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

Proceeding	91195823
Party	Plaintiff OMS Investments, Inc.
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Submission	Motion for Summary Judgment
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Date	05/13/2011
Attachments	Motion for Summary Judgment - Opposition No. 91195823 Part1.pdf (6 pages)(268347 bytes) Motion for Summary Judgment - Opposition No. 91195823 Part2.pdf (6 pages)(213128 bytes) Exhibits A-B.pdf (12 pages)(648296 bytes) Exhibits C-D.pdf (7 pages)(178108 bytes) Exhibit E.pdf (10 pages)(496414 bytes) Exhibit F.pdf (7 pages)(594469 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Application Serial No.: 77/853,842
For the mark: CHAMPIONGRO
Published: March 30, 2010

OMS Investments, Inc.,	)	
	)	Opposition No. 91195823
Opposer,	)	
	)	**MOTION FOR SUMMARY JUDGMENT**
v.	)	
	)	
NCA Biotech, Inc.	)	
	)	
Applicant.	)	
	)	

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure and Rule 2.127(e) of the Trademark Rules of Practice, Opposer OMS Investments, Inc. ("OMS") respectfully moves the Trademark Trial and Appeal Board for summary judgment in the opposition against Applicant NCA Biotech, Inc. ("NCA") and its intent-to-use application for the CHAMPIONGRO mark (Application Serial No. 77/853,842). The opposition should be terminated, and NCA should be denied registration of the CHAMPIONGRO mark, because the undisputed facts demonstrate that NCA entered into a settlement agreement in which: (1) it agreed to expressly abandon its CHAMPIONGRO application, and (2) it agreed never to use the CHAMPIONGRO mark, meaning that it cannot have a *bona fide* intent to use that mark in commerce.

BRIEF IN SUPPORT OF OMS'S MOTION FOR SUMMARY JUDGMENT

OMS requests summary judgment because it is indisputable that NCA is not entitled to register the CHAMPIONGRO mark for two reasons: (1) it agreed to expressly abandon the CHAMPIONGRO application, and (2) it cannot demonstrate a *bona fide* intent to use the CHAMPIONGRO mark because it agreed never to use that mark.

I. STATEMENT OF UNDISPUTED FACTS

A. Procedural Background

OMS filed its initial Notice of Opposition ("Initial Notice") against NCA and its CHAMPIONGRO application on July 28, 2010. *See* Notice of Opposition. In the Initial Notice, OMS asserted its prior rights in its registered and famous MIRACLE-GRO mark and in a number of other registered marks featuring the "GRO" element (collectively, the "GRO Marks"). *See id.* at ¶¶ 3-4. And OMS asserted that NCA's CHAMPIONGRO mark creates a likelihood of confusion and a likelihood of dilution with OMS's prior GRO Marks. *See id.* at ¶¶ 11-12.

Soon after OMS filed its Initial Notice, OMS and NCA began trying to settle this dispute. *See* Motion for Leave to File a First Amended Notice of Opposition ("Motion for Leave") at p.3. Both parties wanted to suspend the opposition to pursue settlement, so, on December 3, 2010, OMS filed a consented request to suspend the opposition for 90 days. *See id.* at p.2. The Board suspended the opposition for 90 days, and OMS and NCA continued their settlement discussions. *See id.* On January 14, 2011, OMS and NCA reached a settlement, documented by a Settlement and Release Agreement ("Settlement Agreement") and other communications, in which NCA agreed not to use the CHAMPIONGRO mark and to abandon the CHAMPIONGRO application. *See id.*

After the Settlement Agreement was completed, NCA began trying to back out of it. This led OMS, on April 21, 2011, to file a motion for leave to assert new grounds for opposition based on the Settlement Agreement. Those new grounds are that OMS cannot register the CHAMPIONGRO mark because it agreed to abandon the CHAMPIONGRO application and because it agreed not to use the CHAMPIONGRO mark, making it impossible for OMS to have a *bona fide* intent to use that mark.

B. The Settlement Agreement

As noted above, soon after OMS filed its Initial Notice, OMS and NCA began trying to settle this dispute. *See* Exhibit A (11/18/10 email from OMS's prior counsel to NCA's counsel, without attachments). OMS made clear that, as part of any settlement, NCA would have to cease plans to use CHAMPIONGRO and withdraw its CHAMPIONGRO application. *See* Exhibit B (11/18/10 proposed Settlement and Release Agreement ("Proposed Settlement Agreement") at ¶ 3. Specifically, in the Proposed Settlement Agreement, NCA was obligated: (1) to "forever refrain, on a worldwide basis, from using, applying to register, or registering any mark consisting of or incorporating the term CHAMPIONGRO, the GRO Marks, any marks confusingly similar to the GRO Marks, or any mark which contains the famous and distinctive GRO element, in connection with any goods or services," and (2) to "expressly abandon the CHAMPIONGRO Application by filing with the PTO a Request For Express Abandonment (Withdrawal) Of Application in substantially the form provided at Exhibit B." *See* Exhibit B at §§ 3, 1.

After an e-mail exchange in which NCA said it would "review the settlement agreement carefully," *see* Exhibit C (11/18/10 to 12/15/10 emails between OMS's prior counsel and NCA's counsel) at p.2, NCA responded on December 15, 2010 by making a counteroffer noting that it would agree to OMS's proposed Settlement Agreement if OMS would choose one of two options, either: (1) drop from the Settlement Agreement a provision by which NCA would acknowledge OMS's rights in its GRO Marks, or (2) pay NCA a monetary amount in order to keep that provision in:

> Therefore, we are asking EITHER:
>
> You drop all the language[s] that would indicate our acknowledgment of your right of the GRO mark. ***The settlement agreement would simply state that NCA Biotech would give up the CHAMPIONGRO trademark application.***

OR,

> OMS pays NCA Biotech a reasonable sum for giving up the mark...In such case, you can keep all the language[s] in the draft since our CEO would feel it to be justified then.

See id. at p.1 (emphasis added).

On January 14, 2011, OMS, by counsel, accepted Applicant's counteroffer, stating "[a]s [the December 15, 2010] email indicates, you were willing to enter into the Settlement Agreement provided Scotts[1] paid you $6,000, or it withdrew the language of the Agreement requiring NCA to recognize Scotts' rights in the GRO mark. The [sic] Scotts has elected the latter." *See* Exhibit D (1/14/11 email from OMS's counsel to NCA's counsel) at p.1. To memorialize this agreement, OMS also sent NCA a revised and finalized Settlement and Release Agreement deleting the provision in which NCA acknowledged OMS's rights in the GRO Marks. *See* Exhibit E (1/14/11 Settlement and Release Agreement) ("Settlement Agreement").

II. ARGUMENT

Summary judgment is the appropriate way to dispose of this opposition because there are no genuine issues of material fact and the case can be resolved as a matter of law. *See* Fed. R. Civ. P. 56(a); *see also* TBMP 528; *and see American Express Marketing & Development Corp. v. Gilad Development Corp.,* 94 U.S.P.Q.2d 1294, 1301 (T.T.A.B. 2010). The undisputed fact is that NCA, by its own agreement, cannot legally register its CHAMPIONGRO mark. NCA made a binding Settlement Agreement with OMS, and it agreed: (1) to withdraw the CHAMPIONGRO application and (2) never to use the CHAMPIONGRO mark. The Board should therefore grant summary judgment to OMS, refuse to register NCA's CHAMPIONGRO mark, and dismiss this opposition.

[1] "Scotts" referred to the Scotts Company LLC, the parent company of OMS.

A. OMS and NCA Entered Into a Binding Settlement Agreement

OMS and NCA entered into a Settlement Agreement on January 14, 2011, by which NCA agreed to abandon its CHAMPIONGRO application and any plans to use the CHAMPIONGRO mark. OMS is not asking the Board to enforce the Settlement Agreement against NCA. OMS is asking the Board only to consider the Settlement Agreement, including the fact that it prohibits NCA from registering the CHAMPIONGRO mark.

It is appropriate for the Board to consider the Settlement Agreement, including the effect that the Settlement Agreement has on the registrability of NCA's CHAMPIONGRO mark and, in turn, the outcome of this opposition. In *Bausch & Lomb Inc. v. Karl Storz GmbH*, 87 U.S.P.Q.2d 1526 (T.T.A.B. 2008), the Board held that "although other courts would be the proper tribunals in which to litigate a cause of action for ***enforcement*** or ***breach*** of the contract here involved, that is not sufficient reason for the board to decline to ***consider*** the agreement." *Id.* at 1530 (emphasis added). The Board did consider the agreement before it, and it granted summary judgment to the opposer because the agreement prohibited the applicant from using the mark at issue. *Id.* at 1531.

Like the agreement in *Bausch & Lomb*, the Settlement Agreement in this case is a valid and binding contract. The Settlement Agreement, including its validity, is governed by California law: "The validity, construction and performance of this Agreement are governed by the laws of the State of California, without regard to or application of conflicts of laws rules." *See* Exhibit E at ¶ 8. "Under California law, a settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement agreements." *In re Clawson*, 434 Bankr. 556, 559 (N.D. Cal. 2010).

And a contract formed by an offer, a counteroffer and a subsequent acceptance of the counteroffer -- like the Settlement Agreement here -- is a valid and binding contract. "Mutual assent usually is manifested by an offer communicated to the offeree and an acceptance communicated to the offeror." *Lopez v. Charles Schwab & Co.,* 13 Cal. Rptr. 3d 544, 548 (Cal. Ct. App. 2004); *see also* Restatement (Second) of Contracts § 50 (1981 & 2011) ("Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.").

Here, the undisputed facts make clear that there was an offer and acceptance, as well as mutual assent on definite terms. On November 18, 2010, OMS sent NCA the Proposed Settlement Agreement, which required NCA to "forever refrain . . . from using, applying to register, or registering any mark consisting of or incorporating the term CHAMPIONGRO, the GRO Marks, any marks confusingly similar to the GRO Marks, or any mark which contains the famous and distinctive GRO element, in connection with any goods or services," and to "expressly abandon the CHAMPIONGRO Application by filing with the PTO a Request For Express Abandonment (Withdrawal) Of Application." *See* Exhibit B at ¶¶ 3, 1. This was the ***offer***.

NCA and its counsel reviewed the Settlement Agreement, and, on December 15, 2010, countered by stating that NCA would agree to OMS's proposed Settlement Agreement if OMS would choose one of two options, ***either***: (1) drop from the Proposed Settlement Agreement a provision by which NCA would acknowledge OMS's rights in its GRO Marks ***or*** (2) pay NCA a monetary amount in order to keep that provision in the Proposed Settlement Agreement. *See* Exhibit C. This was the ***counteroffer***.

On January 14, 2011, OMS accepted the first option in NCA's counteroffer.

Specifically, OMS agreed to remove from the Settlement Agreement the provision by which NCA would have acknowledged OMS's rights in its GRO Marks. *See* Exhibits D and E. This was OMS's ***acceptance*** of NCA's counteroffer, OMS ***communicated*** this acceptance to NCA by sending an email and the revised Settlement Agreement on January 14, 2011, and this completed the settlement.

Through OMS's offer, NCA's counteroffer, OMS's acceptance of NCA's counteroffer, and OMS's communication of its acceptance to NCA, OMS and NCA formed a binding Settlement Agreement and attained mutual assent on the definite terms of that Agreement, including the terms obligating NCA to abandon its CHAMPIONGRO application and to refrain from using the CHAMPIONGRO mark.

The Settlement Agreement was not signed, but California law makes clear that a contract need not be signed, or even be in writing, in order to be binding. *See General Motors LLC v. Santa Monica Group, Inc.*, 2010 WL 2740166 (C.D. Cal. Jul. 9, 2010) (settlement agreement binding even though parties intended that formal writing would be executed later); *see also Mann v. Mueller*, 140 Cal. App. 2d 481, 487 (Cal. Ct. App. 1956) (contract binding even though several more formal instruments were to be prepared and signed later); *and see Larsen v. Johannes*, 7 Cal. App. 3d 491, 503 (Cal. Ct. App. 1970) (contract need not be written to be binding).

B. The Settlement Agreement Requires NCA To Abandon Its CHAMPIONGRO Application

The Settlement Agreement makes clear that NCA cannot register its CHAMPIONGRO mark because it requires NCA to "expressly abandon the CHAMPIONGRO Application by filing with the PTO a Request For Express Abandonment (Withdrawal) Of Application." *See* Exhibit E at ¶ 1. As a result, OMS's

opposition should be sustained and NCA's CHAMPIONGRO application should be denied registration.

C. The Settlement Agreement Prevents NCA From Having a *Bona Fide* Intent To Use the CHAMPIONGRO Mark

The Settlement Agreement also makes clear that NCA cannot have a *bona fide* intent to use its CHAMPIONGRO mark because it requires NCA to "forever refrain . . . from using, applying to register, or registering any mark consisting of or incorporating the term CHAMPIONGRO . . . in connection with any goods or services." *See id.* at ¶ 3. NCA filed its CHAMPIONGRO application pursuant to Section 1(b) of the Trademark Act, based on its *bona fide* intent to use the mark in commerce with the goods identified in the application. *See* Exhibit F (PTO printout of NCA's CHAMPIONGRO application); *see also* 15 U.S.C. § 1051(b). Thus, NCA's CHAMPIONGRO application cannot proceed to registration unless NCA files a valid Statement of Use for the mark: "except for applications filed pursuant to section 1126 of this title, no mark shall be registered until the applicant has met the requirements of subsections (c) and (d) of this section" (which include filing a statement of use and a specimen of use for the mark). *See* 15 U.S.C. § 1051(b). In the Settlement Agreement, however, NCA agreed never to use the CHAMPIONGRO mark. *See* Exhibit E at ¶ 3. As a result, NCA can never have a *bona fide* intent to use the CHAMPIONGRO mark, can never file a valid Statement of Use for that mark, and can never register that mark under Section 1(b).

D. The Settlement Agreement Mandates Summary Judgment for OMS

Because the Settlement Agreement makes it impossible for NCA to register its CHAMPIONGRO mark, the Board should refuse registration of that mark, should award summary judgment to OMS, and should terminate this opposition proceeding. Under

closely similar circumstances in the *Bausch & Lomb* case, the Board awarded summary judgment to the opposer because an agreement between the opposer and the applicant prohibited the applicant from using the applied-for mark. Specifically, the Board found that the applicant's use and attempted registration of the mark at issue breached an agreement that the applicant had made with the opposer: "If the Agreement bars applicant's use of Applicant's Mark, then applicant is not entitled to registration." *Bausch & Lomb*, at 1530 (*citing Vaughn Russell Candy Co. v. Cookies in Bloom Inc.*, 47 U.S.P.Q.2d 1635, 1637 (T.T.A.B. 1998)).

In fact, the Board has granted summary judgment even in scenarios where the applicant and the opposer disputed some aspects of the agreement at issue. Thus, when the applicant in *Ron Cauldwell Jewelry, Inc. v. Clothestime Clothes, Inc.*, 63 U.S.P.Q.2d 2009 (T.T.A.B. 2002), moved for summary judgment on the basis that the parties had entered into a coexistence agreement whereby the opposer had consented to the applicant's use and registration of applicant's mark, the Board considered "the full terms of [a coexistence] agreement" set out in a two page letter from the applicant's counsel to the opposer. Rejecting the opposer's arguments that the coexistence agreement was unclear or ambiguous and that the consideration was inadequate, the Board held that "the interpretation of an agreement must be based, not on the subjective intention of the parties, but on the objective words of their agreement." And the Board found the agreement sufficient to mandate summary judgment. *Id.* at 2013. NCA cannot legitimately dispute the validity of the Settlement Agreement, but even if it tried to do so, this would not prevent summary judgment against it.

Finally, in *Vaughn Russell*, a case virtually identical to this one, the Board granted

summary judgment to an opposer based on a settlement agreement in which the applicant, like NCA here, had agreed to stop using the mark at issue. *See Vaughn Russell*, 47 U.S.P.Q.2d at 1636. As in this case, the settlement agreement was reached after the opposition had begun, and it gave the opposer new grounds for opposing the applicant's mark. Like OMS here, the opposer moved for leave to amend its notice of opposition to assert the new grounds, and the Board granted the motion. *See id.* at 1637. And like OMS here, the opposer moved for summary judgment, asserting that the applicant should be denied registration because the settlement agreement prevented the applicant from lawfully using its mark in commerce. *See id.*

The Board granted the opposer's summary judgment motion, finding that "no material fact exist[s] with respect to [the opposer's] claim that applicant cannot lawfully use in commerce the mark [at issue] and thus is not entitled to obtain a registration for this mark." *Id.* The Board further found that "applicant being precluded by the terms of the settlement agreement from making any use whatsoever of a portion of its mark . . . clearly cannot assert the exclusive right to use in commerce the mark for which registration is sought." *Id.* The Board acknowledged that it did not have jurisdiction to enforce the terms of the settlement agreement, but the Board noted that it could consider that agreement in determining whether to register a mark: "while it does not lie within the jurisdiction of the Board to enforce the contract between the parties, agreements to cease use of a mark or to not use a mark in a certain format are routinely upheld and enforced." *Id.* at 1638 n. 6.

Like the applicant and opposer in *Vaughn Russell*, NCA and OMS have formed a Settlement Agreement in which NCA has agreed never to use or register the

CHAMPIONGRO mark. As a result, NCA has no lawful basis for using or registering that mark. The Board should grant OMS's summary judgment motion and put an end to this opposition.

III. CONCLUSION

For the foregoing reasons, OMS respectfully requests that the Board grant its motion for summary judgment.

Dated: May 13, 2011

Respectfully submitted,

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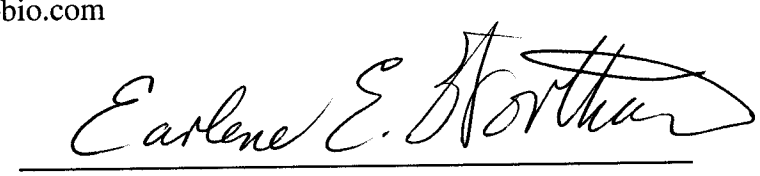
Attorneys for Opposer OMS Investments, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **MOTION FOR SUMMARY JUDGMENT** has been properly served, via first class mail and e-mail, this 13th day of May, 2011, at the following addresses:

Stanley T. Hsiao, Esq.
NCA Biotech, Inc.
3406 Pomona Boulevard
Pomona, California 91768

stanleyth@cpbio.com



Earlene E. Wortham

EXHIBIT A

Allen, Linda

From: Anderson, Britt
Sent: Thursday, November 18, 2010 3:46 PM
To: Stanley Hsiao
Cc: Hollander, Susan; Allen, Linda
Subject: OMS v. NCA Biotech (28405-302)
Attachments: Settlement Agreement (NCA BIOTECH) (2).DOC

Dear Mr. Hsiao -

Following our recent discussions, please see the attached draft settlement agreement in Word format. If you would like to discuss this matter by phone so that we can cover any aspects of the proposed agreement, please let me know. I will be available on Monday and Tuesday of next week if you would like to discuss the matter.

Regards,

Britt L. Anderson
manatt | phelps | phillips
One Embarcadero Center, 30th Floor
San Francisco, CA 94111
Tel.: (415) 291-7403
Fax: (415) 291-7474
e-mail: blanderson@manatt.com

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EXHIBIT B

SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement ("Agreement") is effective as of _____, 2010 ("Effective Date") by and between OMS Investments, Inc., with a place of business at 10250 Constellation Boulevard, Suite 2800, Los Angeles, California 90067 ("OMS"), and NCA Biotech, Inc., 4802 Murrieta Street, Chino, CA 91710 ("NCA Biotech").

WHEREAS, since at least as early as 1951, OMS, through its predecessors in interest, has used and continues to use the MIRACLE-GRO trademark, which is famous and distinctive, in connection with a wide range of lawn and garden products, including fertilizers;

WHEREAS, OMS is the sole and exclusive owner of numerous trademark and service mark registrations and applications in the United States and throughout the world incorporating the MIRACLE-GRO mark and GRO suffix, including those U.S. registrations and applications listed at Exhibit A hereto (collectively, the "GRO Marks");

WHEREAS, OMS is the sole and exclusive owner of a famous and distinctive green and yellow trade dress, subject to U.S. Reg. No. 2,139,929, which is incontestable, and is used in connection with, in addition to other products, those sold under its GRO Marks (the "Green and Yellow Trade Dress");

WHEREAS, pursuant to Sections 7 and 33 of the Lanham Act, 15 U.S.C. §§ 1057(b) and 1115, each of the federally registered GRO Marks and the Green and Yellow Trade Dress are presumed, by virtue of its federal registration to be valid, registered, owned by OMS, and entitling OMS to the exclusive right to use the registered mark in commerce in connection with the goods listed therein, subject to any legal or equitable defense, including those found under Lanham Act Section 33(b), 15 U.S.C. § 1115(b);

WHEREAS, on or about October 3, 2006, NCA Biotech filed United States Trademark Application Serial No. 77/853,842 for CHAMPIONGRO in Class 1 for plant growth regulators for agricultural use (the "CHAMPIONGRO Application");

WHEREAS, on July 28, 2010, OMS filed a Notice of Opposition with the Trademark Trial and Appeal Board ("TTAB") against the CHAMPIONGRO Application alleging that the CHAMPIONGRO Mark is confusingly similar to and dilutive of the GRO Marks and therefore the CHAMPIONGRO Application should not mature to registration (the "Opposition");

WHEREAS, NCA Biotech currently uses the marks PHOTOGRO, ROOTGRO, MEGAGRO and HAPPYGRO ("NCA Biotech's Existing GRO MARKS") in connection with plant growth regulators for agricultural use;

WHEREAS, NCA Biotech currently uses green and yellow packaging in connection with its PHOTOGRO, MEGAGRO and HAPPYGRO products ("NCA Biotech's Green and Yellow Packaging");

WHEREAS, OMS and NCA Biotech wish to resolve any and all claims OMS may have against NCA Biotech arising out of the CHAMPIONGRO Application, NCA Biotech's Existing GRO Marks, and NCA Biotech's Green and Yellow Packaging.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Within five (5) days of the Effective Date hereof, NCA Biotech shall expressly abandon the CHAMPIONGRO Application by filing with the PTO a Request For Express Abandonment (Withdrawal) Of Application in substantially the form provided at Exhibit B.

2. Upon receipt of a service copy of NCA Biotech's Notice of Consented Express Abandonment pursuant to Section 1 above, OMS shall within five (5) business days withdraw the pending Opposition against the CHAMPIONGRO Application by filing with the TTAB a Notice of Consented Withdrawal of Opposition in substantially the same form as that attached hereto as Exhibit C.

3. NCA Biotech agrees that it shall forever refrain, on a worldwide basis, from using, applying to register, or registering any mark consisting of or incorporating the term CHAMPIONGRO, the GRO Marks, any marks confusingly similar to the GRO Marks, or any mark which contains the famous and distinctive GRO element, in connection with any goods or services, except that NCA Biotech may continue to use the marks PHOTOGRO, ROOTGRO, MEGAGRO and HAPPYGRO, provided that such marks are used only in connection with "plant growth regulators for agricultural use."

4. NCA Biotech agrees to phase out the NCA Biotech Green and Yellow Packaging by June 30, 2010 and replace it with packaging that does not predominantly consist of green and yellow. NCA Biotech further agrees to refrain from future use or adoption of any packaging consisting predominantly of green and yellow.

5. NCA Biotech hereby acknowledges OMS's ownership of and rights to the GRO Marks identified in Exhibit A attached hereto. NCA Biotech further acknowledges OMS's sole and exclusive right to use the GRO Marks, including the GRO element of those marks, in commerce and agrees not to contest or dispute, and agrees not to assist any third party in contesting or disputing, the validity or enforcement of any of the GRO Marks.

6. Subject to the full and complete performance by each of the parties hereto of all of the terms and conditions set forth herein, as well as the accuracy of the representations and warranties contained herein, the parties hereby mutually release and discharge one another, and each of their respective parents, subsidiaries, affiliates, partners, officers, directors, shareholders, agents, representatives, employees, successors, and assigns from any and all claims, causes or rights of action, liability, or obligations of any kind, type or nature, whether presently known or unknown, which each or any of them now has or may have against each other from the beginning of the world to the Effective Date hereof arising out of or in connection with the filing of the CHAMPIONGRO Application, the use by NCA Biotech of NCA Biotech's Existing GRO MARKS, and/or use by NCA Biotech of NCA Biotech's Green and Yellow Packaging. This mutual release does not release any party from any of the obligations contained in this Agreement.

7. NCA Biotech hereby expressly waives any and all rights and benefits which it may have under the terms of Section 1542 of the California Civil Code which provides as follows:

> **A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.**

8. The parties acknowledge that they have read this Agreement and understand all of its terms, and that this Agreement is executed voluntarily, without duress, and with full knowledge of its legal significance. The parties acknowledge that they have had the opportunity to obtain independent legal advice from an attorney of its choice with respect to the legal consequences of entering into this Agreement. The parties agree they have participated equally in the choice of language and terms of this Agreement and that no presumption shall exist with respect to the party initially drafting the Agreement.

9. This Agreement shall be binding on and inure to the benefit of the assigns, successors and licensees of the parties hereto. This Agreement contains the entire agreement of the parties on the subjects contained herein and supersedes any other oral or written representations by and agreements between the parties with respect to the subjects contained herein. This Agreement shall not be amended, modified, or supplemented except by a writing signed by an authorized representative of each party. The validity, construction and performance of this Agreement are governed by the laws of the State of California, without regard to or application of conflict of laws rules.

10. This Agreement may be executed in counterparts, each of which is deemed an original.

IN WITNESS WHEREOF, the parties have caused the Agreement to be executed by their duly authorized representatives who are authorized to bind the respective parties.

OMS Investments, Inc.	NCA Biotech, Inc.
By:_____	By:_____
Name:_____	Name:_____
Title:_____	Title:_____
Date:_____	Date:_____

EXHIBIT A

Mark	Reg. No/Ser. No..	Goods/Services
MIRACLE-GRO	0668868	Class 1: Water soluble plant food.
MIRACLE-GRO	1051605	Class 1: Plant food and fertilizer
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	2618698	Class 1: Fertilizers for domestic use. Class 5: Herbicides for domestic use.
MIRACLE-GRO GARDEN WEED PREVENTER	2618699	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 landscape 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 landscape 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 & Design	2822655	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.

Mark	Reg. No/Ser. No.	Goods/Services
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 use of products relating to 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 lawn and garden equipment and advices and information related to flowers and their care.
MIRACLE-GRO SELECT PLANTS & Design	2900658	Class 31: Living house plants.
MIRACLE-GRO SELECT PLANTS & Design	2723181	Class 31: Live plants and containers therefor
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, blood 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.

Mark	Reg. No/Ser. No..	Goods/Services
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 purposes and for use as a soil conditioner.
MIRACLE-GRO	77/215022	Class 7: Composter machines and components thereof for recycling solid waste
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 CHOICE & Design	1723116	Class 1: Natural organic and mineral fertilizer for lawn and garden use, agricultural use and commercial use; cow manure, composted cow manure, dehydrated cow manure, potting soil and humus.
EARTHGRO THE NATURAL CHOICE & Design	1726060	Class 31: Top soil.
EARTHGRO THE NATURAL CHOICE DECORATIVE HARDWOOD MULCH FOR WELL-GROOMED LANDSCAPES & Design	2357372	Class 31: Mulch
EARTHGRO THE NATURAL CHOICE PLANTING SOIL FOR FLOWERS, TREES AND SHRUBS & Design	2484307	Class 1: Potting soil.
GARDEN GRO	76/653762	Class 1: Fertilizers
GARDEN-GRO	77/394176	Class 31: Mulch
PRO GRO	77/406779	Class 1: Fertilizers 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	78/614950	Class 31: Grass seed and grass sod for commercial and residential use

Mark	Reg. No/Ser. No.	Goods/Services
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 sprayers 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 seed, flower seed, garden seeds, plant food, potting soil, 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.
IT'S 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, fertilizer and mulch for the purpose of lawn repair; soil containing fertilizer; live plants
IT'S GRO TIME	77/341556	Class 1: Fertilizers 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
IT'S GRO TIME	77/341566	Class 44: Providing advice and information on the subjects of gardening and lawn care and the use of products relating to gardening and lawn care, including plant foods, fertilizers, pesticides, herbicides, grass seed, potting mixes, soil, soil conditioners and amendments, mulches, and lawn and garden equipment via print, advertising, and the internet; providing in-store consulting services on the subjects of gardening and lawn care and the use of related products, including plant foods, fertilizers, pesticides, grass seed, potting mixes, soil, soil conditioners and amendments, mulches, and lawn and garden equipment; lawn, tree, and shrub care services; landscape gardening services; consulting services in the field of lawn, tree, and shrub care and landscape gardening

EXHIBIT B

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

OMS Investments, Inc., Opposer v. NCA Biotech, Inc., Applicant.	Opposition No. _____ NOTICE OF CONSENTED EXPRESS ABANDONMENT PURSUANT TO 37 C.F.R. §2.68

Applicant, NCA Biotech, Inc., hereby expressly abandons with prejudice its United States Trademark Application bearing Serial No. 77/853,842 to register the mark CHAMPIONGRO. Opposer, by its counsel, Manatt, Phelps & Phillips, LLP, has consented to this Notice of Express Abandonment. This Notice of Consented Express Abandonment is executed by Applicant and Opposer by signature of counsel having authority to bind each.

Respectfully submitted,

NCA BIOTECH, INC.

Date: _____, 2010

By: _____
Stanley T. Hsiao
4802 Murrieta Street
Chino, CA 91710
Telephone: (909) 348-5133
Attorney for Applicant, NCA Biotech, Inc.

MANATT, PHELPS & PHILLIPS, LLP

Date: _____, 2010

By: _____
Susan E. Hollander, Esq.
Britt L. Anderson, Esq.
1001 Page Mill Road, Bldg. 2
Palo Alto, CA 94304
Telephone: (650) 812-1300
Attorneys for Opposer,
OMS Investments, Inc.

EXHIBIT C

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

OMS Investments, Inc., Opposer v. NCA Biotech, Inc., Applicant.	) Opposition No. _____)) NOTICE OF CONSENTED) WITHDRAWAL OF OPPOSITION) PURSUANT TO 37 C.F.R. §2.106(c))))

Pursuant to 37 C.F.R. § 2.106(c), Opposer OMS Investments, Inc. ("Opposer") hereby withdraws with prejudice its Notice of Opposition to Applicant NCA Biotech, Inc.'s ("Applicant") U.S. Trademark Application Serial No. 77/853,842 in Class 1 in the above-identified opposition proceeding. Applicant has consented to this Notice of Consented Withdrawal. This Notice of Consented Withdrawal is executed by Applicant and by Opposer by signature of counsel having authority to bind each.

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

Date: _____, 2010

By: _____
Susan E. Hollander, Esq.
Britt L. Anderson, Esq.
1001 Page Mill Road, Bldg. 2
Palo Alto, CA 94304
Telephone: (650) 812-1300
Attorneys for Opposer, OMS Investments, Inc.

NCA BIOTECH, INC.

Date: _____, 2010

By: _____
Stanley T. Hsiao
4802 Murrieta Street
Chino, CA 91710
Telephone: (909) 348-5133
Attorney for Applicant, NCA Biotech, Inc.

EXHIBIT C

From: Stanley Hsiao [mailto:stanleyth@cpbio.com]
Sent: Wednesday, December 15, 2010 2:15 PM
To: Anderson, Britt
Subject: RE: OMS v. NCA Biotech (28405-302)

Dear Britt,

Sorry that I was unable to come back to you until now. We are a small but growing company. We have a lot of things going on.

I had the opportunity to discuss with our CEO regarding the content of the settlement agreement you drafted. To simply and frankly put, we feel that as drafted we are not gaining anything. Yet OMS gets not only whatever it wanted, but also a situation which can be used to facilitate your opposition in similar future cases.

Therefore, we are asking EITHER:

You drop all the languages that would indicate our acknowledgment of your right of GRO mark. The settlement agreement would simply state that NCA Biotech would give up the CHAMPIONGRO trademark application.

OR,

OMS pays NCA Biotech a reasonable sum for giving up the mark. We actually had a similar case about six years ago when we operated under a different name, in which we received $6,000.00 to give up our mark. You did offer to pay us a sum of $1,500.00 before. Our CEO was thinking that if $6,000.00 was a reasonable amount six years ago, a reasonable amount now should be more than $6,000.00. At any rate, if you decide to pay a sum to settle, we would then decide the amount. In such case, you can keep all the languages in the draft since our CEO would feel it to be justified then.

Hope that you and your client understand our situation.

Best regards,

Stanley

From: Anderson, Britt [mailto:BLAnderson@manatt.com]
Sent: Thursday, December 09, 2010 7:58 PM
To: Stanley Hsiao
Cc: Holloway, Sonya
Subject: RE: OMS v. NCA Biotech (28405-302)

Mr. Hsiao -

Please let me know if you have had a chance to review the agreement.

Regards,
Britt Anderson

From: Stanley Hsiao [mailto:stanleyth@cpbio.com]
Sent: Friday, December 03, 2010 8:54 AM
To: Anderson, Britt
Subject: RE: OMS v. NCA Biotech (28405-302)

Britt,
I will be tied up today. I shall review the settlement agreement carefully and come back to you next week.
Stanley

From: Anderson, Britt [mailto:BLAnderson@manatt.com]
Sent: Thursday, December 02, 2010 3:52 PM
To: Stanley Hsiao
Cc: Allen, Linda
Subject: FW: OMS v. NCA Biotech (28405-302)

Mr. Hsiao -

Please let us know if you have had a chance to review this agreement. I left a telephone message today at your office.

Regards,
Britt Anderson

From: Anderson, Britt
Sent: Thursday, November 18, 2010 3:46 PM
To: 'Stanley Hsiao'
Cc: Hollander, Susan; Allen, Linda
Subject: OMS v. NCA Biotech (28405-302)

Dear Mr. Hsiao -

Following our recent discussions, please see the attached draft settlement agreement in Word format. If you

would like to discuss this matter by phone so that we can cover any aspects of the proposed agreement, please let me know. I will be available on Monday and Tuesday of next week if you would like to discuss the matter.

Regards,

Britt L. Anderson
manatt | phelps | phillips
One Embarcadero Center, 30th Floor
San Francisco, CA 94111
Tel.: (415) 291-7403
Fax: (415) 291-7474
e-mail: blanderson@manatt.com

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EXHIBIT D

To: 'stanleyth@cpbio.com'[stanleyth@cpbio.com];
Cc: Maynard, John Gary[jgmaynard@hunton.com]; 'Anderson, Britt'[BLAnderson@manatt.com]; Ford, Tina[tford@hunton.com];
Subject: FW: NCA Biotech
Sent: Fri 1/14/2011 7:57:07 PM
From: Maynard, John Gary

Email re settlement agreement (NCA Biotech) (34032292) (1).PDF
Comparison of Settlement Agmt (NCA Biotech) (34126510) (1).PDF
Settlement Agreement (NCA Biotech) (revised version) (34126485) (1).PDF

Mr. Hasio

My name is John Gary Maynard. I recently took over this file from Manatt. I have copied Britt Anderson should you have any questions regarding my involvement.

I have also attached a copy of the last email correspondence between you and Mr. Anderson regarding settlement. As that email indicates, you were willing to enter into the Settlement Agreement provided Scotts paid you $6,000, or it withdrew the language of the Agreement requiring NCA to recognize Scotts' rights in the GRO mark. The Scotts has elected the latter.

I have attached a redline as well as a revised agreement for your review and consideration. Presuming this meets your approval, please sign the document and return it to me by email.

We look forward to your prompt response.

http://www.hunton.com _
http://www.hunton.com/media/emailsig/images/HW2.gif
John Gary Maynard, III
Partner
jgmaynard@hunton.com

Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
Phone: (804) 788-8772
Fax: (804) 343-4672
www.hunton.com

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help_desk@hunton.com and then delete this message and all copies and backups thereof.

EXHIBIT E

SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement ("Agreement") is effective as of _____, 2011 ("Effective Date") by and between OMS Investments, Inc., with a place of business at 10250 Constellation Boulevard, Suite 2800, Los Angeles, California 90067 ("OMS"), and NCA Biotech, Inc., 4802 Murrieta Street, Chino, CA 91710 ("NCA Biotech").

WHEREAS, since at least as early as 1951, OMS, through its predecessors in interest, has used and continues to use the MIRACLE-GRO trademark, which is famous and distinctive, in connection with a wide range of lawn and garden products, including fertilizers;

WHEREAS, OMS is the sole and exclusive owner of numerous trademark and service mark registrations and applications in the United States and throughout the world incorporating the MIRACLE-GRO mark and GRO suffix, including those U.S. registrations and applications listed at Exhibit A hereto (collectively, the "GRO Marks");

WHEREAS, OMS is the sole and exclusive owner of a famous and distinctive green and yellow trade dress, subject to U.S. Reg. No. 2,139,929, which is incontestable, and is used in connection with, in addition to other products, those sold under its GRO Marks (the "Green and Yellow Trade Dress");

WHEREAS, pursuant to Sections 7 and 33 of the Lanham Act, 15 U.S.C. §§ 1057(b) and 1115, each of the federally registered GRO Marks and the Green and Yellow Trade Dress are presumed, by virtue of its federal registration to be valid, registered, owned by OMS, and entitling OMS to the exclusive right to use the registered mark in commerce in connection with the goods listed therein, subject to any legal or equitable defense, including those found under Lanham Act Section 33(b), 15 U.S.C. § 1115(b);

WHEREAS, on or about October 3, 2006, NCA Biotech filed United States Trademark Application Serial No. 77/853,842 for CHAMPIONGRO in Class 1 for plant growth regulators for agricultural use (the "CHAMPIONGRO Application");

WHEREAS, on July 28, 2010, OMS filed a Notice of Opposition with the Trademark Trial and Appeal Board ("TTAB") against the CHAMPIONGRO Application alleging that the CHAMPIONGRO Mark is confusingly similar to and dilutive of the GRO Marks and therefore the CHAMPIONGRO Application should not mature to registration (the "Opposition");

WHEREAS, NCA Biotech currently uses the marks PHOTOGRO, ROOTGRO, MEGAGROA and HAPPYGRO ("NCA Biotech's Existing GRO MARKS") in connection with plant growth regulators for agricultural use;

WHEREAS, NCA Biotech currently uses green and yellow packaging in connection with its PHOTOGRO, MEGAGRO and HAPPYGRO products ("NCA Biotech's Green and Yellow Packaging");

WHEREAS, OMS and NCA Biotech wish to resolve any and all claims OMS may have against NCA Biotech arising out of the CHAMPIONGRO Application, NCA Biotech's Existing GRO Marks, and NCA Biotech's Green and Yellow Packaging.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Within five (5) days of the Effective Date hereof, NCA Biotech shall expressly abandon the CHAMPIONGRO Application by filing with the PTO a Request For Express Abandonment (Withdrawal) Of Application in substantially the form provided at Exhibit B.

2. Upon receipt of a service copy of NCA Biotech's Notice of Consented Express Abandonment pursuant to Section 1 above, OMS shall within five (5) business days withdraw the pending Opposition against the CHAMPIONGRO Application by filing with the TTAB a Notice of Consented Withdrawal of Opposition in substantially the same form as that attached hereto as Exhibit C.

3. NCA Biotech agrees that it shall forever refrain, on a worldwide basis, from using, applying to register, or registering any mark consisting of or incorporating the term CHAMPIONGRO, the GRO Marks, any marks confusingly similar to the GRO Marks, or any mark which contains the famous and distinctive GRO element, in connection with any goods or services, except that NCA Biotech may continue to use the marks PHOTOGRO, ROOTGRO, MEGAGRO and HAPPYGRO, provided that such marks are used only in connection with "plant growth regulators for agricultural use."

4. NCA Biotech agrees to phase out the NCA Biotech Green and Yellow Packaging by June 30, 2010 and replace it with packaging that does not predominantly consist of green and yellow. NCA Biotech further agrees to refrain from future use or adoption of any packaging consisting predominantly of green and yellow.

5. Subject to the full and complete performance by each of the parties hereto of all of the terms and conditions set forth herein, as well as the accuracy of the representations and warranties contained herein, the parties hereby mutually release and discharge one another, and each of their respective parents, subsidiaries, affiliates, partners, officers, directors, shareholders, agents, representatives, employees, successors, and assigns from any and all claims, causes or rights of action, liability, or obligations of any kind, type or nature, whether presently known or unknown, which each or any of them now has or may have against each other from the beginning of the world to the Effective Date hereof arising out of or in connection with the filing of the CHAMPIONGRO Application, the use by NCA Biotech of NCA Biotech's Existing GRO MARKS, and/or use by NCA Biotech of NCA Biotech's Green and Yellow Packaging. This mutual release does not release any party from any of the obligations contained in this Agreement.

6. NCA Biotech hereby expressly waives any and all rights and benefits which it may have under the terms of Section 1542 of the California Civil Code which provides as follows:

> **A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if know by him must have materially affected his settlement with the debtor.**

7. The parties acknowledge that they have read this Agreement and understand all of its terms, and that this Agreement is executed voluntarily, without duress, and with full

knowledge of its legal significance. The parties acknowledge that they have had the opportunity to obtain independent legal advice from an attorney of its choice with respect to the legal consequences of entering into this Agreement. The parties agree they have participated equally in the choice of language and terms of this Agreement and that no presumption shall exist with respect to the party initially drafting the Agreement.

8. This Agreement shall be binding on and inure to the benefit of the assigns, successors and licensees of the parties hereto. This Agreement contains the entire agreement of the parties on the subjects contained herein and supersedes any other oral or written representations by and agreements between the parties with respect to the subjects contained herein. This Agreement shall not be amended, modified, or supplemented except by a writing signed by an authorized representative of each party. The validity, construction and performance of this Agreement are governed by the laws of the State of California, without regard to or application of conflicts of laws rules.

9. This Agreement may be executed in counterparts, each of which is deemed an original.

IN WITNESS WHEREOF, the parties have caused the Agreement to be executed by their duly authorized representatives who are authorized to bind the respective parties.

OMS Investments, Inc.	NCA Biotech, Inc.
By:_____	By:_____
Name:_____	Name:_____
Title:_____	Title:_____
Date:_____	Date:_____

EXHIBIT A

Mark	Reg. No/Ser. No..	Goods/Services
MIRACLE-GRO	0668868	Class 1: Water soluble plant food.
MIRACLE-GRO	1051605	Class 1: Plant food and fertilizer
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	2618698	Class 1: Fertilizers for domestic use. Class 5: Herbicides for domestic use.
MIRACLE-GRO GARDEN WEED PREVENTER	2618699	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 landscape 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 landscape 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 & Design	2822655	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.

Mark	Reg. No/Ser. No..	Goods/Services
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 use of products relating to 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 lawn and garden equipment and advices and information related to flowers and their care.
MIRACLE-GRO SELECT PLANTS & Design	2900658	Class 31: Living house plants.
MIRACLE-GRO SELECT PLANTS & Design	2723181	Class 31: Live plants and containers therefor
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, blood 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.

Mark	Reg. No/Ser. No..	Goods/Services
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 purposes and for use as a soil conditioner.
MIRACLE-GRO	77/215022	Class 7: Composter machines and components thereof for recycling solid waste
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 CHOICE & Design	1723116	Class 1: Natural organic and mineral fertilizer for lawn and garden use, agricultural use and commercial use; cow manure, composted cow manure, dehydrated cow manure, potting soil and humus.
EARTHGRO THE NATURAL CHOICE & Design	1726060	Class 31: Top soil.
EARTHGRO THE NATURAL CHOICE DECORATIVE HARDWOOD MULCH FOR WELL-GROOMED LANDSCAPES & Design	2357372	Class 31: Mulch
EARTHGRO THE NATURAL CHOICE PLANTING SOIL FOR FLOWERS, TREES AND SHRUBS & Design	2484307	Class 1: Potting soil.
GARDEN GRO	76/653762	Class 1: Fertilizers
GARDEN-GRO	77/394176	Class 31: Mulch
PRO GRO	77/406779	Class 1: Fertilizers 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	78/614950	Class 31: Grass seed and grass sod for commercial and residential use

Mark	Reg. No/Ser. No..	Goods/Services
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 sprayers 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 seed, flower seed, garden seeds, plant food, potting soil, 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.
IT'S 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, fertilizer and mulch for the purpose of lawn repair; soil containing fertilizer; live plants
IT'S GRO TIME	77/341556	Class 1: Fertilizers 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
IT'S GRO TIME	77/341566	Class 44: Providing advice and information on the subjects of gardening and lawn care and the use of products relating to gardening and lawn care, including plant foods, fertilizers, pesticides, herbicides, grass seed, potting mixes, soil, soil conditioners and amendments, mulches, and lawn and garden equipment via print, advertising, and the internet; providing in-store consulting services on the subjects of gardening and lawn care and the use of related products, including plant foods, fertilizers, pesticides, grass seed, potting mixes, soil, soil conditioners and amendments, mulches, and lawn and garden equipment; lawn, tree, and shrub care services; landscape gardening services; consulting services in the field of lawn, tree, and shrub care and landscape gardening

EXHIBIT B

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

OMS Investments, Inc., Opposer v. NCA Biotech, Inc., Applicant.	Opposition No. _____ NOTICE OF CONSENTED EXPRESS ABANDONMENT PURSUANT TO 37 C.F.R. §2.68

Applicant, NCA Biotech, Inc., hereby expressly abandons with prejudice its United States Trademark Application bearing Serial No. 77/853,842 to register the mark CHAMPIONGRO. Opposer, by its counsel, Hunton & Williams, LLP, has consented to this Notice of Express Abandonment. This Notice of Consented Express Abandonment is executed by Applicant and Opposer by signature of counsel having authority to bind each.

Respectfully submitted,

NCA BIOTECH, INC.

Date: _____, 2011

By: _____
Stanley T. Hsiao
4802 Murrieta Street
Chino, CA 91710
Telephone: (909) 348-5133
Attorney for Applicant, NCA Biotech, Inc.

HUNTON & WILLIAMS, LLP

Date: _____, 2011

By: _____
John Gary Maynard, III, Esq.
Janet W. Cho, Esq.
951 E. Byrd Street
Richmond, VA 23219
Telephone: (804) 788-8772
Attorneys for Opposer,
OMS Investments, Inc.

EXHIBIT C

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

OMS Investments, Inc., Opposer v. NCA Biotech, Inc., Applicant.	Opposition No. _____ NOTICE OF CONSENTED WITHDRAWAL OF OPPOSITION PURSUANT TO 37 C.F.R. §2.106(c)

Pursuant to 37 C.F.R. § 2.106(c), Opposer OMS Investments, Inc. ("Opposer") hereby withdraws with prejudice its Notice of Opposition to Applicant NCA Biotech, Inc.'s ("Applicant") U.S. Trademark Application Serial No. 77/853,842 in Class 1 in the above-identified opposition proceeding. Applicant has consented to this Notice of Consented Withdrawal. This Notice of Consented Withdrawal is executed by Applicant and by Opposer by signature of counsel having authority to bind each.

Respectfully submitted,

NCA BIOTECH, INC.

Date: _____, 2011

By: _____
Stanley T. Hsiao
4802 Murrieta Street
Chino, CA 91710
Telephone: (909) 348-5133
Attorney for Applicant, NCA Biotech, Inc.

HUNTON & WILLIAMS, LLP

Date: _____, 2011

By: _____
John Gary Maynard, III, Esq.
Janet W. Cho, Esq.
951 E. Byrd Street
Richmond, VA 23219
Telephone: (804) 788-8772
Attorneys for Opposer,
OMS Investments, Inc.

EXHIBIT F

PTO Form 1478 (Rev 9/2006)
OMB No. 0651-0009 (Exp 12/31/2011)

Trademark/Service Mark Application, Principal Register

TEAS Plus Application

Serial Number: 77853842
Filing Date: 10/21/2009

NOTE: Data fields with the * are mandatory under TEAS Plus. The wording "(if applicable)" appears where the field is only mandatory under the facts of the particular application.

The table below presents the data as entered.

Input Field	Entered
TEAS Plus	**YES**
MARK INFORMATION	
***MARK**	ChampionGro
***STANDARD CHARACTERS**	YES
USPTO-GENERATED IMAGE	YES
LITERAL ELEMENT	ChampionGro
***MARK STATEMENT**	The mark consists of standard characters, without claim to any particular font, style, size, or color.
REGISTER	Principal
APPLICANT INFORMATION	
***OWNER OF MARK**	NCA Biotech, Inc.
***STREET**	3406 Pomona Blvd
***CITY**	Pomona
***STATE** **(Required for U.S. applicants)**	California
***COUNTRY**	United States
***ZIP/POSTAL CODE** **(Required for U.S. applicants only)**	91768
PHONE	909-348-5133
FAX	909-348-5135

EMAIL ADDRESS	stanleyth@ncabiotech.com
AUTHORIZED TO COMMUNICATE VIA EMAIL	Yes
LEGAL ENTITY INFORMATION	
***TYPE**	CORPORATION
*** STATE/COUNTRY OF INCORPORATION**	California
GOODS AND/OR SERVICES AND BASIS INFORMATION	
*** INTERNATIONAL CLASS**	001
IDENTIFICATION	Plant growth regulators for agricultural use
***FILING BASIS**	SECTION 1(b)
ADDITIONAL STATEMENTS INFORMATION	
*TRANSLATION (if applicable)	
*TRANSLITERATION (if applicable)	
*CLAIMED PRIOR REGISTRATION (if applicable)	
*CONSENT (NAME/LIKENESS) (if applicable)	
*CONCURRENT USE CLAIM (if applicable)	
CORRESPONDENCE INFORMATION	
***NAME**	NCA Biotech, Inc.
FIRM NAME	NCA Biotech, Inc.
***STREET**	3406 Pomona Blvd
***CITY**	Pomona
***STATE (Required for U.S. applicants)**	California
***COUNTRY**	United States
***ZIP/POSTAL CODE**	91768
PHONE	909-348-5133
FAX	909-348-5135
***EMAIL ADDRESS**	stanleyth@ncabiotech.com
***AUTHORIZED TO COMMUNICATE VIA EMAIL**	Yes

FEE INFORMATION	
NUMBER OF CLASSES	1
FEE PER CLASS	275
*TOTAL FEE PAID	275
SIGNATURE INFORMATION	
* SIGNATURE	/Stanley T. Hsiao/
* SIGNATORY'S NAME	Stanley T. Hsiao
* SIGNATORY'S POSITION	Corporate Secretary
* DATE SIGNED	10/21/2009

PTO Form 1478 (Rev 9/2006)
OMB No. 0651-0009 (Exp 12/31/2011)

Trademark/Service Mark Application, Principal Register

TEAS Plus Application

Serial Number: 77853842
Filing Date: 10/21/2009

To the Commissioner for Trademarks:

MARK: ChampionGro (Standard Characters, see mark)
The literal element of the mark consists of ChampionGro.
The mark consists of standard characters, without claim to any particular font, style, size, or color.

The applicant, NCA Biotech, Inc., a corporation of California, having an address of
3406 Pomona Blvd
Pomona, California 91768
United States
requests registration of the trademark/service mark identified above in the United States Patent and Trademark Office on the Principal Register established by the Act of July 5, 1946 (15 U.S.C. Section 1051 et seq.), as amended, for the following:

For specific filing basis information for each item, you must view the display within the Input Table.
International Class 001: Plant growth regulators for agricultural use
Intent to Use: The applicant has a bona fide intention to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the identified goods and/or services. (15 U.S.C. Section 1051(b)).

The applicant's current Correspondence Information:
NCA Biotech, Inc.
NCA Biotech, Inc.
3406 Pomona Blvd
Pomona, California 91768
909-348-5133(phone)
909-348-5135(fax)
stanleyth@ncabiotech.com (authorized)

A fee payment in the amount of $275 has been submitted with the application, representing payment for 1 class(es).

Declaration

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements, and the like, may jeopardize the validity of the application or any resulting registration, declares that he/she is properly authorized to execute this application on behalf of the applicant; he/she believes the applicant to be the owner of the trademark/service mark sought to be registered, or, if the application is being filed under 15 U.S.C. Section 1051(b), he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true.

Signature: /Stanley T. Hsiao/ Date Signed: 10/21/2009
Signatory's Name: Stanley T. Hsiao
Signatory's Position: Corporate Secretary

RAM Sale Number: 672
RAM Accounting Date: 10/22/2009

Serial Number: 77853842
Internet Transmission Date: Wed Oct 21 14:28:23 EDT 2009
TEAS Stamp: USPTO/FTK-64.32.154.226-2009102114282308
2653-77853842-460184fa9a86c9fe19e9cd2dc8
f6190d-CC-672-20091021141542949191

ChampionGro