

## IP Forecast: 6th Circ. To Eye Seed Biz's \$9M Trade Secret Win

By **Andrew Karpan**

Law360 (April 21, 2022, 8:57 PM EDT) -- The Sixth Circuit will consider next week whether certain information on broccoli seeds can fall under trade secrets law when it hears the appeal of a dietary supplements brand that was ordered to pay a seed company more than \$9 million after recruiting the outfit's research director.

On April 28, a three-judge panel in Cincinnati will examine arguments from Jarrow Formulas, a recent purchase of private equity shop New Mountain Capital, to overturn a jury verdict that Caudill Seed & Warehouse Co. **won in 2019** on allegations Jarrow poached an executive in order to steal research and development information related to Caudill's work with broccoli seeds and sprouts.

At the center of the appeal are the questions of what constitutes trade secrets and what constitutes fair competition. A federal judge in Kentucky, where Caudill is based, allowed the seed business to argue to jurors that its trade secrets covered an "entire body of knowledge developed over the course of many years" on the subject of broccoli seeds.

Judge Charles Simpson III then **added** enhanced damages and legal fees to the jury's \$2.4 million verdict, bringing the award to over \$9 million.

"Caudill never adequately defined [the trade secret] to distinguish it from general industry knowledge or [the executive's] legitimate use of his own experience, knowledge, and skill," Jarrow argued in its brief. The company says Caudill's lawyers are effectively using Kentucky's law protecting trade secrets "as an overbroad non-compete agreement."

The argument from Caudill will be that this was all a matter for jurors in Louisville to decide and decide it they did.

"The unanimous jury and seasoned trial judge properly adjudicated the case," Caudill lawyer J. Mark Grundy told Law360 in an email.

Representatives for Jarrow did not respond to a request for comment.

Caudill Seed is represented by J. Mark Grundy, Jared A. Cox, Benjamin J. Lewis, Amanda D. Reed and Kyle W. Miller of Dentons.

Jarrow Formulas is represented by Christopher A. Eiswerth and David R. Carpenter of Sidley Austin LLP.

The case is Caudill Seed & Warehouse Co. v. Jarrow Formulas Inc., case number 21-5345, in the U.S. Court of Appeals for the Sixth Circuit.

### Also on Appeal

In Pittsburgh on April 27, the Third Circuit is scheduled to hear a debate over how command codes that control when fireworks explode can be covered by federal copyright law.

A company called Pyrotechnics Management won an early injunction blocking Romanian rival XFX Pyrotechnics from selling competing "digital pyrotechnic firing systems," but XFX says the material

Pyrotechnics actually registered with the U.S. Copyright Office fails to contain the "over 4 billion pages of possible codes" needed to run such a system.

## **In the Courts**

On Monday, U.S. District Judge Richard Andrews of Delaware is overseeing a five-day jury trial over whether the Canadian company that supplies Member's Mark-brand bath tissue to Sam's Club does that by infringing three patents covering a type of dried tissue owned by rival First Quality Tissue LLC. Irving Consumer Products says it plans to demonstrate to the jury that its tissues do not have the same kind of "waviness" the patents cover and that the patents are invalid in light of products long sold by Procter & Gamble and Charmin.

A different Delaware federal jurist, Judge Maryellen Noreika, is set to kick off a 10-day jury trial Monday over allegations that the NextSeq brand of gene sequencers sold by biotech giant Illumina infringe patents owned by Chinese rival BGI Group, as well as allegations that BGI's own sequencing products infringe Illumina's patents. The last time such a suit went before a jury — in California last year over different patents — Illumina had the upper hand, winning **\$8 million** and an **injunction**.

On Monday, a Florida federal judge is set to begin a jury trial in a patent dispute between KioSoft and PayRange, feuding fintech companies that make competing payment-collecting kiosks. When PayRange hit KioSoft with the patent suit in 2020, PayRange estimated in its complaint it would be seeking more than \$50 million. For its part, KioSoft plans to argue that PayRange engaged in unfair competition in how it marketed the suit in a press release that was picked up by more than 400 media outlets.

California Magistrate Judge Alka Sagar on Tuesday will hear a discovery dispute between two failed screenwriters who say The Walt Disney Co. stole a rejected pitch to create its blockbuster "Pirates of the Caribbean" series. After **a ruling** from a federal judge kept the case afloat last year, the writers want more information about how much money the movies made. Disney, meanwhile, wants a solid answer about how exactly the case is going to look to a jury because "in the five years they have been litigating this case, plaintiffs' account of what elements of their screenplay were allegedly appropriated has been all over the map."

Finally, on April 28, Magistrate Judge Robert Lehrburger of the Southern District of New York will hear objections to an order **he issued** that blocked Hedgeye Risk Management from posting on Twitter about its trade secrets suit against its ex-managing director. Hedgeye, which has a Twitter account with almost 140,000 followers, calls the order "an unconstitutional prior restraint on the parties' speech, surpassing his (or anyone's) authority," with "grave" stakes for free speech rights.

*To suggest a case for an upcoming IP Forecast, contact [andrew.karpan@law360.com](mailto:andrew.karpan@law360.com).*

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