

ESTTA Tracking number: **ESTTA452078**

Filing date: **01/19/2012**

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

|                        |   |
|------------------------|---|
| Proceeding             | 91200105  |
| Party                  | Defendant<br>Cleary Chemicals, LLC  |
| Correspondence Address | TAMA L DRENSKI<br>RENNER KENNER GREIVE BOBAK TAYLOR ET AL<br>FIRST NATIONAL TOWER , FL 4<br>AKRON, OH 44308-1456<br>UNITED STATES<br>pto@rennerkenner.com, tldrenski@rennerkenner.com   |
| Submission             | Answer and Counterclaim   |
| Filer's Name           | Tama L. Drenski   |
| Filer's e-mail         | TLDrenski@rennerkenner.com  |
| Signature              | /Tama L. Drenski/   |
| Date                   | 01/19/2012  |
| Attachments            | AmendedAnswer.pdf ( 15 pages )(459475 bytes )<br>Exhibit A.pdf ( 4 pages )(3281762 bytes )<br>Exhibit B.pdf ( 7 pages )(10363982 bytes )<br>Exhibit C.pdf ( 5 pages )(4018725 bytes )<br>Exhibit D.pdf ( 7 pages )(4910684 bytes )<br>MotiontoRestrict.pdf ( 6 pages )(194474 bytes ) |

Registration Subject to the filing

|                 |  |                   |            |
|-----------------|--|-------------------|------------|
| Registration No | 3511124  | Registration date | 10/07/2008 |
| Registrant      | NOVOZYMES BIOAG, INC.<br>13100 WEST LISBON AVENUE<br>BROOKFIELD, WI 53005<br>UNITED STATES |                   |            |

Goods/Services Subject to the filing

Class 001. First Use: 2007/06/25 First Use In Commerce: 2007/06/25  
All goods and services in the class are requested, namely: Natural molecule or bacteria for plant growth enhancement in agriculture crops

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

|                           |   |                           |
|---------------------------|---|---------------------------|
|                           | ) | In re Matter of Trademark |
|                           | ) | Application No. 77/942162 |
| EMD CROP BIOSCIENCE INC., | ) | Filed: Feb. 23, 2011      |
| Opposer,                  | ) |                           |
|                           | ) | Opposition No. 91200105   |
| v.                        | ) |                           |
|                           | ) |                           |
| CLEARY CHEMICALS, LLC,    | ) |                           |
| Applicant.                | ) |                           |
|                           | ) |                           |

**AMENDED ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM**

Applicant, CLEARY CHEMICALS, LLC, hereby answers, asserts its affirmative defenses and counterclaims with respect to the Notice of Opposition No. 91200105 as follows:

**I. ANSWER**

Applicant, CLEARY CHEMICALS, LLC (“Cleary”), hereby answers Notice of Opposition No. 91200105 as follows:

**Paragraph 1:**

EMD Crop BioScience Inc. and its predecessors (hereinafter collectively referred to as “Opposer”) are manufacturers of chemical and biochemical preparations for use in the agriculture and horticulture fields, including natural and artificial manure for the earth, fertilizers, plant growth inoculants and bacteria plant growth promoters and enhancers to improve plant health and enhance growth of agriculture and horticulture crops.

**Response:**

Cleary lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 1.

**Paragraph 2:**

Since long prior to the filing date of the intent-to-use application opposed herein, opposer has used the mark TORQUE for one of its plant growth enhancement products – namely, natural molecule or bacteria for plant growth enhancement in agriculture crops (hereinafter “opposer’s goods”) and is the owner of United States Registration No. 3,511,124 for the mark TORQUE for natural molecule or bacteria for plant growth enhancement in agriculture crops, a copy of which is attached.

**Response:**

Cleary lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 2.

**Paragraph 3:**

On information and belief, Cleary Chemicals, LLC (hereinafter “Applicant”) is a manufacturer of chemical preparations for use in agricultural and horticultural fields including fungicides.

**Response:**

Cleary admits only that it markets the following products for the turf and ornamental industries: fungicides, limestone, animal repellants, insecticides, colorants, tank cleaners, defoamers, soil decontaminators, and anti-transpirants. Otherwise denies.

**Paragraph 4:**

On information and belief, applicant has adopted the mark TORQUE for fungicides and has filed an intent-to-use application on the mark TORQUE for fungicides for agricultural use and fungicides for domestic use.

**Response:**

Cleary admits only that it has adopted the mark TORQUE for Turf and Ornamental Fungicide, and has filed an intent-to-use trademark application, U.S. Serial No. 77/942162, on the mark TORQUE for Turf and Ornamental Fungicide. Otherwise denies.

**Paragraph 5:**

On information and belief, applicant made no use of the mark TORQUE prior to the filing date of its application, namely, February 23, 2010.

**Response:**

Denies.

**Paragraph 6:**

On information and belief, applicant has made no use of the mark TORQUE prior to (a) the filing date of opposer's application, namely, October 19, 2007 and (b) the issue date of opposer's Registration No. 3,511,124 - namely, October 7, 2008.

**Response:**

As presently advised, Cleary lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 6.

**Paragraph 7:**

On information and belief, applicant is now using the mark TORQUE for fungicides for agricultural use.

**Response:**

Admits only that Cleary is using the mark “TORQUE” and affirmatively states that it is using the mark “TORQUE” for Turf and Ornamental Fungicide. Otherwise denies.

**Paragraph 8:**

On information and belief, applicant is now using the mark TORQUE for fungicides for domestic use.

**Response:**

Admits only that Cleary is using the mark “TORQUE” and affirmatively states that it is using the mark “TORQUE” for Turf and Ornamental Fungicide. Otherwise denies.

**Paragraph 9:**

On information and belief, applicant’s fungicides are compatible with, and can be used in conjunction with, plant growth enhancement products.

**Response:**

Clearly lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 9.

**Paragraph 10:**

On information and belief, applicant’s fungicides are compatible with opposer’s natural molecule or bacteria for plant growth enhancement in the agriculture crops.

**Response:**

Cleary lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 10.

**Paragraph 11:**

On information and belief, applicant's fungicides are sold through distributors who also handle plant growth enhancement products.

**Response:**

Cleary lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 11.

**Paragraph 12:**

Opposer's chemical and biochemical products, including opposer's goods sold under the mark TORQUE, are distributed through Ag distributors also handling applicant's fungicide products.

**Response:**

Cleary lacks knowledge or information sufficient to form a belief about the truth of the allegations of Paragraph 12.

**Paragraph 13:**

On information and belief, applicant's goods and opposer's goods are sold or are likely to be sold through the same channels of trade and by the same distributors and/or to the same end customers.

**Response:**

Denies.

**Paragraph 14:**

On information and belief, Crop Production Services, Loveland Product Division, is a customer of applicant's TORQUE fungicides.

**Response:**

Admits only that Cleary is a supplier for Agrium Advanced Technologies, and that Agrium Advanced Technologies supplies Crop Production Services' Turf & Ornamental business east of the Rockies. Otherwise denies.

**Paragraph 15:**

On information and belief, Wilber Ellis is a customer of applicant's TORQUE fungicides.

**Response:**

Admits only that Wilbur Ellis is a customer or a supplier of Cleary in the Turf + Ornamental Market Segment. Cleary denies that its TORQUE product is supplied to or marketed by Wilbur Ellis.

**Paragraph 16:**

On information and belief, Cardinal Chemical is a customer of applicant's TORQUE fungicides.

**Response:**

Denies.

**Paragraph 17:**

On information and belief, Simplot is a customer of applicant's TORQUE fungicides.

**Response:**

Admits only that Cleary is a supplier for Simplot Partners Turf & Horticulture, which provides products to golf courses, landscapers, nurseries, municipalities and athletic field managers. Otherwise denies. Denies that Cleary Chemicals is a customer or supplier of Simplot Agra Business.

**Paragraph 18:**

On information and belief, Van Diest Supply Company is a customer of applicant's TORQUE fungicides.

**Response:**

Admits only that Cleary is a supplier for the Specialty Products Division of Van Diest Supply Company, which offers products for the turf, tree and ornamental market, the vegetation management market, the mosquito control market and the aquatics market. Denies that Cleary Chemicals is a supplier or customer of Van Diest Ag Distribution.

**Paragraph 19:**

On information and belief, Helena Chemical is a customer of applicant's TORQUE fungicides.

**Response:**

Admits only that Cleary Chemicals is a supplier for Helena Chemicals Specialty Division, which offers a variety of turf and ornamental professional products, forestry and vegetative management chemicals, fertilizers, turf seed and related products. Denies that Cleary Chemicals is a supplier and customer of Helena Products Group, which markets products that fall under the crop protection and crop production categories.

**Paragraph 20:**

Turf use restrictions and precautions on applicant's TORQUE fungicide label include warnings reading in part "Do not use on home lawns, Not for homeowner use, and Do not use clippings for animal feed."

**Response:**

Denies.

**Paragraph 21:**

Opposer is damaged or will be damaged by the sale or offering for sale of applicant's goods bearing the mark TORQUE since applicant's mark, as used in connection with applicant's goods, falsely suggests a connection with opposer's goods and/or falsely suggests that applicant is associated with, or sponsored by, opposer.

**Response:**

Denies.

**Paragraph 22:**

The mark TORQUE so resembles opposer's mark TORQUE, previously used in interstate commerce by opposer, and not abandoned, as to be likely, when applied to the goods of the applicant, to cause confusion, or to cause mistake or to deceive.

**Response:**

Denies.

**II. AFFIRMATIVE DEFENSES**

23. The agricultural chemicals market is highly segmented such that Applicant's goods and Opposer'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. By way of examples, Wilbur

Ellis is comprised of at least three divisions, with the Agribusiness Division further sub-divided based upon Market Segment, including Turf + Ornamental (See Exhibit A). Wilbur Ellis Products are not available online, or through retail outlets, but must be purchased through Wilbur-Ellis professionals; J.R. Simplot Company is made up of a number of divisions, and the Agricultural Division is completely separate from the Turf and Horticultural Division (See Exhibit B). The Simplot Partners®Turf & Horticulture Headquarters office is in Palm Desert, California. In contrast, the Simplot Agra Business Headquarters is in Boise, Idaho; the Van Diest Supply Company consists of three major divisions, Ag Distribution, Specialty Products and Formulation/Bulk Terminalling. The Specialty Products Division Headquarters is located in McCook, Nebraska, while the Ag Distribution Headquarters is in Webster City, Iowa (See Exhibit C); and the Helena Chemical Company has at least two distinct business units, the Helena Products Group and the Specialty Division. The Helena Products Group markets crop protection and crop production products from Memphis, Tennessee. The Specialty Division has other locations separate and apart from Memphis, Tennessee (Exhibit D).]

24. Applicant is at least entitled to a registration whereby its identification of goods is restricted to “fungicides for domestic use, and fungicides for agricultural use, namely outdoor terrestrial turf and ornamental agricultural fungicides;” the description of goods of Opposer’s registration is restricted to exclude fungicides for outdoor terrestrial turf and ornamental agricultural fungicides. Such restriction of the identification of Applicant’s goods will avoid a likelihood of confusion, and Opposer is not using the mark on the products being excluded from its registration.

25. Opposer's mark is weak, and is only entitled to a narrow scope of protection against closely related goods or services.

26. On information and belief, Opposer's mark was fraudulently obtained. The original application was filed under Section 1(a) of the Trademark Act. No specimen was provided. No date of first use anywhere was provided. The application was not signed and verified as required therefore, the initial application was not complete. 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. The described acts of EMD were done knowingly and with the intent to induce the Trademark Examiner to rely thereon and grant said registration. Reasonably relying upon the truth of said false statement, and as a consequence thereof, the U.S. Patent and Trademark Office did, in fact, grant said registration to EMD.

In view of the foregoing, Applicant contends that this opposition is groundless and baseless in fact; that Opposer has not shown where it will be or is likely to be damaged by the registration of Applicant's trademark. Therefore, Applicant requests that the Opposition be overruled, and that Applicant's mark that is the subject of Application Serial No.77/942,162 be placed on the Principal Register.

### **III. COUNTERCLAIMS**

Applicant CLEARY CHEMICAL COMPANY ("Cleary") asserts the following counterclaims:

## REQUEST TO RESTRICT IDENTIFICATION OF GOODS

1. Cleary has applied to register the mark TORQUE for “fungicides for agricultural use; fungicides for domestic use” (Application Serial No. 77/942,162).

2. EMD Crop BioScience Inc. (“EMD”) is the purported owner of Registration No. 3,511,124 for the mark TORQUE for “natural molecule or bacteria for plant growth enhancement in agriculture crops.”

3. EMD has filed the within opposition alleging that the parties respective goods travel through the same channels of trade and are sold by the same distributors to the same end customers.

4. The agricultural chemicals market is highly segmented, however, 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. By way of examples, Wilbur Ellis is comprised of at least three divisions, with the Agribusiness Division further subdivided based upon Market Segment, including Turf + Ornamental (See Exhibit A). Wilbur Ellis Products are not available online, or through retail outlets, but must be purchased through Wilbur-Ellis professionals; J.R. Simplot Company is made up of a number of divisions, and the Agricultural Division is completely separate from the Turf and Horticultural Division (See Exhibit B). The Simplot Partners®Turf & Horticulture Headquarters office is in Palm Desert, California. In contrast, the Simplot Agra Business Headquarters is in Boise, Idaho; the Van Diest Supply Company consists of three major divisions, Ag Distribution, Specialty Products and Formulation/Bulk Terminalling. The Specialty Products Division Headquarters is located in

McCook, Nebraska, while the Ag Distribution Headquarters is in Webster City, Iowa (See Exhibit C); and the Helena Chemical Company has at least two distinct business units, the Helena Products Group and the Specialty Division. The Helena Products Group markets crop protection and crop production products from Memphis, Tennessee. The Specialty Division has other locations separate and apart from Memphis, Tennessee (See Exhibit D).

5. Cleary is using the mark TORQUE for fungicides for outdoor terrestrial turf and ornamental agricultural fungicides.

6. EMD is not using the mark TORQUE for fungicides for outdoor terrestrial turf and ornamental agricultural fungicides; EMD is using the mark TORQUE for natural molecule or bacteria for plant growth enhancement in agriculture crops.

7. Because the agricultural chemicals market is highly segmented, the parties' 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.

8. As such, EMD's registration should be restricted to exclude fungicides for outdoor terrestrial turf and ornamental agricultural fungicides from the description of its goods. Such restriction of EMD's description of goods, and a restriction of Cleary's goods to fungicides for outdoor terrestrial turf and ornamental agricultural fungicides as requested above, will avoid a likelihood of confusion, and EMD is not using the mark TORQUE on the products sought to be excluded from its registration by the proposed restriction (i.e. EMD does not use TORQUE for fungicides for outdoor terrestrial turf and ornamental agricultural fungicides.)

As such, Cleary prays that its counterclaim for restriction of EMD's goods be sustained in

its favor, and Cleary's mark that is the subject of Application Serial No. 77/942,162 be placed on the Principal Register, with the description of its goods being restricted as requested above.

#### CANCELLATION

1. Cleary believes that it has been and will be damaged by Registration No. 3,511,124 for the mark TORQUE for "natural molecule or bacteria for plant growth enhancement in agriculture crops," owned in the name of EMD Crop BioScience Inc. ("EMD"), and pursuant to 15 U.S.C. §1064 et seq. and 37 C.F.R. §2.111 et seq., hereby petitions to cancel the same.

2. Cleary markets the following products for the turf and ornamental industries: fungicides, limestone, animal repellants, insecticides, colorants, tank cleaners, defoamers, soil decontaminators, and anti-transparent.

3. Since at least February 23, 2010, Cleary has used the mark TORQUE in connection with its sales of Turf and Ornamental Fungicide.

4. EMD has opposed Cleary's registration of the mark TORQUE, and has objected and is likely to continue to object to Cleary's continued use of the mark.

5. On information and belief, EMD's mark was fraudulently obtained. The original application was filed under Section 1(a) of the Trademark Act. No specimen was provided. No date of first use anywhere was provided. The application was not signed and verified as required therefore, the initial application was not complete. 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. The described acts of EMD were done knowingly and with the intent to induce the Trademark Examiner to rely

thereon and grant said registration. Reasonably relying upon the truth of said false statement, and as a consequence thereof, the U.S. Patent and Trademark Office did, in fact, grant said registration to EMD.

In view of the foregoing allegations, EMD is not entitled to continued registration of its mark since upon information and belief, EMD committed fraud in the procurement of the subject registration. As such, Cleary prays that Registration No. 3,511,124 for the mark TORQUE for natural molecule or bacteria for plant growth enhancement in agriculture crops issued October 7, 2008 be cancelled, and that its Counterclaim for Cancellation be sustained in favor of Cleary.

Respectfully Submitted,

Dated: January 19, 2012

/Tama L. Drenski/  
Tama L. Drenski (Reg. No. 50,323)  
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Akron, Ohio 44308-1456  
Telephone: (330) 376-1242  
FAX: (330) 376-9646  
Attorney for Registrant

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Amended Answer, Affirmative Defenses and Counterclaim has been sent by first class mail, postage prepaid, to:

Edward M. Prince, Esq.  
Alston & Bird LLP  
950 F Street NW, The Atlantic Building  
Washington, DC 20004

Attorney for Opposer, *EMD Crop Bioscience, Inc.*, on the 19<sup>th</sup> day of January 2012

/Tama L. Drenski/  
Tama L. Drenski

EXHIBIT A



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- Continually seeking new markets and growth opportunities
- Searching out innovative ways to increase efficiency and provide quality solutions

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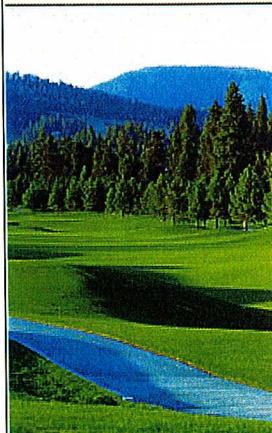
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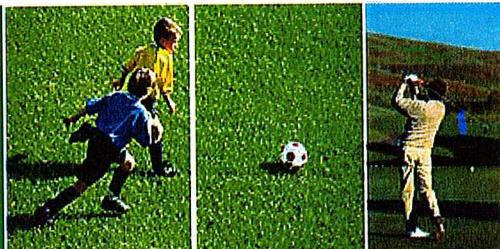
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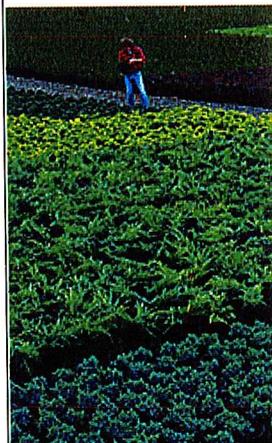


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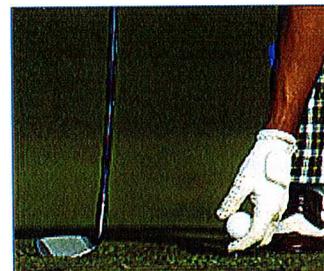
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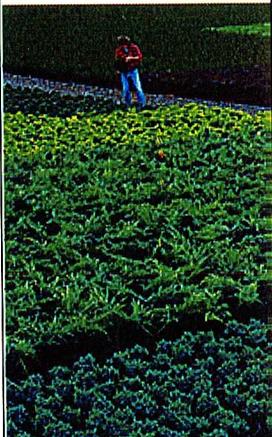
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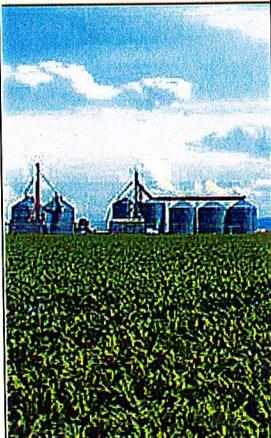

 Agriculture
   
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The Simplot Grower Solutions mission is simple: "Delivering Solutions to Growers". To us that means delivering exactly what you want, when you want it !

We realize that production agriculture is sometimes unpredictable, that's why we are structured for operational excellence. Our operational goal is to "Service the Sale." With nearly 80 retail locations, 160 Crop Advisors and a full line of crop inputs Simplot Grower Solutions is your one-stop resource for agricultural supplies and precision agronomy services.



When your demand for wholesale crop nutrients peaks, count on the J.R. Simplot Company to deliver. We offer extended in-season hours, customer-dedicated service teams, online order status, plus an extensive warehouse system across the Western U.S. that reduces your freight charges and speeds delivery. From quality products and customer service, every aspect of our business is designed to help support yours.



Consistent physical & chemical characteristics. High biological availability. The lowest heavy metal profile in the industry. The Simphos quality process begins with the phosphate rock mined at Vernal, Utah, the purest reserve of phosphate rock in North America. The phosphoric acid produced from this rock is then combined with a premium white limestone to create a superior product. What's more, as the only producer in the West, our location offers you faster delivery and lower freight costs.



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Products and expertise to help you increase profitability and save time.



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The Simplot Grower Solutions mission is simple: "Delivering Solutions to Growers". To us that means delivering exactly what you want, when you want it!

We realize that production agriculture is sometimes unpredictable, that's why we are structured for operational excellence. Our operational goal is to "Service the Sale." With over 80 retail locations, 200 Crop Advisors and a full line of crop inputs Simplot Grower Solutions is your one-stop resource for agricultural supplies and precision agronomy services.

We also have a free account management tool! Our customers can register to become members of our online statements program where they can run product purchase history reports and restricted-use pesticide reports. [REGISTER TODAY!](#)

#### Member Log-in

Simplot Growers Solutions Members, click [here](#) to log-in or [register](#) to become a member today.



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Talk to your store:

Click [here](#) to find the contact information of your nearest Simplot Grower Solutions location.

Business Questions:

[gs.business@simplot.com](mailto:gs.business@simplot.com)

Are you interested in doing business with us? Send us an email with your ideas.

Simplot AgriBusiness Headquarters

999 Main Street  
Boise, Idaho 83702  
1-800-635-9444

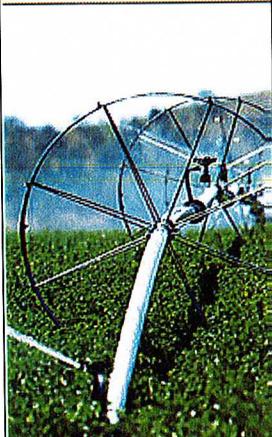


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Website Feedback:

[gs.content@simplot.com](mailto:gs.content@simplot.com) We designed the Grower Solutions website to meet your business needs. The site will grow and change based on your feedback. How can we help your business grow? Drop us a line to tell us what tools, services and information you'd like to see on this site in the future.



**VAN DIEST  
SUPPLY COMPANY**  
Distributor and Manufacturer of Agricultural Chemicals

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- Ag Distribution
- Specialty
- Formulation
- Locations

### Our Divisions

Van Diest Supply consists of three major divisions: [ag distribution](#), [specialty products division](#), and [formulation/bulk terminalling](#). Van Diest Supply Company is committed to quality in everything we do. Our quality policy states "Van Diest Supply Company is committed to providing products and services that consistently meet or exceed the expectations of our customers." This has been the driving force in our commitment to excellence and continuous improvement.

At Van Diest Supply Company **PEOPLE MAKE THE DIFFERENCE**. We believe people deal with people who have a sincere interest in their business and a desire to help them. We strive for long-lasting partnership relationships with our Customers, our Suppliers and our Team Members



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Van Diest Supply Company's Specialty Products Division offers the most complete line of specialty products in the industry. Our Specialty Products team members have 245 years combined pesticide experience. Van Diest Supply Company's Specialty Products Division markets in a 11 state geography in the Midwest, Plains and Rocky Mountain regions.

Our Specialty Products Division is nationally recognized for its product training and stewardship programs. Each spring Van Diest Supply Company hosts regional mosquito product training seminars and service clinics for mosquito spraying equipment. In the fall Van Diest Supply Company hosts regional training courses for the vegetation management, aquatics and the turf, tree and ornamental markets.

Van Diest Supply Company has published three nationally recognized product guides for the specialty markets we serve: Turf, Tree and Ornamental Guide, 8th Edition, Vegetation Management Guide, 13th Edition and our Mosquito Control Guide, 7th Edition. Each guide contains a complete section dedicated to Aquatic Vegetation Management.

**Turf, Tree, and Ornamental Market:**

Our full product line of Turf, Tree and Ornamental products meet the needs of golf courses, lawn care companies, tree care companies, greenhouses and nurseries, parks and recreation departments and sports turf facilities.

**Vegetation Management Market:**

Our brush control, bareground applicators and noxious weed customers are served with a full line of vegetation management products.

**Mosquito Control Market:**

Van Diest Supply Company carries a complete line of larvicides, adulticides and application equipment for the mosquito control market.

**Aquatics Market:**

Our full line of aquatics products control aquatic weeds and algae in lakes, ponds, irrigation and drainage ditches.

**Dann Watson**  
Vice President of Specialty Products



**Tony Bennett**  
Marketing Specialist, Specialty Products





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[Ag Distribution Headquarters Directory](#)

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**Facilities...Equipment...Commitment**

**Wholesale Chemical Distribution**

Van Diest Supply Company is a distributor for all of the major agricultural chemical companies. The chemicals are warehoused at Webster City, Iowa and our 15 outlying distribution centers then sold and delivered to approximately 3,500 dealers throughout a sixteen-state area located in the heart of the Midwest cornbelt.

Van Diest Supply Company marketing people are located throughout the Midwest. They generate sales and supply technical support to our customers. The products are delivered to dealers from Webster City, Iowa and from our 16 outlying distribution centers by company-employed drivers in company-owned trucks.

**Delivery Capacity**

We have a company-owned delivery fleet of 86 semi tractors, 49 straight trucks and 86 pickups. We have 66 van trailers for packaged goods and 38 bulk transports. Van Diest Supply Company can deliver over 3 million pounds of product per day with our own delivery fleet.



**Distribution Centers**

Our 16 distribution centers are fully staffed year around to serve our customers.





**VAN DIEST  
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Distributor and Manufacturer of Agricultural Chemicals



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Area Managers**

**Corporate HQ**

**Ag Distribution HQ**

**Specialty HQ**

**Formulation HQ**

**Specialty Headquarters**

|                  |  |
|------------------|--|
| Shipping Address | 71703 US Highway 83, McCook, NE 69001-7500 |
| Mailing Address  | PO Box 410, McCook, NE 69001-0410          |
| WATS Line        | 800-652-9306                               |
| Telephone        | 308-345-5057                               |
| FAX              | 308-345-3401                               |

**Vice President of Specialty Products**

|                    |  |
|--------------------|--|
| Dann Watson FAX    | 308-345-4956   |
| Dann Watson E-Mail | <a href="mailto:vandiest@mccooknet.com">vandiest@mccooknet.com</a> |

**Marketing Specialist Specialty Products**

|                     |  |
|---------------------|--|
| Tony Bennett FAX    | 308-345-3401   |
| Tony Bennett E-Mail | <a href="mailto:tbennett@mccooknet.com">tbennett@mccooknet.com</a> |

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 Area Managers**

**Corporate HQ**

**Ag Distribution HQ**

**Specialty HQ**

**Formulation HQ**

**Ag Distribution Headquarters**

|                  |  |
|------------------|--|
| Shipping Address | 1434 220th Street, Webster City, IA 50595-7628     |
| Mailing Address  | PO Box 610, Webster City, IA 50595-0610            |
| WATS Line        | 800-779-2424                                       |
| Telephone        | 515-832-2366                                       |
| FAX              | 515-832-2955                                       |
| E-Mail           | <a href="mailto:sales@vdsc.com">sales@vdsc.com</a> |

**Vice President of Marketing**

|                          |  |
|--------------------------|--|
| John Van Diest Telephone | 515-832-2366   |
| John Van Diest E-Mail    | <a href="mailto:john.vandiest@vdsc.com">john.vandiest@vdsc.com</a> |

**Inventory Manager**

|                      |  |
|----------------------|--|
| Tim Nilles Telephone | 515-832-8656   |
| Tim Nilles E-Mail    | <a href="mailto:tim.nilles@vdsc.com">tim.nilles@vdsc.com</a> |

**Marketing Specialists**

|                       |  |
|-----------------------|--|
| Dan Asklund Telephone | 515-832-2366 EXT. 3528   |
| Dan Asklund E-Mail    | <a href="mailto:dan_asklund@vdsc.com">dan_asklund@vdsc.com</a> |
| Craig Law Telephone   | 515-832-2366 EXT. 3525   |
| Craig Law E-Mail      | <a href="mailto:craig.law@vdsc.com">craig.law@vdsc.com</a>     |
| Geary Meyer Telephone | 515-832-8658   |
| Geary Meyer E-Mail    | <a href="mailto:geary.meyer@vdsc.com">geary.meyer@vdsc.com</a> |

**Director of Transportation**

|                             |  |
|-----------------------------|--|
| Harold Cornelison Telephone | 515-832-8654   |
| Harold Cornelison E-Mail    | <a href="mailto:harold.cornelison@vdsc.com">harold.cornelison@vdsc.com</a> |

**Sales Service Coordinator**

|                       |  |
|-----------------------|--|
| Rick Wilson Telephone | 515-832-8657   |
| Rick Wilson E-Mail    | <a href="mailto:rick.wilson@vdsc.com">rick.wilson@vdsc.com</a> |

**Service Coordinator**

|                           |  |
|---------------------------|--|
| Gene Hassebrock Telephone | 515-832-2366 EXT. 3214   |
| Gene Hassebrock E-Mail    | <a href="mailto:gene.hassebrock@vdsc.com">gene.hassebrock@vdsc.com</a> |

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## PRODUCTS

Helena offers a wide variety of products and services for agricultural and non-crop/specialty markets. The list changes by region as market conditions and needs vary. It includes a growing line of Helena-sourced products.



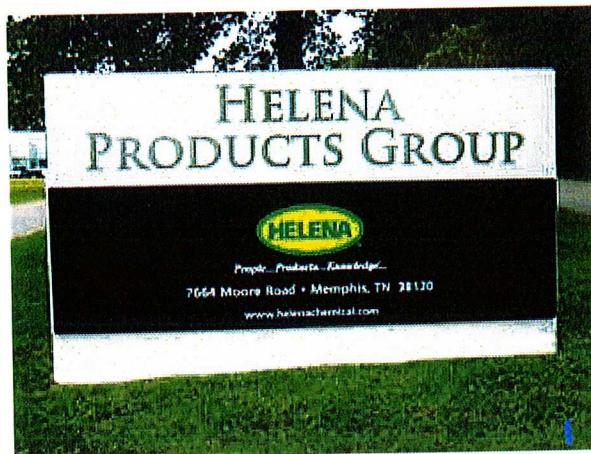
- New and existing chemistries.  
This category includes insecticides, herbicides, and fungicides and covers such services as custom seed treating and product delivery
- Fertilizer blends & services. Helena has an impressive network of strategically located bulk storage facilities that supply our branch locations with fertilizer for blending and application to customer fields. These products are mostly sourced via deep water ports.
- Plant-tissue testing and soil-testing services.
- Micronutrients and specialty foliar fertilizers.
- Field mapping services for variable-rate application of soil- and foliar-applied products.
- Financial services.
- Agronomic consultation and advice.

---

Helena also offers an extensive line of products under the umbrella of Helena Products Group

## HELENA PRODUCTS GROUP

This important group within Helena develops and markets key products that fall under two broad categories—Crop Protection and Crop Production. They operate from their own building on the grounds of Agricenter International in Memphis, TN.



## Crop Protection

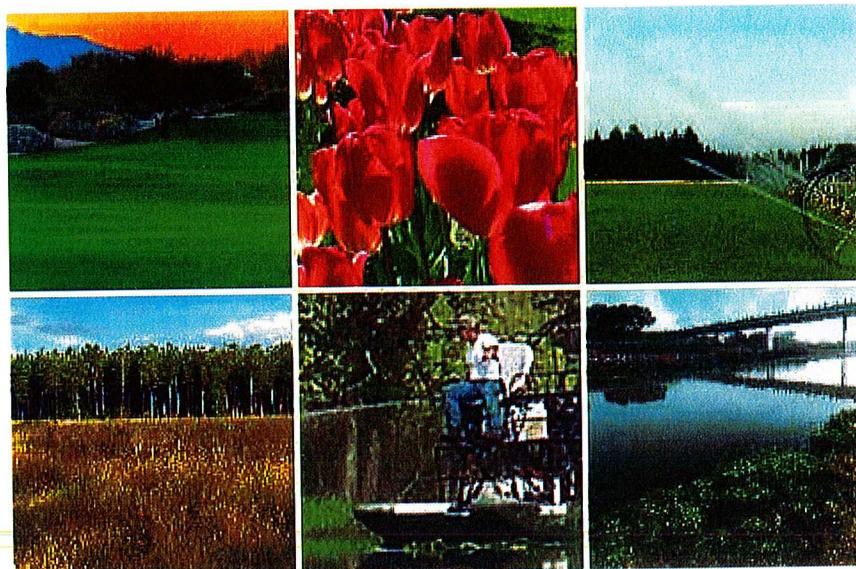
Crop Protection Groups — Adjuvants, Seed Treatments, and Value-Added Products — are associated with the application of products that are used to control insects, weeds, and plant diseases.

- **Adjuvants** are used to modify the physical characteristic(s) of a liquid spray application to improve its performance. That can include many different functions — from improving the coverage of an application to spray drift reduction to water conditioning and other functions. Adjuvants include such products as nonionic surfactants, crop oil concentrates, water conditioners, stickers, drift reduction agents, deposition agents and others.
- **Seed Treatments**, primarily fungicides and insecticides, are used to protect the seed from seedling plant diseases and insects. As the traits of transgenic seed varieties and hybrids becomes more valuable, it is critical to protect that investment with seed treatments. Some seed treatments also provide nutrition with minor elements. Helena has seed treatment products/nutritionals that are combined with basic suppliers' products and custom-treated at Helena locations. Customers are offered a variety of seed treatment options. Seed is then re-bagged or stored in bulk and delivered to customers.
- **Value-Added Products** are made from existing pesticide chemistries that have been re-formulated with value-added constituents to increase activity, safety, performance and ease of use. There are several Helena-patented products and formulation processes among the roster of Helena Value-Added Products. These products include herbicides, soil insecticides and many others under development.

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**SPECIALTY DIVISION**

Helena's Specialty Division offers a variety of Turf and Ornamental Professional Products, Forestry and Vegetative Management Chemicals, Fertilizers, Turf Seed and related products. Product Development efforts also include Soil Wetting Agents, Nutritionals, BioScience and Value Added Generic Products.



---

**SUPPLIERS**

Below is a list of some of our Suppliers:

|                             |                                |
|-----------------------------|--------------------------------|
| BASF Specialty Products     | Micro-Flo Company              |
| Bayer Environmental Science | Monsanto Company               |
| Becker Underwood            | Olympic Horticulture           |
| Cleary Chemical Corporation | PBI Gordon Corporation         |
| Dow AgroSciences            | Nufarm                         |
| DuPont                      | SePro Corporation              |
| FMC Corporation (T&O)       | Syngenta Professional Products |
| Gowan Company               | Chemtura                       |
| Valent USA                  |                                |

---

**SPECIALTY LOCATIONS****Aurora (CO)**

14704 East 33rd Place Unit J  
Aurora, CO 80011  
Phone: 720-374-1994  
Fax: 720-374-8696

**Chico (CA) Specialty**

3155 Southgate Lane  
Chico, CA 95928  
Phone: 530-342-4786  
Fax: 530-343-9047

**Delray (FL) T&O**

3020 High Ridge Road Suite 600 A  
Boynton Beach, FL 33426  
Phone: 561-585-2221  
Fax: 561-585-2223

**Four Oaks (NC) Specialty**

1097 US 701 South  
Four Oaks, NC 27524  
Phone: 919-934-7395  
Fax: 919-934-0578

**Houston (TX) Specialty**

41232B Park 290  
Waller, TX 77484  
Phone: 936-372-1505  
Fax: 936-372-1509

**Las Vegas (NV)-Spclty**

3650 West Dewey Drive  
Las Vegas, NV 89118  
Phone: 702-740-5320  
Fax: 702-740-5325

**Bermuda Dunes (CA)**

79 833 Country Club Drive  
Bermuda Dunes, CA 92201  
Phone: 760-200-0098  
Fax: 760-200-0844

**Columbus (OH)**

800 Distribution Drive  
Columbus, OH 43228  
Phone: 614-275-4200  
Fax: 614-275-4270

**Florida Lawn Care (FL)**

11500 Old Lakeland Road  
Dade City, FL 33525  
Phone: 352.567.5622  
Fax: 352.567.0204

**Greenville-Spclty (TX)**

6801 Highway 66 West  
Greenville, TX 75402  
Phone: 903-455-5540  
Fax: 903-455-5563

**Lakeland, FL (Golf Only)**

5101 Gateway Blvd. #18  
Lakeland, FL 33811  
Phone: 863-666-1513  
Fax: 863-667-3862

**Lenexa (KS) Spclty**

8215 Hedge Lane  
Shawnee, KS 66227  
Phone: 913-441-0676  
Fax: 913-441-0522

**Lenexa Fertilizer (KS)**

8215 Hedge Lane  
Shawnee, KS 66227  
Phone: 913-441-0676  
Fax: 913-441-0522

**Minnesota T&O (MN)**

2905 Lexington Ave South  
Eagan, MN 55121  
Phone: 651-994-7025  
Fax: 651-484-8257

**NE Specialty Whse (NJ)**

4 Killdeer Court, Suite 100  
Swedesboro, NJ 08085-1736  
Phone: 856-241-2070  
Fax: 856-241-2086

**New Mexico (NM) Spec**

8905 Adams NE  
Albuquerque, NM 87113  
Phone: 505-797-5800  
Fax: 505-797-5859

**Northwest Specialty Warehouse (WA) Pittsburgh Specialty (PA)**

900 N Nelson St Suite B  
Spokane, WA 99202  
Phone: 509-536-2634  
Fax: 509-536-3244

1498 Evans City Road  
Evans City, PA 16033  
Phone: 724-538-3304  
Fax: 724-538-3576

**Selma (AL) - Forestry**

3200 Old Montgomery Highway  
Selma, AL 36701  
Phone: 334-875-2737  
Fax: 334-875-3814

**Selma (AL) Industrial**

3200 Old Montgomery Hwy  
Selma, AL 36702  
Phone: 334-875-2737  
Fax: 334-875-3814

**Spartanburg (SC) T&O**

120 Settle Rd  
Inman, SC 29349  
Phone: 864-472-2017  
Fax: 864-472-5004

**St Louis (MO)**

12964B St Charles Rock Road  
Bridgeton, MO 63044  
Phone: 314-298-0686  
Fax: 314-298-0689

**Stafford (VA)**

2000 International Parkway Suite 105  
Fredericksburg, VA 22406  
Phone: 540-752-6855  
Fax: 540-752-6887

**Summerdale-Spclty (AL)**

113 North West First Street  
Summerdale, AL 36580  
Phone: 251-989-6241  
Fax: 251-989-6242

**Tabor City (NC) Spec**

12087 Joe Brown Highway South  
Tabor City, NC 28463

**Winder (GA) T&O**

3211 Shawnee Industrial Way Ste 100  
Suwanee, GA 30024

Phone: 910-653-8996

Phone: 770-945-0686

Fax: 910-653-8998

Fax: 770-945-6908

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

|                           |   |                           |
|---------------------------|---|---------------------------|
|                           | ) | In re Matter of Trademark |
|                           | ) | Application No. 77/942162 |
| EMD CROP BIOSCIENCE INC., | ) | Filed: Feb. 23, 2011      |
| Opposer,                  | ) |                           |
|                           | ) | Opposition No. 91200105   |
| v.                        | ) |                           |
|                           | ) |                           |
|                           | ) |                           |
| CLEARY CHEMICALS, LLC,    | ) |                           |
| Applicant.                | ) |                           |
|                           | ) |                           |

**MOTION TO RESTRICT IDENTIFICATION OF GOODS, AND  
MEMORANDUM IN SUPPORT**

Applicant, in its Answer, included an Affirmative Defense and Counterclaim to amend its own identification of goods by way of restriction. Opposer filed a Motion to Strike these portions of the pleading on procedural grounds. Addressing the Motion to Strike, the Board granted the Applicant thirty (30) days to file a motion stating that (1) the restriction it seeks will avoid a likelihood of confusion and (2) Opposer is not using the mark on the products being excluded.

In light of the foregoing, Applicant, CLEARY CHEMICALS, LLC (“Cleary” or “Applicant”), pursuant to Trademark Rule 2.133, hereby moves the Board to restrict the identification of Cleary’s goods in U.S. Serial No. 77/942162 to the following: “fungicides for domestic use, and fungicides for agricultural use, namely outdoor terrestrial turf and ornamental agricultural fungicides.” The grounds for this motion are that such restriction of Cleary’s goods will avoid a likelihood of confusion, and Opposer, EMD Crop BioScience Inc. (“EMD” or “Opposer”), is not using the mark on the goods being excluded.

Applicant files this motion with a two-fold purpose. First, Applicant believes that its identification of goods as restricted falls outside of the identification of goods in Opposer's registration. And, in addition to or in the alternative, Applicant is requesting, by Counterclaim in its Amended Answer, that the identification of goods in Opposer's registration be amended to exclude the goods identified in Applicant's application, either as originally filed or as amended per this motion, upon Applicant's showing of facts demonstrating that Opposer does not use its registered mark in association with the excluded goods and that such exclusion will avoid any likelihood of confusion.

**I. Relevant Facts.**

In its Notice of Opposition, EMD Crop BioScience Inc. ("EMD") admits that it is, like its predecessors in interest, a manufacturer of chemical and biochemical preparations for use in the agriculture and horticulture fields, including natural and artificial manure for the earth, fertilizers, plant growth inoculants and bacteria plant growth promoters and enhancers to improve plant health and enhance growth of agriculture and horticulture crops. (¶1) EMD also admits using the mark TORQUE for one of its plant growth enhancement products – namely, natural molecule or bacteria for plant growth enhancement in agriculture crops, and purports to be the owner of United States Registration No. 3,511,124 for the mark TORQUE for natural molecule or bacteria for plant growth enhancement in agriculture crops, a copy of which is attached. (¶2) Notably, EMD does not allege selling the plant growth enhancement product for which it uses the mark TORQUE, or any other product for that matter, for use by the turf and ornamental industries.

Clearly markets the following products for the turf and ornamental industries: fungicides, limestone, animal repellants, insecticides, colorants, tank cleaners, defoamers, soil

decontaminators, and anti-transpirants. Cleary has adopted the mark TORQUE for turf and ornamental fungicide and is presently using it. Cleary filed an intent-to-use trademark application, U.S. Serial No. 77/942162, on the mark TORQUE for turf and ornamental fungicide.

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. By way of examples, Wilbur Ellis is comprised of at least three divisions, with the Agribusiness Division further sub-divided based upon Market Segment, including Turf + Ornamental (See Exhibit A). Wilbur Ellis Products are not available online, or through retail outlets, but must be purchased through Wilbur-Ellis professionals; J.R. Simplot Company is made up of a number of divisions, and the Agricultural Division is completely separate from the Turf and Horticultural Division (See Exhibit B). The Simplot Partners® Turf & Horticulture Headquarters office is in Palm Desert, California. In contrast, the Simplot Agra Business Headquarters is in Boise, Idaho; the Van Diest Supply Company consists of three major divisions, Ag Distribution, Specialty Products and Formulation/Bulk Terminalling. The Specialty Products Division Headquarters is located in McCook, Nebraska, while the Ag Distribution Headquarters is in Webster City, Iowa (See Exhibit C); and the Helena Chemical Company has at least two distinct business units, the Helena Products Group and the Specialty Division. The Helena Products Group markets crop protection and crop production products from Memphis, Tennessee. The Specialty Division has other locations separate and apart from Memphis, Tennessee.

## **II. Law and Argument.**

Pursuant to Trademark Act § 18 (15 U.S.C. § 1068), the Board: "...may modify the application or registration by limiting the goods or services specified therein,...". See also, TBMP § 309.03 (d) (3d 2011). A request by an applicant to restrict its identification of goods must (1) be raised as an affirmative defense in the applicant's answer as originally filed or as amended, by way of an allegation that sets forth the proposed restriction in detail, and alleges that the restriction will avoid a likelihood of confusion and that the opposer is not using the mark on the products or services being excluded from the registration. See, TBMP 311.02(b)(3d 2011); and (2) be the subject of a motion under Trademark Rule 2.133.

Here, Cleary filed an amended answer of even date herewith setting forth in detail its proposed restriction of goods, alleging that the restriction will avoid a likelihood of confusion and that EMD is not using the mark on the products or services being excluded from its registration, namely fungicides for domestic use, and fungicides for agricultural use, namely outdoor terrestrial turf and ornamental agricultural fungicides. (See, Affirmative Defenses, page 9, ¶24). Cleary has now filed the within motion under Trademark Rule 2.133 setting forth the facts from which the Board may support a restriction.

## **III. Conclusion.**

Because the products of the parties are distinct, and the agricultural chemicals market is highly segmented, the parties' 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. As such, Cleary is at least entitled to a registration whereby its identification of goods is restricted to "fungicides for domestic use, and fungicides for agricultural use, namely outdoor terrestrial turf and ornamental agricultural fungicides." Such restriction of Cleary's goods avoids any alleged

likelihood of confusion, and EMD is not using the mark on the products or services being excluded.

Respectfully Submitted,

Dated: January 19, 2012

/Tama L. Drenski/  
Tama L. Drenski (Reg. No. 50,323)  
Renner, Kenner, Greive, Bobak, Taylor & Weber  
Fourth Floor, First National Tower  
Akron, Ohio 44308-1456  
Telephone: (330) 376-1242  
FAX: (330) 376-9646  
Attorney for Registrant

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion to Restrict Description of Goods, and Memorandum in Support has been sent by first class mail, postage prepaid, to:

Edward M. Prince, Esq.  
Alston & Bird LLP  
950 F Street NW, The Atlantic Building  
Washington, DC 20004

Attorney for Opposer, *EMD Crop Bioscience, Inc.*, on the 19<sup>th</sup> day of January 2012

/Tama L. Drenski/  
Tama L. Drenski