

COUNT I

1. Upon information and belief, VIVACE, INC. (hereinafter "Applicant"), filed an application to register VIVACE, Application S.N. 78/357,903 for fresh herbs, on January 27, 2004 (hereinafter "the '903 application").

2. Upon information and belief, Applicant did not use VIVACE for the goods recited in the '903 application prior to December 1, 2000.

3. Upon information and belief, Applicant did not use VIVACE for the goods recited in the '903 application prior to June 19, 2000.

4. Upon information and belief, Applicant did not use VIVACE for the goods recited in the '903 application prior to March 1, 2000.

5. Upon information and belief, Applicant did not use VIVACE for the goods recited in the '903 application prior to January 1, 2000.

6. Upon information and belief, Applicant did not use VIVACE for the goods recited in the '903 application prior to November 1, 1999.

7. Upon information and belief, Applicant did not use VIVACE for the goods recited in the '903 application prior to January 1, 1999.

8. Opposer is the owner of Registration No. 2,718,435 for the mark VIVA!, which was filed on July 20, 2000 and which recites "Live plants, excluding grasses, namely Galleta Grass, Yellow Bluestem, Kentucky Bluegrass, Perennial Ryegrass, Winter Rape and Marigold, and vegetables and fruits, excluding tomatoes, sweet corn, melon, lettuce, sugar beets, onions, barley and field beans" (hereinafter "the '435 registration"); Registration No. 2,485,981 for the mark VIVA!VEGGIES, which was filed on September 15, 1999 and which recites "Live potted vegetables" (hereinafter "the '981 registration"); and Registration No. 2,362,305 for the mark VIVA! HERBS, which was filed on September 2, 1999 and which recites "Live potted herbs" (hereinafter "the '305 registration")(hereinafter collectively "Opposer's Registrations").

9. Opposer is the owner of Application No. 76/501,156 for the mark VIVA!, which was filed on March 27, 2003 and which recites "Fertilizer for domestic use, potting soil" (hereinafter "the

'156 application"); and Application No. 76/514,017 for the mark VIVA!, which was filed on May 6, 2003 and which recites "Hand gardening tools, namely, trowels, weeding forks, spades, hoes, pruning shears, rakes, shovels, tillers, pitchforks, cultivators, and hedge clippers" (hereinafter "the '017 application") (hereinafter collectively "Opposer's Applications").

10. Opposer is the owner of common law rights in VIVA and variations thereof for a variety of goods including, but not limited to, the goods recited in Opposer's Registrations and Opposer's Applications.

11. Opposer is the owner of a family of marks which include VIVA. The family of marks owned by Opposer includes Opposer's Registrations, Opposer's Applications and Opposer's common law rights in VIVA and variations thereof (hereinafter collectively referred to as "Opposer's VIVA Marks").

12. Opposer has used Opposer's VIVA Marks to identify its plant products long prior to the filing of Applicant's '903 application and continues such use today.

13. Opposer has used Opposer's VIVA Marks to identify its plant products long prior to the filing date and/or the claimed first use dates of Applicant's '903 application.

14. Applicant's '903 application for the mark VIVACE consists of or comprises a phrase which so resemble one or more of Opposer's VIVA Marks, including Opposer's Registrations, as to be likely, when used on or in connection with the goods sought to be registered by Applicant to cause confusion, or to cause mistake, or to deceive.

15. VIVACE, as is set forth in the '903 application, is confusingly similar to one or more of the Opposer's VIVA Marks used by Opposer, and registration of VIVACE to Applicant is therefore likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Applicant with Opposer, or as to the origin, sponsorship, or approval of Applicant's goods, services, or commercial activities by Opposer and, therefore, would damage Opposer.

COUNT II

Opposer incorporates the allegations of paragraphs 1-15 as is stated herein.

16. Through Opposer's use, sales, advertising, and quality of use, Opposer has built Opposer's VIVA Marks into strong marks.

17. Through Opposer's use, sales, advertising, and quality of use, Opposer has built Opposer's VIVA Marks into famous marks.

18. Opposer's VIVA Marks are famous trademarks in the area of Opposer's plant products.

19. Through its quality products sold under Opposer's VIVA Marks, together with sales and the advertising of the products sold under Opposer's VIVA Marks, Opposer has developed tremendous value and goodwill in Opposer's VIVA Marks.

20. Applicant seeks registration of VIVACE, which when used on or in connection with the goods sought to be registered by Applicant in the '903 application, will cause dilution of the distinctive quality of Opposer's VIVA Marks.

21. Applicant seeks registration of a mark which, when used on or in connection with goods or services sought to be registered by Applicant, will result in the public becoming confused as to the value of Opposer's products sold under Opposer's VIVA Marks and thereby diminishing the advertising value and goodwill associated with Opposer's VIVA Marks.

22. Applicant's mark, if registered or used in connection with the goods sought to be registered and intended to be used by Applicant, is likely to irreparably damage the distinctiveness, distinctive quality, goodwill and reputation associated with Opposer's VIVA Marks, thus, weakening Opposer's VIVA Marks so that the marks becomes less famous and less protectable, ultimately destroying rights in and to Opposer's VIVA Marks.

COUNT III

Opposer incorporates the allegations of paragraphs 1-22 as is stated herein.

23. Applicant seeks registration of VIVACE on goods such that such use is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of Applicant with Opposer or as to the origin, sponsorship or approval of Applicant's goods by Opposer.

24. Applicant seeks registration of VIVACE which consists of or comprises a phrase which so resembles Opposer's Registrations, Opposer's Applications and/or Opposer's common law rights in VIVA and variations thereof previously used in the United States by Opposer as to be likely, when used on or in connection with the goods of the '903 Application, to cause confusion, or to cause mistake, or to deceive.

25. Opposer, therefore, believes it will be damaged by the registration of the '903 Application to Applicant.

PRAYER FOR RELIEF

WHEREFORE, Opposer prays that application S.N. 78/357,903 be denied, that Applicant be enjoined from obtaining registration of S.N. 78/357,903, that no registration be issued to Applicant and that this opposition be sustained.

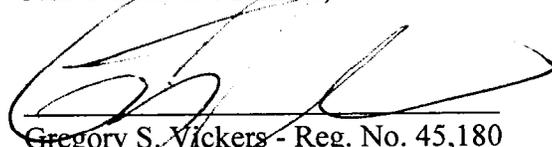
Payment for the filing of this Notice of Opposition and any associated fees are authorized to be charged to a Credit Card. The appropriate form PTO-2038 is enclosed for this purpose. If the Credit Card is unable to be charged, please charge any and all fees or credit any overpayment to Deposit Account No. 06-0308.

Opposer further requests that all correspondence in this matter be addressed to:

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Respectfully Submitted,

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