

**IN THE 13TH JUDICIAL CIRCUIT COURT OF
BOONE COUNTY, MISSOURI**

THE CURATORS OF THE)
UNIVERSITY OF MISSOURI,)
)
Plaintiff,)
)
v.)
)
GALEN J. SUPPES,)
WILLIAM R. SUTTERLIN,)
RENEWABLE ALTERNATIVES, LLC)
and HOMELAND TECHNOLOGIES, LLC,)
)
Defendants.)

Case No. 09-BA-CV02314

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Defendant Galen J. Suppes (“Suppes”) hereby moves for dismissal of all Counts because the claims presented are not ripe for adjudication, for failure to state a claim upon which relief can be granted, and for failure to bring this action within the statute of limitations or, in the alternative, for more definite statement of paragraphs 14-17, 19-27, 31-32, 36-38, 40-41, 50, 56-57, 61, 63, 66-67, 69, 74-76, and 81-82, and Counts I through VII; and striking Count III in its entirety or in the alternative striking paragraph I in Count III.

I. Legal Standard.

Generally, parties must exhaust adequate administrative remedies before resorting to an action at law or in equity. See, e.g., *Drury Displays, Inc. v. City of Richmond Heights*, 922 S.W.2d 793, 797 (Mo. App. 1996); *State ex rel. J.S. Alberici, Inc. v. City of Fenton*, 576 S.W.2d 574, 577 (Mo. App. 1979); *Westside Enter., Inc. v. City of Dexter*, 559 S.W.2d 638, 640 (Mo. App. 1977). As stated recently by our Supreme Court, there are several exceptions to the general requirement of exhaustion. *State ex rel. Whiteco Industries, Inc. v. Bowers*, 965 S.W.2d 203, 206

(Mo. App. 1998). A party is not required to exhaust administrative procedures where: (1) no adequate remedy lies through the administrative process, (2) the authority of the political subdivision to impose particular regulations is challenged, (3) the validity of agency rules or the threatened application thereof is at issue, or (4) the authority of a municipal corporation to enact certain regulations under the statutory enabling acts granting it the power to zone is challenged. *Premium Standard Farms, Inc. v. Lincoln Township*, 946 S.W.2d 234, 237 (Mo. banc 1997). Exhaustion of administrative remedies is a jurisdictional requirement for a declaratory judgment action. See *State ex rel. Missouri State Board of Registration for the Healing Arts v. Hartenbach*, 768 S.W.2d 657, 659 (Mo. App. 1989); *State ex rel. J.S. Alberici, Inc. v. City of Fenton*, 576 S.W.2d 574, 577 (Mo. App. 1979); *Green v. City of St. Louis*, 870 S.W.2d 794, 796 (Mo. banc 1994) ("The rule requiring exhaustion of administrative remedies is one of subject matter jurisdiction."). All of these statements of the rule presuppose an adequate administrative remedy. *Id.* A claimant must present the facts of its case to the governing administrative body before administrative remedies can conceivably be exhausted. See *Bettis v. Potosi R-III School Dist.*, 51 S.W.3d 183 (Mo. App. 2001).

In addition, a cause of action should be dismissed for failure to state a claim when "taking all factual allegations as true, plaintiff's pleadings are insufficient to establish a cause of action." *Grewell v. State Farm Mut. Auto. Ins. Co., Inc.*, 102 S.W.3d 33, 35-36 (Mo. 2003); Rule 55.27(a)(6). The failure to state a claim occurs when plaintiff's petition is inadequate. *Id.* A petition is inadequate when the facts alleged fail to meet the elements of a recognized cause of action. *S&P Properties, Inc. v. City of University City*, 178 S.W.3d 579, 581 (Mo. App. 2005).

In the alternative, the Missouri rules of civil procedure require fact pleading such that a party may move for a more definite statement of any matter contained in a petition which is "not

averred with sufficient definiteness or particularity” to allow proper preparation of responsive pleadings. Rule 55.08 and 55.27(d); *see* R.S.Mo. § 509.310; *see also* *Picarella v. Great Atlantic & Pacific Tea Co.*, 316 S.W.2d 642 (Mo. App. 1958). Under Rule 55.05 sufficient and definite fact pleading must set forth a claim for relief by “(1) a short statement of the facts showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the pleader claims to be entitled.” Rule 55.04 requires that “[e]ach averment of a pleading shall be simple, concise and direct.” Further, Rule 55.11 requires that “[a]ll averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances.” Otherwise, “[u]pon motion made by a party . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Rule 55.27(e); *see* *Harvey v. Wells*, 955 S.W.2d 546 (Mo. 1997); *Butler v. Circulus, Inc.*, 557 S.W.2d 469 (Mo. App. 1977).

Finally, all actions upon contracts, obligations or liabilities shall be commenced within five years from the date the cause of action accrues. R.S.Mo. § 516.120.

II. Plaintiff’s Claims are not Ripe for Failure to Exhaust Administrative Remedies.

The University of Missouri (“University”) is considered a state agency (*Krasney v. Curators of University of Missouri*, 765 S.W.2d 646, 649 (Mo. App. 1989); *Todd v. Curators of the University of Missouri*, 147 S.W.2d 1063, 1064 (Mo. 1941)). It was granted special status by the Missouri legislature, however, by exempting institutions of higher learning from the Missouri Administrative Procedure Act “if such institution has established written procedures to assure that constitutionally required due process safeguards exist and apply to a proceeding that would otherwise constitute a ‘contested case’ as defined in section 536.010.” *See* R.S.Mo. § 536.018. A “contested case” is a proceeding before an agency in which legal rights, duties or privileges of

specific parties must be given due process and are required by law to be determined after a hearing. Mo. Rev. Stat. § 536.010.

Plaintiff alleges that Defendant Suppes violated his employment contract with the Plaintiff through multiple violations of its Collected Rules and Regulations. See Plaintiff's Petition, p.7, para. 24, p.10, para. 29. It seeks a declaratory judgment that Defendant violated its own rules and a set of administrative remedies. None of the above-stated exceptions to the exhaustion requirement, however, apply to the case at bar. Because Defendant Suppes, a tenured professor with protected property and liberty interests at the University, is entitled to a hearing in which legal rights, duties or privileges are required by law, Plaintiff's lawsuit against Defendant Suppes seeks a judicial declaration of the legal rights between the parties derived from patent law and contractual law, and the associated duties or privileges of the specific parties at issue. As such, Plaintiff must follow the written procedures set forth in its own Collected Rules and Regulations, if any, before the matter can be ripe for judicial review.

In fact, Plaintiff has several established written procedures for administratively adjudicating its claims against Defendant Suppes, yet it has failed to utilize any of these procedures before proceeding to this judicial forum. See Collected Rules and Regulations, Sections 300.010.L.4 (A charge of unethical or irresponsible action may be brought against a Faculty member or teacher by a person or group of persons associated with the University, such as a student, Faculty member, teacher, administrator, or Board member); 370.015 (There has been a violation, a misinterpretation, an arbitrary or discriminatory application of University policy, regulation, or procedure which applies personally to the faculty member, notwithstanding that it may apply to others within or without the grievant's unit, relating to the privileges, responsibilities, or terms and conditions of employment as a member of the faculty); and

310.020 & 310.060 (adequate cause for dismissal shall be related, directly and substantially, to the faculty member's fitness or performance in the professional capacity of teacher or researcher. Cause for dismissal may include ... severe research misconduct, academic irresponsibility, or other default of academic integrity in the performance of academic responsibilities.) Each of these procedures govern the disposition of disputes with faculty members arising from their employment.

On one hand, Plaintiff demands that Defendant Suppes follow the Collected Rules and Regulations yet it has made no attempt to follow these procedures and, in fact, terminated the Section 370.015 grievance proceeding, instituted by Defendant Suppes to resolve these issues, by filing this lawsuit. By demonstrating such disregard for its own procedural safeguards, the University has failed to exhaust the administrative remedies in order to merit judicial review. Therefore, the University's causes of action are not ripe for judicial review, and should be dismissed.

III. Plaintiff Fails to State a Claim Upon Which Relief Can Be Granted.

Upon a motion to dismiss for failure to state a cause of action, "the court reviews the allegations of the petition to determine whether the facts pled therein are sufficient as a matter of law." *State ex rel. Union Elec. Co. v. Dolan*, 256 S.W.3d 77, 81 (Mo. 2008). In reviewing the petition, the court "assume[s] all averments to be true and give[s] the plaintiff the benefit of all reasonable inferences to be drawn therefrom." *Thompson v. Hunter*, 2003 MO 196 (MOCA 2003).

Plaintiff seeks declaratory judgment for determination of ownership and dates of conception and reduction to practice for inventions created by defendants in Count I. The relief sought is characterized in Paragraph 39 in the following manner, "Any such inventions

conceived or reduced to practice during either of defendants' employment by the University are and should be declared to be owned by the University." A declaration of the University's ownership of certain intellectual property is the actual relief sought in this count, however plaintiff fails to state a proper claim for declaratory judgment. The University misstates Section 100.020(D)(1) of the Collected Rules and Regulations as to ownership of inventions, which is as follows:

D. Inventions by Employees of the University

1. Rights of University and of Employees

- a. The University, as the employer and as the representative of the people of the state, shall have the ownership and control of any Invention or Plant Variety developed in the course of the employee's service to the University. Each employee of the University is required and shall upon request assign to The Curators of the University of Missouri all domestic and foreign rights to any Invention or Plant Variety made by the employee within the general scope of her/his duties as employee of the University, unless such requirement is waived in writing by the University. Remuneration to the employee for such assignment is detailed in Section 100.020 E.2.c and E.2.d.

An Invention or Plant Variety shall be considered as having been made within the general scope of the employee's duties for the University if either of the following conditions are met:

(1) Whenever the employee's duties include research or investigation, and the Invention or Plant Variety arose in the course of such research or investigation and is relevant to the general field of an inquiry to which the employee was assigned; or

(2) Whenever the Invention or Plant Variety was in a substantial degree made or developed through the use of University facilities or financing, or on University time, or through the aid of University information not available to the public.

Even deeming all allegations presented in the petition as true, a petition for declaratory judgment must "invoke principles of substantive law" which provide an entitlement to the plaintiff of the rights claimed. *Thompson v. Hunter*, 2003 MO 196, 18 (MOCA 2003). "If the

petition's allegations are supported by facts rather than mere conclusions and if those facts demonstrate a justiciable controversy, the trial court should render a declaration." *Id.*

In Count I, Plaintiff does not provide this Court with sufficient factual allegations to state a claim for declaratory judgment, even were these allegations taken as true. Particularly in light of the fact-pleading requirement before this Court, Plaintiff does not provide adequate factual support to show the plausibility of its allegations. The Plaintiff does not allege in its facts that Suppes invented anything utilizing University facilities or resources while working for the University, as is required by the University's own Collected Rules. Plaintiff has alleged no fact to controvert the fact stated in paragraph 16 of the petition. Further, the basis of Count I is federal patent law codified in 35 U.S.C. § 101 et seq., which allegedly provides statutory authority for determination of the date of invention, conception and reduction to practice. Not a single section of Title 35 of the United States Code provides for any such determination. Thus, Count I is void on its face.

Similarly in Count II, Plaintiff fails to allege facts that Suppes invented anything utilizing University facilities or resources while working for the University, as is required by the University's own Collected Rules, and as such has not controverted paragraph 16. By merely reciting excerpts from the University's Collected Rules and Regulations, and alleging the University is entitled to a declaration that such language constitutes an automatic assignment based on these excerpts, Plaintiff has not put a case or controversy before this Court. Plaintiff must provide more than labels and conclusions to make its case, and has not even gone so far as to provide a formulaic recitation of the elements of a cause of action although such would still fail to state a claim given the speculative nature of the factual allegations. Plaintiff must provide

this Court with an actual case or controversy— by alleging no more than that defendants have failed to “cooperate with the University” in Paragraph 48, this they do not do.

The statutory authority cited to support its allegation of automatic assignment is 35 U.S.C. § 261. This section of the Patent Act is devoid of any such notion of automatic assignment. 35 U.S.C. § 261 provides as follows:

Subject to the provisions of this title, patents shall have the attributes of personal property.

Applications for patent, patents, or any interest therein, shall be assignable in law by an instrument in writing. The applicant, patentee, or his assigns or legal representatives may in like manner grant and convey an exclusive right under his application for patent, or patents, to the whole or any specified part of the United States.

A certificate of acknowledgment under the hand and official seal of a person authorized to administer oaths within the United States, or, in a foreign country, of a diplomatic or consular officer of the United States or an officer authorized to administer oaths whose authority is proved by a certificate of a diplomatic or consular officer of the United States, or apostille of an official designated by a foreign country which, by treaty or convention, accords like effect to apostilles of designated officials in the United States, shall be prima facie evidence of the execution of an assignment, grant or conveyance of a patent or application for patent.

An assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from its date or prior to the date of such subsequent purchase or mortgage.

Accordingly, Court II is also void on its face.

Finally, in Counts VI and VII Plaintiff requests an equitable action for accounting and specific performance, respectively. Once again, Plaintiff requests relief of this Court without alleging facts which meet the elements of any ascertainable cause of action. Although the relief

requested may be sought in the context of, for example, a properly pled claim for breach of contract— a request for relief is not equivalent to a claim for relief absent a corresponding cause of action.

Accordingly, defendant moves this Court for dismissal of Counts I, II, VI and VII for failure to state a claim upon which relief can be granted.

IV. Counts I - VII are barred by the Statute of Limitations.

In applying the appropriate statute of limitations, Missouri courts look to the “gravamen... of the complaint in its totality.” *Wages v. Young*, 261 S.W.3d 711, 715 (Mo. App. 2008). The statute of limitations is controlled by the object of the action, rather than its form. When the duty alleged to have been breached stems from a contract, the action is premised on contractual liability. *Id.* Actions upon contracts, obligations or other liabilities must be brought within five years of the accrual of such actions. R.S.Mo. 515.120. “A claim accrues when one has some notice of his cause of action, an awareness either that he has suffered an injury or that another person has committed a legal wrong which ultimately may result in harm to him.” *Community Title Co. v. U.S. Title Guar. Co., Inc.*, 965 S.W.2d 245, 253 (Mo. App. 1998).

Plaintiff admits in Paragraph 18 that U. S. Patent No. 6,574,971 issued on June 10, 2003. The associated patent application serial No. 09/945,682 published on January 31, 2002. The patent and published application have been publically available for over five years. Arguably any action based on assignment of the patent should have been brought at least by January 31, 2007, and certainly no later than June 10, 2008, as certainly upon issuance of the patent plaintiff had an awareness of potential harm stemming from the alleged failure to assign, or “legal wrong.” Each of Counts I – VII relies on allegations based on this patent. In fact, the ‘971 patent is the only intellectual property that has not been assigned by Suppes to the University.

Plaintiff admits in Paragraph 74 that this patent was made public at least as of its issue date of June 10, 2003, yet failed to pursue any action for more than five years.

Accordingly, defendant moves this Court for dismissal of Counts I - VII for failure to bring this action within the statute of limitations.

V. Counts I-VII Fail to State Sufficient Facts to Show Plaintiff is Entitled to Relief.

A motion for more definite statement of facts is appropriate concerning “any matter not averred with sufficient definiteness or particularity to enable the adverse person to properly plead or prepare generally for trial.” *Gerber v. Schutte Investment Co.*, 194 S.W.2d 25, 27 (MO 1946). In contrast to the federal system where discovery is the primary vehicle for refining the issues for trial, “in Missouri... the proper remedial device to define and sharpen the issues is a motion to make more definite and certain.” *State ex rel. Papin Builders, Inc. v. Litz*, 734 S.W.2d 853, 861 (Mo. App. 1987). If a motion for more definite statement is granted, and the order of the court is not obeyed within the time allotted, the court may strike the pleading to which the motion was directed. *State ex rel. Harvey v. Wells*, 955 S.W. 2d 546, 547 (Mo. 1997).

A. Facts not sufficiently averred

The following facts are not sufficiently averred:

Paragraph 14: the specific section of the Collected Rules is not identified.

Paragraph 15: the specific inventions invented by Suppes are not identified.

Paragraph 16: the specific inventions are not identified.

Paragraph 17: the specific patent applications are not identified.

Paragraph 19: the specific University-owned intellectual property is not identified.

Paragraph 20: the background intellectual property existing and owned by the University is not identified.

Paragraph 21: the specific invention is not identified.

Paragraph 22: the specific intellectual property is not identified.

Paragraph 23: the specific patent applications are not identified; the specific intellectual property is not identified.

Paragraph 24: the specific section of the Collected Rules is not identified; the specific intellectual property is not identified.

Paragraph 25: the specific patent applications are not identified.

Paragraph 26: the specific equipment is not identified.

Paragraph 27: the specific intellectual property rights are not identified; the specific patent application is not identified.

Paragraph 31: the specific University-owned intellectual property is not identified.

Paragraph 32: the specific inventions removed from the assignment document are not identified.

Paragraph 36: the specific inventions, patent applications and patents are not identified.

Paragraph 37: the specific intellectual property is not identified.

Paragraph 38: the specific intellectual property is not identified.

Paragraph 40: the specific section of 35 U.S.C. is not identified.

Paragraph 41: the specific inventions, loss of income, loss of royalties, loss of business opportunities and resources are not identified.

Paragraph 48: the specific section of federal patent law is not identified.

Paragraph 50: the specific patent applications and federal patent law section are not identified.

Paragraph 56: the specific intellectual property and proper assignment documents are not identified.

Paragraph 57: the specific damages, lost revenue and business relationships are not identified.

Paragraph 61: the specific unfair practices, confidential information, deception, and intellectual property are not identified.

Paragraph 63: the specific damages, failed business dealings, business reputation, strained business relationships, and lost business opportunities are not identified.

Paragraph 66: the specific intellectual property is not identified.

Paragraph 67: the specific inventions and technology are not identified.

Paragraph 69: the specific damages, lost revenue, lost royalties, lost business reputation, and lost business opportunities are not identified.

Paragraph 74: the specific intellectual property is not identified.

Paragraph 75: the specific intellectual property is not identified.

Paragraph 76: the specific intellectual property is not identified.

Paragraph 81: the specific intellectual property and inventions are not identified.

Paragraph 82: the specific obligation to account is not identified.

B. Counts not sufficiently averred

Plaintiff seeks declaratory judgment for determination of ownership and dates of conception and reduction to practice for inventions created by defendants (Count I) without identifying the specific intellectual property at issue or a single section of the Patent Statute which supports their claim. Further, Plaintiff seeks declaratory judgment as to automatic

assignment of all inventions created by defendants (Count II) without identifying the section of federal patent law defining this right or the intellectual property subject to automatic assignment.

Plaintiff alleges breach of contract (Count III) by Defendant Suppes with insufficient particularity. In Paragraph 56 of the Complaint, the facts pled are indefinite as plaintiff fails to identify the intellectual property which Suppes purportedly failed to “properly” disclose, or how this alleged “improper” disclosure rises to the level of a breach of contract. Plaintiff further alleges breach by Defendant Suppes on the basis that he failed to “acknowledge the University’s ownership in “such intellectual property,” and failed to execute “proper” assignment documents “in said intellectual property.” Plaintiff has failed to provide sufficient facts to show how the assignment documents executed by Defendant Suppes are so egregiously improper as to rise to the level of a breach, or even identify the intellectual property allegedly improperly assigned. Therefore, more definite statement is required in order for Defendant Suppes to provide an appropriate responsive pleading.

Likewise, Plaintiff fails to provide a definite statement of the factual basis for its claim of tortious interference with business relationships in Count IV. Despite its allegation, in Paragraph 59, that conduct by defendants “jeopardized” its relationship with University and Missouri Soybean Merchandising Council, Mid-America Research and Development Foundation, and University and Senegy Chemical Corporation—no specific and definite factual basis is set forth to demonstrate Plaintiff’s entitlement to relief aside from the conclusory allegations in Paragraph 61. The vague allegations in Paragraph 61 identify defendants’ conduct by legal conclusion rather than factual allegation in stating that defendants jeopardized plaintiff’s business relationships “by entering into licenses and contracts with no authority to do so, by engaging in

unfair practices, by threatening to release confidential information to competitors, by using deception to obtain funds... and by refusing to cooperate in business dealings....”

In Count V, plaintiff claims Defendant Suppes breached his duty of loyalty to the University on the basis of indefinite facts stating Suppes “caused” conduct by RA which was in direct competition with the interests of the University, thereby breaching his duty of loyalty to the University. These allegations fail to identify conduct *by Defendant Suppes*, relied upon in stating the claim, thereby failing to demonstrate plaintiff’s entitlement to relief.

In Counts VI and VII, the specific intellectual property is not identified.

C. Paragraphs not simple, concise, direct or limited to a single set of circumstances

The following paragraphs are not simple, concise, direct and/or limited to a single set of circumstances as required by Rules 55.04 and 55.11: 14, 15, 17-21, 23-27, and 29-32.

D. Count for breach of contract and attorneys fees should be stricken

Count III for breach of contract fails to allege an amount of damages and thus should be stricken. Additionally, Paragraph I of the prayer requests attorneys’ fees which are not awardable for any count alleged by plaintiff, and thus should be stricken.

For these reasons, Defendant Suppes moves this Court to order plaintiff to provide a more definite statement of the paragraphs identified in section A above and Counts I-VII; simple, concise, direct, and statements limited to a single set of circumstances for the paragraphs identified in section C above; and to strike Count III and Paragraph I of the prayer.

VI. Conclusion.

Plaintiff fails to present any of its claims with sufficient factual particularity. Counts I, II, VI and VII are requests for relief rather than claims for relief, and thus should be dismissed for failure to state a claim upon which relief can be granted. Defendant should not be prejudiced by

the expense and burden of these proceedings on the basis of mere speculation or claims that have no basis in fact or law. Further, Defendant Suppes requests dismissal of Counts I-VII for failure to bring this action within the statute of limitations. Alternatively, Defendant Suppes requests that this Court grant their motion for more definite statement of Counts I-VII and to strike Count III and Paragraph I of the prayer.

Defendant Homeland Technologies has filed a motion to dismiss concurrently with the present motions. To the extent that its motion is denied, Defendant Homeland Technologies joins Defendant Suppes in the present motions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following attorneys by deposit in the United States Mail at Kansas City, Missouri, in a sealed envelope with first class postage thereon fully prepaid, this 15th day of June, 2009:

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