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12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF ARIZONA**

14 David Austin Roses Limited,
15 Plaintiff,

16 v.

17 Jessie’s Nursery LLC dba
18 JessiesRoseUSA; Sheng Zhang and John
Doe Zhang,
19 Defendants.

Case No.

COMPLAINT

20 Plaintiff David Austin Roses Limited (“David Austin” or “Plaintiff”), by and
21 through its undersigned counsel, brings this civil action seeking damages and injunctive
22 relief against Jessie’s Nursery LLC dba JessiesRoseUSA, Sheng Zhang and John Doe
23 Zhang (collectively, “JessiesRoseUSA” or “Defendants”), and in support thereof, David
24 Austin makes the following allegations based upon information or belief, except to
25 allegations specially pertaining to itself, which are based on personal knowledge.

26 **Nature of the Case**

27 1. This is an action for willful Patent Infringement, Trademark Infringement,
28 Unfair Competition, and False Advertising relating to Defendants’ illegal propagation of

1 plants protected by U.S. Plant Patents, including U.S. Patent Nos. PP32874, PP27349,
2 PP29874, PP32531, PP17267, PP25042, PP32662, PP29958, PP26677, PP22206,
3 PP26363, PP24462, PP19254, PP17159, PP26365, PP22947, PP26676, PP25064,
4 PP22032, and PP17553, *inter alia*; and the offer for sale and/or sale of such plants under
5 trademarks held by Plaintiff, including U.S. Trademark Registration Nos. 6183410,
6 3475601, 4821250, 6126261, 6433414, 4821245, 4825590, 6183409, 6126260,
7 4825588, 97768264, 4785615, 4821247, 4821251, 4821246, 4821249, 4802803,
8 4821248, 3207256, 1638561, 2822789, and 2706235 and other common law trademarks,
9 *inter alia*; and using copyright protected material of Plaintiff to make such sales.

10 **The Parties**

11 2. Plaintiff David Austin Roses Limited is a private limited company
12 organized under the laws of the United Kingdom, with an address of Bowling Green
13 Lane, Albrighton, Wolverhampton, United Kingdom WV7 3HB.

14 3. On information and belief, Defendant Jessie’s Nursery LLC, is a limited
15 liability company organized under the laws of the State of Arizona, with an address of
16 29683 N. 127th Lane, Peoria, Arizona 85383, and it is doing business as
17 JessiesRoseUSA.

18 4. On information and belief, Defendant Sheng Zhang is an individual and
19 resident of the State of Arizona who owns and/or operates Defendant Jessie’s Nursery,
20 LLC dba JessiesRoseUSA.

21 5. Defendant John Doe Zhang is Defendant Sheng Zhang’s spouse and, upon
22 information and belief, is also a resident of the State of Arizona. Defendant John Doe
23 Zhang is named solely for community property purposes because all actions by Sheng
24 Zhang giving rise to this lawsuit were, on information and belief, made on behalf of the
25 marital community.

26 **Jurisdiction and Venue**

27 6. This action arises under the United States Patent Act, codified at 35 U.S.C.
28 §§ 1, *et seq.*, and, in particular, 35 U.S.C. §§ 271 and 281-285; the U.S. trademark laws,

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1 codified at 15 U.S.C. §§ 1051, *et seq.*; and the U.S. copyright laws, codified at 15 U.S.C.
2 §§ 101, *et seq.*

3 7. This Court has federal question jurisdiction over the subject matter of this
4 action under 15 U.S.C. § 1121; 28 U.S.C § 1331; and 28 U.S.C. § 1338.

5 8. This Court has personal jurisdiction over Defendant Jessie’s Nursery LLC,
6 because it is incorporated in this state, it does business in this state and district, and
7 because the actions described herein took place in this state and in this district.

8 9. This Court has personal jurisdiction over Defendants Sheng Zhang and
9 John Doe Zhang because these individuals are residents of this state, do business in this
10 state and district, and because the actions described herein took place in this state and in
11 this district.

12 10. Venue is proper in the District of Arizona under 28 U.S.C. § 1391(b) and
13 (c) because the facts giving rise to the claims alleged herein occurred in this judicial
14 district.

15 **Facts Common to All Counts**

16 11. David Austin has been breeding beautiful and popular English roses since
17 1961.

18 12. David Austin owns U.S. Plant Patents covering many of its proprietary
19 rose plants, including but not limited to the following:

- 20 • U.S. Patent No. PP32874 P2 for the ‘Ausgray’ variety (Ex. A);
- 21 • U.S. Patent No. PP27349 for the ‘Ausweather’ variety (Ex. B);
- 22 • U.S. Patent No. PP29874 for the ‘Ausoblige’ variety (Ex. C);
- 23 • U.S. Patent No. PP32531 P2 for the ‘Auswagsy’ variety (Ex. D);
- 24 • U.S. Patent No. PP17267 for the ‘Ausimmon’ variety (Ex. E);
- 25 • U.S. Patent No. PP25042 for the ‘Auswasher’ variety (Ex. F);
- 26 • U.S. Patent No. PP32662 P2 for the ‘Ausimage’ variety (Ex. G);
- 27 • U.S. Patent No. PP29958 for the ‘Ausapply’ variety (Ex. H);
- 28 • U.S. Patent No. PP26677 for the ‘Ausyacht’ variety (Ex. I);

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- 1 • U.S. Patent No. PP22206 for the ‘Auschariot’ variety (Ex. J);
- 2 • U.S. Patent No. PP26363 for the ‘Auspluto’ variety (Ex. K);
- 3 • U.S. Patent No. PP24462 for the ‘Auschris’ variety (Ex. L);
- 4 • U.S. Patent No. PP19254 for the ‘Auspastor’ variety (Ex. M);
- 5 • U.S. Patent No. PP17159 for the ‘Ausjameson’ variety (Ex. N);
- 6 • U.S. Patent No. PP26365 for the ‘Auslevity’ variety (Ex. O);
- 7 • U.S. Patent No. PP22947 for the ‘Ausboxer’ variety (Ex. P);
- 8 • U.S. Patent No. PP26676 for the ‘Austruss’ variety (Ex. Q);
- 9 • U.S. Patent No. PP25064 for the ‘Ausconsin’ variety (Ex. R);
- 10 • U.S. Patent No. PP22032 for the ‘Ausjosiah’ variety (Ex. S);
- 11 • U.S. Patent No. PP17553 for the ‘Austango’ variety (Ex. T)

12 (hereinafter, the “David Austin Patents”).

13 13. David Austin marks its products with the relevant patent numbers and lists
14 the relevant patent numbers on its marketing materials, such as its website, thereby
15 putting the public on constructive notice that its products are patented.

16 14. Plaintiff possesses all rights under the David Austin Patents, including the
17 right to sue for infringement, recourse for damages, and to seek injunctive relief. Copies
18 of these patents are attached as Exhibits A-T.

19 15. David Austin also owns U.S. Trademarks and Trademark Registrations,
20 under which it sells many of its rose varieties, including but not limited to the following:

- 21 • **EFFIE**® (Reg. No. 6183410), under which the ‘Ausgray’ variety is sold.
- 22 • **ROSALIND**® (Reg. No. 3475601), under which the ‘Austew’ variety is sold.
- 23 • **CAREY**® (Reg. No. 4821250), under which the ‘Ausweather’ variety is sold.
- 24 • **PURITY**® (Reg. No. 6126261), under which the ‘Ausoblige’ variety is sold.
- 25 • **LEONORA**® (Reg. No. 6433414), under which the ‘Auswagsy’ variety is
26 sold.
- 27 • **MIRANDA**® (Reg. No. 4821245), under which the ‘Ausimmon’ variety is
28 sold.

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- 1 • **CHARITY**® (Reg. No. 4825590), under which the ‘Auswasher’ variety is
2 sold.
- 3 • **EUGENIE**® (Reg. No. 6183409), under which the ‘Ausimage’ variety is
4 sold.
- 5 • **CAPABILITY**® (Reg. No. 6126260), under which the ‘Ausapply’ variety is
6 sold.
- 7 • **TESS**® (Reg. No. 4825588), under which the ‘Ausyacht’ variety is sold.
- 8 • **BESSIE**™ (Application Serial No. 97768264), under which the ‘Ausperidot’
9 variety is sold.
- 10 • **DARCEY**® (Reg. No. 4785615), under which the ‘Auschariot’ variety is
11 sold.
- 12 • **EDITH**® (Reg. No. 4821247), under which the ‘Auspluto’ variety is sold.
- 13 • **KATE**™, a common law trademark under which the ‘Auschris’ variety is
14 sold.
- 15 • **PATIENCE**® (Reg. No. 4821251), under which the ‘Auspastor’ variety is
16 sold.
- 17 • **JULIET**® (Reg. No. 4821246), under which the ‘Ausjameson’ variety is sold.
- 18 • **BEATRICE**® (Reg. No. 4821249), under which the ‘Auslevity’ variety is
19 sold.
- 20 • **KEIRA**® (Reg. No. 4802803), under which the ‘Ausboxer’ variety is sold;
- 21 • **CONSTANCE**® (Reg. No. 4821248), under which the ‘Austruss’ variety is
22 sold;
- 23 • **JUBILEE CELEBRATION**® (Reg. No. 3207256), under which the
24 ‘Aushunter’ variety is sold
- 25 • **ABRAHAM DARBY**® (Reg. No. 1638561), under which the ‘Auscot’
26 variety is sold.
- 27 • **JUDE THE OBSCURE**™ (Application Serial No. 97813269), under which
28 the ‘Ausgo’ variety is sold.

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- 1 • **AMBRIDGE ROSE™**, a common law trademark under which the
- 2 'Auswonder' variety is sold.
- 3 • **SPIRIT OF FREEDOM™**, a common law trademark under which the
- 4 'Ausbite' variety is sold.
- 5 • **WILLIAM SHAKESPEARE 2000®** (Reg. No. 2822789), under which the
- 6 'Ausromeo' variety is sold.
- 7 • **BOSCOBEL™**, a common law trademark under which the 'Auscousin'
- 8 variety is sold.
- 9 • **WILLIAM MORRIS™**, a common law trademark under which the
- 10 'Auswill' variety is sold.
- 11 • **GEOFF HAMILTON™**, a common law trademark under which the
- 12 'Ausham' variety is sold.
- 13 • **THE WEDGWOOD ROSE™**, a common law trademark under which the
- 14 'Ausjosiah' variety is sold.
- 15 • **EVELYN™** (Application Serial No. 79108523), under which the 'Aussaucer
- 16 variety is sold.
- 17 • **SUMMER SONG™**, a common law trademark under which the 'Austango
- 18 variety is sold.
- 19 • **DAVID AUSTIN®** (Reg. No. 2706235), under which all of these varieties are
- 20 sold.

21 (hereinafter, the "David Austin Trademarks").

22 16. Each of the David Austin Trademark are distinctive and protectable.

23 Plaintiff possesses all rights under the David Austin Trademarks, including the right to

24 sue for infringement, recourse for damages, and to seek injunctive relief. Copies of these

25 registrations are attached as Exhibit U.

26 17. David Austin promotes and sells its roses bearing the David Austin

27 Trademarks through authorized retailers throughout the United States, and through its

28 own catalog and website, available at the following link:

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1 <https://eu.davidaustinroses.com/pages/shop-online>. Its website contains many original
2 photographs showcasing the products, as well as original descriptions of the products
3 offered. David Austin owns the copyright relating to these original marketing materials
4 created and utilized to promote its roses.

5 18. David Austin has spent considerable resources developing and promoting
6 its rose plants and the associated patents, trademarks, and copyrights, and these
7 properties are some of Plaintiff’s most valuable assets.

8 19. In late 2023, David Austin first discovered “JessiesRoseUSA” doing
9 business on Etsy.com, an online marketplace where independent crafters and collectors
10 can sell their wares. Its Etsy shop is located at

11 https://www.etsy.com/shop/JessiesRoseUSA?ref=profile_header.

12 20. Through its Etsy shop, JessiesRoseUSA was promoting, offering for sale,
13 and selling rose plants that were originally bred and introduced by David Austin, many
14 of which were protected by the David Austin Patents and which bore the David Austin
15 Trademarks, all without authorization from David Austin.

16 21. Upon information and belief, from April of 2023 through October of 2023,
17 Defendant Sheng Zhang, as an individual, owned and operated the “JessiesRoseUSA”
18 shop on Etsy.com.

19 22. On October 28, 2023, Defendant Jessie’s Nursery, LLC, was incorporated
20 with the State of Arizona, and, thereafter, upon information and belief, Defendant
21 Jessie’s Nursery, LLC, owned and operated the “JessiesRoseUSA” shop on Etsy.com.

22 23. On or about October of 2023, Defendants created a website located at
23 <https://www.jessiesrose.com/> on which they continued and expanded their activities
24 relating to the propagation, promotion, offering for sale, and sale of rose plants that were
25 bred and introduced by David Austin, many of which were protected by the David
26 Austin Patents and which bore the David Austin Trademarks, all without authorization
27 from David Austin.

28 24. Defendants were using, and, on information and belief, continue to be

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1 using, every one of the David Austin Trademarks on their Etsy shop and website to
2 promote and sell their own roses, without authorization from David Austin.

3 25. Further, Defendants were, and, on information and belief, continue to be,
4 illegally propagating and/or importing varieties protected by U.S. Plant Patents owned
5 by David Austin, including every one of the David Austin Patents, and were and, on
6 information and belief, continue to be, using, offering for sale, and selling those illegally
7 propagated and/or imported rose plants, all without authorization from David Austin,
8 through both its Etsy shop and its website.

9 26. For example, on information and belief, the roses sold by JessiesRoseUSA
10 under the **CAPABILITY**® mark are of the variety ‘Ausapply’, protected by U.S. Patent
11 No. PP29958; the roses sold by JessiesRoseUSA under the **KEIRA**® mark are of the
12 variety ‘Ausboxer’, protected by U.S. Patent No. PP22947; and the roses sold by
13 JessiesRoseUSA under the **CONSTANCE**® mark are of the variety ‘Austruss’,
14 protected by U.S. Patent No. PP26676, as shown in the screenshots attached as Exhibits
15 V-Z.

16 27. These varieties are from David Austin’s wedding collection, which are not
17 commercially available as a plant, and therefore, could not have been obtained from any
18 authorized source.

19 28. On information and belief, Defendants had actual or constructive
20 knowledge of the David Austin Patents and the infringement of these patent rights was
21 willful.

22 29. The product descriptions on Defendants’ Etsy shop and website contain
23 text and images copied directly from David Austin’s own catalog and website.

24 30. Defendants are not authorized to use the David Austin Patents, the David
25 Austin Trademarks, nor David Austin’s proprietary product descriptions and images, and
26 they do not adhere to any guidelines utilized by David Austin and its authorized growers
27 and sellers. These actions divert customers away from legitimate, authorized sources of
28 genuine David Austin roses and therefore cause harm to David Austin in the form of lost

1 sales and reputational harm.

2 31. Defendants are benefiting financially from the unauthorized use of the
3 David Austin Patents, the David Austin Trademarks, and David Austin’s proprietary
4 product descriptions and images.

5 32. On information and belief, Defendants have sold no less than 750 rose
6 plants through their Etsy shop and website that were illegally propagated and/or
7 imported, in violation of Plaintiff’s U.S. patent rights, and that were sold through the
8 illegal use of Plaintiff’s copyright and trademark rights. On information and belief,
9 prices for those roses range from about \$60 to over \$100, with an average selling price
10 that exceeds \$70 per rose, thus providing Defendants with revenue of over \$50,000 from
11 their illegal activities.

12 33. Sales through the Etsy shop have been ongoing since at least April 2023,
13 long before Jessie’s Nursery, LLC, was formed, thereby making Sheng Zhang personally
14 liable for at least some portion of the infringement.

15 34. David Austin has lost and continues to lose revenue from the diversion of
16 customers away from away from legitimate, authorized sources of genuine David Austin
17 roses.

18 35. On December 11, 2023, through counsel, David Austin sent a letter to
19 Defendants in regard to the above-discussed activities of JessiesRoseUSA, alleging
20 patent infringement, trademark infringement and false designation of origin, and
21 copyright infringement, and requesting Defendants take numerous remedial actions.

22 36. An initial response signed by “Sheng Zhang JessiesRoseUSA” was sent to
23 David Austin, wherein JessiesRoseUSA agreed to take certain limited steps to attempt to
24 mitigate its infringing activities, including taking down certain listings from its Etsy
25 shop and website to which David Austin had specifically objected, but declined to take
26 all remedial steps necessary to correct the wrongdoing.

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COUNT I
Willful Infringement of Each of the David Austin Patents

1
2
3 37. David Austin hereby adopts and incorporates by reference the allegations
4 set forth in the preceding Paragraphs as though fully pleaded herein.

5 38. The claim of each of the issued David Austin Patents is presumed valid
6 pursuant to 35 U.S.C. § 282.

7 39. Defendants are infringing claim 1 of U.S. Patent No. PP29958, in violation
8 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
9 ‘Ausapply’ variety without license or authority, and by using, offering for sale, and
10 selling such plants and/or parts thereof throughout the United States, and will continue to
11 infringe claim 1 of U.S. Patent No. PP29958 through their continued asexual
12 reproduction, importation, use, offer for sale, and sale of such plants in the future.

13 40. Defendants are infringing claim 1 of U.S. Patent No. PP22947, in violation
14 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
15 ‘Ausboxer’ variety without license or authority, and by using, offering for sale, and
16 selling such plants and/or parts thereof throughout the United States, and will continue to
17 infringe claim 1 of U.S. Patent No. PP22947 through their continued asexual
18 reproduction, importation, use, offer for sale, and sale of such plants in the future.

19 41. Defendants are infringing claim 1 of U.S. Patent No. PP26676, in violation
20 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
21 ‘Austruss’ variety without license or authority, and by using, offering for sale, and
22 selling such plants and/or parts thereof throughout the United States, and will continue to
23 infringe claim 1 of U.S. Patent No. PP26676 through their continued asexual
24 reproduction, importation, use, offer for sale, and sale of such plants in the future.

25 42. Defendants are infringing claim 1 of U.S. Patent No. PP32874, in violation
26 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
27 ‘Ausgray’ variety without license or authority, and by using, offering for sale, and
28 selling such plants and/or parts thereof throughout the United States, and will continue to



1 infringe claim 1 of U.S. Patent No. PP32874 through their continued asexual
2 reproduction, importation, use, offer for sale, and sale of such plants in the future.

3 43. Defendants are infringing claim 1 of U.S. Patent No. PP27349, in violation
4 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
5 ‘Ausweather’ variety without license or authority, and by using, offering for sale, and
6 selling such plants and/or parts thereof throughout the United States, and will continue to
7 infringe claim 1 of U.S. Patent No. PP27349 through their continued asexual
8 reproduction, importation, use, offer for sale, and sale of such plants in the future.

9 44. Defendants infringing claim 1 of U.S. Patent No. PP29874, in violation of
10 at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
11 ‘Ausoblige’ variety without license or authority, and by using, offering for sale, and
12 selling such plants and/or parts thereof throughout the United States, and will continue to
13 infringe claim 1 of U.S. Patent No. PP29874 through their continued asexual
14 reproduction, importation, use, offer for sale, and sale of such plants in the future.

15 45. Defendants are infringing claim 1 of U.S. Patent No. P32531, in violation
16 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
17 ‘Auswagsy’ variety without license or authority, and by using, offering for sale, and
18 selling such plants and/or parts thereof throughout the United States, and will continue to
19 infringe claim 1 of U.S. Patent No. PP32531 through their continued asexual
20 reproduction, importation, use, offer for sale, and sale of such plants in the future.

21 46. Defendants are infringing claim 1 of U.S. Patent No. PP17267, in violation
22 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
23 ‘Ausimmon’ variety without license or authority, and by using, offering for sale, and
24 selling such plants and/or parts thereof throughout the United States, and will continue to
25 infringe claim 1 of U.S. Patent No. PP17267 through their continued asexual
26 reproduction, importation, use, offer for sale, and sale of such plants in the future.

27 47. Defendants are infringing claim 1 of U.S. Patent No. PP25042, in violation
28 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the

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1 ‘Auswasher’ variety without license or authority, and by using, offering for sale, and
2 selling such plants and/or parts thereof throughout the United States, and will continue to
3 infringe claim 1 of U.S. Patent No. PP25042 through their continued asexual
4 reproduction, importation, use, offer for sale, and sale of such plants in the future.

5 48. Defendants are infringing claim 1 of U.S. Patent No. PP32662, in violation
6 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
7 ‘Ausimage’ variety without license or authority, and by using, offering for sale, and
8 selling such plants and/or parts thereof throughout the United States, and will continue to
9 infringe claim 1 of U.S. Patent No. PP32662 through their continued asexual
10 reproduction, importation, use, offer for sale, and sale of such plants in the future.

11 49. Defendants are infringing claim 1 of U.S. Patent No. PP26677, in violation
12 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
13 ‘Ausyacht’ variety without license or authority, and by using, offering for sale, and
14 selling such plants and/or parts thereof throughout the United States, and will continue to
15 infringe claim 1 of U.S. Patent No. PP26677 through their continued asexual
16 reproduction, importation, use, offer for sale, and sale of such plants in the future.

17 50. Defendants are infringing claim 1 of U.S. Patent No. PP22206, in violation
18 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
19 ‘Auschariot’ variety without license or authority, and by using, offering for sale, and
20 selling such plants and/or parts thereof throughout the United States, and will continue to
21 infringe claim 1 of U.S. Patent No. PP22206 through their continued asexual
22 reproduction, importation, use, offer for sale, and sale of such plants in the future.

23 51. Defendants are infringing claim 1 of U.S. Patent No. PP26363, in violation
24 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
25 ‘Auspluto’ variety without license or authority, and by using, offering for sale, and
26 selling such plants and/or parts thereof throughout the United States, and will continue to
27 infringe claim 1 of U.S. Patent No. PP26363 through their continued asexual
28 reproduction, importation, use, offer for sale, and sale of such plants in the future.

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1 52. Defendants are infringing claim 1 of U.S. Patent No. PP24462, in violation
2 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
3 ‘Auschris’ variety without license or authority, and by using, offering for sale, and
4 selling such plants and/or parts thereof throughout the United States, and will continue to
5 infringe claim 1 of U.S. Patent No. PP24462 through their continued asexual
6 reproduction, importation, use, offer for sale, and sale of such plants in the future.

7 53. Defendants are infringing claim 1 of U.S. Patent No. PP19254, in violation
8 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
9 ‘Auspastor’ variety without license or authority, and by using, offering for sale, and
10 selling such plants and/or parts thereof throughout the United States, and will continue to
11 infringe claim 1 of U.S. Patent No. PP19254 through their continued asexual
12 reproduction, importation, use, offer for sale, and sale of such plants in the future.

13 54. Defendants are infringing claim 1 of U.S. Patent No. PP17159, in violation
14 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
15 ‘Ausjameson’ variety without license or authority, and by using, offering for sale, and
16 selling such plants and/or parts thereof throughout the United States, and will continue to
17 infringe claim 1 of U.S. Patent No. PP17159 through their continued asexual
18 reproduction, importation, use, offer for sale, and sale of such plants in the future.

19 55. Defendants are infringing claim 1 of U.S. Patent No. PP26365, in violation
20 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
21 ‘Auslevity’ variety without license or authority, and by using, offering for sale, and
22 selling such plants and/or parts thereof throughout the United States, and will continue to
23 infringe claim 1 of U.S. Patent No. PP26365 through their continued asexual
24 reproduction, importation, use, offer for sale, and sale of such plants in the future.

25 56. Defendants are infringing claim 1 of U.S. Patent No. PP25064, in violation
26 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
27 ‘Auscousin’ variety without license or authority, and by using, offering for sale, and
28 selling such plants and/or parts thereof throughout the United States, and will continue to

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1 infringe claim 1 of U.S. Patent No. PP25064 through their continued asexual
2 reproduction, importation, use, offer for sale, and sale of such plants in the future.

3 57. Defendants are infringing claim 1 of U.S. Patent No. PP22032, in violation
4 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
5 ‘Ausjosiah’ variety without license or authority, and by using, offering for sale, and
6 selling such plants and/or parts thereof throughout the United States, and will continue to
7 infringe claim 1 of U.S. Patent No. PP22032 through their continued asexual
8 reproduction, importation, use, offer for sale, and sale of such plants in the future.

9 58. Defendants are infringing claim 1 of U.S. Patent No. PP17553, in violation
10 of at least 35 U.S.C. § 163, by asexually reproducing and/or importing plants of the
11 ‘Austango’ variety without license or authority, and by using, offering for sale, and
12 selling such plants and/or parts thereof throughout the United States, and will continue to
13 infringe claim 1 of U.S. Patent No. PP17553 through their continued asexual
14 reproduction, importation, use, offer for sale, and sale of such plants in the future.

15 59. Defendants’ infringement of each of the David Austin Patents is willful.

16 60. As a result of Defendants’ willful infringement of each of the David Austin
17 Patents, Plaintiff has been damaged to an extent not yet determined.

18 61. Plaintiff is entitled to monetary damages adequate to compensate it for
19 infringement by Defendants of each of the David Austin Patents, together with trebling
20 of damages, interest, costs, and attorneys’ fees.

21 **COUNT II**
22 **Federal Trademark Infringement**
23 **U.S.C. § 1114**

24 62. David Austin hereby adopts and incorporates by reference the allegations
25 set forth in the preceding Paragraphs as though fully pleaded herein.

26 63. This claim is brought under 15 U.S.C. § 1114.

27 64. Plaintiff has continuously and exclusively used David Austin Trademarks
28 in the United States starting since at least as early as 2000.

65. Plaintiff owns the federal trademark registrations for the David Austin

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1 Trademarks, which registrations are valid, subsisting, and in full force and effect.

2 66. Plaintiff's use and registration of the David Austin Trademarks, in
3 commerce in the United States for live plants, namely, roses, is prior to any date upon
4 which any Defendants could rely as the first date on which Defendants used the same
5 marks on the same products within the same industry.

6 67. Defendants' use of the David Austin Trademarks in commerce in
7 connection with the sale or advertising of the same products offered within the same
8 industry is such that it is likely to confuse, mislead, and deceive members of the public
9 into believing that Plaintiff has allowed, sponsored, approved, or licensed Defendants to
10 provide competing products, or that Defendants are in some way connected to or
11 affiliated with Plaintiff.

12 68. Any such confusion would result in injury or have a direct impact on
13 Plaintiff's reputation and its ability to market its own products under its own registered
14 marks. Also, any defect, objection, or fault found with Defendants' products would
15 negatively impact and seriously injure the reputation Plaintiff has established for the
16 products it sells under its own registered marks.

17 69. Defendants' activities are being carried out willfully, with constructive and
18 actual notice of Plaintiff's prior rights and registrations.

19 70. Defendants are liable for infringement of Plaintiff's federally registered
20 marks in violation of 15 U.S.C. § 1114.

21 71. Plaintiff is entitled to recover damages in an amount to be determined at
22 trial, including profits made by Defendants on their sales of infringing products, and the
23 costs of this action; also, because Defendants' activities are willful, this is an exceptional
24 case entitling Plaintiff to recover treble damages and reasonable attorneys' fees, pursuant
25 to 15 U.S.C. § 1117(a).

26 72. Plaintiff has been and will continue to be irreparably injured by
27 Defendants' conduct. Plaintiff cannot be adequately compensated for these injuries by
28 monetary remedies alone, and Plaintiff has no adequate remedy at law for Defendants'

1 infringement of its rights. Plaintiff is therefore entitled to injunctive relief against
2 Defendants pursuant to 15 U.S.C. § 1116(a).

3 **COUNT III**
4 **False Designation of Origin**
5 **15 U.S.C. § 1125(a)(1)(A)**

6 73. David Austin hereby adopts and incorporates by reference the allegations
7 set forth in the preceding Paragraphs as though fully pleaded herein.

8 74. This claim is brought under 15 U.S.C. § 1125(a)(1)(A).

9 75. Plaintiff has continuously and exclusively used the David Austin
10 Trademarks in the United States since starting at least as early as 2000.

11 76. Each of the David Austin Trademarks is distinctive and commercially
12 strong.

13 77. Plaintiff's use and registration of the David Austin Trademarks, in
14 commerce in the United States for live plants, namely, roses, is prior to any date upon
15 which any Defendants could rely as the first date on which Defendants used the same
16 marks on the same products within the same industry.

17 78. Defendants' use of the David Austin Trademarks in commerce in
18 connection with the sale or advertising of the same products offered within the same
19 industry is such that it is likely to confuse, mislead, and deceive members of the public
20 into believing that Plaintiff is the source of the products sold by Defendants, or that
21 Plaintiff is otherwise associated with Defendants.

22 79. Any such confusion would result in injury or have a direct impact on
23 Plaintiff's reputation and its ability to market its own products under its own marks. In
24 addition, any defect, objection, or fault found with Defendants' products would
25 negatively impact and seriously injure the reputation Plaintiff has established for the
26 products it sells under its own marks.

27 80. Defendants' activities are being carried out willfully, with constructive and
28 actual notice of Plaintiff's prior rights and registrations.

81. Defendants are liable for false designation of origin in violation of 15



1 U.S.C. § 1125(a)(1).

2 82. Plaintiff is entitled to recover damages in an amount to be determined at
3 trial, including profits made by Defendants on its sales of the infringing products, and
4 the costs of this action; also, because Defendants' activities are willful, this is an
5 exceptional case entitling Plaintiff to recover treble damages and reasonable attorneys'
6 fees, pursuant to 15 U.S.C. § 1117(a).

7 83. Plaintiff has been and will continue to be irreparably injured by
8 Defendants' conduct. Plaintiff cannot be adequately compensated for these injuries by
9 monetary remedies alone, and Plaintiff has no adequate remedy at law for Defendants'
10 infringement of its rights. Plaintiff is therefore entitled to injunctive relief against
11 Defendants pursuant to 15 U.S.C. § 1116(a).

12 **COUNT IV**
13 **Unfair Competition**
14 **15 U.S.C. § 1125(a)(1)(B)**

15 84. David Austin hereby adopts and incorporates by reference the allegations
16 set forth in the preceding Paragraphs as though fully pleaded herein.

17 85. This claim is brought under 15 U.S.C. §1125(a)(1)(B).

18 86. Defendants have made statements in its commercial advertisements on
19 Etsy and its own website indicating that its products are legitimate David Austin
20 products, and such statements are either literally false or likely to mislead, confuse, or
21 deceive consumers regarding the nature and function of Defendants' products.

22 87. Defendants' statements are deceiving and/or have the capacity to deceive a
23 substantial segment of potential consumers of the parties' products.

24 88. Defendants' deception is material, in that it is likely to influence the
25 consumer's purchasing decision.

26 89. Defendants are liable for unfair competition in violation of 15 U.S.C. §
27 1125(a)(1)(B).

28 90. Plaintiff will be and/or has been and will continue to be irreparably injured
by Defendants' conduct. Moreover, Plaintiff cannot be adequately compensated for these



1 injuries by monetary remedies alone, and Plaintiff has no adequate remedy at law for
2 Defendant's infringement of its rights. Plaintiff is therefore entitled to injunctive relief
3 against Defendants pursuant to 15 U.S.C. § 1116(a).

4 **PRAYER FOR RELIEF**

5 Plaintiff David Austin Roses Limited prays for relief as follows:

6 a) That judgment be entered in favor of Plaintiff on all causes of action
7 set forth herein.

8 b) That a finding be made that Defendants' infringement was willful.

9 c) That Defendants, their officers, directors, principals, agents,
10 servants, and all those in privity or acting in concert or participation with
11 Defendants, and each and all of them, be preliminarily and permanently enjoined
12 and restricted from directly or indirectly:

13 i. using, in any manner, or holding themselves out as having
14 rights to use, the David Austin Patents;

15 ii. using, in any manner, or holding themselves out as having
16 rights to use, the David Austin Trademarks, and any confusingly similar
17 variations on or in conjunction with any live plants, roses, or related
18 products;

19 iii. engaging in any course of conduct likely to cause confusion,
20 deception or mistake with Plaintiff's trademarks, or otherwise cause
21 damage or injury to Plaintiff's business, reputation, trademarks, and their
22 goodwill;

23 iv. using, in any manner, or holding themselves out as having
24 rights to use, any proprietary product descriptions or images created and
25 owned by David Austin; or

26 v. otherwise unfairly competing with Plaintiff.

27 d) That the Court issue an Order directing any other relief that the
28 Court may deem appropriate to prevent the public from deriving any erroneous

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1 impression that any products offered by Defendants are authorized by Plaintiff or
2 are in any way related to Plaintiff and its products.

3 e) That the Court issue an Order directing Defendants to file with the
4 Court and serve on Plaintiff, within thirty (30) days after the service on
5 Defendants of such injunctions, a report in writing and under oath, setting forth in
6 detail the manner and form in which Defendants have complied with the
7 injunction.

8 f) That the Court issue an Order directing Defendants to file with the
9 Court and serve on Plaintiff a full and complete accounting of all monies received
10 by Defendants as a result of the sale of products protected by the David Austin
11 Patents and/or the David Austin Trademarks.

12 g) That in accordance with 15 U.S.C. §§ 1114 and 1117, Plaintiff be
13 awarded monetary damages sufficient to recover Defendants' improper profits,
14 and all damages suffered by Plaintiff, including a trebling of damages and an
15 award of attorneys' fees and costs due to the exceptional nature of this case.

16 h) For such other and further relief as the Court may deem just and
17 proper.

18 DATED this 22nd day of February, 2024.

19 PAPETTI SAMUELS WEISS MCKIRGAN LLP

20 /s/Bruce Samuels

21 Bruce Samuels
22 Lindsey Huang

23 PANITCH SCHWARZE BELISARIO & NADEL,
24 LLP

25 Travis W. Bliss
26 (*pro hac vice application forthcoming*)
27 Bridget H. Labutta
28 (*pro hac vice application forthcoming*)

Attorneys for Plaintiff