

Walmart Hid Patent Evidence, Co.'s Sanctions Bid Claims

By **Adam Lidgett**

Law360 (October 24, 2024, 9:07 PM EDT) -- Zest Labs wants Walmart sanctioned in a suit claiming the retail giant stole the startup's trade secrets related to shelf-freshness technology, telling an Arkansas federal judge that Walmart hid important evidence about patents it had filed applications for.

In a Wednesday motion, Zest Labs targeted both Walmart, which last year won a new trial in the case following a jury finding that Zest Labs was owed \$115 million in damages, and the retail chain's former counsel at Skadden Arps Slate Meagher & Flom LLP.

Zest Labs said it recently uncovered what it called "concealed critical evidence" that Walmart filed two patent applications that were later granted by the U.S. Patent and Trademark Office that included some of Zest's trade secrets.

Zest compared the situation to "a [World War II] U-Boat commander lying in wait and launching torpedoes at an unarmed civilian passenger ship." The company called those two patents "stealth torpedoes, making pre-impact detection impossible."

The "torpedoes" were part of "a chain of events rendering it inevitable that at least some of Zest's trade secrets" were made available to the public, according to Zest Labs.

Among other sanctions, Zest said that the jury should be told that Walmart flouted discovery requirements and that jurors can assume those allegedly concealed patents would have hurt Walmart in the case. It also wants more discovery in relation to those patents as well as monetary sanctions against Walmart and Skadden.

Zest's latest move in the case follows U.S. District Judge James Moody Jr. saying in a July notice that he was considering sanctioning former counsel who represented Zest Labs Inc. before and during the 2021 trial. A jury had given Zest \$60 million in damages and \$50 million in exemplary damages, finding the alleged theft of self-freshness technology to be willful and malicious. Another \$5 million was added because the jury found that Walmart broke a 2015 nondisclosure agreement it had signed when it requested a demonstration of Zest's shelf-management system.

However, Judge Moody ordered a new trial in December after finding Zest Labs failed to disclose that it noticed Walmart applied for a patent related to a system that keeps groceries fresh for longer.

While Walmart exercised due diligence in trying to find that evidence, it wasn't made available until Zest filed a motion for attorney fees shortly after the jury returned its verdict, according to the order. At the time, the judge said the patent application evidence "would probably produce a different result at trial."

The judge said he was considering the penalty against Zest's former counsel "for their misrepresentation to the court regarding their knowledge of" a separate Walmart patent application that has now been abandoned "and the timing of their knowledge."

Zest sued in 2018, claiming that a year prior, it spent millions to hold pilots at Walmart stores to show its food preservation technology called Zest Fresh but was told Walmart wasn't interested.

"Zest Labs was stunned when, just four months later, Walmart announced a system that looks, sounds and functions very similarly to Zest Fresh, which Walmart publicly claimed had been 'developed in just six months by [Walmart's] own associates and created via a 'hackathon' involving Walmart engineers," the suit said.

Zest claimed Walmart used its "unfettered access" to trade secrets to develop its own freshness system called Eden, which involves attaching tracking devices to produce as it travels and using the gathered data to predict when food will spoil.

"We will respond appropriately to the court but believe this to be another distraction from the misdeeds of Zest during the litigation," Walmart said in a statement to Law360 on Thursday. "It's important to remember the court has already found that certain statements Zest made were misleading, which led to the reversal of the original jury verdict and potential additional penalties."

Patrick Ryan, an attorney for Zest Labs, said "Walmart not only stole Zest's trade secrets under the guise of partnering with them on development, it had the audacity to secretly file patent applications on Zest's incredibly valuable technology, notwithstanding the fact that the lawsuit and a preliminary injunction motion were pending."

"Walmart's intentional suppression of two of those patent applications all the way through close of discovery, trial, and the post-trial proceedings, is the worst example of litigation misconduct that I have ever observed in my entire two-decades-plus career," he added.

A representative for Skadden did not immediately respond to a request for comment.

Zest Labs is represented by Patrick Ryan, Sean R. McTigue, Kenneth L. Richard and Natalie A. Felsen of Bartko LLP, Scott P. Richardson of McDaniel Wolff PLLC, H. Christopher Bartolomucci of Schaerr Jaffe LLP and Kate M. Falkenstien of Blue Peak Law Group LLP.

Walmart is represented by John Keville, Robert Green and Chante B. Westmoreland of Sheppard Mullin Richter & Hampton LLP and John E. Tull III and R. Ryan Younger of Quattlebaum Grooms & Tull PLLC.

The case is Zest Labs Inc. and Ecoark Holdings Inc. v. Walmart Inc., case number 4:18-cv-00500, in the U.S. District Court for the Eastern District of Arkansas.

--Additional reporting by Lauren Berg and Elliot Weld. Editing by Rich Mills.