

## Litigation

# Walmart Patent Bids Set \$223 Million Trade Secret Loss Apart

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- Walmart said to covertly pursue supply-chain patents mid-suit
- Winning new trial ultimately doubled retail giant's losses

A plaintiff's claims that Walmart publicly applied to patent technology after it was accused of stealing it added an unusual twist to a trade-secrets case that's twice resulted in nine-figure verdicts and appears far from over.

Zest Labs Inc. also called two Walmart Inc. patent applications not disclosed in discovery "stealth torpedoes" that would inevitably erase its trade secrets for managing fresh-food inventory. Walmart said they were irrelevant to the case, but two juries found Walmart willfully and maliciously stole trade secrets tied to another application filed during the suit, first awarding \$115 million in 2021 and then \$223 million in a retrial last month.

"The notion that a company would file a patent application, exacerbating their misappropriation of trade secrets liability, is shocking to me," attorney Russell Beck of Beck Reed Riden LLP said.

The case represents a cautionary tale for companies that explore deals with larger entities for their protected innovations under nondisclosure agreements, a common fact pattern in trade secrets litigation. It also highlights trade-offs in choosing trade secrets over other forms of IP: despite advantages, especially for processes like Zest's system for reducing fresh-food spoilage, publishing trade secrets eviscerates their protection, regardless of circumstances.

"It doesn't matter if it was done by a bad person," IP professor Sharon K. Sandeen of Mitchell Hamline School of Law said. "The minute it was disclosed, it's no longer a trade secret."

Walmart, which claims it developed its system independently, vowed after the trial to continue its fight. But it faces its own cost-benefit analysis after the second trial expanded damages, multiple attorneys said. An appeal could also prompt Zest to try to revive a more lucrative damages model that had sought nearly \$1 billion.

IP attorney Joshua A. Hartman of Merchant & Gould PC said the costliness of winning a new trial might alter Walmart's perspective.

"Sometimes parties have a hard time figuring out the value of the case. Something like two jury verdicts can help inform them," Hartman said, saying the case could settle.

"But sometimes, especially in trade secrets cases, the parties tend to get inflamed in ways that's not true of other IP litigation," he added.

### **'Stealth Torpedoes'**

Walmart began exploring implementing Zest's delivery management solution in 2015, according to court records. In November 2017, the retail behemoth ended the relationship, and one day later filed a provisional patent application—a non-public date placeholder—on its own system. In March 2018 Walmart said its "Eden" system was developed in a six-month "hackathon," had saved \$86 million, and would save \$2 billion over five years.

Zest sued five months later.

"The chronology reveals a profound degree of willfulness and malice on Walmart's part," Zest lead trial counsel Patrick M. Ryan of Bartko Pavia LLP told Bloomberg Law.

Beck called timing of Walmart's moves "highly suspect." Applying for a patent could be understandable if Walmart's engineers worked independently of the team working with Zest, he said. But, he noted, juries twice rejected that contention.

Walmart argued at trial it was working with three other vendors on shelf-life models and algorithm solutions. The executive who cut off Zest and the inventor listed on Walmart's patents both testified they knew nothing of each other's efforts.

Judge James M. Moody Jr. of the Eastern District of Arkansas vacated the first verdict because Zest's then-counsel failed to disclose it learned of Walmart's 2019 non-provisional patent application weeks before it was published. Moody deemed it material evidence that Zest didn't take all reasonable efforts to keep its claimed secrets confidential.

Beck, who isn't involved in the case, criticized that ruling, saying granting a new trial over such a "red herring" seemed "punitive." He said Walmart's position that it should escape liability because of its own post-theft patent filing "has no basis in reality."

Walmart, meanwhile, accused Zest of "unethical behavior" that "compromised the integrity of this case from the start." Zest, in a 2024 filing, characterized Walmart's argument as victim-blaming, and said it wasn't obligated to pursue "every option Walmart can now dream up" to protect its secrets.

Walmart's 2023 motion for a new trial and sanctions said Zest attorneys lied under oath and destroyed evidence regarding their knowledge of the initial patent application. Walmart had also downplayed the value of Zest's work, noting the company struggled to find a buyer or turn a profit, including as it successfully fought admission of Zest expert testimony that it owes nearly \$1 billion in unjust enrichment in 2021.

Walmart declined to comment for this story.

### **'Sophisticated Company'**

Walmart abandoned its initial application weeks after the 2021 trial loss. But two other 2019 applications were published in 2020 and granted in 2021 and 2022. Zest requested any patent filings related to Eden in discovery, but Walmart never disclosed them.

"Yes, Walmart's a big company and discovery is a complex undertaking," Hartman said. "But Walmart is a sophisticated company that has sophisticated lawyers and you'd expect patent applications related to the technology at issue to be disclosed."

Walmart argued its patents on systems for ripening produce and detecting inventory movements weren't secrets Zest claimed, and said emails indicated Zest's attorneys at least informally knew of more than one patent. Zest said it had to pick secrets it could prove were stolen, and if it had known of those patents it would have litigated them.

Moody barred mention of the undisclosed patents in the second trial, saying he wouldn't let Zest improve its case in a retrial it had caused.

"This is an oversimplification, but you don't get to say: 'My bank was robbed.' And what did they take? 'I don't know. What did you find on the robber?'" he said at a November hearing.

Walmart will all but certainly appeal, Beck predicted, noting its vast resources could counter Zest's leverage from the two jury wins in settlement negotiations.

"How far the appeal goes is anybody's guess," he said.

The case is Zest Labs Inc et al v. Walmart Inc., E.D. Ark., No. 4:18-cv-00500.

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