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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91190654
Party	Defendant Hidden Creations
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE  
THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Opposition No. 91190654  
For the Mark Shake-n-Grow  
Filed on: July 13, 2008  
Published on: December 16, 2008

OMS Investments Inc.	)
	)
Opposer,	)
	)
v.	)
	)
Hidden Creations	)
	)
Applicant	)
	)

APPLICANT' S ANSWER TO NOTICE OF OPPOSITION

Applicant, Hidden Creations ("Applicant") Hereby answers Opposer OMS Investments Inc. ("Opposer") "Notice of Opposition" as follows:

*Opposer' s Introductory Paragraph:* OMS Investments ("Opposer"), having its principal place of business at 10250 Constilation Blvd. Suite 3800 Los Angeles California 90067, by its Application Serial No. 77520947 filed July 13, 2008 by Hidden Creation ("Applicant"), and hereby opposes the same pursuant to 15 U.S.C. § 1051 *et seq.*, including specifically 15 U.S.C. § 1063.

*Applicant' s Answer:* Applicant denies that Oppose will be damaged by the issuance of a registration for the trademark shown in Application Serial No. 77520947. Applicant is without sufficient knowledge or information as to the truth of the remaining allegations set forth in Opposer' s introductory pangraph and, accordingly, denies same.

*Opposer' s Paragraph1* upon information and belief, applicant Hidden Creations, is a California sole proprietorship, with a mailing address of 1000 Lincoln Road, Suite H, No. 123 Yuba City, California 95991 ("Applicant").

*Applicant' s answer:* Applicant admits that Hidden Creatøns is a California sole proprietorship, with a mailing address of 1000 Lincoln Road, Suite H, No. 123 Yuba City, California 95991.

*Opposer' s Paragraph 2 Applicant' s Application.*As evidenced in Application Serial No. 77/520,947, Applicant seeks to register the mark SHAKE-N-Grow for "food supplements for agricultural products and other plants" in International Class 1.

*Applicant' s Answer:* Applicant admits that it filed Application Serial No. 77520947 for "food supplements for Agricultural products and other plants in International Class 1 for the mark SHAKE-N-GROW with filing dates July 13, 2008.

Mark	Reg. No. / App. No.	Goods/Services
SHAKE ' N GROW	77520947	International Class: 001 Class 7: Food supplements for agricultural products and other plants

*Opposer's Paragraph 3 Use of the Mark:* Since at least as early as 2001, Opposer has been using in commerce in the United States the distinctive and famous mark SHAKE' N FEED in connection with lawn and garden goods, namely, plant food, and owns the following federal trademark registration for the SHAKE' N FEED mark:

Mark	Reg. No. / App. No.	Goods/Services
SHAKE ' N FEED	2,705,327	Class 1: Slow release plant food.
SHAKE ' N FEED	3,254,549	Class 8: Manually operated fertilizer and plant food spreader.

True and correct copies of the electronic records for these registrations printed from the United States Patent and Trademark Office's ("USPTO's") online database are attached hereto as Exhibit A. Each of the registrations noted above were issued on the Principal Register and are presently in full force and effect. Notably, Registration No. 2,705,327 is incontestable.

Applicant's Answer: Applicant lacks sufficient knowledge or information as to the truth of the allegations set forth in Paragraph No. 3 and accordingly, denies same.

*Opposer's Paragraph 4* In addition, Opposer owns two pending federal trademark applications for the mark SHAKE' N SEED, with filing dates of September 19, 2006:

Mark	Reg. No. / App. No.	Goods/Services
SHAKE ' N SEED	77/002750	Class 8: Manually operated seed and fertilizer spreader.
SHAKE ' N SEED	77/002759	Class 31: Grass seed and bird seed.

True and correct copies of the electronic records for these applications printed from the USPTO's online database are attached hereto as Exhibit B.

Applicant's Answer: Applicant lacks sufficient knowledge or information as to the truth of the allegations set forth in Paragraph No. 4 and accordingly, denies same.

*Opposer's Paragraph 5:* Opposer also owns a federal trademark registration for an additional "SHAKE" formative mark, containing the word component "GRO".

Mark	Reg. No. / App. No.	Goods/Services
SHAKE A LITTLE GROW A LOT	2,792,358	Class 1: Slow release plant food

A true and correct copy of the electronic record for this registration printed from the USPTO's online database is attached hereto as Exhibit C. The SHAKE A LITTLE GROW A LOT MARK IS DISTINCTIVE AND FAMOUS (the SHAKE N' SEED, SHAKE A LITTLE GROW A LOT marks are hereinafter referred to as the "SHAKE ' N FEED Marks").

Applicant's Answer: Applicant lacks sufficient knowledge or information as to the truth of the allegations set forth in and accordingly, denies same.

*Opposer's Paragraph 6:* Moreover, Opposer, through its predecessors in interest and affiliates, has used in commerce the famous and distinctive MIRACLE-GRO mark since at least as early as 1951 in connection with plant food. Over the years, the mark has been used in connection with a wide range of lawn and garden services and goods. Opposer owns numerous federal trademark registrations and applications incorporating the famous and distinctive MIRACLE-GRO mark as reflected in the following representative registrations and application (the MIRACLE-GRO Marks):

Mark	Reg. No./ App. No.	Goods/Services
MIRACLE-GRO	0668868	Class 1: Water soluble plant food.
MIRACLE-GRO	1223038	Class 1: Fertilizer in the form of spikes for trees and shrubs.
MIRACLE-GRO	2235973	Class 31: Flower, vegetable and plant seeds for domestic and agricultural purposes.
MIRACLE-GRO SELECT PLANTS	2525828	Class 31: Live plants.
MIRACLE-GRO POUR & FEED	2601682	Class 1: Fertilizer for home and garden use.
MIRACLE-GRO GARDEN WEED PREVENTER & PLANT FOOD	2601682	Class 1: Fertilizers for domestic use. Class 5: Herbicides for domestic use.
MIRACLE-GRO GARDEN WEED PREVENTER	2618611	Class 1: Fertilizers for domestic use. Class 5: Herbicides for domestic use.
MIRACLE-GRO SELECT PLANTS & Design	2723181	Class 31: Live plants and containers therefore.
MIRACLE-GRO PROFESSIONAL TREE & SHRUB CARE & Design	2758533	Class 44: Lawn, tree and shrub care, landscape gardening services and consulting services in the field of lawn, tree and shrub care and landscaping gardening.
MIRACLE-GRO FAST ROOT	2787356	Class 1: Root stimulating hormone that converts plant cells to stem cells
MIRACLE-GRO TREE & SHRUB CARE	2809982	Class 44: Lawn, tree and shrub care, landscape gardening services and consulting services in the field of lawn, tree and shrub care and landscaping gardening.
MIRACLE-GRO SELECT PLANTS & Design	2816031	Class 21: Containers not of metal for use with plants and for commercial use. Class 31: Live plants.
MIRACLE-GRO & Design	2820953	Class 1: Fertilizers for domestic use; plant food; garden soil; potting mix; seed starter mix for domestic use; root stimulating hormone that converts plant cells to stem cells. Class 5: Herbicides for domestic use. Class 21: Garden feeders, namely containers designed to hold plant food and are used to feed and water plants. Class 31: Sphagnum peat moss.
MIRACLE-GRO	2856922	Class 21: Flower pots and planters.
MIRACLE-GRO & Design	2856923	Class 21: Flower pots and planters.
MIRACLE-GRO & Design	2856924	Class 21: Watering cans Class 31: Flower, vegetable and plant seeds.
HAVE YOU USED MIRACLE-GRO LATELY?	2870768	Class 1: Lawn and garden fertilizer for domestic use; plant food; fertilizer in the form of spikes for houseplants, outdoor plants, trees and shrubbery for domestic use; peat fertilizer; composts; humus; loam; manure; potting soil, soil conditioners, soil amendments, growing media for plants, all for domestic use. Class 16: Brochures about subjects of lawn care and landscape gardening and the sue of products relations go lawn care and landscape gardening, including fertilizers, herbicides, fungicides, insecticides, grass seed, flower seeds, garden seeds, plant food, potting soil, soil conditioners and amendments, ground cover and land and garden equipment and advices and information related to flowers and their care.

MIRACLE-GRO SELECT Plant & Design	2900658	Class 31: Living house plants.
MIRACLE-GRO SELECT PLANTS	77/421528	Class 31: Live plants.
MIRACLE-GRO & Design	2906855	Class 31: Live plants.
MIRACLE-GRO & Design	2906856	Class 31: Live plants.
MIRACLE-GRO MOISTURE CONTROL POTTING MIX CONTAINS AQUACOIR & Design	2935663	Class 1: Potting soil, growing media for plants.
MIRACLE-GRO & Design	2996098	Class 9: Protective work gloves. Class 21: Gardening gloves and gardening gloves for handling chemicals.
MIRACLE-GRO	3074660	Class 9: Protective work gloves. Class 21: Gardening gloves and gardening gloves for handling chemicals.
MIRACLE-GRO GARDEN SOIL ROSES BONE MEAL ADDED TO GROW BIG, BEAUTIFUL BLOOMS! (PACKAGE) (COLOR)	3156217	Class 1: Garden soil, planting soil, soil containing additives, chemical soil conditioners, soil conditioners for agricultural, domestic, or horticultural use and fertilizers for soil and potting soil.
MIRACLE-GRO ORGANIC CHOICE & Design	3180531	Class 1: Fertilizers for domestic use, potting soil, bone meal, and bone meal.
MIRACLE-GRO GARDEN SOIL TREES & SHRUBS (PACKAGE) (COLOR)	3182529	Class 1: Garden soil, planting soil, soil containing additives, soil conditioners for agricultural, domestic or horticultural use and fertilizers for soil and potting soil.
MIRACLE-GRO GARDEN SOIL FLOWERS & VEGETABLES & Design	3190987	Class 1: Garden soil, planting soil, soil containing additives, soil conditioners for agricultural, domestic or horticultural use and fertilizers for soil and potting soil.
MIRACLE-GRO & Design	3233837	Class 1: Charcoal for horticultural purposes and for use as a soil conditioner, perlite for horticultural purpose and for use as a soil conditioner.
MIRACLE-GRO	77/215022	Class 7: Composter machines and components thereof for recycling solid waste.

True and correct copies of the electronic records for these registrations and applications printed from the USPTO's online database are attached hereto as Exhibit D. Each of the registrations noted above were issued on the Principal Register and are presently in full force and effect. Notably, Registration Nos. 0668868, 1223038, and 2235973 are incontestable.

Applicant's Answer: Applicant lacks sufficient knowledge or information as to the truth of the allegations set forth in

Paragraph No. 6 and accordingly, denies same.

*Opposer's Paragraph 7:* Further, Scotts owns numerous additional trademark applications and registrations containing the GRO suffix or component, including GARDEN-GRO, PRO GRO, AND SLO-GRO ("GRO Component Marks"), all as reflected below:

Mark	Reg. No. / App. No.	Goods/Services
EARTHGRO	1378337	Class 31: Top soil and peat humus.
EARTHGRO	1378721	Class 1: Cow manure, composted cow manure, dehydrated cow manure, potting soil.
EARTHGRO THE NATURAL	1723116	Class 1: Natural organic and mineral fertilizer for lawn and garden use, agricultural use and commercial use; cow manure dehydrated cow manure, potting

CHOICE & Design		soil and hums.
EARTHGRO THE NATRUAL CHOICE & Design	1726060	Class 31: Top soil.
GARDEN-GRO	76/653762	Class 1: Fertilizers.
GARDEN-GRO	3498947	Class 31: Mulch.
ITS GRO TIME	77/341556	Class 1: Fertilizer for domestic, agricultural and horticultural use; soil amendments, soil conditioners, and soil improving agents for domestic, agricultural and horticultural use; plant food; potting soil; planting soil; growing media for plants; humus; manure; peat; compost; and loam.
ITS GRO TIME	77/341562	Class 31: Grass seed; grass products, namely, grass sod and grass plugs; top soil; mulch; raw bark; peat moss; combination of grass seed, fertilizers and mulch for the purpose of lawn repair, soil containg fertilizers, live plants.
ITS GRO TIME	3552933	Class 44: Providing advice and information on the subjects of gardening and lawn care and the use of products relations to gardening and lawn care, namely, plant foods, fertilizers . . . via the internet; providing in store consulting services on the subjects of gardening and lawn care and the use of related products, namely, plant foods, fertilizers . . . and shrub care service; landscape gardening service; consulting service in the filed of lawn, tree, and shrub care and landscape gardening.
LET YOURSELF GRO	78/795657	Class 1: Lawn and garden fertilizer, plant food, fertilizer in the form of spikes for houseplants, outdoor plants, trees and shrubbery; peat, compost, humus, loam and manure; potting soil, soil conditioners, soil amendments and growing media for plants all for domestic use. Class 5: Herbicides for domestic use. Class 21: Fertilizer mixers and sprayer attached to garden hoses. Class 31: Flower, vegetable, plant and grass seed; live plants. Class 44: Providing information via the Internet on lawn care and landscape gardening, including how to use and apply fertilizers, herbicides, fungicides, insecticides, grass soil conditioners and amendments and ground cover; providing information via the Internet on the use of equipment for the lawn and garden; providing advice and information via the Internet on flowers and their care.
PRO GRO	77/406779	Class 1: Fertilizer for domestic, agricultural and horticultural use; soil amendments, soil conditioners, and soil improving agents for domestic, agricultural and horticultural use; plant food; potting soil; planting soil; growing media for plants; humus; manure; peat; compost; and loam.
SLO-GRO	77/727569	Class 31: Grass seed.

True and correct copies of the electronic records for these registrations printed from the USPTO' s online database are attached hereto as Exhibit E (the MIRACLE-GRO MARKS and GRO Component Marks are hereinafter collective referred to as the "GRO Marks"). Notably, Registration Nos. 1378337, 137821, 1403361, 1723116, and 1726060, are incontestable.

Applicant' s Answer: Applicant lacks sufficient knowledge or information as to the truth of the allegations set forth in

Paragraph No. 7 and accordingly, denies same.

*Opposer' s Paragraph 8:Opposer' s Senior Rights in the Mark.* The distinctiveness of the SHAKE ' N FEED Marks and the Gro Marks is buttressed by their widespread secondary meaning in the marketplace. Opposer has expended and continues to expend substantial time, money and effort in advertising and prominent the SHAKE ' N FEED Marks and the GRO Marks to identify itself as the source of its goods and services, such as in newspapers, magazines, sponsorships, and through nationally broadcast television and radio commercials.

Applicant' s Answer: Applicant lacks sufficient knowledge or information as to the truth of the remaining allegations set forth in Paragraph No. 8 and, accordingly, denies same.

*Opposer' s Paragraph 9:*In addition, the SHAKE ' N FEED Marks and the GRO Marks and products have been prominently featured on Opposer' s popular website [www.scotts.com](http://www.scotts.com), among others. Over the years, the SHAKE ' N' FEED Marks and the GRO

Marks and the products associated with those marks have received a significant amount of unsolicited press and have been the subject of numerous articles in major publications. In addition, the strength of SHAKE ' N FEED Marks and the GRO Marks is enhanced by Opposer' s vigilant and successful policing efforts of these marks.

Applicant Answer: Applicant lacks sufficient knowledge or information as to the truth of the remaining allegations set forth in Paragraph No. 9 and, accordingly, denies same.

*Opposer' s Paragraph 10:* As a result of Opposer' s efforts, the SHAKE ' N FEED Marks and the GRO Marks have become assets of substantial value and symbols of Opposer' s good will. Today, these marks are some of the most recognizable and valuable brands in the lawn and garden and horticulture industry. Moreover, due to the national, and indeed, worldwide consumer recognition of Opposer' s GRO Marks, consumers have come to recognize the suffix "GRO" as also symbolizing the goodwill inherent in the GRO Marks, and further, associate the "GRO" element solely with Opposer and its line of high quality products.

Applicant Answer: Applicant lacks sufficient knowledge or information as to the truth of the remaining allegations set forth in Paragraph No. 10 and, accordingly, denies same.

*Opposer' s Paragraph 11:* No issue of priority exists with respect to Opposer' s first use of one or more of its SHAKE-N-FEED Marks. Opposer has used, promoted and advertised its goods, specifically plant food, under one or more of its SHAKE' N FEED Marks in commerce for over 7 years, since at least as early as 2001. In addition, Opposer has used, promoted and advertised its goods, specially plant food, under one or more of its GRO Marks in commerce for over 50 years, since at least as early as 1951.

Applicant Answer: Applicant lacks sufficient knowledge or information as to the truth of the remaining allegations set forth in Paragraph No. 11 and, accordingly, denies same.

*Opposer' s Paragraph 12:* Conversely, Applicant does not claim to have used its mark in commerce or otherwise until July 17, 2008, and it did not file its application for registration of the SHAKE-N-GROW mark until July 29, 2008. Accordingly, Opposer has priority over Applicant With respect to the SHAKE ' N FEED Marks and the GRO Marks.

Applicant Answer: Applicant lacks sufficient knowledge or information as to the truth of the remaining allegations set forth in Paragraph No. 12 and, accordingly, denies same.

*Opposer' s Paragraph 13: Likelihood of Confusion.* Applicant' s proposed mark is confusingly similar to Opposer' s SHAKE' N FEED and the GRO marks because it is in appearance, sound, meaning, and commercial impression pursuant to 15 U.S.C. § 1052(d) among other things applicant' s SHAKE-N-GROW mark is similar to Opposer' s SHAKE' N FEED and SHAKE' N SEED marks in sight sound and meaning. Moreover because Applicant' s mark combines the "SHAKE-N" component at the beginning of the mark with the "GROW" component as a suffix, Applicant' s proposed mark appears to be a combination of Opposer' s SHAKE' N FEED and GRO Marks.

Applicant Answer: Applicant denies the allegations set forth in Paragraph No. 13 and, accordingly, denies same.

*Opposer' s Paragraph 14:* The likelihood of confusion between Applicant' s proposed mark and Opposer' s SHAKE N FEED Marks and the GRO Marks is further exacerbated because the goods sold under Applicant' s proposed mark, namely food supplements for agricultural products and other plants are identical or closely related to the products sold under Opposer' s "GRO" Marks such that consumers may believe, incorrectly, that SHAKE-N-GROW is an extension of Opposer' s family of SHAKE ' N FEED Marks and the GRO Marks.

Applicant Answer: Applicant denies the allegations set forth in Paragraph No. 14 and, accordingly, denies same.

*Opposer' s Paragraph15:* Given the goodwill and public recognition arising from the association of the SHAKE ' N FEED Marks and the GRO Marks with Opposer, consumers are likely to believe that Opposer has licensed, approved or otherwise authorized Applicant' s use of the SHAKE-N-GROW mark when it has not..

Applicant Answer: Applicant denies the allegations set forth in Paragraph No. 15 and, accordingly, denies same.

*Opposer' s Paragraph16:* The maturation of Applicant' s application into registration will cause a likelihood of confusion, mistake or deception with respect to the source or origin of Applicant' s goods. Consumers will erroneously believe that Applicant' s goods are produced by or associated with Opposer.

Applicant Answer: Applicant denies the allegations set forth in Paragraph No. 16 and, accordingly, denies same.

*Opposer' s Paragraph17:* Applicant' s use and registration of the proposed mark will also cause dilution by tarnishment and dilution by blurring of Opposer' s famous SHAKE ' N FEED Marks and the GRO Marks, whose fame established well before Applicant' s first use of its proposed mark, as prohibited by 15 U.S.C. § 1125(c).

Applicant Answer: Applicant denies the allegations set forth in Paragraph No. 17 and, accordingly, denies same.

*Opposer' s Paragraph18:* Opposer' s Injury Pursuant to 15 U.S.C. § 1063 (a), Opposer Will be damaged by registration of Applicant' s proposed mark, which would grant Applicant a *prima facie* exclusive right to use the proposed mark despite Opposer' s priority over Applicant and the likelihood of confusion, dilution and injury to goodwill that will be caused by Applicant' s mark.

Applicant Answer: Applicant denies allegations set forth in Paragraph No. 18.

*Opposer' s Paragraph19:* In summary, registration of the proposed mark would be incorrect and improper in view of the requirements of the Trademark Act of 1946, as amended, including specifically but not limited to the provisions of 15 U.S.C. §§ 1051, *et seq.*

Applicant Answer: Applicant denies allegations set forth in Paragraph No. 19.

Opposer prays that this Opposition be sustained, and that registration to the applicant for SHAKE-N-GROW in Application Serial 77/520,947 for the goods identified in International Class 1 be denied.

FIRST AFFIRMATIVE DEFENSE

1. Opposer fails to state a claim upon which relief may be granted.

WHEREFORE, Applicant prays that the "Notice of Opposition" be denied in its entirety, and that the Application be allowed proceed to registration.

Respectfully submitted,

Dated: Aug. 24, 2009

By: /Gail E. Smith/

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that one copy of the foregoing APPLICANT'S ANSWER TO NOTICE OF OPPOSITION was served upon Counsel for Opposer by email and first-class mail, postage pre-paid, this 24 day of Aug., 2009, addressed as follows:

OMS INVESTMENTS  
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