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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SYNGENTA SEEDS, LLC,
Plaintiff,
v.
SEMINIS VEGETABLE SEEDS, INC.,
Defendant.

No. 2:19-cv-01986-TLN-CKD

ORDER

This matter is before the Court on Defendant Seminis Vegetable Seeds, Inc.’s (“Defendant”) Motion to Dismiss. (ECF No. 17.) Plaintiff Syngenta Seeds, LLC (“Plaintiff”) filed an opposition. (ECF No. 19.) Defendant filed a reply (ECF No. 21), and Plaintiff filed a sur-reply (ECF No. 30). For the reasons set forth below, the Court GRANTS in part and DENIES in part Defendant’s motion.

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1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 Plaintiff is an agribusiness involved in the research, development, and sale of plants and
3 seed products, including watermelon pollenizer plant varieties used to produce seedless
4 watermelons. (ECF No. 1 at 2.) Growers purchase such pollenizer plants and plant them in their
5 fields to pollinate other watermelon plants. (*Id.*) Plaintiff and its predecessors have developed
6 several watermelon pollenizers, including lines SP-1, SP-4, and Pollen Pro. (*Id.*) Pollen Pro is a
7 hybrid variety created by crossing SP-1 and SP-4 varieties. (*Id.*) Plaintiff’s intellectual property
8 related to its watermelon pollenizer plants is protected through its patents, including U.S. Patent
9 Nos. 6,759,576 (“576 Patent”), 7,528,298 (“298 Patent”), 7,071,374 (“374 Patent”), and
10 7,550,652 (“652 Patent”), and Plant Variety Protection (“PVP”) Certificates, including PVP
11 Certificate Nos. 200300006 and 200700023 (collectively, “PVP Certificates”). (*Id.*)

12 Defendant markets and sells a watermelon pollenizer variety called Wingman, which
13 competes with Plaintiff’s watermelon pollenizers. (*Id.* at 13.) Plaintiff alleges Defendant’s plant
14 breeders purchased Pollen Pro seed and derived the Wingman variety by planting and self-
15 pollenating (a process sometimes also referred to as “selfing”) Pollen Pro over multiple
16 generations. (*Id.* at 14–15.) Plaintiff alleges Defendant has sold, and continues to sell, Wingman
17 in the United States, willfully infringing Plaintiff’s intellectual property rights and harming
18 Plaintiff’s business and commercial interests. (*Id.* at 3.)

19 Plaintiff filed this action on September 30, 2019. (*Id.* at 1.) Plaintiff alleges claims for
20 patent infringement under 35 U.S.C. § 1 *et seq.*, and PVP certificate infringement under the Plant
21 Variety Protection Act, 7 U.S.C. § 2321 *et seq.* (“PVPA”). (*Id.*) Defendant filed the instant
22 motion to dismiss pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(6) on November
23 11, 2019. (ECF No. 17.)

24 **II. STANDARD OF LAW**

25 A motion to dismiss for failure to state a claim upon which relief can be granted under
26 Rule 12(b)(6) tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th
27 Cir. 2001). Rule 8(a) requires that a pleading contain “a short and plain statement of the claim
28 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a); *see also Ashcroft v. Iqbal*, 556

1 U.S. 662, 677–78 (2009). Under notice pleading in federal court, the complaint must “give the
2 defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atlantic*
3 *v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation and quotations omitted). “This simplified
4 notice pleading standard relies on liberal discovery rules and summary judgment motions to
5 define disputed facts and issues and to dispose of unmeritorious claims.” *Swierkiewicz v. Sorema*
6 *N.A.*, 534 U.S. 506, 512 (2002).

7 On a motion to dismiss, the factual allegations of the complaint must be accepted as true.
8 *Cruz v. Beto*, 405 U.S. 319, 322 (1972). A court must give the plaintiff the benefit of every
9 reasonable inference to be drawn from the “well-pleaded” allegations of the complaint. *Retail*
10 *Clerks Int’l Ass’n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not allege
11 “‘specific facts’ beyond those necessary to state his claim and the grounds showing entitlement to
12 relief.” *Twombly*, 550 U.S. at 570 (internal citation omitted).

13 Nevertheless, a court “need not assume the truth of legal conclusions cast in the form of
14 factual allegations.” *U.S. ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986).
15 While Rule 8(a) does not require detailed factual allegations, “it demands more than an
16 unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. A
17 pleading is insufficient if it offers mere “labels and conclusions” or “a formulaic recitation of the
18 elements of a cause of action.” *Twombly*, 550 U.S. at 555; *see also Iqbal*, 556 U.S. at 678
19 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory
20 statements, do not suffice.”). Thus, “[c]onclusory allegations of law and unwarranted inferences
21 are insufficient to defeat a motion to dismiss for failure to state a claim.” *Adams v. Johnson*, 355,
22 F.3d 1179, 1183 (9th Cir. 2004) (citations omitted). Moreover, it is inappropriate to assume the
23 plaintiff “can prove facts that it has not alleged or that the defendants have violated the . . . laws
24 in ways that have not been alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State*
25 *Council of Carpenters*, 459 U.S. 519, 526 (1983).

26 Ultimately, a court may not dismiss a complaint in which the plaintiff has alleged “enough
27 facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. “A claim
28 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the

1 reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at
2 680. While the plausibility requirement is not akin to a probability requirement, it demands more
3 than “a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678. This plausibility
4 inquiry is “a context-specific task that requires the reviewing court to draw on its judicial
5 experience and common sense.” *Id.* at 679. Thus, only where a plaintiff fails to “nudge [his or
6 her] claims . . . across the line from conceivable to plausible[,]” is the complaint properly
7 dismissed. *Id.* at 680 (internal quotations omitted).

8 If a complaint fails to state a plausible claim, “[a] district court should grant leave to
9 amend even if no request to amend the pleading was made, unless it determines that the pleading
10 could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122,
11 1130 (9th Cir. 2000) (en banc) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995));
12 see also *Gardner v. Martino*, 563 F.3d 981, 990 (9th Cir. 2009) (finding no abuse of discretion in
13 denying leave to amend when amendment would be futile). Although a district court should
14 freely give leave to amend when justice so requires under Rule 15(a)(2), “the court’s discretion to
15 deny such leave is ‘particularly broad’ where the plaintiff has previously amended its
16 complaint[.]” *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 520 (9th Cir.
17 2013) (quoting *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir. 2004)).

18 III. ANALYSIS

19 Defendant moves to dismiss the Complaint in its entirety. (ECF No. 17-1 at 5.) The
20 Court will address Defendant’s arguments as to each of Plaintiff’s claims in turn.

21 A. Claims One and Two

22 In Claims One and Two, Plaintiff alleges Defendant directly infringed at least claim 19 of
23 the ’576 Patent (Claim One) and at least claim 19 of the ’652 Patent (Claim Two) under 35
24 U.S.C. § 271(g) (“§ 271(g)”). (ECF No. 1 ¶¶ 133–42, 150–57.) These exemplary claims recite
25 methods or processes (“the patented processes”) of producing a hybrid watermelon variety by
26 crossing a watermelon plant with a plant of the SP-1 or SP-4 varieties. (*Id.* ¶¶ 31, 135–37, 151–
27 52.) Plaintiff alleges Pollen Pro was made by the patented processes within the meaning of §
28 271(g) and therefore Defendant’s Wingman was also made by the patented processes because

1 Defendant used Pollen Pro to make Wingman. (*Id.* ¶¶ 31, 138–40, 153–55.) As a result, Plaintiff
2 alleges Defendant has infringed, and continues to infringe, these exemplary claims of the '576
3 and '652 Patents under § 271(g) by using, selling, and/or offering to sell seed and plants made by
4 the patented processes. (*Id.* ¶¶ 141–42, 156–57.)

5 In moving to dismiss, Defendant argues Plaintiff has not stated a claim for direct
6 infringement because Plaintiff used its own patented processes to create Pollen Pro and Plaintiff
7 does not allege Defendant carried out any steps of the patented processes to create Wingman.
8 (ECF No. 17-1 at 9; ECF No. 21 at 2.) In opposition, Plaintiff does not dispute there are no
9 allegations that Defendant carried out any steps of the patented processes. (ECF No. 19 at 12.)
10 Plaintiff instead argues § 271(g) does not require the accused infringer to have carried out the
11 patented processes. (*Id.*) Plaintiff's theory seems to be that because Plaintiff used its own
12 patented processes to make Pollen Pro and Defendant used Pollen Pro to make Wingman,
13 Defendant has used and sold products made by patented processes in violation of § 271(g). (*Id.*)

14 Section 271(g) states in relevant part: "Whoever without authority imports into the United
15 States or offers to sell, sells, or uses within the United States *a product which is made by a*
16 *process patented* in the United States shall be liable as an infringer, if the importation, offer to
17 sell, sale, or use of the product occurs during the term of such process patent." 35 U.S.C. §
18 271(g) (emphasis added). The central issue before the Court is whether Plaintiff's own use of its
19 patented process to create Pollen Pro is sufficient to confer § 271(g) liability to Defendant for
20 using Pollen Pro to create Wingman.

21 Plaintiff primarily relies on *Trustees of Columbia Univ. in City of N.Y. v. Roche*
22 *Diagnostics GmbH* ("*Roche*"), 272 F. Supp. 2d 90 (D. Mass. 2002), to support the contention that
23 it does not matter who carried out the patented process under § 271(g). (ECF No. 19 at 12.)
24 Plaintiff cites a single sentence in *Roche* where the court stated, "it is irrelevant under [§] 271(g)
25 who manufactured the goods so long as the goods were manufactured using a patented process."
26 272 F. Supp. 2d at 108. Based on this sentence, Plaintiff suggests Defendant can be liable for
27 using or selling a product regardless of who carried out the patented processes to make the
28 product at issue — even if it was the patentee. However, Plaintiff ignores the context of the

1 *Roche* court’s statement, which was made in response to the defendant’s argument that it could
2 not be liable under § 271(g) for shipping the product at issue to the United States because a *third*
3 *party* used the plaintiff’s patented processes to manufacture the product. *Id.* The court rejected
4 the defendant’s argument and explained, “under [§ 271(g)], liability attaches to one who, without
5 authority, *imports* a product made by a patented process into the United States. The defendant
6 need not have performed the patented process itself.” *Id.* (emphasis in original).

7 While *Roche* supports the notion that Defendant can be liable under § 271(g) even if
8 Defendant did not carry out the patented processes (i.e., if a third party manufactured the product
9 using Plaintiff’s patented processes), it does not support the notion that Defendant can be liable
10 when Plaintiff carried out its own patented processes. In fact, the court in *Roche* explained “[the
11 defendant’s] liability depends on [the third-party manufacturer]. [The defendant] is liable only if
12 [the third-party manufacturer’s] underlying actions directly infringed [the plaintiff’s] patents.”
13 272 F. Supp. 2d at 100. Put simply, there must be an underlying infringing act. *See id.* (“If the
14 product shipped by [the defendant] into the United States was made by a process that did not
15 directly infringe upon [the plaintiff’s] patents, then [the defendant] cannot have violated [§]
16 271(g).”); *see also McRO, Inc. v. Namco Bandai Games Am., Inc.*, 23 F. Supp. 3d 1113, 1121
17 (C.D. Cal. 2013) (explaining § 271(g) “makes it an act of infringement to import, sell, offer to
18 sell, or use, a product *made by an infringing process*”) (emphasis added). For example, the *Roche*
19 court first analyzed whether the third-party manufacturer infringed the plaintiff’s patented
20 processes and then found the defendant could be liable under § 271(g) for importing the product
21 that resulted from the infringement. 272 F. Supp. 2d at 108.

22 In contrast, Plaintiff in the instant case — the patentee — allegedly carried out its own
23 patented processes to create Pollen Pro, which Defendant bought and used to create Wingman.
24 Plaintiff fails to explain how Defendant can be liable under § 271(g) when there is no underlying
25 infringement alleged. Neither *Roche* nor any of the other cases Plaintiff cites are persuasive as
26 each of them involve § 271(g) liability when someone other than the patentee carried out the
27 patented processes. *See Bio-Tech. Gen. Corp. v. Genentech, Inc.*, 80 F.3d 1553, 1560 (Fed. Cir.
28 1996) (holding that an entity who imported products it made by using another entity’s patented

1 process was liable under § 271(g) even though the process was performed prior to the enactment
2 of the statute); *Zond, LLC v. Toshiba Corp.*, No. 13-cv-11581-DJC, 2014 WL 4056024, *3–5 (D.
3 Mass. Aug. 14, 2014) (defendant used plaintiff’s patented process as steps in the manufacture of
4 the defendant’s product); *Anvik Corp. v. Sharp Corp.*, No. 07 Civ. 0825 (SRC), 2010 WL
5 11416949, *2–6 (S.D. N.Y. Aug. 11, 2010) (same); *OKI America, Inc. v. Advanced Micro*
6 *Devices, Inc.*, No. C 04-03171 CRB, 2006 WL 2711555, *15 (N.D. Cal. Sept. 21, 2006) (same).
7 Plaintiff fails to explain how merely purchasing and using a product the patentee made by its own
8 patented process violates § 271(g).

9 Accordingly, the Court finds Plaintiff fails to state a claim against Defendant for directly
10 infringing the ’576 and ’652 Patents under § 271(g). Because Plaintiff’s indirect infringement
11 claims are derivative of its direct infringement claims, the Court also finds Plaintiff fails to state
12 indirect infringement claims for the ’576 and ’652 Patents under 35 U.S.C. § 271(b) (“§ 271(b)”).
13 *See In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1333 (Fed.
14 Cir. 2012) (“[L]iability for indirect infringement of a patent requires direct infringement.”).

15 Therefore, the Court GRANTS Defendant’s motion to dismiss Claims One and Two and
16 DISMISSES those claims with leave to amend.

17 B. Claim Three

18 In Claim Three, Plaintiff alleges Defendant directly infringed at least claim 1 of the ’298
19 Patent under 35 U.S.C. § 271(a) (“§ 271(a)”). (*Id.* ¶¶ 165–68.) This exemplary claim is directed
20 to a watermelon plant with certain characteristics made by a process involving crossing a
21 watermelon plant of the SP-1 variety with another watermelon plant. (*Id.* ¶¶ 165–66.) Plaintiff
22 alleges Pollen Pro was made using the recited process, and so too was Defendant’s Wingman
23 because the use of the recited process to develop Pollen Pro was a necessary and essential
24 predicate to making Wingman. (*Id.* ¶¶ 38, 138–40, 153–55.) Plaintiff thus alleges Defendant has
25 infringed, and continues to infringe, exemplary claim 1 under § 271(a) by using, selling, and/or
26 offering to sell seed and plants of the Pollen Pro and Wingman varieties. (*Id.* ¶¶ 167–68.)

27 In moving to dismiss, Defendant argues Plaintiff fails to allege either Pollen Pro or the
28 accused Wingman variety meet every element of any claim. (ECF No. 17-1 at 13.) More

1 specifically, Defendant argues claim 1 requires an accused watermelon plant that is produced by
2 crossing a watermelon plant with an SP-1 plant and selected for certain characteristics, such as “a
3 rind . . . which breaks under a pressure of not more than about 1,800 g when a fruit tester with a 2
4 mm tip is used or under a pressure of not more than about 2,300 g when a fruit tester with a 3 mm
5 tip is used” and “a 5th leaf from the smallest new leaf on a vine having a surface area of not more
6 than about 50 cm².” (*Id.* at 13–14.) Defendant argues Plaintiff does not allege Wingman was
7 produced by crossing a watermelon plant with an SP-1 plant, nor does Plaintiff allege Wingman
8 was selected for the specific characteristics recited in claim 1. (*Id.* at 13–15.) In opposition,
9 Plaintiff argues Defendant’s breeding activities using Pollen Pro constitute an unauthorized use
10 that directly infringed at least claim 1 of the ’298 Patent under § 271(a). (ECF No. 19 at 17.)
11 Plaintiff also argues Wingman is a product made by the process recited in claim 1 for the same
12 reasons articulated in the context of the ’576 and ’652 Patents — namely, that Wingman was
13 made by the recited processes due to its proximity to the processes used to make Pollen Pro. (*Id.*;
14 ECF No. 30 at 9.)

15 Section 271(a) states “whoever without authority makes, uses, offers to sell, or sells any
16 patented invention, within the United States . . . infringes the patent.” 35 U.S.C. § 271(a). “A
17 direct infringement claim does not satisfy the standards of *Twombly* and *Iqbal* where it does not at
18 least contain factual allegations that the accused product practices every element of at least one
19 exemplary claim.” *AlterG, Inc. v. Boost Treadmills LLC*, 388 F. Supp. 3d 1133, 1142–43 (N.D.
20 Cal. 2019). “This requirement is animated by the principle that the failure to meet a single
21 limitation is sufficient to negate infringement of a claim.” *Id.* at 1143; *see Yi-Ping Lin v.*
22 *Transform Partners LLC*, No. 18-cv-1933 DMS (KSC), 2019 WL 446403, *2 (S.D. Cal. Feb. 5,
23 2019).

24 In Claim Three, Plaintiff recites claim 1 of the ’298 Patent and alleges Defendant
25 infringed this claim by using Pollen Pro and selling Wingman. (ECF No. 1 at 24–26.) However,
26 Plaintiff does not allege that either product — Pollen Pro or Wingman — practice every element
27 of at least one exemplary claim. (*See id.*) Plaintiff fails to allege either Pollen Pro or Wingman
28 possess the rind and leaf characteristics required under claim 1 of the ’298 Patent. (*See id.*)

1 Plaintiff also fails to allege Pollen Pro or Wingman is made by the specific process recited in the
2 '298 Patent. (*See id.*) Moreover, because Plaintiff's indirect infringement claim is derivative of
3 its direct infringement claim, the Court also finds Plaintiff fails to state indirect infringement
4 claims for the '298 Patent under § 271(b). *See In re Bill*, 681 F.3d at 1333.

5 For these reasons, the Court GRANTS Defendant's motion to dismiss Claim Three and
6 DISMISSES this claim with leave to amend.

7 C. Claim Four

8 In Claim Four, Plaintiff alleges Defendant directly infringes at least claim 11 of the '374
9 Patent under § 271(a). (*Id.* ¶ 184.) This exemplary claim is directed to a process for increasing
10 the yield of seedless watermelon plants by using a watermelon pollenizer plant that is
11 homozygous for gene *e* to pollinate a triploid watermelon plant in order to produce and harvest
12 seedless watermelon fruit. (*Id.* ¶¶ 176–77.) Gene *e* when present in homozygous form results in
13 watermelon fruit having a brittle, crushable rind. (*Id.* ¶ 178.) As Plaintiff alleges, Pollen Pro is
14 homozygous for gene *e*, and so too is Wingman, which was created by selfing Pollen Pro. (*Id.* ¶¶
15 178–83.) Plaintiff alleges Defendant directly infringed exemplary claim 1 under § 271(a) by
16 using Pollen Pro and/or Wingman to produce seedless watermelon fruit. (*Id.* ¶¶ 185–90.)

17 In moving to dismiss, Defendant argues Plaintiff fails to provide any basis to ascertain
18 whether the accused Wingman pollenizer is homozygous for gene *e* because there are no
19 allegations that Plaintiff obtained and genetically tested Wingman for the presence and copy
20 number of gene *e*. (ECF No. 17-1 at 18–19.) In opposition, Plaintiff points to its allegations that
21 both Pollen Pro and Wingman are homozygous for gene *e*. (ECF No. 19 at 20.) Plaintiff argues
22 Defendant is raising a factual dispute that is improper to decide on a motion to dismiss. (*Id.*)

23 The Court agrees with Plaintiff. Defendant's sole argument for dismissing Claim Four is
24 that Plaintiff must allege it obtained and genetically tested Wingman for the presence and copy
25 number of gene *e*. (*See* ECF No. 17-1 at 19.) Yet Defendant cites no authority to support the
26 proposition that Plaintiff must make these allegations to survive a motion brought under Rule
27 12(b)(6). (*See id.*) The Court must accept the factual allegations of the Complaint as true at this
28 early stage. *Cruz*, 405 U.S. at 322. Plaintiff alleges Defendant infringes claim 11 of the '374

1 Patent by pollenating triploid watermelon plants with the pollen of a watermelon pollenizer plants
2 that are homozygous for gene *e*, including Pollen Pro and Wingman. (ECF No. 1 at 27.) While
3 Defendant may dispute whether Pollen Pro and Wingman are homozygous for gene *e*, the Court
4 declines to resolve those factual disputes on a motion to dismiss.

5 Accordingly, the Court DENIES Defendant’s motion to dismiss Claim Four.

6 D. Claims Five and Six

7 In Claims Five and Six, Plaintiff alleges Defendant infringed the PVP Certificates under 7
8 U.S.C. § 2541, explaining that these certificates cover not only Plaintiff’s protected SP-1 and SP-
9 4 varieties but also varieties such as Wingman that are “essentially derived” or “not clearly
10 distinguishable” from the SP-1 and SP-4 varieties. (*Id.* ¶¶ 116–118, 195–201, 209–13); *see also* 7
11 U.S.C. § 2541(c)(1)–(c)(2). Plaintiff alleges that Defendant has infringed, and continues to
12 infringe, the PVP Certificates by (among other things) producing, conditioning, stocking, selling,
13 and dispensing Wingman. (*Id.* ¶¶ 202, 214.)

14 In moving to dismiss, Defendant argues Plaintiff fails to allege Defendant used Plaintiff’s
15 protected SP-1 or SP-4 varieties in any way. (ECF No. 17-1 at 20.) Defendant also argues it did
16 not infringe because a breeder is permitted to use a plant that is protected by a PVP certificate to
17 “develop” a new inbred line, as is the case here. (*Id.* at 22.) In opposition, Plaintiff argues it has
18 sufficiently alleged Wingman is covered by the PVP Certificates because it is “essentially
19 derived” or “is not clearly distinguishable” from the protected SP-1 and SP-4 varieties. (ECF No.
20 19 at 24.) In addition, Plaintiff argues the PVPA’s breeder exemption does not apply because its
21 PVPA claims accuse Defendant of only those activities the PVPA explicitly recognizes as
22 infringing under § 2541(a), such as Defendant’s production, conditioning, stocking, sale, offer for
23 sale, and dispensing of Wingman. (*Id.*)

24 The PVPA provides “patent-like protection to novel varieties of sexually reproduced
25 plants (that is, plants grown from seed).” *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 181
26 (1995). Under the PVPA, the U.S. Department of Agriculture may issue a PVP certificate to the
27 breeder of any novel variety of sexually reproduced plant that is new, distinct, uniform, and
28 stable. *See* 7 U.S.C. § 2402(a). “The PVPA is regularly discussed in terms of patent law and the

1 Federal Circuit applies patent law to fill in the gaps in PVPA jurisprudence.” *Zuckerman Family*
2 *Farms, Inc. v. Bidart Bros.*, No. 1:14-cv-01529-AWI-BA, 2014 WL 7239423, at *3 (E.D. Cal.
3 Dec. 17, 2014). The PVPA enumerates specific acts which constitute infringement of a PVP
4 certificate. *See* 7 U.S.C. § 2541(a). The PVPA applies with equal force to “(1) any variety that is
5 essentially derived from a protected variety, unless the protected variety is an essentially derived
6 variety; [and] (2) any variety that is not clearly distinguishable from a protected variety.” 7
7 U.S.C. § 2541(c)(1)–(c)(2).

8 The parties dispute whether Wingman constitutes a variety that is “essentially derived” or
9 “not clearly distinguishable” from the protected SP-1 or SP-4 varieties. The parties also dispute
10 whether the PVPA’s breeder exemption applies. *See J.E.M. Ag Supply, Inc.*, 534 U.S. at 143
11 (“[O]ne cannot use a protected plant variety to produce a hybrid for commercial sale . . . however,
12 . . . a breeder can use a plant that is protected by a PVP certificate to ‘develop’ a new inbred
13 line.”). These are factual disputes that are not appropriate for determination on a motion to
14 dismiss and would benefit from further development of the record and clearer argument. For the
15 purposes of ruling on the instant motion, the Court finds Plaintiff adequately alleges Wingman is
16 covered by the PVP Certificates and that Defendant infringed on those certificates by using
17 Wingman for activities that fall outside the scope of the breeder exemption.

18 Accordingly, the Court DENIES Defendant’s motion to dismiss Claims Five and Six.

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IV. CONCLUSION

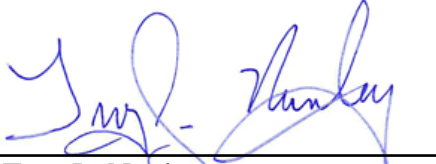
For the foregoing reasons, the Court hereby GRANTS in part and DENIES in part Defendant's Motion to Dismiss (ECF No. 17) as follows:

1. The Court GRANTS Defendant's motion as to Claims One, Two, and Three and DISMISSES those claims with leave to amend; and
2. The Court DENIES Defendant's motion as to Claims Four, Five, and Six.

Plaintiff may file an amended complaint not later than thirty (30) days from the date of electronic filing of this Order. Defendant's responsive pleading is due twenty-one (21) days after Plaintiff files an amended complaint.

IT IS SO ORDERED.

DATED: January 10, 2022



Troy L. Nunley
United States District Judge