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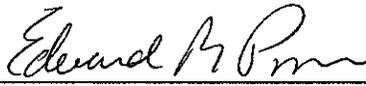
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91200105
Party	Plaintiff NOVOZYMES BIOAG, INC.
Correspondence Address	EDWARD M PRINCE ALSTON & BIRD LLP 950 F STREET NW, THE ATLANTIC BUILDING WASHINGTON, DC 20004 UNITED STATES edward.prince@alston.com
Submission	Motion to Strike
Filer's Name	Edward M. Prince
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Signature	/Edward M. Prince/
Date	01/26/2012
Attachments	Motion to STRike Under F.R.C.P. 12(c) - Novozymes BioAg.PDF (31 pages) (1225873 bytes)

Opposer submits its Memorandum of Law in support of these motions
which details the facts and law that support the basis for these motions.

Respectfully submitted,

Novozymes BioAg, Inc.
By its Attorneys

By: 

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

Date: January 26, 2012

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

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

**OPPOSER’S MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO STRIKE AND/OR MOTION FOR JUDGMENT ON THE
PLEADINGS UNDER F.R.C.P. 12(c) WITH RESPECT TO APPLICANT’S
COUNTERCLAIM ENTITLED “REQUEST TO RESTRICT IDENTIFICATION
OF GOODS” AND MOTION FOR SUMMARY JUDGMENT ON APPLICANT’S
COUNTERCLAIM ENTITLED “CANCELLATION”**

The Federal Rules of Civil Procedure recognize 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.

Case Background

Novozymes BioAg, Inc. (hereinafter “NBA” or “Opposer”), owner of the mark TORQUE for “natural molecule or bacteria for plant growth enhancement in agriculture crops, has filed an opposition against the application of 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 and is not the subject of these motions.

Restriction of Identification of Goods

In its initial response to the opposition, Cleary filed two counterclaims styled as "Request to Restrict Identification of Goods" and "Cancellation." The initial counterclaim to restrict the identification of goods pertained to restriction of Applicant's goods. The Board granted Opposer's motion to strike this counterclaim with leave for Applicant to file a motion under Trademark Rule 2.133(a) as well as an amended answer properly and sufficiently setting forth the matter as an affirmative defense. Applicant has complied with this directive. However, Applicant has now amended its counterclaim styled as "Request to Restrict Identification of Goods" to seek a restriction of Opposer's goods. Opposer's goods in Reg. No. 3,511,124 for the mark TORQUE comprise "natural molecule or bacteria for plant growth enhancement in agriculture crops." It is unclear what language would be used for this restriction.

Cleary prays in paragraph 8 of its Amended Request to Restrict Identification of Goods that "EMD's [NBA's] registration should be restricted to exclude fungicides for outdoor terrestrial turf and ornamental agricultural fungicides from the description of its goods." Opposer's goods do not comprise fungicides. Is Applicant suggesting that this exclusion be tacked on to the end of Opposer's recitation of goods? There is no provision in the Lanham Act, 15 USC § 1051 et seq., to support the relief sought by Cleary. Section 14 of the Lanham

Act, 15 USC § 1064, provides the only basis by which a third party can attack a registration granted to another. There is no basis in this section to cause a registration to be amended with exclusionary language suggested by a third party. As the Board stated on page 3 of its December 20, 2011 opinion:

The Board may strike from a pleading any insufficient defense, or any redundant, immaterial, impertinent or scandalous matter. See Fed. R. Civ. P. 12(f); TBMP § 506 (3D ED. 2011); American Vitamin Products, Inc. v. Dow Brands Inc., 22 USPQ2d 1313, 1314 (TTAB 1992); S.C. Johnson & Son, Inc. v. GAF Corp., 177 USPQ 720 (TTAB 1973). The Board has the authority to strike an impermissible or insufficient claim or portion of a claim. TBMP § 506.01 (3d ed. 2011). Motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues in the case. See Ohio State Univ. v. Ohio Univ., 51 USPQ2d 1289, 1292 (TTAB 1999).

The counterclaim entitled "Request to Restrict Identification of Goods" is clearly impermissible or insufficient and should be stricken from the case even though motions to strike are not favored. Alternatively, judgment on this counterclaim should be granted to Opposer dismissing the counterclaim.

Motion for Summary Judgment on Fraud Counterclaim

a. Factual Background

Opposer initially filed a motion to dismiss the fraud counterclaim for failure to state a claim upon which relief can be granted. The Board pointed out that the test for such motion is "a test solely of the legal sufficiency of a complaint." The Board denied opposer's motion on the grounds that applicant had set forth a claim for relief. In paragraph 5 of the cancellation, applicant states,

"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.”

In its decision, the Board noted that Opposer had submitted exhibits with its motion, but said specifically that the exhibits had been given “no consideration,” citing Compagnie Gervais Danone v. Precision Formulations LLC, 89 USPQ2d 1251, 1255-56 (TTAB 2009) (the Board generally will not convert motions to dismiss that refer to matters outside the pleadings into motions for summary judgment, if such motions are filed before the moving party serves its initial disclosures).

Opposer has now served its initial disclosures. The exhibits submitted with first Broughton declaration are identical to the exhibits attached to the second Broughton declaration and are included in Opposer's initial disclosures.

b. Legal Standard

A motion for summary judgment is appropriate because there are no genuine issues of material facts in dispute, thus leaving the case to be resolved as a matter of law. Fed. R. Civ. 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; rather, 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 which 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).

c. Argument

It makes sense to resolve this issue now so that the parties can concentrate on the substantive issue of likelihood of confusion. Opposer has been using the mark TORQUE since 2007. Applicant's constructive date of use for its intent-to-use application on the mark TORQUE is its filing date of February 23, 2010, although Cleary has alleged in paragraph 3 of the cancellation that it has used its mark since February 23, 2010. If it had used its mark since February 23, 2010, why didn't Cleary file a use based application? Perhaps Cleary is only referring to a constructive use.

Consider the facts that are undisputed in this matter (the exhibits being exhibits to the Broughton Declaration).

1. Opposer does not dispute the TORQUE specimen (Product No. 8300) submitted to the Trademark Office was a label bearing a 2008 copyright date. (Exhibit 1)
2. Exhibit 2 is the 2007 TORQUE label for the same Product No. 8300.
3. Exhibit 3 is an invoice showing a sale on March 27, 2007 of Product No. 8300 (TORQUE).
4. Exhibit 4 is a "Sales by Item" summary for 2007 showing the sale of 1,812 units for a total price of \$67,943.75 in 2007.
5. Exhibit 5 is a 2007 TORQUE promotional piece.
6. Exhibit 6 is a photograph of a 2007 poster bearing the mark TORQUE.

7. Exhibits 7 and 8 are close-ups of the poster showing the 2007 copyright date and the specific reference to TORQUE on the poster.

The 2007 label was discontinued because the size of the container was changed. It was changed from a net weight of 20.8 pounds and net contents of 2.5 gallons to a net weight of 41.7 pounds and net contents of 5 gallons. Opposer recently came across a copy of the 2007 label (Exhibit 2) in its investigation in connection with this opposition showing the changes in pen to be made to the label when it was revised in 2008. The display of the mark and all material statements on the two labels are substantially identical with the main difference being in net weight and net contents.

The original applicant for Opposer's mark TORQUE was Merck KGaA of Frankfurter Strasse 250, 64293 Darmstadt, Federal Republic of Germany. The original application did not contain a specimen. The declaration of Merck submitting a specimen in response to an office action was executed by Helge Erkelenz and Jonas Kolle of Merck KGaA. The declaration states that "the applied for mark is in use in commerce and was in use in commerce on or in connection with the goods listed in the application at least as early as the application filing date." This is a true statement. See Broughton Exhibits 3-8. The declaration further states that "the enclosed specimens are in use in commerce and have been in use in commerce on or in connection with the goods listed in the application since at least as early as the application filing date." One portion of this statement is technically incorrect. If the 2007 label was submitted, it would be incorrect to state that the "specimens are in use in commerce" if

“specimen” is interpreted to mean the actual label. If the 2008 specimen is submitted, this statement would be correct, but then it would be incorrect to state that the specimen had been in use since at least as early as the application filing date. Both statements would be correct if the word “specimen” is interpreted to mean a display of the mark as actually used. The issue is whether this statement in the declaration to the extent it refers to the actual document rather than the display is mere negligence or an unintentional mistake or whether it is “a false material statement or misrepresentation with the intent to deceive the USPTO.” If interpreted to mean that the 2008 label was in use at the time the application was filed, it is false, but this does not necessarily mean that the statement is fraudulent. See *McCarthy*, Section 19:51. While Opposer was not involved in selecting the specimen, it is clear that the 2007 label had been discontinued when the size of the container was changed, thus necessitating a revision of the label in 2008. See Broughton Declaration.

An application to register a mark based on use requires, among other items, “a drawing of the mark and such number of specimens or facsimiles of the mark as used as may be required by the Commissioner.” The 2008 label was clearly a specimen of the mark. It showed how the mark was spelled, where it was placed on the label, and the stylized manner in which it was displayed. The examining attorney in the office action involving Opposer’s mark TORQUE defined the term “specimen” as “(i.e., an example of how applicant actually uses its mark in commerce).” The examining attorney further required a statement

reading, "the specimen was in use in commerce at least as early as the filing date of the application."

Does this statement mean that the physical document on which the mark was applied must have been in use at least as early as the filing date of the application? Alternatively, using the definition supplied by the examining attorney, does the reference to specimen mean "an example of how applicant actually uses its mark in commerce." Clearly, the 2008 specimen was an example of how Opposer's predecessor used its mark in commerce at least as early as the filing date of the application. True, the particular document itself was not in use at that time, but the document does show the actual display of the mark as used in commerce prior to the filing date of the application.

This situation is similar in many respects to the situation faced by the Board and the Court of Customs and Patent Appeals in the case of Morehouse Manufacturing Corp. v. J. Strickland & Co., 160 USPQ 715 (CCPA 1969). That case involved a Section 8 affidavit showing "a specimen of the mark as now actually being used." The goods covered in the application were hair dressing and the mark was BLUE MAGIC. There was no dispute that there was continuing use of the mark. However, instead of attaching a current label on which the goods were named as "pressing oil," the Registrant attached a prior discontinued label where the goods were identified as "hair dressing." The Section 8 affidavit submitted what was described as "a specimen of the mark as now actually being used." The court noted that this statement "cannot clearly be said to be false because the mark on that label is substantially the mark as then

being used, even if the label was not.” In rejecting the claim of fraud, the court stated at 720:

Given the fact of continuing use, from which practically all of the user’s substantive trademark rights derive, nothing is to be gained from and no public purpose is served by cancelling the registration of a technically good trademark because of a minor technical defect in an affidavit.

...

It is in the public interest to maintain registrations of technically good trademarks on the register so long as they are still in use. The register then reflects commercial reality. Assertions of “fraud” should be dealt with realistically, comprehending, as the board did, that trademark rights, unlike patent rights continue notwithstanding cancellation of those additional rights which the Patent office is empowered by statute to grant.

The examining attorney in the present application has not been deceived in any way with respect to the use and manner of use of the mark TORQUE sought to be registered at that time. As noted by the court in Morehouse, at 720, “It is in the public interest to maintain registrations of technically good trademarks on the register so long as they are still in use.”

Cleary’s position might have some merit if there was no use of the mark in 2007 or if the use in 2007 was not trademark usage. Such is not the case. There was no attempt by Opposer to obliterate the 2008 copyright date. If the examiner had some question concerning the specimen, it could have been easily raised at the time and easily explained. Under the circumstances of this case, given the statements in the declaration and the extensive proof of use of the mark in 2007, there has been no material misrepresentation of fact in connection with this application. Since the mark was clearly in use in 2007 and since the

submitted specimen shows how it was used in 2007, it is respectfully contended that Cleary will not be able to prove the requisite intent to support a fraud claim. There was no specific intent to commit fraud because there was no need to commit fraud. This is simply an innocent misstatement of fact.

Innocent misstatements of fact or mere negligence are not sufficient to infer fraud. In re Bose Corp., 91 USPQ2d 1938, 1941 (Fed. Cir. 2009); *McCarthy*, Section 19:51. “The Board has consistently and correctly acknowledged that there is ‘a material legal distinction between a false representation and a fraudulent one, the latter involving an intent to deceive, whereas the former may be occasioned by a misunderstanding, an inadvertence, a mere negligent omission or the like.’” In re Bose Corp., *supra* at 1940. The test is not whether the applicant “should have known” that the specimen was not in use at the time the application was filed; rather, Cleary must prove that Opposer did know in fact that the statement was false and intended to deceive the USPTO for some unknown reason. In re Bose Corp., *supra* at 1941; *McCarthy*, Section 31:61. Why would Merck, the applicant at the time, want to deceive the Trademark Office when the mark was in use in 2007. Merck could easily explain why the 2008 specimen was used – i.e., because the 2007 label was discontinued and the 2008 label showed how the mark was always used. Perhaps a photograph of a previously shipped product could have been obtained. “The standard for finding intent to deceive is stricter than the standard for negligence or gross negligence, and evidence of deceptive intent must be clear and convincing.” In re Bose Corp., *supra* at 1941.

The 2008 label showed exactly how the mark was used in 2007. If Cleary believes that submission of the 2008 label to the Trademark Office when the 2007 labels had been discontinued amounts to fraud, it should file a cross-motion for summary judgment. If Opposer's mark is cancelled, Opposer will simply file a new application. One way or the other, the fraud issue should be resolved now, and whatever happens in this case, the fact remains that Opposer has priority of use. The opposition will proceed based on Opposer's registered rights and/or its common law rights.

d. Summary

Cleary is not damaged by Opposer's registration. Cleary is damaged by virtue of the fact that it adopted a mark identical to Opposer's previously used mark under circumstances which are likely to result in confusion. There is a substantial basis for confusion and substantial damage to Opposer when an identical mark is used in the field of agriculture for a plant growth enhancement product and a fungicide.

In conclusion, Opposer requests summary judgment finding that there is no fraud. The parties can then return to the issue of likelihood of confusion.

Respectfully submitted,

Novozymes BioAg, Inc.
By its Attorneys

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

Date: January 26, 2012

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

NOVOZYMES BIOAG, INC. (formerly
EMD CROP BIOSCIENCE, INC.),

Opposer,

v.

CLEARY CHEMICALS, LLC.,

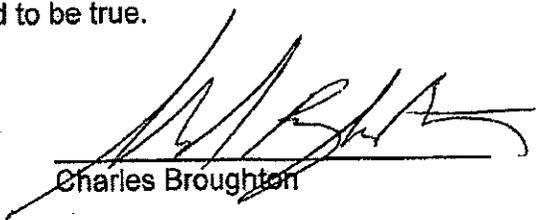
Applicant.

Opposition No. 91200105

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 attached as Exhibit 7 is a 2007 invoice for TORQUE (Product No. 8300); 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: January 25, 2012

EXHIBIT 1

TORQUE™ IF

Product No. 8300

DIRECTIONS FOR APPLICATION

- 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 $1 \times 10^{-7}\%$ lipo-chitooligosaccharide for corn.

INACTIVE INGREDIENTS

Aqueous carrier > 99%



EMD Crop BioScience

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

ISO 9001

©2007 EMD Crop BioScience.

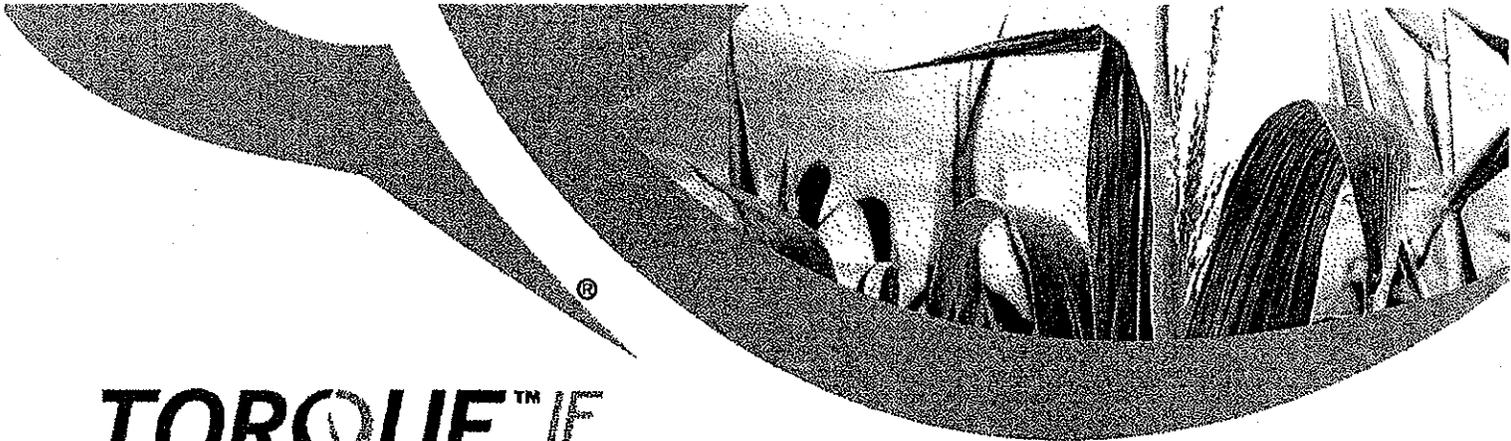
- Product must be applied into the seed furrow and with only seed furrow safe products.
- Clean tank before use.
- Shake product well.
- Add other ingredients into tank in recommended order of addition before adding *Torque IF*.
- For rapid dispensing, hold the *Torque IF* package over the spray tank 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

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-chitoooligosaccharide) 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:

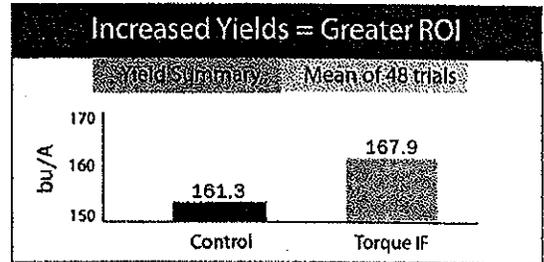
Packaging: 2 units X 2.5 gallons Application Timing: In-furrow

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

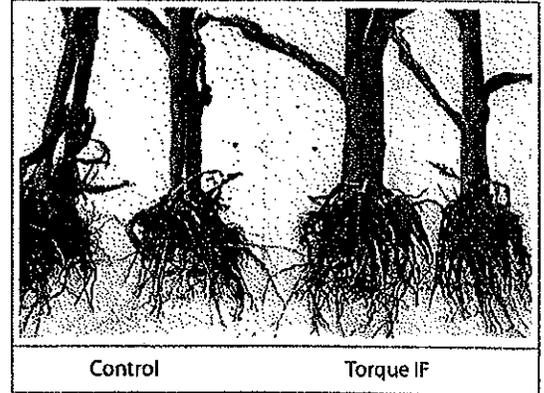
Compatibility: Compatible with most liquid starter fertilizers and insecticides*

*Once mixed, use within 24 hours.

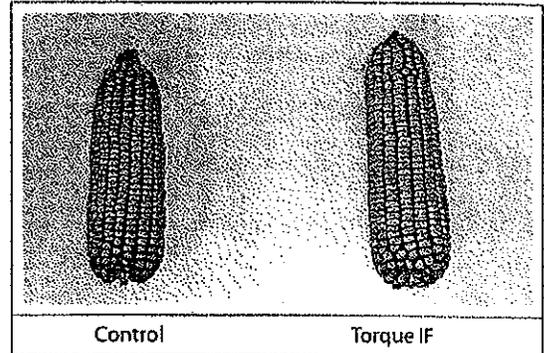
Application Rate / Unit Treats		
Inches per row	Application rate	Acres treated
15	1.5 pt/A	13
20-22	1.25 pt/A	16
30	1.0 pt/A	20



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



Optimize
Reveal
TORQUE T

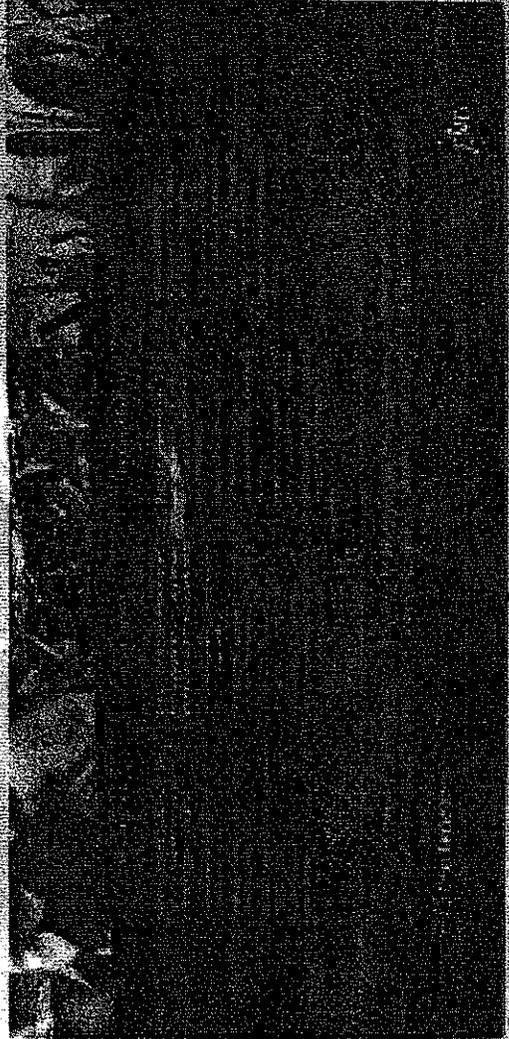


EXHIBIT 4

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

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benefit
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for loo
◦ Earlier
moistu
◦ Advan
to imp

For more information about *LCO Promoter Technology* and how it can help you, visit our website at www.emdcroppioscience.com. Or, you can call 1-800-558-1003, visit our website at www.emdcroppioscience.com.

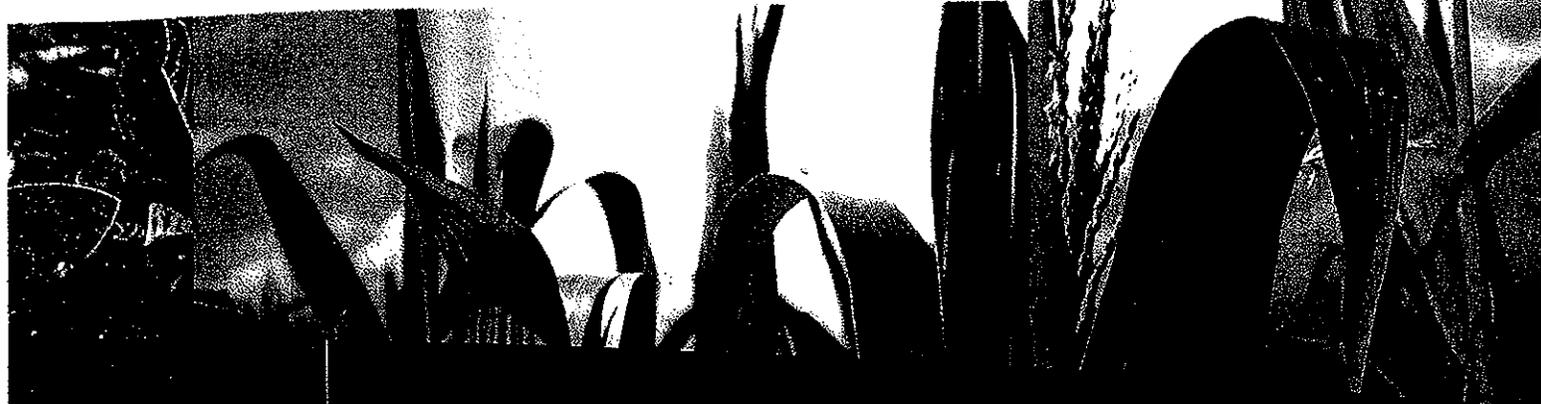
EMD Crop BioScience

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

EXHIBIT 5

al™
LIAR

TORQUE™ IF



BEANS

rn and
application
healthy boost

o enhance

es potential

erves 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

For more information, talk with your retailer.
Contact your local EMD Crop BioScience representative.

EXHIBIT 6

EMD

**SALES BY ITEM
January - July**

EMD Crop BioScience Inc.

8300

TORQUE

<u>2007 UNITS</u>	<u>2007 SALES</u>	<u>2006 UNITS</u>	<u>2006 SALES</u>
1,812	\$67,943.75	0	\$0.00

EXHIBIT 7



EMD Crop BioScience Inc.

13100 W. LISBON ROAD, SUITE 600 --- BROOKFIELD, WI 53005-2509
PHONE (262) 957-2000 --- FAX (262) 957-2121
DUNS 60-853-0713 --- FIN 39-1657804

PAGE NO: 1 of 1
INVOICE NO: 032676
INVOICE DATE: 03/27/2007

I N V O I C E

CUSTOMER NO: 3475
CUSTOMER PH: 701-282-8118

YOUR ORDER NO: VERBAL-KIM
OUR ORDER NO: CO07/03/230003-0000

BILL TO:
AGASSIZ SEED
445 7TH STREET NW
WEST FARGO ND
58078 USA

SHIP TO:
(WE) AGASSIZ SEED
PHONE: 701-282-8118
445 7TH STREET NW
WEST FARGO ND
58078 USA

TERMS: CASH #1: DISC: SHIPPED: 03/26/2007
CASH #2: DISC: SHIPPED VIA: LAKEVILLE MOTOR (C
CASH #3: DISC: F.O.B.: MILWAUKEE
CASH #4: DISC: SHIPMENT NO: 029406 REF: CSR: MG
PRO NO: 36404825083
NET DUE DATE: 04/26/2007

QTY ORDERED	QTY SHIPPED	QTY B.O.	ITEM NUMBER	UNIT PRICE US DOLLARS	EXTD PRICE US DOLLARS
60	60	0	8300	43.75	2,625.00
	LCO-C IF		FREIGHT		179.44

REMIT TO: BIN NUMBER 10057
MILWAUKEE, WI 53288 USA

1 1/2% S/C ADDED PER MONTH ON INVOICES OVER 30 DAYS PAST DUE

SALES TOTAL: 2,625.00
SALES TAX: 0.00
FREIGHT: 179.44
LESS: 0.00
OTHER CHARGES: 0.00
INVOICE TOTAL: 2,804.44
US DOLLARS

Certificate of Service

I hereby certify that on January 26, 2012 a true and correct copy of the foregoing Motion to Strike and/or Motion for Judgment on the Pleadings Under F.R.C.P. 12(c) and Motion for Summary Judgment; Memorandum of Law in Support of Motion to Strike and/or Motion for Judgment on the Pleadings Under F.R.C.P. 12(c), and Motion for Summary Judgment, and Declaration of Charles Broughton with Exhibits were served by first-class mail, postage prepaid, with a courtesy email, to counsel for Applicant, Cleary Chemicals, Inc.:

Tama L. Drenski
Renner, Kenner, Greive, Bobak, Taylor & Weber
Fourth Floor, First National Tower
Akron, Ohio 44308-1456
Email: tldrenski@rennerkenner.com


Edward M. Prince