

GROWERTALKS

GT in Brief

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Westhoff, Proven Winners Battle Over Calibrachoa

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A lawsuit was filed May 4 in a U.S. District Court in Pennsylvania by German flower breeder Westhoff against Proven Winners over the calibrachoa Candy Bouquet. Westhoff alleges that Proven Winners stole the calibrachoa variety Candy Bouquet and renamed it Holy Moly!.

Westhoff spokesman Chris Berg commented on the case back in May.

"The Candy Bouquet case is dealing with Holy Moly! being illegally sold," he replied. "[Holy Moly!] came out the year after Candy Bouquet. They also tried applying for a trademark for Candy Bouquet after we were already on the market, which they later had to withdraw.

"In Europe a few weeks ago, Holy Moly! was not deemed unique or distinctive enough and was denied protection and removed from the market. Candy Bouquet is patented in the U.S. as well."

Chris added that, "despite the dramatic Bloomberg headline, we're not going for \$45 million dollars." (Bloomberg referenced that number in its headline in an article published on May 11, referring to the value of all calibrachoa sold in the U.S. in 2014, according to USDA figures.)

"We're asking them to back pay royalties of Holy Moly! liners sold and to pay damages on lost royalties for Candy Bouquet when they tried to confuse Home Depot growers on the rightful owner of the patented genetics," Chris answered.

He added that they've offered Proven Winners a license agreement going forward, "which we hope they would accept. We know their customers find value in the variety and we're not trying to take that away. They can even still market it as Holy Moly!."

Chris also clarified that this case has nothing to do with the utility patent Proven Winners recently received for the star pattern on calibrachoa.

"The utility patent case has been on clean, non-fading stars, so we removed our Caliplosion lines from our

assortment when that came out. Candy Bouquet doesn't fall into that case," he said.

Proven Winners responded to the lawsuit as follows:

Proven Winners respects intellectual property and we expect others to do the same.

Westhoff's Candy Bouquet variety, as they have told us, is a mutation from Superbells Cherry Star. Superbells Cherry Star is a patented plant from an independent breeding company and is exclusive to Proven Winners North America. Westhoff did no breeding to develop Candy Bouquet, nor did they have the support of the breeder of Superbells Cherry Star; Westhoff simply found the plant and began to sell it.

However, Westhoff cannot do this if Candy Bouquet is covered by a previously applied for and subsequently issued U.S. utility patent. Westhoff was aware of the utility patent application and took a risk when they introduced Candy Bouquet; we are confident that they now regret this decision.

Proven Winners has introduced a different mutation, also from Superbells Cherry Star, called Superbells Holy Moly! Holy Moly! is a different essentially derived variety than Candy Bouquet. Holy Moly! is also covered by the same plant utility patent and has the full support of the plant breeder.

So why has Westhoff filed this lawsuit? The reason is because Proven Winners is the master licensee for this very important new U.S. utility patent. The utility patent provides patent protection for calibrachoa having a described pattern, and both Candy Bouquet and Holy Moly! exhibit this pattern. Westhoff is not licensed, nor will Westhoff be licensed, to use this patent. Proven Winners, however, is licensed to use this patent with the full support of the breeder.

Because of this, Westhoff has taken a preemptory "first strike" by attempting to make claims that confuse the issue. Such legal tactics are, unfortunately, very common in cases like this.

Lawsuits like this one, which are aimed at trying to pretend the occasion is something other than what it really is, historically end poorly for those who file them.

Both sides have now had their say; now we'll have to see what the court says.

We checked in with Proven Winners' Mark Broxon at press time to see if there were any updates. He said that, at the time, they had not been officially served yet. **GT**