

Rutan & Tucker, LLP  
 Attn: Adams, Michael  
 611 Anton Boulevard  
 Suit 1400  
 Costa Mesa, CA 92626

Morrison & Foerster LLP  
 Attn: Chivvis, Matthew A.  
 425 Market Street  
 San Francisco, CA 94105-2482

---

**Superior Court of California, County of Alameda**  
**Rene C. Davidson Alameda County Courthouse**

---

California Strawberry Commiss <div style="text-align: right; font-size: small;">Plaintiff/Petitioner(s)</div> <div style="text-align: center; margin: 10px 0;">vs.</div> The Regents of the Universi <div style="text-align: right; font-size: small;">Defendant/Respondent(s) (Abbreviated Title)</div>	No. <u>RG13698448</u>  Order  Demurrer to the First Amended Complaint Overruled
--	--

The Demurrer to the First Amended Complaint was set for hearing on 10/02/2014 at 02:30 PM in Department 17 before the Honorable George C. Hernandez, Jr.. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

**IT IS HEREBY ORDERED THAT:**

The tentative ruling is affirmed as follows: The Demurrer of Defendant The Regents of the University of California to First Amended Complaint is **OVERRULED**, for the reasons that follow.

The demurrer to the first and second causes of action, for breach of contract and breach of implied contract, is **OVERRULED**. Defendant's contention that the demurrer should be sustained because Plaintiff failed to quote, verbatim, the agreement or attach a copy, is without merit; it is sufficient to plead the legal effect of an agreement. (Construction Protective Services v. TIG Specialty Ins. Co. (2002) 29 Cal.4th 189, 198-99.) Plaintiff has done so.

Defendant's contention that this court can decide, based upon the complaint and judicially noticed materials, that it had no contractual obligation to provide Plaintiff with the germplasm and related data is erroneous. (See Fremont Indem. Co. v. Fremont Gen. Corp. (2007) 148 Cal.App.4th 97, 114-15 ["For a court to take judicial notice of the meaning of a document submitted by a demurring party based on the document alone, without allowing the parties an opportunity to present extrinsic evidence of the meaning of the document, would be improper. A court ruling on a demurrer therefore cannot take judicial notice of the proper interpretation of a document submitted in support of the demurrer."].) The cited provisions of the agreement regarding Defendant's obligations (if any) to provide "results achieved in connection with the program" are ambiguous and, while the court may take judicial notice of certain documents, it may not judicially notice the truth of matters asserted therein, particularly when those matters go to the heart of the instant dispute and may in fact be disputed. (Id., citing authorities.) While Whether Plaintiff's interpretation of this provision is unreasonable is a question more prudently reserved for the trier-of-fact.

Defendant's contention that the Plaintiff must identify, in the complaint, parol evidence that would support Plaintiff's interpretation of the agreement, if correct, is undermined by the facial ambiguity of the agreement (see discussion in George v. Auto. Club of S. California (2011) 201 Cal.App.4th 1112, 1123 of Southern Pacific Land Co. v. Westlake Farms, Inc. (1987) 188 Cal.App.3d 807, 817) and, even assuming there were such an obligation here, is arguably addressed by, e.g., paragraph 13 of the

complaint, which alleges that Plaintiffs' members have in the past been provided with access to the results of the program.

Defendant's challenge to the implied contract cause of action, on the grounds that it conflicts with the breach of contract claim, also fails. Plaintiff has not alleged breach of an implied term that, on its face, contradicts a written term. (*Halvorsen v. Aramark Unif. Servs., Inc.* (1998) 65 Cal.App.4th 1383, 1388, quoting *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal.App.3d 467, 482 ["There cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results."].) Plaintiff's construction may be doubtful, but it is not clearly erroneous.

Defendant's "lack of authority" challenge to the contractual claims likewise fails. It is based upon the premise, which is not pleaded in the complaint and again appears to be the subject of a bona fide dispute that Defendant owns the exclusive intellectual property rights to all cultivars and that, for Plaintiff to succeed in this action, it must incorporate licensing rights. Nor does Paragraph 15 of the complaint admit (as Defendant contends) that Defendant holds exclusive rights, vis a vis Plaintiff, to germplasm and related data.

Defendant's challenge to the conversion claim is based solely on the contention that Plaintiff cannot state a possessory right in germplasm or related data. However, this argument again relies upon the purported "admission" in paragraph 15, which does not concede that Plaintiff lacks such a right.

The parties appear to agree that the declaratory relief action is derivative of the others.

For the foregoing reasons, the Demurrer is OVERRULED in its entirety.

Defendant's request for judicial notice is GRANTED. Nevertheless, the Court does not take judicial notice of the truth of any of the facts asserted in Exs. A-C, I-K, some of which may reasonably be subject to dispute. (See, e.g., *Aquila, Inc. v. Superior Court* (2007) 148 Cal.App.4th 556, 569 [when a court takes judicial notice of official acts or public records, it does not also judicially notice the truth of all matters stated therein; nor does it judicially notice facts that might be deduced from the official act or governmental entity; nor may facts subject to interpretation be judicially noticed]; *Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 483-84 [judicial notice of written decision of state agency, but not of the truth of any factual findings made in the decision or attached independent medical review determination]; *L.B. Rsch. & Educ. Found. v. UCLA Found.* (2005) 130 Cal.App.4th 171, 182 n.2 [information on website subject to interpretation and thus not proper subject for judicial notice].)

Defendant shall answer on or before October 31, 2014.

The court did not receive a chambers copy of Plaintiff's opposition papers. Plaintiff is ADMONISHED, going forward, to provide chambers copies of all filings directly to Department 17 on the date of filing.

Dated: 10/02/2014



Judge George C. Hernandez, Jr.

Superior Court of California, County of Alameda  
Rene C. Davidson Alameda County Courthouse

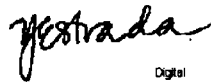
Case Number: RG13698448  
Order After Hearing Re: of 10/02/2014

### DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 10/03/2014.

Executive Officer / Clerk of the Superior Court

By   
Digital  
\_\_\_\_\_  
Deputy Clerk