ESTTA Tracking number: **ESTTA430291**

Filing date: **09/14/2011**

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

Proceeding	91200105
Party	Plaintiff EMD Crop BioScience Inc.
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Date	09/14/2011
Attachments	EMD Motion to Strike and Motion for Judgment Filing.PDF (28 pages)(1096754 bytes)

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

EMD CROP BIOSCIENCE INC.	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91200105
	)	
CLEARY CHEMICALS, LLC,	)	
	)	
Applicant.	)	

MOTION TO STRIKE AND MOTION FOR JUDGMENT ON THE PLEADINGS

Opposer, EMD Crop Bioscience Inc. hereby moves the Board to strike the cancellation entitled "Request to Restrict Identification of Goods" because this counterclaim is not the proper procedure to restrict the identification of goods and for judgment on the pleadings with respect to the counterclaim entitled "Cancellation" since there are no material facts in dispute and Opposer is entitled to judgment as a matter of law.

Opposer submits its Memorandum of Law in Support of Motion to Strike and Motion for Judgment on the Pleadings under F.R.C.P. 12(c), which details the facts and law that support the basis for these motions.

September 14, 2011

Respectfully submitted,

EMD Crop Bioscience Inc.
By its Attorneys
Alston & Bird LLP

By Edward M Prince
Edward M. Prince

950 F Street, NW
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Washington, DC 20004
(202) 239-3358
(202) 239-3333 (fax)

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

EMD CROP BIOSCIENCE INC.	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91200105
	)	
CLEARY CHEMICALS, LLC,	)	
	)	
Applicant.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO STRIKE AND MOTION FOR JUDGMENT ON THE PLEADINGS UNDER F.R.C.P. 12(c)

Introduction

Rule 12(c) of the Federal Rules of Civil Procedure recognizes that some claims are so devoid of any legitimate factual or legal basis that the claims should be disposed of without forcing the other party (in this case the Opposer) and the Board to incur substantial time and expense in litigating the matter. The counterclaims in this case fall into that category.

Factual Background

EMD Crop BioScience Inc. (hereinafter "EMD" or "Opposer") has filed an opposition against Cleary Chemicals, LLC (hereinafter "Cleary" or "Applicant") which seeks to register the mark TORQUE for "fungicides for agricultural use; fungicides for domestic use", Ser" No. 77/942,162. Cleary contends that there is no likelihood of confusion. This issue will eventually be decided by the Board.

In its response to the opposition, Cleary filed two counterclaims styled as "Request to Restrict Identification of Goods" and "Cancellation." EMD's motion to

strike is directed to the counterclaim entitled "Request to Restrict Identification of Goods." EMD's motion for judgment on the pleadings is directed to the counterclaim styled as "Cancellation."

I. Motion to Strike Request to Restrict Identification of Goods

A counterclaim is a pleading stating a claim which at the time of serving the pleading the pleader has against the opposing party. Rule 12 F.R.C.P. Cleary seeks to amend the identification of its goods. While Opposer has objected to the revised identification of goods, in part because it is immaterial, the Applicant is clearly entitled to seek such restriction, but only under the proper procedure.

A counterclaim to restrict the identification of goods is not the appropriate procedure. Section 514 of the TBMP provides in part, "An application subject to an opposition may not be amended in substance . . . except with the consent of the other party or parties and the approval of the Trademark Trial and Appeal Board, or upon motion granted by the Board." Opposer also understands that an acceptable amendment to the identification of goods may be permitted despite Opposer's objection if the amendment limits the identification of goods and if the Applicant consents to entry of judgment on the question of likelihood of confusion as to the broader identification. There is no indication in the papers filed by Applicant as to whether it consents to entry of judgment on the question of likelihood of confusion as to the broader identification of goods.

In summary, it is quite clear that this "counterclaim" should be stricken with leave for Applicant to file a motion under 37 CFR § 2.133(a) to amend the

identification of goods. It should be noted in this instance that the identification of goods covers two items, and the proposed restriction is directed to only one of the two items recited in the definition of goods.

Cancellation Counterclaim

The counterclaim for cancellation, paragraph 5, states, "On information and belief, EMD's mark was fraudulently obtained." This pleading is insufficient in light of In re Bose Corp., 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009). First, petitioner's fraud claim is based "upon information and belief," but under Fed. R. Civ. P. 9(b), as well as Fed. R. Civ. P. 11 and USPTO Rule 11.18, "the pleadings [must] contain explicit rather than implied expression of the circumstances constituting fraud." King Automotive, Inc. v. Speedy Muffler King, Inc., 212 USPQ 801, 803 (CCPA 1981). In fact, "pleadings of fraud made 'on information and belief,' when there is no allegation of 'specific facts upon which the belief is reasonably based' are insufficient." Asian and Western Classics B.V. v. Selkow, 92 USPQ2d 1478, 1479 (TTAB 2009) (quoting Exergen Corp. v. Wal-Mart Stores, Inc., 575 F.3d 1312, 91 USPQ2d 1656, 1670 (Fed. Cir. 2009)). Second, under Asian and Western Classics, "[p]leadings of fraud which rest solely on allegations that the trademark applicant or registrant made material representations of fact in connection with its application or registration which it 'knew or should have known' to be false or misleading are an insufficient pleading of fraud because it implies mere negligence and negligence is not sufficient to infer fraud or dishonesty." Asian and Western Classics, 92 USPQ2d at 1479 (quoting In re Bose, 91 USPQ2d at 1940 and Symbol Techs., Inc. v.

Opticon, Inc., 935 F.2d 1569, 1582, 19 USPQ2d 1241 (Fed. Cir. 1991). Finally, and perhaps most importantly, under In re Bose, "intent is a specific element of a fraud claim." Asian and Western Classics, 92 USPQ2d at 1479.

As noted above, Applicant's pleadings must contain "explicit rather than implied expression of the circumstances constituting fraud." Representation of facts alleged to be false and misleading must be material.

As stated in Hiraga v Arena, 90 USPQ 2d 1102, 1107 (TTAB 2009),

> Fraud in procuring a trademark registration occurs when an applicant knowingly makes false, material representations of fact in connection with the trademark application . . . . "Materiality" of any false application statement is determined in the context of whether the false statement is critical to the Trademark Examining Attorney's decision to approve a mark for publication.

Applicant implies that fraud was committed because the original Section 1(a) application was filed without a specimen, without a date of first use anywhere (overlooking the date of first use in commerce) and the application was not signed or verified. The Applicant further points out that in response to an office action, "Opposer submitted a specimen dated 2008, and fraudulently stated that the specimen had been in use at least as early as the filing date of the application which was October 19, 2007." No effort was made to explain why this was fraudulent in the context of the declaration and why this amounted to a material representation rather than mere negligence or lack of clarity. What the declaration stated was: "the enclosed specimens are in use in commerce and have been in use in commerce on or connection with the goods listed in the application since at least as early as the application filing date." The specimen

was revised in 2008 because the size of the container was changed. Broughton Declaration. The 2007 specimen was no longer in use in 2008. For the convenience of the Board (and Applicant) a 2007 specimen (Broughton, Exhibit 1) is enclosed. A reference in the declaration to the specimen being in use in commerce could only apply to the 2008 specimen. However, if the 2007 specimen had been submitted instead, then the statement that the specimen was in use in commerce on May 21, 2008, would have been in error. Comparing the two labels, you will note that the display of the mark is identical, the product number is identical, the directions for use are identical, the compatibility is identical, the active ingredient is identical (one label refers to inactive ingredients and the other to "other ingredients", but the ingredients are identical). The directions for application are identical, although the 2008 specimen includes a final direction reading "once mixed use within 24 hours." The limited warranty is identical, and the ISO number and identification of the manufacturer are identical. The only difference is that the 2008 specimen refers to a product container double in size from that covered by the 2007 specimen. The statement as to the particular specimen being in use at the time the application was filed is obviously not material in view of the fact that a substantially identical specimen was in use at that time. If the 2008 date on the specimen was critical to the examining attorney's decision to approve the mark for publication, an inquiry could have been easily made and the situation clarified.

In further support of the fact that Opposer's mark was used in 2007, please note Exhibits 2-5 to the Broughton Declaration showing 2007 copyrighted

materials of EMD Crop BioScience. Furthermore, Exhibit 6 provides units and sales details for January-July, 2007. It is clear from the Broughton Declaration and exhibits attached thereto that opposer's mark TORQUE was in use in 2007 and has been in use since that date.

When evaluating motions under Rule 12(c), only the well-pleaded facts of the notice of opposition must be accepted as true. *See* United Life Ins. Co. v. Martinez, 480 F.3d 1043, 1057 (11th Cir. 2007). Moreover, the Board "need not accept as true conclusory allegations or legal characterizations," and instead need only accept, "those 'facts' that alert the defendant to 'circumstances which give rise to the claim.'" See Redding v. Tuggle, No. 1:05-cv-2899-WSD, 2006 WL 2166726 at *5 (N.D. Ga. July 31, 2006).

If the Board, in its discretion, considers extrinsic evidence presented by the parties on a Rule 12(c) motion, the motion must be converted into a motion for summary judgment pursuant to Rule 56. Rule 12(c), F.R.C.P. Such a conversion is not required when the Board considers documents referred to in the complaint that are central to the plaintiff's claim or when the Board considers documents attached as exhibits to a pleading. See Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997).

Just as the purpose of summary judgment is to isolate and then terminate claims that are factually unsupported, see Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986), so too should be a motion for judgment on the pleadings. The Supreme Court has emphasized that summary judgment is to be viewed not as a disfavored technical shortcut but rather as an integral component of the Federal

Rules. *Id.* at 327. A motion under Rule 12(c) is likewise an integral part of the Federal Rules. Applicant is clearly entitled to judgment as a matter of law since no material fact remains in dispute.

Even if the present motion is considered to be a motion for summary judgment, it is appropriate because there are no genuine issues of material facts in dispute, thereby permitting the case to be resolved as a matter of law. F.R.C.P. 56(c). An issue is material when its resolution would affect the outcome of the proceeding under governing law. Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 248 (1986). The moving party has the burden of demonstrating the absence of any genuine issues of material facts in dispute. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The nonmoving party must not rest on conclusory pleadings and assertions of counsel; instead, it must "proffer countering evidence" showing that there is a genuine factual dispute for trial. TBMP § 528.01; Sweats Fashions, Inc. v. Pannill Knitting Co., Inc., 833 F.2d 1560, 1562 (Fed. Cir. 1987). A dispute over a fact that would not alter the Board's decision on the legal issue will not prevent entry of summary judgment. See, e.g., Kellogg Co. v. Pack'Em Enters., Inc., 951 F.3d 330 (Fed. Cir. 1991).

(A) There is No Specific Allegation of Damage.

Applicant simply states that it "believes that it has been and will be damaged by Reg. No. 3,511,124 for the mark TORQUE for 'natural molecule or bacteria for plant growth enhancement and agricultural crop' owned in the name of EMD Bioscience, Inc. . . and hereby petitions to cancel the same." There is no specific allegation of damage. Presumably, Applicant contends that there is

likelihood of confusion between Opposer's registered mark and Applicant's mark for its goods.

Paragraph 3 of the cancellation states that Cleary has used the mark TORQUE in connection with its sales of ornamental fungicide "since at least February 23, 2010." Applicant acknowledges Opposer's 2008 specimen, which was obviously in use before the registration sought to be canceled issued on October 7, 2008. At a minimum, therefore, Opposer's mark TORQUE for its goods was in use at least 16 months prior to Applicant's date of first use. On the face of Applicant's cancellation pleadings, Opposer has priority of use. Since Applicant admits that it has been and will be damaged by the mark TORQUE for natural molecule or bacteria for plant growth enhancement in agricultural crop, and since Opposer has priority, it is clear (a) that Applicant is unable to show that it is damaged; and (b) Opposer will prevail in the opposition itself.

Summary

If Applicant wants to amend the identification of its goods, there is a simple procedure provided in the rules for such course of action. Applicant has not followed that procedure. The attempt to cancel Opposer registration is without merit based on the grounds alleged and the lack of damage.

Cleary is obviously in no position to allege that it is damaged. Rather, it is EMD who is damaged by the later use of the identical mark by Cleary and by the submission of counterclaims that are devoid of any legitimate factual or legal basis. Thus, these counterclaims should be disposed of without further expense and time in litigating the same.

A judgment striking the counterclaim seeking to restrict the identification of goods with leave to seek restriction properly and a judgment dismissing the cancellation counterclaim are clearly warranted.

Respectfully submitted,

EMD Crop BioScience Inc.
By its Attorneys
ALSTON & BIRD LLP

By:
Edward M. Prince

The Atlantic Building
950 F Street, NW
Washington, DC 20004
(202) 239-3358 (Direct)
(202) 239-3333 (Fax)

Date: September 14, 2011

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

EMD CROP BIOSCIENCE INC.	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91200105
	)	
CLEARY CHEMICALS, LLC,	)	
	)	
Applicant.	)	

Declaration of Charles Broughton

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. §1001, and that such willful false statements may jeopardize the validity of the registration, declares that he is currently Director, Global Business Development of Novozymes BioAg Inc., formerly EMD Crop Bioscience Inc.; that he was employed by EMD Crop Bioscience Inc. in 2007 as Director, Marketing; that the mark TORQUE was first adopted and used by EMD Crop Bioscience Inc. in 2007; that Exhibit 1 is a copy of the specimen label used in 2007 found in our company archives; that Exhibit 1 bears a 2007 copyright notice; that this label was discontinued and replaced by a new label in 2008 due to a change in the net weight and net contents; that the 2008 label was the only label in use at the time the specimen was submitted to the Trademark Office; that this 2008 specimen differed in no material respects from the 2007 label and showed how the mark was used in 2007; that attached as Exhibit 2 is a TORQUE publicity piece

bearing a 2007 copyright notice; that attached as Exhibit 3 is a photograph of a poster showing the mark TORQUE and bearing a 2007 copyright date as shown on the photocopy of the bottom, left-hand corner of the poster (Exhibit 4); that attached as Exhibit 5 is a photocopy of that portion of the poster referring to the TORQUE product; that attached as Exhibit 6 is a print-out from our records showing the units and dollar sales of TORQUE sold between January and July of 2007; that all statements made of his own knowledge are true and all statements made on information and belief are believed to be true.

Charles Broughton

Dated: September 14, 2011

EXHIBIT 1

TORQUE™ IF

Product No. 8300

- **NET WEIGHT: 20.8 lb** 41.7
- **NET CONTENTS: 2.5 gal** 2X

- **SHAKE WELL BEFORE USE.**
- **USE BEFORE EXPIRATION DATE.**
- **USE WITHIN FIVE DAYS OF OPENING PACKAGE.**
- **STORE IN COOL, DRY PLACE OUT OF SUNLIGHT.**

COMPATIBILITY

- **MIX AND APPLY WITH ONLY SEED FURROW COMPATIBLE PRODUCTS.**
- **PERFORM JAR TEST PRIOR TO TANK MIXING PRODUCTS TO ENSURE COMPATIBILITY.**
- **FOR PRODUCT COMPATIBILITY QUESTIONS, CONTACT EMD CROP BIOSCIENCE R & D AT 1.800.558.1003.**

APPLICATION RATE / UNIT TREATS

inches/row	application rate	acres treated
15	1.5 pt/A	13
20-22	1.25 pt/A	16
30	1.0 pt/A	20

ACTIVE INGREDIENT

Product contains a minimum of 1×10^{-7}% lipo-chitooligosaccharide for corn.

INACTIVE INGREDIENTS

Aqueous carrier > 99%

EMD

EMD Crop BioScience

Manufactured by
EMD Crop BioScience
3101 W. Custer Ave.
Milwaukee, WI
53209

ISO 9001

©2007 EMD Crop BioScience.

DIRECTIONS FOR APPLICATION

- **Product must be applied into the seed furrow and with only seed furrow safe products.**
- Clean tank before use.
- Shake product well.
- Add other ingredients into tank in recommended order of addition before adding *Torque IF.*
- For rapid dispensing, hold the *Torque IF* package over the spray tank and cut the corner of the bag.
- *Torque IF* does not require agitation to remain in suspension.
- If planting is delayed, keep diluted tank mix out of direct sunlight. Do not allow the diluted tank mix to exceed 100 F.

LIMITED WARRANTY

EMD Crop BioScience Inc. (or EMD Crop BioScience Canada Inc., dependent on which entity is the seller of this product) (the seller of this product is referred to herein as "EMD") guarantees this product conforms to its label description and is suitable for its intended use if stored and used strictly in accordance with label directions under normal conditions of use. EMD, through its distributors, must be notified of any field performance complaint within seventy (70) days after planting. EMD's sole obligation under this warranty shall be to refund the purchase price. EMD SHALL NOT BE LIABLE FOR AND DISCLAIMS ALL CONSEQUENTIAL, INCIDENTAL AND CONTINGENT DAMAGES WHATSOEVER. Without limiting the foregoing, EMD shall not be responsible for loss or partial loss of crop from any cause whatsoever. EMD SHALL NOT BE SUBJECT TO ANY OTHER OBLIGATIONS OR LIABILITIES, WHETHER ARISING OUT OF BREACH OF CONTRACT, WARRANTY, TORT (INCLUDING NEGLIGENCE AND STRICT LIABILITY) OR OTHER THEORIES OF LAW. THIS WARRANTY IS EXCLUSIVE AND IN LIEU OF ALL OTHER REPRESENTATIONS AND WARRANTIES, EXPRESS OR IMPLIED, AND SELLER EXPRESSLY DISCLAIMS AND EXCLUDES ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR PURPOSE.
THE ABOVE LIMITED WARRANTY IS VOID WHERE PROHIBITED BY LAW.

U.S. Patent
5,549,718 5,646,018 5,175,149 5,321,011

0207

EXHIBIT 2

TORQUE™ IF

Introducing LCO Promoter Technology® for Corn.

Turn on healthier corn from the ground up.

Torque IF is an in-furrow treatment that contains LCO Promoter Technology for corn. Providing benefits right from the moment of planting, it is a crop enhancing technology focused on improving plant health and yield. Thanks to LCO Promoter Technology, Torque IF turns on seed so it can reach its genetic potential, leading to improved plant health for stronger, healthier, higher-yielding plants from the roots up.

The plant health benefits provided by Torque IF:

* Improved emergence gets plants up and out of the ground more quickly
* Enhanced root and shoot development to give plants better nutrient and water uptake
* More uniform stands lead to higher yield
* Improved plant health enables plants to better handle environmental pressures
* Increased yields lead to an improved ROI

What is LCO Promoter Technology?

LCO (Lipo-chitooligosaccharide) Promoter Technology is a unique molecule that enhances growth in both root and shoot – providing a boost early in the growth cycle regardless of hybrid, soil, and weather conditions. The LCO molecule attaches to receptor sites present on the plant. On roots, this results in increases in plant root architecture. The natural growth process is advanced, providing a stronger, healthier start for plants, translating into higher yields and better returns at the end of the season.

Product Details:

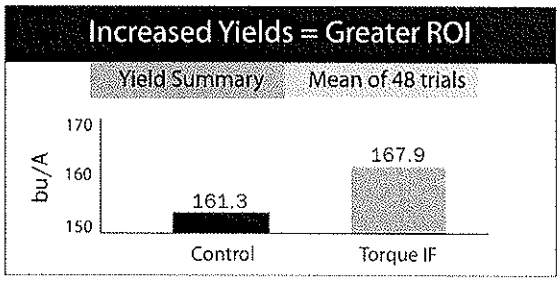
Packaging: 2 units X 2.5 gallons Application Timing: In-furrow

Unit Treats: 20 acres Use Rate: 16 fl oz/acre

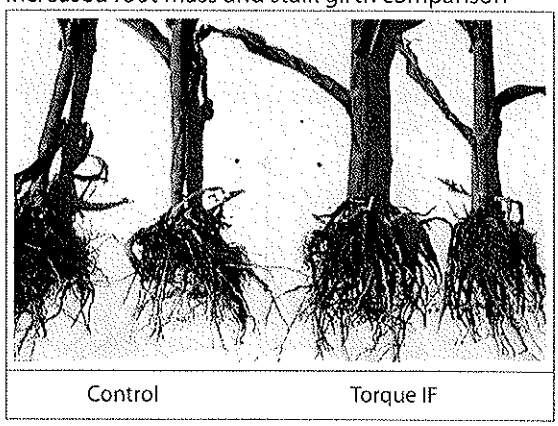
Compatibility: Compatible with most liquid starter fertilizers and insecticides*

*Once mixed, use within 24 hours.

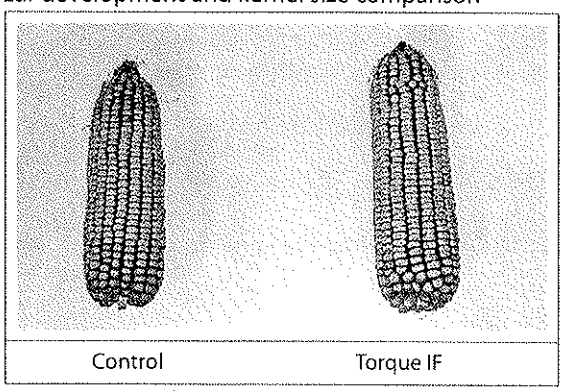
Application Rate / Unit Treats		
Inches per row	Application rate	Acres treated
15	1.5 pt/A	13
20-22	1.25 pt/A	16
30	1.0 pt/A	20



Increased root mass and stalk girth comparison



Ear development and kernel size comparison



In an independent field trial, the Torque IF ear has 16 rows with 38 kernels per row. While the control ear has 18 rows with 30 kernels per row. Torque IF yielded 68 more kernels per ear leading to a 9.6 bu/a advantage.

For more information, call 1-800-558-1003, visit www.emdcropbioscience.com or contact your local EMD Crop BioScience representative.

©2007 EMD Crop BioScience. Torque is a trademark and LCO Promoter Technology is a registered trademark of EMD Crop BioScience and/or its affiliates. EMDC-002 0308

EXHIBIT 3

Mother Nature is waving the white flag
Optimize Pulse
Optimize
ReVeal
TORQUE
END

EXHIBIT 4

PEAS • LENTILS

Available as a retail-applied liquid seed treatment or as an in-furrow granular treatment for peas and lentils.

- Improved vigor and stand from enhanced emergence
- Improved root system for better nutrient and water uptake
- Enhanced nodule development for increased nitrogen fixation
- Consistent/improved protein content as yield increases

SOYBEANS

A dealer-applied seed treatment that help soybeans achieve early-season plant health and season-long benefits.

- Enhanced emergence gives plants an early-season boost
- Earlier and improved root and shoot development
- Earlier canopy closure reduces weed pressure and competition
- 120 days on-seed viability, alone or with compatible seed treatments

C

This foli
soybean
benefits
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- Improve
plant gr
- Increase
for lodg
- Earlier c
moistur
- Advance
to impro

For more information about *LCO Promoter Technology* and hov

Or, you can call 1-800-558-1003, visit our website at www.emdcropbioscience.co

EMD Crop BioScience

©2007 EMD Crop BioScience. Reveal and Torque are trademarks and Optimize and LCO Promoter Technology are registered trademarks of EMD Crop BioScience and/or it
1207-5962-3N

EXHIBIT 5

al™
LIAR

TORQUE™ IF

EANS

rn and
application
ealthy boost

o enhance

es potential

serves soil
d pressure

elopment leads
ity

CORN

An in-furrow treatment for corn that is compatible with liquid starter fertilizers and insecticides.

- Enhanced emergence rate gets plants up and out of the ground more quickly
- Improved root and shoot development for improved nutrient uptake
- Increased stalk girth reduces potential for lodging

k for you, talk with your retailer.
ct your local EMD Crop BioScience representative.

EXHIBIT 6

EMD

SALES BY ITEM
January - July

EMD Crop BioScience Inc.

		2007 UNITS	2007 SALES	2006 UNITS	2006 SALES
8300	TORQUE	1,812	$67,943.75	0	$0.00

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	)	
CLEARY CHEMICALS, LLC,	)	
	)	
Applicant.	)	

ANSWER TO COUNTERCLAIMS

If either the motion to strike or the motion for judgment on the pleadings under F.R.C.P. 12(c) is denied, Opposer, EMD Crop Bioscience Inc., answers the counterclaims as follows:

Request to Restrict Identification of Goods

1. Opposer admits the averments of paragraph 1.

2. Opposer admits the averments of paragraph 2.

3. Opposer admits the averments of paragraph 3.

4. Opposer denies that the agricultural chemicals market is highly segmented such that Cleary's goods and EMD's goods are not sold nor are they likely to be sold through the same channels of trade or by the same distributors or to the same end customers. Opposer is without knowledge or information sufficient to form a belief as to the truth of all other averments of paragraph 4 and therefore denies the same.

5. Opposer denies the averments of paragraph 5.

Cancellation

1. Opposer denies the averments of paragraph 1.

2. Opposer is without knowledge or information sufficient to form a belief as to the truth of paragraph 2 and therefore denies the same.

3. Opposer is without knowledge or information sufficient to form a belief as to the truth of paragraph 3 and therefore denies the same.

4. Opposer admits the averments of paragraph 4.

5. Opposer admits that the original application was filed under Section 1(a) of the Trademark Act, that no specimen was initially provided and that no date of first use anywhere was initially provided. Applicant further admits that the application was not initially signed and verified. Opposer admits that the specimen was submitted with a 2008 copyright date. Opposer denies all other averments of paragraph 5.

WHEREFOR, Opposer demands that a judgment be entered dismissing the counterclaims and holding that Applicant is not entitled to the registration for which it has made application.

Respectfully submitted,

EMD Crop Bioscience Inc.
By its Attorneys

By: Edward M Prince

Edward M. Prince, Esq.
Alston & Bird LLP
The Atlantic Building
950 F Street, NW
Washington, DC 20004
(202) 239-3358

Date: September 14, 2011

Certificate of Service

I hereby certify that on September 14, 2011 a true and correct copy of the foregoing Motion to Strike and Motion for Judgment on the Pleadings Under F.R.C.P. 12(c), Memorandum of Law in Support of Motion to Strike and Motion for Judgment on the Pleadings Under F.R.C.P. 12(c), Declaration of Charles Broughton with Exhibits and Answer to Counterclaims were mailed by first-class mail, postage prepaid, with a courtesy email to counsel for Applicant, Cleary Chemicals, Inc., to:

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By: Edward M Prince
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