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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. LSL BIOTECHNOLOGIES, INC. 1200 North El Dorado Place, #D-44 Tucson, Arizona 85715 and SEMINIS VEGETABLE SEEDS, INC. 20901 North Ventura Road, Suite 250 Oxnard, California 93030 and LSL PLANTSCIENCE LLC 1200 North El Dorado Place, #D-44 Tucson, Arizona 85715 Defendants.	Civil Action No.: _____

COMPLAINT

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this antitrust action to enjoin defendants from enforcing an agreement with Hazera Quality Seeds, Inc. ("Hazera") that prohibits Hazera from competing with defendants in the development of seeds that will grow better, long-lasting, fresh-market tomatoes for United States consumers.

1. United States consumers spend more than $4 billion each year on fresh-market tomatoes. During the summer months, most of these tomatoes are grown on farms located throughout the United States and then sold locally. During the rest of the year, however, most of those tomatoes are grown in the southern portions of the United States and in Mexico. To prevent the tomatoes from rotting before they reach consumers, farmers either pick the fruit while green and artificially ripen it (which produces tomatoes with less flavor than those ripened on the vine in the summer months), or grow special breeds of tomato that have a longer shelf-life and allow the fruit to ripen on the vine. These "long-shelf-life tomatoes" are becoming the tomato of choice during the winter months, when locally-grown tomatoes are unavailable throughout most of the United States.

2. Defendants sell the seeds that farmers use to grow fresh-market tomatoes. They sell more tomato seeds in the United States and in the rest of North America than any other company.

3. Hazera is one of the world's most successful tomato seed companies; a large percentage of all the fresh-market tomatoes consumed in Europe come from seeds it helped develop. But for the non-compete agreement that is the subject of this lawsuit, Hazera would likely be a significant competitor of defendants in North America.

4. Beginning in the early 1980's, Hazera and defendant LSL Biotechnologies, Inc. ("LSL") signed a series of contracts to work together to develop tomatoes with a longer shelf life for the American market. Those contracts expired December 31, 1995, and all that remains of them is a provision (the "Restrictive Clause") that bars Hazera from competing in North America against defendants to develop better long-shelf-life tomatoes. That ban on competition lasts *forever* and extends to tomato development efforts beyond those on which LSL and Hazera cooperated.

5. LSL has threatened to enforce the Restrictive Clause against Hazera and consequently Hazera has been deterred from adapting fresh-market, long-shelf-life tomatoes it is developing for other countries to growing conditions in the United States and Mexico.

6. The Restrictive Clause is a non-compete agreement between actual or potential competitors. It was not reasonably necessary to any legitimate joint activity between defendants and is so overbroad as to scope and unlimited as to time as to constitute a naked restraint of trade in violation of Section 1 of the Sherman Act (15 U.S.C. § 1), as amended.

7. The Restrictive Clause also violates Section 1 of the Sherman Act because it has harmed and will continue to harm American consumers by unreasonably reducing competition to develop better seeds for fresh-market, long-shelf-life tomatoes for sale in the United States.

DEFENDANTS, JURISDICTION AND VENUE

8. The United States files this complaint and institutes these proceedings under Section 4 of the Sherman Act (15 U.S.C. § 4), to prevent and restrain defendants from continuing to violate Section 1 of the Sherman Act (15 U.S.C. § 1), as amended.

9. LSL is incorporated in Delaware. It is the largest seller of fresh-market tomato seeds in Mexico, from which the United States imports the largest number of fresh-market tomatoes. LSL's principal place of business is in Tucson, Arizona. On its own and through its subsidiaries, LSL maintains offices in and transacts business in Arizona.

10. Seminis Vegetable Seeds, Inc. ("Seminis") is incorporated in California. It is the largest tomato seed company in the United States. Seminis, on its own and through its subsidiaries, maintains offices in and transacts business in Arizona.

11. LSL PlantScience LLC ("LSL Plant") is incorporated in Delaware. Its principal place of business is in Tucson, Arizona. It transacts business in Arizona. Defendants LSL and Seminis are its only shareholders, each owning a 50% voting interest.

12. Defendants are engaged in interstate commerce and in activities that substantially affect interstate commerce. Defendants breed plants to produce tomatoes that can better withstand the rigors of interstate transport, and they sell the seeds for those plants in interstate commerce.

13. The Court has jurisdiction over this action and over the defendants pursuant to 28 U.S.C. §§ 1331 and 1337. Venue is proper in this district with respect to the defendants under 15 U.S.C. § 22 and 28 U.S.C. § 1391, because each of them is a corporation that may be found in or transacts business in the District of Arizona.

FACTUAL BACKGROUND

Tomato Perishability

14. Until recently, tomatoes had a short shelf life, beginning to rot within a few days of ripening. As a result, producers could sell ripe tomatoes only within a limited geographic area. During cooler months when locally-grown tomatoes are unavailable in much of the United States, growers generally found it unprofitable to allow the tomatoes to ripen on the vine on southern farms before shipping them for sale in northern supermarkets. Conventional “vine-ripened tomatoes” shipped by truck, the least costly means of shipping, would not remain in marketable condition long enough for supermarkets to shelve them and for consumers to buy and use them. Tomatoes shipped by faster, but more expensive, means were too costly for most consumers.

15. To overcome this problem, growers generally picked, packed and shipped the tomatoes while green. Before sale, the green tomatoes were gassed with ethylene to redden them. These unripened, "gas green" tomatoes did not spoil quickly, but they developed a reputation for poor flavor, especially compared to the tomatoes grown on the vine until fully ripe during the summer months.

Efforts to Develop Tomatoes with a Longer Shelf Life

16. Hazera, incorporated in Israel, is one of the world’s most prominent tomato seed companies. It sells more seeds than any other company in many important tomato producing countries, including Spain, Italy, Israel, and Turkey. Its corporate strategy focuses on the development of newer, improved tomato varieties, including those with extended shelf life. Hazera has been very successful in the European markets in which it competes, and it employs skilled breeders who have developed improved varieties of tomatoes.

17. In the early 1980's, Hazera (then called Hazera (1939) Ltd.) had been working with Hebrew University in Jerusalem to develop tomatoes with longer shelf life. Defendant LSL, which had no prior tomato breeding experience, also began to work with the university on breeding tomatoes during this time.

18. On January 1, 1983, Hazera and LSL signed a contract, agreeing to cooperate in the development of tomatoes for the U.S. market that had a longer shelf life, primarily through coordination with the Hebrew University. LSL, Hazera, and the university agreed to strive to solve the "gas green" problem by breeding tomatoes with enough shelf life after reddening on the vine (up to two weeks) to travel from growing locales in Mexico and the most southern states of the United States to the rest of the United States before spoiling. (Hazera and LSL decided not to cooperate in the development of better cherry tomatoes, greenhouse tomatoes or tomatoes with a normal shelf life).

19. In the contract, Hazera and LSL also allocated to each other territories in which they could exclusively sell (without competition from each other) both tomato seeds that they cooperatively developed and tomato seeds that they had developed on their own. LSL's exclusive territory included North America. Hazera and LSL also agreed that Hazera would supply to LSL the seeds that LSL sold in its exclusive territory.

20. Pursuant to the contract, LSL, Hazera and the university worked to develop quality tomatoes with added shelf life. They focused almost exclusively on breeding a ripening-inhibitor gene (the "RIN" gene) into tomato seeds to be grown in open fields. The goal of this arrangement was to develop tomatoes suited to United States consumers' taste.

21. Hazera, LSL and the university ultimately succeeded in breeding the RIN gene into commercially salable tomatoes. Hazera had previously agreed to assist LSL in applying for a patent for successes related to their joint development efforts. LSL subsequently filed for and obtained a patent covering tomatoes (and tomato seeds) that use the RIN gene to obtain a longer shelf life.

22. These RIN-gene, vine-ripened tomato seeds have proved very popular. The RIN-gene tomato varieties that Hazera and LSL developed pursuant to the contract grow well in Mexican, but not United States climates. Thus, since the arrival of long-shelf-life tomatoes, Mexican farmers have seen their share of fresh, winter tomatoes sold in the United States grow significantly, mostly at the expense of United States tomato farmers.

The Restrictive Clause

23. After signing the initial contract in 1983, LSL and Hazera had contract disputes, including disagreements over the size of Hazera's exclusive sales territory. In 1987, a Hazera lawsuit against LSL led to a renegotiation of the contract and an "addendum" to the 1983 agreement that expanded Hazera's exclusive sales territory in the Mediterranean region.

24. The addendum contained the Restrictive Clause, which prohibited Hazera from competing with LSL on long-shelf-life tomatoes, even after the contract expired:

> "Subsequent to the termination of the agreement hereunder, Hazera shall not engage, directly or indirectly, alone, with others and/or through third parties, in the development, production, marketing or other activities involving tomatoes having any long-shelf-life qualities." (Paragraph k).

25. The Restrictive Clause prohibited Hazera from *ever* developing seeds for tomatoes with long-shelf-life traits after the 1983 agreement expired -- even if the tomatoes result from

completely different gene sets or technologies (*e.g.*, tomatoes bred without using the RIN gene) from those that LSL and Hazera had developed cooperatively.

26. In spite of the addendum, disagreements between Hazera and LSL continued and the cooperation between the two companies largely ceased. In 1989, they again modified the contract, and in 1992, in another attempt to resolve their disputes, LSL and Hazera decided to modify the contract a final time. They agreed to ask an arbitrator to incorporate their final contract modifications into a stipulated arbitration order. The contract modifications contained in the "arbitration settlement" largely resolved disputes over the sales of tomato seeds in North America (part of LSL's exclusive territory) and did not call for any new cooperation between Hazera and LSL in the development of better long-shelf-life tomatoes.

27. The arbitration settlement reaffirmed the Restrictive Clause's prohibition against Hazera ever developing better long-shelf-life tomato seeds of any kind for North America. It also modified the Restrictive Clause with regard to North America so that Hazera could sell cherry tomato seeds and tomato seeds designed to grow in greenhouses that Hazera had previously developed without LSL's help, but only after Hazera gave LSL the details of the sale (*i.e.*, the identity of the purchaser, the quantity sold, and the sales price) and allowed LSL to deliver the seeds.

28. On January 1, 1996, years after Hazera and LSL had ceased trying to jointly develop better tomato seeds, the 1983 agreement expired and the Restrictive Clause became effective. LSL began demanding that Hazera abide by the Restrictive Clause.

Events Since the Restrictive Clause Became Effective

29. Defendant Seminis is the largest tomato seed company in the United States. It owns, among other companies, Asgrow Seed Company, Petoseed Company, and Royal Sluis. Seminis has the largest tomato research and development budget of any seed company in the world. During the time that LSL and Hazera were working to develop seeds that would grow quality tomatoes with a long shelf life, Seminis was working to the same end.

30. In 1998, Seminis, which had not developed commercially successful long-shelf-life seeds for the North American market, decided to combine with LSL.

31. On May 28, 1998, LSL conveyed its patent rights over RIN-gene tomatoes to a newly created company called Patco, LLC ("Patco"). LSL conveyed the rest of its tomato seed-related assets, including the Restrictive Clause, to Defendant LSL Plant. Seminis, fully aware of the Restrictive Clause, purchased a 50% ownership stake in both Patco and LSL Plant. The governance agreement for LSL Plant gives both Seminis and LSL equal rights and opportunities to require LSL Plant to enforce (or block enforcement of) the Restrictive Clause against Hazera.

32. In 1999, LSL sued Hazera in Israel claiming that Hazera had breached provisions of the contracts between the two companies by, *inter alia*, working to develop firmer long-shelf life tomatoes.

THE TOMATO SEED MARKET

33. Farmers desiring to grow fresh-market tomatoes purchase seeds designed to grow fresh-market tomatoes. Fresh-market tomato seeds are bred for particular growing seasons and

particular geographic climates. North American farmers cannot plant fresh-market tomato seeds in the winter season that were bred for the summer season or for other climates without appreciably diminishing yield and/or quality. The relevant market consists of seeds designed to grow fresh-market tomatoes in North America during the winter months.

34. Defendants' share of fresh market tomato seeds sold and manufactured in the relevant market likely exceeds 70%. Other than defendants and Hazera (and their respective affiliates), none of the remaining companies that have tried to breed tomatoes in North America has a significant share of the relevant market. On information and belief, Novartis and Monsanto together have less than a 20% share of the market, while all the other companies combined account for less than 10% of the relevant market.

ANTICOMPETITIVE EFFECTS

35. The Restrictive Clause limits effective competition in innovation in the relevant market by excluding forever from the market one of the few companies likely to develop seeds for growing fresh-market tomatoes for United States consumers during the winter months.

36. Although United States consumers have shown a clear preference for long-shelf- life tomatoes during the winter months, these tomatoes, which have the RIN gene, still do not taste like fully-ripe, summer-grown tomatoes.

37. Novartis, Monsanto and some of the firms with smaller shares of the relevant market have been working to breed a better winter tomato for United States consumers. Success is difficult, however. A company needs a knowledgeable and skilled tomato breeder, and there are few such

breeders available. There is also a significant learning curve to become such a breeder. Additionally, a company needs time (usually several growing seasons) before it can determine whether its innovation efforts have borne fruit. Finally, breeding success is still, to a large degree, a hit or miss proposition.

38. Much of the research and development to date has focused on the RIN gene for which defendants LSL and Seminis hold patent rights. However, for the European and Mediterranean regions, Hazera has successfully worked to breed long-shelf-life tomatoes that do not incorporate the RIN gene and do not implicate defendants' patent rights.

39. Hazera is one of the few firms with the experience, track record and know-how likely to develop seeds that will allow United States and other North American farmers to grow better fresh-market tomatoes for United States consumers during the winter months. The Restrictive Clause, however, bars Hazera from ever competing to develop tomato seeds specifically adapted for North American climates.

40. LSL has threatened to enforce the Restrictive Clause against Hazera, and consequently Hazera has been deterred from adapting the fresh-market, long-shelf-life tomatoes it is developing for other countries to growing conditions in the United States and Mexico.

41. The Restrictive Clause thus delays or makes less likely innovations that will allow consumers to enjoy higher quality, better tasting winter tomatoes and that will allow United States farmers to grow long-shelf-life tomatoes. The Restrictive Clause may also allow defendants to profitably charge more for their seeds (or more for a license to use seeds with the RIN gene) than they otherwise could.

VIOLATION ALLEGED

42. The Restrictive Clause is an agreement between actual or potential competitors not to compete with one another to develop seeds for long-shelf-life fresh market tomatoes for sale in the United States in violation of Section 1 of the Sherman Act. Its ban on competition lasts forever and extends to tomato development efforts beyond those on which LSL and Hazera cooperated. The Restrictive Clause was not reasonably necessary to effectuate the contemplated transaction between LSL and Hazera or achieve integrative efficiencies.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff prays:

1. That the above-mentioned Restrictive Clause be adjudged a violation of Section 1 of the Sherman Act.

2. That a permanent injunction be issued preventing and restraining the defendants, their successors and assignees, and all persons acting on their behalf from enforcing the Restrictive Clause.

3. That Plaintiff have such other relief as the nature of this case may require and as is just and proper to prevent the recurrence of the alleged violation and to dissipate the anticompetitive effects of the violation; and

4. That Plaintiff recover the costs of this action.

DATED this 15th day of September, 2000.

FOR PLAINTIFF UNITED STATES

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