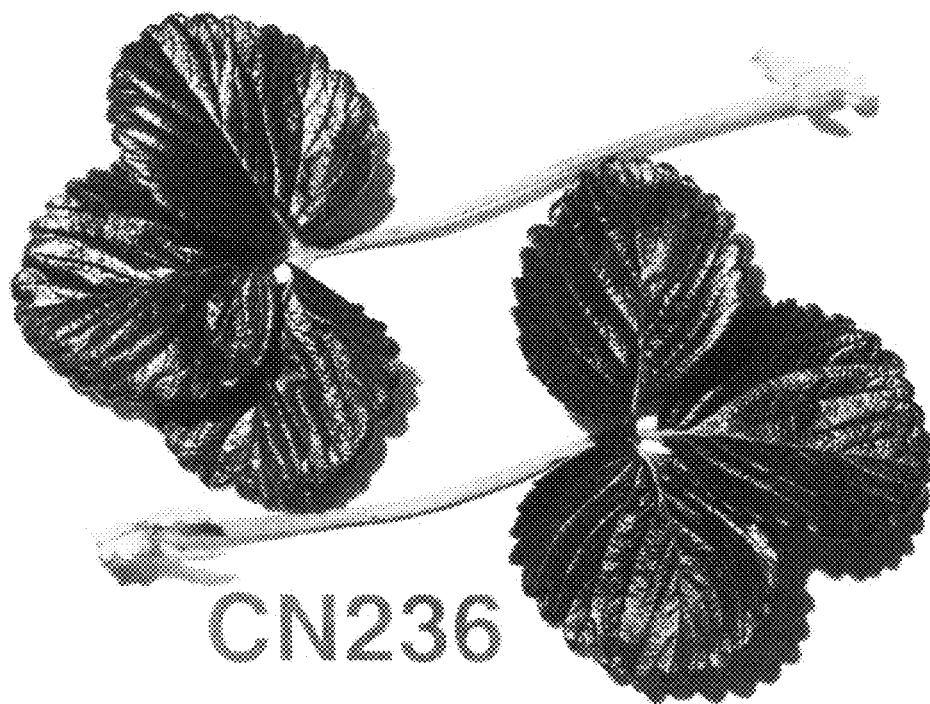
FIG. 1

U.S. Patent

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1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27

FIG. 2

U.S. Patent

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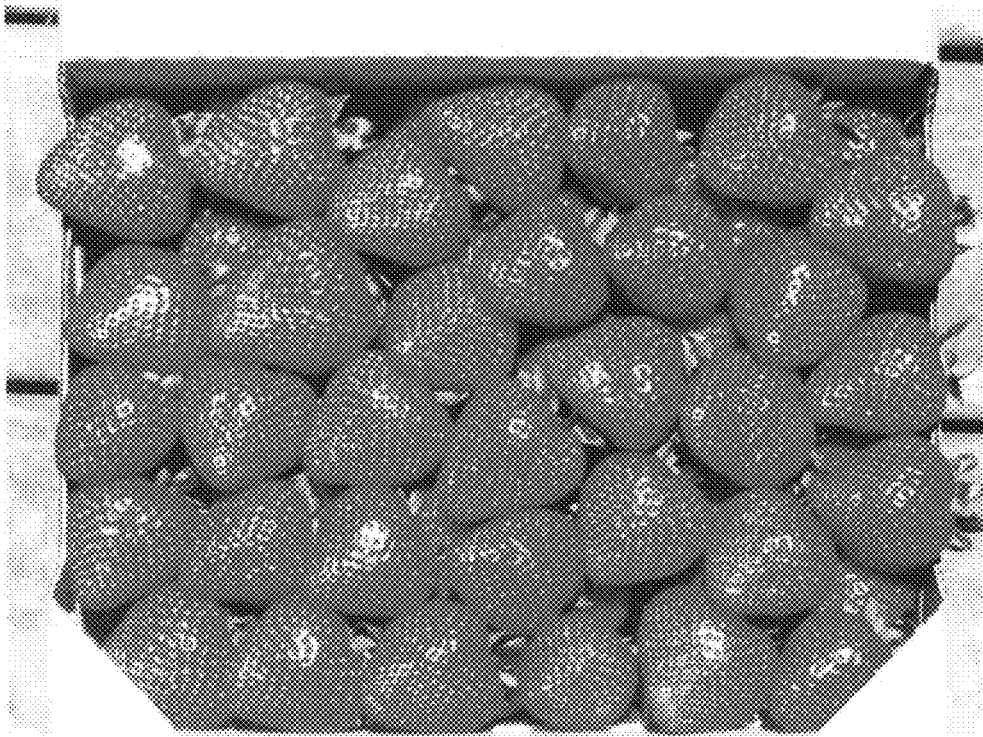


FIG. 3

EXHIBIT 3



Fulcrum Financial Inquiry LLP
888 S. Figueroa Street, Suite 2000
Los Angeles, CA 90017

(213) 787-4100
www.fulcrum.com

January 21, 2017

Frederick McKnight, Esq.
Jones Day
555 S. Flower Street, 50th Floor
Los Angeles, CA 90071

Dear Mr. McKnight:

This report is provided in connection with California Berry Cultivars, LLC ("CBC") vs. The Regents of the University of California ("UC") (USDC Case No. 3:16-cv-02477) to the extent possible at this time.

I. DESCRIPTION OF ENGAGEMENT

Fulcrum Financial Inquiry LLP ("Fulcrum") was asked to calculate CBC's lost profit damages arising from UC's failure to provide CBC nonexclusive access to the Materials (defined subsequently) as of December 1, 2014, which would have allowed CBC personnel to continue development, patenting, and licensing efforts.

In addition to these damages, Fulcrum understands that Drs. Shaw and Larson are entitled to royalties on UC-patented cultivars for which Drs. Shaw and/or Larson are the inventors. Any such amounts owed are not calculated as part of this report or Fulcrum's assignment.

Fulcrum assumes that CBC is able to prevail on its liability claims, for which Fulcrum expresses no opinion.

II. FACTUAL & LEGAL BACKGROUND

This section provides background that provides context to this report. Although Fulcrum is capable of summarizing information contained in this section (and may need to do so as part of providing background to any testimony), Fulcrum is not expressing an opinion of any facts contained in this section.

A. Employment and Strawberry Breeding Program Background

Based on complaints filed by both CBC and UC, the employment history and description of the UC Davis strawberry breeding program ("SBP") appear to be substantially the same for purposes relevant to Fulcrum's calculations. Specifically:

1. Douglas Shaw Ph.D. was a Professor of Plant Sciences at UC's Davis campus, with a special focus in genetics starting in 1986. Dr. Shaw was employed at the UC Davis strawberry breeding program ("SBP") starting in 1988.
2. Kirk Larson Ph.D. was employed at the UC Davis SBP starting in 1991.
3. Drs. Shaw and Larson retired from the UC's employ in November 2014.

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The summary of a UC Internal Audit report on the UC SBP starts with the following background:¹

"California is the nation's leading producer of strawberries. In 2013, over 2.3 billion pounds of strawberries were harvested in California, comprising approximately 88% of the fresh and frozen strawberries in the United States. According to the California Department of Food and agriculture (CDFA), strawberries are one of California's top 20 crop and livestock commodities. University of California (UC) produced varieties make up an estimated 80% of California's strawberry production.

UC Davis' SBP began in the 1930s and has continued to the present day. The SBP has been responsible for the release of a number of notable strawberry varieties, with over 30 patented varieties developed in the last six decades. ...

Until their retirement in November 2014, there were two strawberry breeders (breeders) dedicated to the SBP. Both were faculty members in the UC Davis Department of Plant Sciences (Plant Sciences) within the College of agricultural and Environmental Sciences (CA&ES). The breeders were responsible for developing the strawberry varieties that are the foundation of the SBP ...

Strawberry royalties have been trending upward over the past five years. During fiscal year (FY) 2012 – 2013, UC collected over \$7.5 million in gross strawberry licensing fees and royalties from UC Davis varieties. ...

The SBP is currently at a crossroads with the retirement of the breeders who have been the driving force behind the SBP over the last few decades. ..."

B. CBC's Contentions

For purposes only of understanding the calculations Fulcrum described herein, Fulcrum understands that CBC contends:

1. Upon their retirement, Drs. Shaw and Larson (i) had a nonexclusive right (license) to use the results of their research, plant materials and related information (collectively, the "Materials"), and (ii) assigned their rights to the Materials to CBC.
2. The Materials include (i) approximately 168 cultivars developed by Drs. Shaw and Larson which are subject to a pending United States plant patent application, and (ii) approximately 250 plant varieties developed by Dr. Shaw and Larson that may have value as cultivars and breeding stock. The Materials are a subset of the full collection of strawberry plant materials and information within the UC strawberry breeding program, and do not include any plants for which the UC had obtained a patent.
3. UC violated their obligation to Drs. Shaw and Larson by withholding the Materials from CBC, and not safeguarding the living plants that will allow the Materials to now be provided to CBC in a reasonably usable form.

¹ December 2014 UC Internal audit report regarding the UC strawberry breeding program, project #14-75 (UC STRAW2 00077123 – 184), pages 2 - 3 [citations omitted]

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C. CBC's Expectations of what CBC Could Accomplish

Fulcrum discussed with Dr. Douglas Shaw and Mr. Lucky Westwood what CBC would be capable of accomplishing (i) absent UC's withholding of the Materials and (ii) in the actual conditions that CBC now faces. Their comments included:

1. Drs. Shaw and Larson retired from UC in November 2014. At that time, the transition cultivars comprised of more than 800 varieties, which were viable and in good health, approximately 250 of which, in CBC's judgment, warranted further evaluation and development as cultivars and to serve as breeding stock for annual crosses beginning 2015. These counts excluded all plants for which UC has patents or patents pending.
2. The following nine cultivars were developed by Drs. Shaw and Larson and have at least five years of licensing history:²
 - a. Camino Real
 - b. Ventana
 - c. Albion
 - d. Palomar
 - e. Monterey
 - f. San Andreas
 - g. Portola
 - h. Benica
 - i. Mojave

Earlier cultivars included the efforts of other developers. The nine cultivars listed above are a good cross-select of the type of work that would be expected from CBC's efforts. They include cultivars that were both commercially successful and not commercially successful, as well as a representative mix of short-day and day-neutral cultivars.

3. Absent UC's wrongful conduct, CBC would have been able to patent the first cultivar in 2018 and commercialize this cultivar in 2019.
4. The cultivar development cycle typically lasts eight years. Since CBC had to start from scratch, the actual damages reflect the loss of eight missing cultivars that would have been developed earlier.
5. CBC could be expected to generate at least one new patented cultivar per year, on average.
6. Improvements in the licensing practices used by UC that will be implemented by CBC include:
 - a. Use of market royalty rates, which are higher than what UC has used; and
 - b. More rapid licensing to growers outside of California by eliminating the two-year preferred period that has existed for California growers;³

² This list is consistent with UC STRAW2 00075847

³ Paragraph 7 of UC's November 21, 2016 Third Amended Cross-Complaint

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- c. Greater use of compliance audits to encourage/enforce complete and accurate reporting by growers;⁴ and
- d. Not engaging in practices found by the California State Auditor to have resulted in the SBP not receiving all royalties to which it otherwise would be entitled.⁵

An increase in California royalty rates from \$8 per thousand plants to \$10 per thousand plants would, by itself, increase royalties by 25 percent, with additional royalty increases occurring for the other reasons identified.

7. U.S. patents for plant materials have a twenty year life. Foreign licensing is an important part of the royalties, with such foreign licensing often lasting more than the period for U.S. patent protection.

III. INFORMATION RELIED UPON

In addition to my experience and training, Fulcrum relied upon the following information in preparing this report, each of which is of a type that is reasonably relied upon by experts in my field:

1. Background materials, as follows:
 - a. CBC's May 2, 2016 Complaint filed in the Alameda Superior Court
 - b. UC's November 21, 2016 Third Amended Cross-Complaint
 - c. Presentation regarding the UC strawberry breeding program, entitled "Addressing 21st Century challenges through genetic Innovation"⁶
2. Interview with Dr. Douglas Shaw and Mr. Lucky Westwood, the results of which are summarized in the preceding section
3. UC licensing results of certain cultivars, as follows:
 - a. UC STRAW2 00058007 and UC STRAW2 00075844, both of which show plants licensed from 1991 through 2014
 - b. UC STRAW2 00075847, showing royalties from 1994 through 2016
 - c. UC STRAW2 00075842, showing "inventor shares", aka Exhibit 102 from the Shaw deposition
4. December 14, 2015 memorandum discussing SBP royalty rates (UC STRAW2 000085284 – 7)
5. December 2014 UC internal audit report regarding the UC strawberry breeding program, project #14-75 (UC STRAW2 00077123 – 184)
6. California State Auditor Report 2014 – 121, dated June 9, 2015 (UC STRAW2 00077360 – 408)
7. Other documents and publicly-available information, as referenced herein

⁴ See comments contained in the December 2014 internal audit report on the SBP program on pages 5 and 12.

⁵ California State Auditor Report 2014 – 121, dated June 9, 2015

⁶ <http://gcr.ucdavis.edu/state-govt/capitol-speaker-series/events/strawberry.pdf>

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Fulcrum had available, and considered, additional information that does not directly enter into the calculations contained herein. This additional information generally consist of:

1. Depositions and exhibits thereto, as follows:
 - a. December 8, 2016 for Douglas Shaw, Ph.D.
 - b. December 16, 2016 for Steven Knapp, Ph.D.
 - c. January 5, 2017 for Lucky Westwood
2. A variety of financial planning documents and CBC historical financial statements, all bearing a production number with a CBC prefix
3. CBC's Motion for Temporary Restraining Order, and related exhibits

A more detailed listing of the records and their related production numbers that were available to Fulcrum is attached as Exhibit 4.

IV. SUMMARY OF FULCRUM'S CONCLUSIONS

Lost profit damages represent the present value of the difference between what should have happened (called the "but-for" world), and what actually has or will occur (called the "actual" world).

1. Absent the alleged wrongful conduct (the but-for world), UC would have shared access and ownership to the plant materials as of December 1, 2014, which would have allowed CBC to continue its development, patenting, and licensing efforts. CBC would have been able to patent the first cultivar in 2018 and commercialize this cultivar in 2019.
2. In the actual world, CBC implemented a similar level of effort, but faced delays having to start from scratch in a development cycle that typically lasts eight years. As a result, actual damages span over eight years.

Importantly, all of the calculations and conclusions contained in the rest of this section use, as their starting point, the dollar amount of royalties collected by UC. The use of dollars as the starting point in the analysis adds an element of imprecision (specifically, an understatement of the lost profits damages because:

1. The UC's rates have changed over time,⁷ yet the use of currency amounts does not reflect directly the growth in the units involved.
2. The royalties are a mixture of licenses to the following categories, each of which have a different royalty rate:⁸
 - a. California – Currently \$8.00 per thousand plants
 - b. United States – Currently \$9.00 per thousand plants
 - c. Outside U.S. & Canada – Currently, \$16.50 per thousand plants

A more accurate calculation would consider the actual units shipped to each of these territories, applied to rates that CBC would use for each geography. I intend to perform such a calculation promptly using

⁷ UC STRAW2 000085284 – 7

⁸ UC STRAW2 00075847 and UC STRAW2 000085284 – 7

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the same general methodology described below. The more accurate calculation predictably will increase the amount of lost profits, most likely by a significant amount.

Prior to the completion of the more accurate calculation described in the preceding paragraph, the present value of lost profits comparing the but-for and actual worlds is **at least \$20,450,000**. Calculations of this amount are shown on Exhibit 1, and are explained as follows:

1. The historic licensing data for the nine cultivars listed in the "Background" (Section II) of this report are summarized. Six of these nine cultivars have not reached the end of their licensing capability. Fulcrum used a 21-year life for the more successful cultivars after considering the following:
 - a. As described in Section II, U.S. patents are effective for twenty years, with foreign licensing often lasting longer than this.
 - b. Some royalties occur while the patent is pending.
 - c. Reporting delays cause the receipt of royalties past the patent expiration date.
 - d. Multiple cultivars obtained royalties for more than 20 years. UC cultivars with long economic lives include Camarosa, Chandler, Oso Grande, Pajaro, Parker, Douglas, Selva, Fern, Hecker, and Aptos.⁹
2. To analyze the expected results of a lost cultivar, one needs to consider the entire licensing life of the cultivar. Additional future royalties (which are shaded in the last two pages of Exhibit 1) were estimated as follows:
 - a. Camino Real - Revenues have been relatively stable for the past eight years, with declines being modest. Post-2016 revenues are estimated to continue for the rest of the 21-year maximum period at \$300,000 each year.
 - b. Ventana - Revenues have been relatively stable for the past eight years, with only minor declines over the past six years. Post-2016 revenues are estimated to continue for the rest of the 21-year maximum period at \$500,000 each year.
 - c. Albion – Although recent revenues are less than the preceding four peak years, revenues remain large. Post-2016 revenues are estimated to continue for the remaining 21-year maximum period at \$1,300,000 for the next two years, \$1,000,000 for the next three years, and \$700,000 for the last three years.
 - d. Monterey – Revenues continue to increase. Post-2016 revenues are estimated to be 80% of the actual and estimated future revenues for Albion, beginning in Albion's year 10.
 - e. San Andreas - Post-2016 revenues are estimated to be equal to the actual and estimated future revenues for Albion, beginning in Albion's year 10.
 - f. Portola - Revenues continue to increase. Post-2016 revenues are estimated to be equal to the actual and estimated future revenues for Ventana, beginning in Ventana's year 10.

⁹ UC STRAW2 00058007, "total strawberry" tab

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3. As a reasonableness check on the above estimates for these six cultivars, Fulcrum made a second calculation of future expected revenues using an arithmetic average of royalties for whatever actual licensing period exists for that cultivar. The remaining portion of the 21-year maximum period use the arithmetic average royalty. Predictably, this calculation understates the future royalties because it gives equal weight to each of the first few licensing years, when the amounts involved are small and not representative of what will occur with an established cultivar. The results of this reasonableness check are shown on the last page of Exhibit 1, and support the reasonableness of the first calculation Fulcrum prepared.
4. As described in Section II, CBC's royalties will be at least 25% greater than what UC obtained.
5. The overall average licensing results using the two calculations describe above are shown on the third page of Exhibit 1 and are graphed in Exhibit 2. UC's past licensing history, as calculated above and on Exhibit 1, show that the average cultivar will generate \$12,840,000 for CBC in lifetime royalties.
6. Over the eight years that CBC will miss cultivars because of UC's conduct, CBC will miss \$102,720,000 of royalties (calculated as eight cultivars, at an average of \$12,840,000 for each cultivar).
7. The revenue streams described above are royalties, for which there are only immaterial incremental expenses. Expenses are estimated at \$1,500,000 annually under both the but-for and actual world. Because the level of expenses are the same, expenses need not be an explicit part of the calculation because one would be comparing identical amounts. Similarly, any misestimating of expenses does not alter the damage conclusion.
8. Inflation is expected to be 4% annually. A lower rate of inflation (which would be justified by historical inflation in the last several years) of approximately 2% to 3 % would increase damages.
9. A 15% compound annual discount rate is used. This is a reasonable discount rate for an established technology-based endeavor. The discount rate address both the time value of money and the business risk of this business. In this calculation a net discount rate is used; meaning, the 15% discount and 4% inflation are offset to equal a net 11%. This provides mathematical simplification, but otherwise is an identical mathematical result when compared to treating the discount rate and inflation separately. As would be typical when royalties are received throughout the year, a mid-year discounting convention is used.

The damages resulting from the discounting of eight years of missed cultivars is shown on the first page of Exhibit 1. For comparison, a similar calculation using the reasonableness-check revenues of \$11,670,000 per average cultivar is shown on the second page of Exhibit 1.

The use of a discount rate that includes business risk addresses the possible concern that the future projections to which the discount rate is applied is otherwise "speculative". The discount rate is primarily based on future business risks, and serves to reduce substantially the damages calculated. Because of this discount, the damages are reasonably certainty because (i) all of the inputs have a historical basis, (ii) the methodology used is generally accepted and widely used, and (iii) substantially larger amounts could otherwise be presented, so the remaining amount represents a reasonable minimum. The total discount contained in this calculation is the difference between the \$102,720,000 of undiscounted royalties, and the \$20,450,000 of damages presented herein. The total discount is \$82,270,000, or 80 percent.

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V. OTHER REQUIRED INFORMATION

A. QUALIFICATIONS FOR OFFERING OPINIONS

Attached as Exhibit 3 is a copy of my curriculum vitae summarizing my education, experience and qualifications. Exhibit 3 also includes a listing of the cases in which I have testified as an expert at trial or by deposition within the preceding four years, and publications that I have authored in the last ten years.

B. COMPENSATION

Fulcrum is being paid at its normal hourly rates for the persons involved in the assignment. Our compensation is not contingent on the conclusions reached or ultimate resolution of the case. My personal hourly rate is currently \$625.

Very truly yours,
Fulcrum Financial Inquiry LLP

By: 
David Nolte

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, a corporation,

Plaintiff,

v.

CALIFORNIA BERRY CULTIVARS, LLC,
DOUGLAS SHAW, AND KIRK LARSON,

Defendants.

CALIFORNIA BERRY CULTIVARS, LLC,

Cross-Complainant,

v.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, a corporation,

Crossclaim Defendant.

Case No. 3:16-cv-02477-VC

**[PROPOSED] ORDER GRANTING
THE UNIVERSITY’S MOTION IN
LIMINE NO. 6 RE: THE IMPACT
OF THE COURT’S SUMMARY
JUDGMENT RULING ON
EVIDENCE AND ARGUMENT
RELATED TO CBC’S IMPLIED
COVENANT CLAIM AND THE
UNIVERSITY’S BREACH OF
CONTRACT CLAIM**

1 Having considered the University's Motion *in limine* No. 6: Re: The Impact of the Court's
2 Summary Judgment Ruling on Evidence and Argument Related to CBC's Implied Covenant
3 Claim and The University's Breach of Contract Claim, the evidence submitted therewith, the
4 opposition thereto, and all related documents on file in this action, the Court hereby GRANTS the
5 University's Motion *in limine* No. 6 and (1) limits evidence or argument regarding CBC's
6 purported breach of the implied covenant of good faith and fair dealing to evidence or argument
7 regarding the patenting of the CSG, and (2) permits presentation of evidence and argument
8 regarding Dr. Shaw and Larson's breaches of their employment agreements to the jury.

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10 **IT IS SO ORDERED.**

11 Dated: _____
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15 The Honorable Vince Chhabria
16 United States District Judge
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Plaintiff,

v.

CALIFORNIA BERRY CULTIVARS, LLC,
DOUGLAS SHAW, AND KIRK LARSON,

Defendants.

CALIFORNIA BERRY CULTIVARS, LLC,

Cross-Complainant,

v.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Cross-Defendant.

Case No. 3:16-CV-02477-VC

**[PROPOSED] ORDER DENYING
THE UNIVERSITY’S MOTION IN
LIMINE NO. 6 RE: THE IMPACT OF
THE COURT’S SUMMARY
JUDGMENT RULING ON
EVIDENCE AND ARGUMENT**

1 Having considered The Regents of the University of California's (the "University")
2 Motion In Limine No. 6 Re: The Impact of the Court's Summary Judgment Ruling On Evidence
3 and Argument and California Berry Cultivars, LLC, Douglas Shaw, and Kirk Larson's
4 Opposition thereto, the supporting memoranda of points and authorities, the evidence submitted
5 therewith, the arguments of counsel for the parties in connection therewith, if any, and finding
6 good cause therefore, this Court **HEREBY DENIES** the University's motion in its entirety.

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8 **IT IS SO ORDERED.**

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11 Dated:

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13 HONORABLE VINCE CHHABRIA
14 U.S. DISTRICT COURT JUDGE
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