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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Arizona Grain Incorporated, et al.,
10 Plaintiffs,

No. CV-18-03371-PHX-GMS
ORDER

11 v.
12 Barkley Ag Enterprises LLC, et al.,
13 Defendants.

14 Northern Agri Brands, LLC,
15 Counterclaim Plaintiff,

16 v.
17 Arizona Plant Breeders, Inc., et al.,
18 Counterclaim
19 Defendants.

20 Northern Agri Brands, LLC,
21 Third-Party Plaintiff,

22 v.
23 Eric Wilkey; et al.,
24 Third-Party Defendants.
25

26 Pending before the Court are Lockwood Seed and Grain’s Motion to Dismiss for
27 Lack of Jurisdiction and for Failure to State a Claim, (Doc. 68); Northern Agri Brands,
28 LLC (“NAB”)’s Motion for Leave to Supplement Opposition to Motion to Dismiss and to

1 Seal Document Exhibits A & B in Support of Supplemental Opposition, (Doc. 81); NAB’s
2 Motion to Amend/Correct Amended Counterclaim, Amended Third Party Complaint,
3 (Doc. 84); and NAB’s Motion to Seal Document Declaration of Glenn Johnson and
4 Exhibits 1-8 iso Reply re Motion for Leave to Amend, (Doc. 93).¹ The Motion to Dismiss
5 is granted in part and denied in part, the Motion for Leave to Supplement is denied, the
6 Motion to Amend/Correct is granted, and the Motion to Seal is granted.

7 **BACKGROUND**

8 Because the factual background of this case was summarized in the Court’s order
9 on Lockwood’s prior motion to dismiss, the Court will not restate it here. (*See* Doc. 62 at
10 2–5.)

11 **DISCUSSION**

12 **I. NAB’s Motion for Leave to Supplement Opposition to Motion to Dismiss**

13 NAB requests leave to supplement its opposition to Lockwood’s Motion with “new
14 and material information” from the initial production of materials by Arizona Plant
15 Breeders (“APB”)/Arizona Grain. (Doc. 81 at 4.) In addition to two exhibits, NAB’s
16 motion includes a four-page “Supplemental Opposition.”

17 Local Rule of Civil Procedure 7.2 generally does not allow filings by the party
18 opposing a motion beyond a “responsive memorandum.” NAB has not provided a
19 compelling reason for the Court to consider this supplemental information, which was
20 available to NAB when it filed its original Opposition to Lockwood’s Motion to Dismiss
21 back on January 22, 2020. In response to the suggestion that “this information could have
22 been contained in NAB’s Opposition to the Motion to Dismiss filed in January,” NAB
23 asserts that “Attorney Scott Johnson had left the McKee firm at nearly the same time as
24 Lockwood filed its second Motion to Dismiss.” (Doc. 91 at 2.) Nevertheless, remaining
25 counsel filed NAB’s Opposition and did not raise this issue with the Court prior to filing
26 the instant Motion for Leave to Supplement. Attorney Johnson’s departure—the only

27 ¹ The parties have requested oral argument. Those requests are denied because the parties
28 have had an adequate opportunity to discuss the law and evidence and oral argument will
not aid the Court’s decision. *See Lake at Las Vegas Investors Group, Inc. v. Pac. Malibu*
Dev., 933 F.2d 724, 729 (9th Cir. 1991).

1 rationale provided to support this Motion—is not sufficient reason to allow
2 supplementation. The Motion is denied.

3 **II. NAB’s Motion to Amend/Correct Amended Counterclaim, Amended Third**
4 **Party Complaint**

5 NAB also moves to Amend/Correct its Amended Counterclaim/Amended Third
6 Party Complaint to add “new factual allegations based on information recently ascertained
7 from APB documents.” (Doc. 84 at 3.) NAB seeks to file these additional specific
8 allegations pursuant to Federal Rule of Civil Procedure 15(a)(2) to support its claim for the
9 Court’s exercise of personal jurisdiction over Lockwood. (Doc 84 at 3.) Lockwood argues
10 that the proposed amendment “would be futile in attempting to demonstrate a prima facie
11 case of personal jurisdiction” and “NAB’s proposed amended third party complaint would
12 still be subject to dismissal under Rule 12(b)(6).” (Doc 86 at 4, 5.) Federal Rule of Civil
13 Procedure 15 instructs the Court to “freely give leave [to amend] when justice so requires.”
14 As Lockwood provides no procedural basis for its objection and the deadline for amending
15 pleadings has not yet been set, NAB’s amendment is allowed and is considered in
16 addressing Lockwood’s Motion to Dismiss.

17 **III. NAB’s Motion to Seal²**

18 NAB filed a Motion to Seal documents attached to its Reply in its Motion for Leave
19 to Amend/Correct. Those documents include exhibits previously designated as “HIGHLY
20 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” pursuant to the Court’s protective
21 order, (Doc 46), and a declaration describing those exhibits in detail. As Lockwood does
22 not contest the confidentiality of NAB’s lodged documents, the Motion to Seal is granted.
23 However, as NAB filed these documents with its Reply rather than the original Motion,
24 giving Lockwood no opportunity to respond, the Court did not consider the documents in
25 addressing the underlying Motion for Leave to Amend/Correct.

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27 ² In its Response to NAB’s Motion to Seal, (Doc. 97), NAB either intentionally or
28 unintentionally misled the Court when, in its Reply to its Motion to Amend/Correct, it
described its “PVP protected SY 158” as “awnless,” (Doc. 92 at 6n.4).

1 **IV. Lockwood’s Motion to Dismiss**

2 **A. Motion to Dismiss for Lack of Jurisdiction**

3 This Court previously determined that specific personal jurisdiction³ over
4 Lockwood was appropriate in this case. (Doc. 62.) Lockwood filed the instant Motion
5 because it believes “the Court’s decision appears to have relied, at least in significant part,
6 on a misapprehension of fact regarding NAB’s state of domicile” when, in distinguishing
7 *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S.
8 Ct. 1773 (2017), “the Court stated ‘[u]nlike NAB, however, the plaintiffs in *Bristol-Myers*
9 were not domiciled in the state where the action was brought.’” (Doc. 68 at 1, 6.)

10 The Court was mistaken in suggesting that NAB is domiciled in Arizona. However,
11 *Bristol-Myers* remains distinguishable from the instant case in several respects. First, the
12 defendant in *Bristol-Myers* “did not develop Plavix [(the drug that allegedly caused the
13 plaintiffs’ harm)] in California [(the disputed jurisdiction)], did not create a marketing
14 strategy for Plavix in California, and did not manufacture, label, package, or work on the
15 regulatory approval of the product in California.” *Bristol-Myers*, 137 S. Ct. at 1778. By
16 contrast, NAB alleges that Lockwood’s growth and distribution of its protected triticale
17 variety was made possible because Lockwood contracted with APB, whose research
18 operations are primarily based in Arizona. NAB also alleges that Lockwood sold the
19 protected triticale back to Arizona-based Arizona Grain,⁴ and that Lockwood directed
20 APB/Arizona Grain to engage in breeding operations to advance the development of four
21 genotypes of triticale, some of which contained the legally protected germplasm of NAB,
22 in whole or part in Arizona. Second, the nonresident plaintiffs in *Bristol-Myers* did not
23 allege that they obtained Plavix through California physicians or from any other California

24 ³ NAB still alleges only specific personal jurisdiction. Thus, general personal jurisdiction
25 is not addressed here.

26 ⁴ The emails evidencing this sale found at Doc. 55-3 and 55-4 are not included in NAB’s
27 complaint; however, as a court may consider “any combination of the recognized methods
28 of discovery” in making a personal jurisdiction determination, *Quick Techs., Inc. v. Sage
Grp. PLC*, 313 F.3d 338, 344 (5th Cir. 2002) the Court considers the emails here. *See also
Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, at 430 n. 24 (9th Cir. 1977)
 (“a court may allow discovery to aid in determining whether it has in personal or subject
matter jurisdiction”).

1 source. *Id.* at 1778. Nor did they “adduce[any] evidence to show how or by whom the
2 Plavix they took was distributed to the pharmacies that dispensed it to them.” *Id.* at 1783.
3 NAB, on the other hand, alleges that, pursuant to a 2015 contract between Lockwood and
4 APB, five separate genotypes of triticale, including NAB’s germplasm, were delivered to
5 Lockwood by APB for independent experimentation.

6 The Court maintains the remainder of its prior analysis of specific personal
7 jurisdiction. Lockwood’s Motion is therefore again denied as to lack of personal
8 jurisdiction and improper venue.

9 **B. Motion to Dismiss for Failure to State a Claim**

10 **1. Legal Standard**

11 To survive dismissal for failure to state a claim pursuant to Federal Rule of Civil
12 Procedure 12(b)(6), a complaint must contain more than a “formulaic recitation of the
13 elements of a cause of action”; it must contain factual allegations sufficient to “raise the
14 right of relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
15 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While “a complaint need not
16 contain detailed factual allegations . . . it must plead ‘enough facts to state a claim to relief
17 that is plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th
18 Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the
19 plaintiff pleads factual content that allows the court to draw the reasonable inference that
20 the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
21 (2009) (citing *Twombly*, 550 U.S. at 556). When analyzing a complaint for failure to state
22 a claim, “allegations of material fact are taken as true and construed in the light most
23 favorable to the non-moving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996).
24 In addition, the Court must assume that all general allegations “embrace whatever specific
25 facts might be necessary to support them.” *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d
26 517, 521 (9th Cir. 1994). However, legal conclusions couched as factual allegations are not
27 given a presumption of truthfulness, and “conclusory allegations of law and unwarranted
28 inferences are not sufficient to defeat a motion to dismiss.” *Pareto v. F.D.I.C.*, 139 F.3d

1 696, 699 (9th Cir. 1998).

2 **2. Count One: Infringement of PVP Certificate No. 201200083**

3 As in its original complaint, NAB alleges in its Third Amended Complaint that,
4 “[w]ithout authorization from NAB,” Lockwood “knowingly and intentionally” “used,
5 conditioned, marketed, sold, and/or stocked NAB’s triticale varieties in the United States
6 in violation of the PVPA” and “dispensed NAB’s triticale varieties, in a form which can
7 be propagated, without restriction to other growers, in violation of the PVPA.” (Doc. 84-1
8 at 28–29.) However, in response to the Court’s order granting Lockwood’s previous motion
9 to dismiss for failure to state a claim, NAB’s Third Amended Complaint includes the
10 additional allegation that “Lockwood was provided actual notice of Counterclaim
11 Plaintiff’s PVP rights on July 16, 2018 via a Notice letter sent from Mark Henry to
12 Lockwood Seed and Grain and A.L. Gilbert Company.” (Doc. 84-1 at 29.) That letter
13 states:

14 Attached is PVP Certificate No. 201200083 owned by my client, Northern
15 Agri Brands, LLC (“NAB”). You are on actual notice of my client’s PVPA
16 rights. Your past and future sales of RAPTOR brand triticale are understood
to be in violation of my client’s federally protected intellectual property
rights.

17 (Doc. 16-1 at 1.)

18 In the Court’s prior order granting Lockwood’s motion to dismiss, the Court relied
19 on language from *Syngenta Seeds, Inc. v. Delta Cotton Co-op., Inc.*, 457 F.3d 1269, 1275
20 (Fed. Cir. 2006), requiring that an accused infringer be given notice that the seed it is
21 dispensing is PVPA-protected before the infringer can be held liable. In the prior order, the
22 Court reasoned that NAB had not plausibly alleged that Lockwood “had notice that the
23 seeds it purchased from APB Defendants were PVPA protected” because “[e]ven if the
24 statutory language [signifying that the seed was protected under the PVPA] was always
25 present on NAB’s bags, it is not reasonable to infer that APB Defendants would be using
26 those same bags in reselling SY 158T as RAPTOR to Lockwood.” (Doc. 62 at 13.)
27 However, as NAB now alleges that Lockwood received notice of NAB’s PVP rights
28 through the letter described above, NAB has plausibly alleged that Lockwood was on

1 notice of NAB’s PVPA protection. Lockwood argues that NAB’s “‘notice’ is nothing more
2 than a bare assertion of a violation that has been controverted by APB; it provided no
3 analysis or facts to Lockwood.” (Doc. 68 at 11–12.) But mere “notice” is the requirement
4 under *Syngenta*, and Lockwood has cited no authority requiring that an infringing party be
5 provided with “analysis or facts” to meet the *Syngenta* standard. Viewing the facts in the
6 light most favorable to NAB as the Court must at this stage in the proceedings, NAB has
7 plausibly stated a claim against Lockwood for PVP infringement.

8 **3. Count Seven: Unjust Enrichment**

9 In the Court’s order addressing Lockwood’s prior motion to dismiss, the Court
10 dismissed NAB’s unjust enrichment claim as preempted by the AUTSA because “NAB
11 relies heavily on fact allegations that are based on or rooted in misappropriation of trade
12 secrets.” (Doc. 62 at 18–19.) The Court reasoned that NAB had not provided any factual
13 allegations in support of unjust enrichment that were unrelated to theft of its proprietary
14 information since NAB’s claims were “based on APB and Lockwood’s sale of RAPTOR
15 triticale” coupled with RAPTOR’s “genetic[] match[with] NAB’s SY 158T triticale
16 variety.” (Doc. 62 at 19.)

17 NAB’s Third Amended Complaint does not alter the Court’s prior analysis. NAB
18 argues that the Third Amended Complaint “clarifie[s] that its unjust enrichment claim is
19 based on the facts supporting its PVPA infringement claim rather than its trade secret
20 misappropriation claims.” (Doc. 70 at 13.) But NAB’s PVPA infringement claim is still
21 based solely on RAPTOR’s alleged genetic match with SY 158T. NAB’s unjust enrichment
22 claim is thus preempted under even the most “narrow form of preemption” because NAB
23 has failed to allege “any act beyond what constitutes misappropriation.” *Unisource*
24 *Worldwide, Inc. v. Swope*, 964 F. Supp. 2d 1050, 1057 (D. Ariz. 2013). Moreover, NAB’s
25 caveat that unjust enrichment is asserted only “[t]o the extent any germplasm, pedigree and
26 breeding information is found not to rise to the level of a trade secret” cannot save this
27 claim, since “the AUTSA preempts torts based on misappropriation of information
28 *regardless* of whether it qualifies as a trade secret.” *Id.* at 1056 (emphasis added).

1 Lockwood’s Motion to Dismiss is granted as to Count Seven.

2 **4. Count Eight: Lanham Act Violation**

3 NAB alleges that Lockwood is violating the Lanham Act “[b]y falsely designating
4 the origin of [its] Raptor triticale line and by making false and misleading representations
5 of fact in the selling and marketing of Raptor,” (Doc. 84-1 at 38)—in other words, “by
6 reverse passing off,” (Doc. 70 at 14). “[R]eading the phrase ‘origin of goods’ in the Lanham
7 Act in accordance with the Act’s common-law foundations (which were not designed to
8 protect originality or creativity), and in light of the copyright and patent laws
9 (which *were*),” the Supreme Court has held that the Lanham Act prohibits misleading
10 representations regarding “the producer of the tangible goods that are offered for sale” but
11 not misrepresentations regarding “the author of any idea, concept, or communication
12 embodied in those goods.” *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S.
13 23, 37 (2003). Thus, “a claim for reverse passing off cannot be brought to prevent the
14 copying of intellectual property.” *OTR Wheel Eng’g, Inc. v. W. Worldwide Servs., Inc.*, 897
15 F.3d 1008, 1012 (9th Cir. 2018).

16 Here, NAB tries to do exactly that. NAB does not allege that Lockwood “passed off
17 genuine [NAB] products as [its] own” like the defendant held liable in *OTR Wheel. Id.*
18 (describing a defendant who asked his competitor’s supplier to “provide him with sample
19 tires from [the competitor’s] molds” and “remove [the competitor’s] identifying
20 information from the tires” in order “to use the tires to obtain business from one of [the
21 competitor’s] customers”). Instead, NAB alleges that Lockwood “cop[ied NAB’s]
22 intellectual property,” *id.*, by “directing APB/Arizona Grain . . . to advance the
23 development of up to four (4) new triticale cultivars . . . some of which contained the legally
24 protected germplasm of NAB,” (Doc. 84-1 at 23), and by selling a seed variety created
25 from NAB’s misappropriated confidential and/or trade secret breeding information. “The
26 Lanham Act . . . does not exist to reward manufacturers for their innovation in creating a
27 particular device; that is the purpose of the patent law and its period of exclusivity.” *Dastar*
28 *Corp.*, 539 U.S. at 34. Thus, the Lanham Act is inapplicable here. Lockwood’s Motion to

1 Dismiss is granted as to this claim.⁵

2 **IT IS THEREFORE ORDERED** that Lockwood's Motion to Dismiss for Lack of
3 Jurisdiction and for Failure to State a Claim (Doc. 68) is **GRANTED IN PART** and
4 **DENIED IN PART**. NAB's Third Amended Counterclaims (Doc. 84-1) Seven and Eight
5 shall be dismissed as to Lockwood.

6 **IT IS FURTHER ORDERED** that NAB's Motion for Leave to Supplement
7 Opposition to Motion to Dismiss and to Seal Document Exhibits A & B in Support of
8 Supplemental Opposition, (Doc. 81), is **DENIED**.


9 **IT IS FURTHER ORDERED** that NAB's Motion to Amend/Correct Amended
10 Counterclaim, Amended Third Party Complaint, (Doc. 84), is **GRANTED**.

11 **IT IS FURTHER ORDERED** that NAB shall forthwith file its Third Amended
12 Answer & Affirmative Defenses to First Amended Complaints & Counterclaims & Third-
13 Party Complaint (Doc. 84-1).

14 **IT IS FURTHER ORDERED** that NAB's Motion to Seal Document Declaration
15 of Glenn Johnson and Exhibits 1-8 iso Reply re Motion for Leave to Amend, (Doc. 93), is
16 **GRANTED**. The Clerk of Court is directed to file the lodged Declaration (Doc. 94) under
17 seal.

18 **IT IS FURTHER ORDERED** that any party that has not yet filed an answer as of
19 this date, shall do so **within fourteen (14) days** of the date of this Order.

20 Dated this 10th day of April, 2020.

21 
22 _____
23 G. Murray Snow
24 Chief United States District Judge

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26
27 ⁵ Because *Pioneer Hi-Bred Int'l v. Holden Foundation Seeds, Inc.*, 35 F.3d 1226 (8th Cir.
28 1994), a case on which NAB heavily relies in its Response in Opposition, was decided
prior to, and appears to conflict with, *Dastar Corporation v. Twentieth Century Fox Film
Corp.*, 539 U.S. 23, 37 (2003), the Court did not consider *Pioneer* in its analysis.