

ESTTA Tracking number: **ESTTA201560**

Filing date: **03/31/2008**

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

Proceeding	92047976
Party	Defendant Sylvester J. Arena
Correspondence Address	Sylvester J. Arena P.O. Box 3570 Paso Robles, CA 93447 UNITED STATES
Submission	Answer
Filer's Name	Sylvester J. Arena
Filer's e-mail	vendors@sylarenaphoto.com
Signature	/ syl arena /
Date	03/31/2008
Attachments	Hiraga - 080327 response to First Set of Interrogatories.pdf (28 pages) (1368096 bytes)

INTERROGATORY NO. 1:

“Describe in detail the circumstances of the adoption and use by You of each and every mark or trade name incorporating "GARDEN ORGANICS" as an element, including a detailed specification of each good and service offered with respect to each such mark or name and the time periods during which each such mark or name was used with respect to each such good and service.

REPLY TO No. 1 –

1. Respondent started developing the Garden Organics label and line of products in September, 2003. The original product line included: *Garden Organics Organic Rose Fertilizer 7-8-4, Garden Organics Microbial Planting Powder, Garden Organics North Atlantic Seaweed Powder and Garden Organics Humic Acid Soil Conditioner.*
2. The initial offering of Garden Organics products occurred in November, 2003 on the back cover of the Arena Roses catalog for spring 2004. Respondent has provided evidence in the Response to Request for Documents that 19,555 copies of this catalog were mailed on December 8, 2003. {As Respondent has noted elsewhere, Arena Roses marketed and distributed rose plants, organics, garden furniture, gifts and other items through 3 channels: the annual mailorder catalog, the website *ArenaRoses.com*, and a retail garden center in Paso Robles, California. Arena Roses shipped items nationally. As has been acknowledged by the Respondent in other documents of this matter, Arena Roses ceased operations on or about May 31, 2006.}
3. The detailed specification of each Garden Organics product is listed on the Garden Organics Product Sheet and the individual product labels – copies of which have been provided with the documents.
4. The products were offered exclusively through the Arena Rose channels until the closing of that business in May, 2006.
5. In January 2007, Respondent contacted Star Roses – a wholesale distributor of garden roses to inquire if they would be interested in selling Garden Organics products. Bill Mann, their general manager, declined.
6. Respondent contacted Steve Bening, the sales representative for Star Roses in California. Prior to working with Star Roses, Mr. Bening sold fertilizers in southern California. During the early spring of 2007, he gave the Respondent his thoughts on potential distributors, potential products and evaluated the Garden Organics Rose Fertilizer by using it in his home garden.
7. In the early autumn of 2007, Respondent proposed the Garden Organics Rose Fertilizer (now known as Garden Organics Rose Granola) to Edmunds’ Roses – a subsidiary of JW Jung Seed Co., Randolph, Wisconsin. Edmunds’ sells roses nationally via its mailorder catalog and website. Edmunds’ added the product to their catalog and website (published November, 2007) and continues to offer the products to this day.

INTERROGATORY NO. 2:

“Describe with particularity all goods and services that have been offered in connection with Your Mark and, separately for each good or service, state the quantity by year (since the inception of your use) of each good or service that has been sold and the annual gross revenues earned by You from such sales.”

REPLY TO No. 2 –

Respondent has not been able to retrieve the actual sales documents for the year’s 2003 – 2006 as they were put into storage after the closing of Arena Roses and have not been located due to poor filing. The following is the best guestimate by the Respondent of the gross sales figures:

Item	2003	2004	2005	2006	2007	2008
Rose Fertilizer	>\$200	\$2000	\$2000	\$1500	\$350	\$350
Microbial Planting Powder	>\$200	\$500	\$500	\$350	\$0	\$0
Seaweed Powder	>\$200	\$500	\$500	\$350	\$0	\$0
Humic Acid Soil Conditioner	>\$200	\$500	\$500	\$350	\$0	\$0

INTERROGATORY NO. 3:

“For each mark and each good or service, separately state the annual amounts expended for marketing, advertising, and promoting the goods and/or services sold in connection with "GARDEN ORGANICS" and any other names or marks including the words "garden organics".

REPLY TO No. 3 –

For the period 2003-2006, it is not possible to extract the amount spent specifically for the marketing of each Garden Organics product. As stated above, the products were marketed through a mail order catalog, on a website and in a garden center – all operated by Arena Roses.

The mail order marketing expenses include design, printing, postage, etc. The catalogs included 100 to 200 items. Records were not specifically kept as to what share of these expenses pertained specifically to the sale of Garden Organics products.

The website marketing expenses include design, hosting, etc. The website included 100 to 200 items. Records were not specifically kept as to what share of these expenses pertained specifically to the sale of Garden Organics products.

Marketing for the garden center included radio, print, direct mail, web and garden shows. Records were not specifically kept as to what share of these expenses pertained specifically to the sale of Garden Organics products.

Subsequent to the closing of Arena Roses, the Respondent marketed the Garden Organics product line via emails, telephone calls and personal visits. No specific records have been maintained as to the expense for these activities.

Respondent is not in a position to advise how much has been expended by Edmunds Roses for the marketing of Garden Organics Rose Granola in its catalog and website.

INTERROGATORY NO. 4:

“Describe in detail your marketing and promotional efforts in conjunction with Your Mark, including a description of the marketing and promotion channels utilized in advertising and promoting the goods and/or services sold in connection with Your Mark and a description of each and every brochure, advertisement (including but not limited to video and audio advertisement), and all other printed promotional materials used or distributed.

REPLY TO No. 4 –

November, 2003 - annual mailorder catalog of Arena Roses, full-color, 9” x 11”, 52 pages. Garden Organics products featured on back cover.

November, 2003 through May, 2006 – www.ArenaRoses.com, Garden Organics products sold through website

November, 2003 through May, 2006 – Arena Roses Garden Center, 1041 Paso Robles St., Paso Robles, CA, 93446, Garden Organics products sold in garden center owned by Respondent.

March, 2004 – San Francisco Flower & Garden Show, Arena Roses 10’x20’ booth, Garden Organics products featured among products offered for sale

April, 2004 – Fullerton Arboretum Garden Festival, Fullerton, California, Arena Roses booth, Garden Organics products featured among products offered for sale

April, 2004 – South Coast Plaza Garden Show, Costa Mesa, California, Arena Roses booth, Garden Organics products featured among products offered for sale

May, 2004 – Sunset Magazine Garden Festival, Menlo Park, California, Arena Roses booth, Garden Organics products featured among products offered for sale.

November, 2004 – annual mailorder catalog of Arena Roses, full-color, 5.5” x 8.5”, 52 pages. Garden Organics products featured on page 48.

April, 2005 – Fullerton Arboretum Garden Festival, Fullerton, California, Arena Roses booth, Garden Organics products featured among products offered for sale

January, 2007 – emails and telephone calls to Star Roses to discuss potential for them to market Garden Organics products to garden centers nationally

February, 2007 – provided samples of Garden Organics Rose Granola to Steve Bening, a former fertilizer salesman near Los Angeles for evaluation in his garden.

September, 2007 – emails and telephone calls to Edmunds Roses to discuss potential for them to market Garden Organics Rose Granola in their catalog and on their website.

November, 2007 to present – Garden Organics Rose Granola offered for sale by Edmunds’ Roses catalog and website

January, 2008 – Respondent attended Mid-American Horticulture Show in Chicago to survey prospects for wholesale distribution in Midwest and East.

January, 2008 – Respondent attended Nor-Cal Horticultural Show in San Mateo, California to survey prospects for wholesale distribution in California

INTERROGATORY NO. 5:

“Identify all persons, whether or not employed by You, who prepare or who have prepared advertisements, press releases, or other promotional materials for You, who perform or have performed public relations services for You, or who have consulted with or offered advice to You with respect to marketing, merchandising, trademarks, branding, corporate identity, trade identity, product identity, advertising, or promotional activities.

REPLY TO No. 5 –

The Respondent designs the advertisements and promotional materials for Garden Organics.

Respondent consults with Amy Arena, his wife, on marketing, merchandising, trademarks, branding, corporate identity, trade identity, product identity, advertising, and promotional activities.

Julie Krzmenski, then an employee of Arena Roses, worked in the booths at the San Francisco Garden Show, The Sunset Magazine Garden Show and on an intermittent basis in the garden center. In this capacity, she occasionally presented the benefits of Garden Organics products to potential customers – which some might construe as public relations.

Steve Bening, introduced above, offered advice related to marketing and merchandising.

Mike Lindsey, Research Director, Global Organics, Inc., Goodyear, Arizona, offered advice on product formulation and the wholesale marketing of organics.

INTERROGATORY NO. 6:

“Identify all persons, whether or not employed by You, who have been involved in selling your goods or services.”

REPLY TO No. 6 –

Respondent and his wife.

Former employees of Arena Roses, namely Linda Charnley and Julie Krzmenski.

J.W. Jung Seed Co, dba: Edmunds’ Roses (Dotti Schultz – catalog manager, Tom McAnly – hardgoods buyer)

INTERROGATORY NO. 7:

“For each of the goods and services sold or provided in conjunction with Your Mark, identify your customers and describe the degree of care exercised by your customers in purchasing the goods and/or services sold in connection with Your Mark.”

REPLY TO No. 7 –

The original customers of Garden Organics products were individual gardening enthusiasts. This is also true of the customers of Edmunds Roses.

Respondent is not in a position to know the degree of care exercised by these many individuals.

INTERROGATORY NO. 8:

“Identify the location of each place where You have offered goods and/or services for sale in connection with Your Mark and state the inclusive dates during which such goods and/or services were offered at each such location.”

REPLY TO No. 8 – Respondent

November, 2003 - annual mailorder catalog of Arena Roses, full-color, 9” x 11”, 52 pages. Garden Organics products featured on back cover.

November, 2003 through May, 2006 – www.ArenaRoses.com, Garden Organics products sold through website

November, 2003 through May, 2006 – Arena Roses Garden Center, 1041 Paso Robles St., Paso Robles, CA, 93446, Garden Organics products sold in garden center owned by Respondent.

March, 2004 – San Francisco Flower & Garden Show, Arena Roses 10’x20’ booth, Garden Organics products featured among products offered for sale

April, 2004 – Fullerton Arboretum Garden Festival, Fullerton, California, Arena Roses booth, Garden Organics products featured among products offered for sale

April, 2004 – South Coast Plaza Garden Show, Costa Mesa, California, Arena Roses booth, Garden Organics products featured among products offered for sale

May, 2004 – Sunset Magazine Garden Festival, Menlo Park, California, Arena Roses booth, Garden Organics products featured among products offered for sale.

November, 2004 – annual mailorder catalog of Arena Roses, full-color, 5.5” x 8.5”, 52 pages. Garden Organics products featured on page 48.

April, 2005 – Fullerton Arboretum Garden Festival, Fullerton, California, Arena Roses booth, Garden Organics products featured among products offered for sale

January, 2007 – emails and telephone calls to Star Roses to discuss potential for them to market Garden Organics products to garden centers nationally

February, 2007 – provided samples of Garden Organics Rose Granola to Steve Bening, a former fertilizer salesman near Los Angeles for evaluation in his garden.

September, 2007 – emails and telephone calls to Edmunds Roses to discuss potential for them to market Garden Organics Rose Granola in their catalog and on their website.

November, 2007 to present – Garden Organics Rose Granola offered for sale by Edmunds’ Roses catalog and website

INTERROGATORY NO. 9:

“State the date on which and describe with particularity the circumstances pursuant to which You first became aware of any use of any mark including "GARDEN ORGANICS" by Petitioner.

REPLY TO No. 9 – To the best of Respondent’s recollection, he first became aware of competing use of “Garden Organics” by Petitioner when he received a phone call from Petitioner’s attorney. Respondent does not recall the date of this phone call.

INTERROGATORY NO. 10:

“If You contend that You would be damaged by the continued use and/or registration of " GARDEN ORGANICS ", or any trade name, trademark, or service mark incorporating " GARDEN ORGANICS ", by Petitioner, please state all facts, including an identification of all relevant documents and all persons with knowledge of such facts, which support your contention, including a calculation of your alleged damages.”

REPLY TO No. 10 –

Respondent argues that he is damaged by the Petitioner’s use of “Garden Organics” in that Petitioner’s usage is confusing and limits the potential for Respondent to market his products with the distinctiveness that the brand warrants. It is the position of the Respondent that Petitioner uses the mark in ways that exceed her stated usage and that said usage infringes upon Respondent’s usage by creating confusion.

In reviewing the Petitioner’s websites in preparation for these Responses, the Respondent has recently come to the opinion that these infringements are widespread, persistent and openly promoted by the Petitioner.

Petitioner states on her USPTO application for registration (serial no. 78632995) that the mark is used in the following classes and goods/services:

- a. C 031. US 001 046. G & S: Agricultural and horticultural products, namely, living plants, plant seeds, and seedlings.
- b. C 041. US 100 101 107. G & S: Educational services, namely, conducting workshops and seminars in the fields of methods for growth and maintenance of edible herbs, flowers, vegetables and fruits, the design and implementation of organic culinary beds, nutrition, recipes and distributing course material in connection therewith.

Petitioner states on her website (http://www.mygardenorganics.com/about_us.html) that “*We are continually developing organic garden products that include culinary container pots and window boxes, potting kits, organic custom potting soil, nutrition, tools and lifestyle items.*” The Respondent contends that “*organic custom potting soil, nutrition...*” is well beyond the “*living plants, plant seeds, seedlings*” and “*educational services...*” originally indicated by the Petitioner. The Respondent asserts that “*organic custom potting soil, nutrition...*” is a clear infringement of his GARDEN ORGANICS mark as registered.

Petitioner states on her website (http://www.mygardenorganics.com/about_us.html) “*GARDEN ORGANICS inc. NEWS // ORGANICS Rx GARDEN NUTRITION LINE LAUNCHES IN 2007 // ORGANICS Rx, a parent company of Garden Organics Inc. will be rolling out the first products of a full line of plant and garden nutrition and support in February 2007.*” The Respondent asserts that such an announcement under the heading “*Garden Organics Inc. News*” is a clear infringement of his GARDEN ORGANICS mark as registered.

Petitioner maintains a separate website that is linked to MyGardenOrganics.com. This separate website, OrganicsRx.com, features organic fertilizers and soil amendments sold under the Petitioner’s “OrganicsRx” label. Respondent yesterday noted that Petitioner’s GARDEN ORGANICS products are included in the same photograph with Petitioner’s OrganicsRx fertilizer products (http://www.organicsrx.com/product_shots.html) and that “Garden Organics” products are offered for sale adjacent to organic amendments (<http://www.organicsrx.com/products.html>). Respondent asserts that this establishes a clear link between the Petitioner’s use of “Garden Organics” and organic fertilizers. The Respondent asserts that such visual representation is a clear infringement of his GARDEN ORGANICS mark as registered.

The USPTO supports the Respondent’s position that the Petitioner’s mark is confusing. Specifically, the examining attorney refused to register the Petitioner’s use of “Garden Organics” (serial no. 78/632995). That office action, dated February 21, 2007, states in part:

“*Refusal based on 2(d) – Likelihood of Confusion*”

The examining attorney refuses registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), because the applicant's mark, when used on or in connection with the identified goods, so resembles the mark in U.S. Registration No. 3125129 as to be likely to cause confusion, to cause mistake, or to deceive. TMEP section 1207."

Further, the Petitioner's own actions acknowledge the likelihood of confusion between the marks. On August 20, 2007, Petitioner responded to the above Office Action by filing a Petition for Cancellation of Respondent's mark (ESTAA157869). As grounds for cancellation, Petitioner cited: *Abandonment (Trademark Act section 14)* along with *Priority and Likelihood of Confusion (Trademark Act section 2(d))*.

The Respondent learned yesterday (March 27, 2008) that Petitioner is marketing "Garden Organics" products to wholesale accounts with which Respondent has either previously sold garden products (not necessarily under the "Garden Organics brand) or has identified in written correspondence as being a good prospect. Specifically, Petitioner states on <http://www.organicsrx.com/stores.html> that "*Organics Rx & Garden Organics products are sold in over 120 retail stores, and growing every month.*" Among the companies listed are *Smith & Hawken* – to whom Respondent has previously sold garden rose plants on a wholesale basis – and *Whole Foods* – which Respondent listed in his correspondence of January 23, 2007 with Mr. Bill Mann as being a likely prospect for his GARDEN ORGANICS products. Respondent asserts that the Petitioner's marketing of "Garden Organics" products to these firms greatly diminishes his potential to offer products with his registered mark to the same companies. Further, the Respondent argues that the Petitioner's widespread distribution of 'Garden Organics' products through such a large number of prominent retailers serves as a indication of the value of the mark.

As demonstrated herein, the Respondent has not abandoned the mark. Based on documents filed by both parties with the USPTO, Respondent's first use of the mark in commerce preceded Petitioner's first use. Further, respondent is providing several documents that demonstrate the Respondent's first use in November, 2003 and the mailing of 19,555 copies of the Arena Roses 2004 catalog on December 8, 2003. As acknowledged by both parties and by the UPSTO, there is a likelihood of confusion if both parties continue to use the mark.

The Respondent is unable at this time to calculate damages, but reserves the right to do so in the future.

Screen captures of the referenced sites are included below.

ABOUT US

MISSION

CASE STUDIES

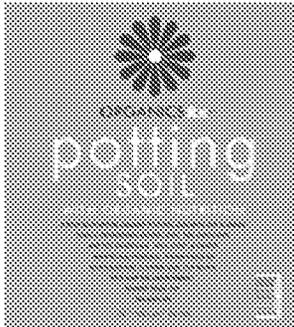
PRODUCTS SHOTS



above: Petitioner's site http://www.organicsrx.com/product_shots.html as of March 27, 2008 (11:15 PDT) showing 'Garden Organics' products displayed with organic fertilizers

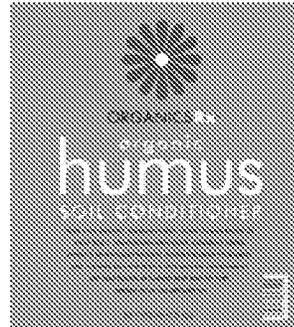
see before & after

ORGANIC POTTING MIX & HUMUS SOIL



POTTING SOIL

Coming Soon



HUMUS SOIL CONDITIONER

Coming Soon

CULINARY SEED COLLECTIONS



GOURMET LETTUCE MIX

Mesculan Mix

Total seed weight:
2 ounces \$24.99

[more info](#)



HEIRLOOM TOMATO COLLECTION

Tigerella, Chadwick Red Cherry,
Brandywine

Total seed weight:
2 ounces \$24.99

[more info](#)



BASIL COLLECTION

Genovese, Large Leaf,
Purple Opal Basil

Total seed weight:
2 ounces \$24.99

[more info](#)



EDIBLE FLOWER MIX

Borage, Calendula,
Nasturtium

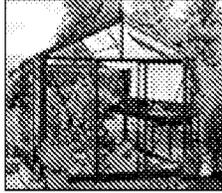
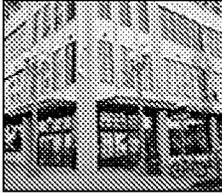
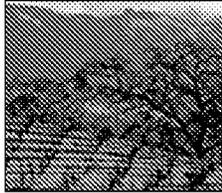
Total seed weight:
2 ounces \$24.99

[more info](#)

above: Petitioner's site <http://www.organicsoil.com/products.html> as of March 27, 2008 (19:20 PDT) showing 'Garden Organics' products being offered for sale adjacent to organic soil amendments

Organics Rx & Garden Organics products are sold in over 120 retail stores, and growing every month. Visit the sites below to find out if our products are sold at a location near you.

A shopping cart service will be added in the coming months. Check back often for store updates and additions.

	<p>Smith & Hawken</p> <p>All 59 National Store Locations USA</p>		<p>PLANET HARDWARE™</p> <p>38 California Store Locations New stores added every month</p>
	<p>WHOLE FOODS</p> <p>All 25 Southern California Store Locations New stores added every month</p>		<p> RETAIL STORES</p>

RETAIL

If you are interested in carrying any of the Garden Organics or Organics Rx products for retail sales, please contact us at info@mygardenorganics.com for more information.

above: Petitioner’s site <http://www.organicsrx.com/stores.html> as of March 27, 2008 (19:23 PDT) showing several prominent retail outlets selling ‘Garden Organics’ products along with the statement that “‘Garden Organics’ products are sold in over 120 retail stores.”

following page: Petitioner’s site http://www.mygardenorganics.com/about_us.html as of March 27, 2008 (11:15 PDT) showing:

- link from MyGardenOrganics.com to OrganicsRx.com
- statement that Petitioner is “developing organic garden products...”
- announcement under ‘Garden Organics Inc. News’ that Petitioner is “launching” a garden nutrition line.



GARDEN ORGANICS

ABOUT US



G.O. IN THE NEWS

Santa Monica Mirror

LINKS

- OrganicsRx.com
- John.Jeavons.info
- StewFood.com
- Santa Monica Farmer's Market
- GraceRestaurant.net
- Bordergrill.com
- Copia.org
- Zingersnews.com
- AllDentsPasta.com
- FairViewGardens.org
- Velonews.com

CONTACT

Kathleen Hraga (Garden Director)
info@mygardenorganics.com

EMPLOYMENT

Garden Organics Inc. is always looking for qualified people to join our garden team. Please e-mail a resume and cover letter to info@mygardenorganics.com

OPEN POSITIONS

Experienced Double Diggers

ORGANICS Rx

Experienced Sales Rep
Northern California

Office Assistant
Part to full-time
Start Date: February 2007

ABOUT GARDEN ORGANICS INC.

GARDEN ORGANICS INC. is a specialty grower based out of Santa Monica, California and registered as certified organic with the State of California and The USDA - National Organic Program (NOP). Our greenhouse seedlings are cultivated for culinary garden design projects, garden nurseries and fine retail stores including Whole Foods, quality Southern California Nurseries and California Farmers Markets. We are continually developing organic garden products that include culinary container pots and window boxes, potting kits, organic custom potting soil, nutrition, tools and lifestyle items.

GARDEN ORGANICS INC. NEWS ORGANICS Rx GARDEN NUTRITION LINE LAUNCHES IN 2007

ORGANICS Rx, a parent company of Garden Organics Inc. will be rolling out the first products of a full line of plant and garden nutrition and support in February 2007. Look for SUPERGROW and SEA-KELP 100 garden nutrition, and check back when ORGANICS Rx launches in early spring at OrganicsRx.com

CULINARY BED DESIGN FOR THE HOME AND RESTAURANT CHEF

Growing season never stops in Southern California, and we are designing Custom Culinary Beds year round for home and restaurant chefs. Imagine replacing your empty lawn with a culinary garden bed that yields heirloom varieties of tomatoes, vegetables, herbs and edible flowers twelve months out of the year. It will reduce your water bill up to 75% from conventional lawn care watering, and pay for itself in less than 6 months. Please contact us for a site consultation, or questions regarding Culinary Garden Design Services at info@mygardenorganics.com

GARDEN ORGANICS INC. BASED OUT OF YAMAGUCHI NURSERY IN WEST LOS ANGELES

Garden Organics Inc. is based out of Yamaguchi Bonsai Nursery on 1905 Sawtelle Blvd. in West Los Angeles, between Olympic and Santa Monica Boulevard. As one of the most historical and respected family run nurseries in Los Angeles (87 years and counting), we are pleased to be a part of the Yamaguchi retail store and nursery. We have a full retail selection of Garden Organics culinary seedlings and Organics Rx plant and garden nutrition available year round.

GREENHOUSE FOR SALE

CLEARSPAN GREENHOUSE- COMMERCIAL

We are downsizing with a couple smaller versions of this model, and could not be happier with how this greenhouse has worked in all weather conditions. No leaking, frost damage, plants thrive, great temperature control.

Specs:

- 20 width x 12 height x 48 length
- Sides are weatherproof 6 mil. greenhouse film
- Ends are translucent 10 oz. 22 mil. premium rip stop fabric
- Adjustable Roll up sides / 4 sided ventilation
- Front and back zipper openings
- Structure is Allied Getershield steel tubing
- TOTAL PAID = 8,500.00
- SELLING = 3,900.00 obo

Comes with ground cloth, 50% shade cloth, all hardware and wood that was additional, cinder blocks and more. Available immediately. Needs to be disassembled at site. Can facilitate labor for take down.

[click here for images](#)

ESTTA Tracking number: **ESTTA157869**

Filing date: **08/20/2007**

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

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Kathleen Hiraga		
Entity	Individual	Citizenship	UNITED STATES
Address	Box 1985 Santa Monica, CA 90406-1985 UNITED STATES		

Attorney information	Don Thornburgh Don Thornburgh Law Corporation 466 Foothill Blvd. #220 La Canada Flintridge, CA 91011 UNITED STATES uspto@donthornburgh.com Phone:818-790-6547		
----------------------	--	--	--

Registration Subject to Cancellation

Registration No	3125129	Registration date	08/01/2006
Registrant	Arena, Sylvester J. PO Box 3570 Paso Robles, CA 93447 UNITED STATES		

Goods/Services Subject to Cancellation

Class 001. First Use: 2003/11/01 First Use in Commerce: 2003/11/01 All goods and services in the class are cancelled, namely: Fertilizers, soil conditioners and soil amendments for domestic use
--

Grounds for Cancellation

<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
Abandonment	Trademark Act section 14
Priority and likelihood of confusion	Trademark Act section 2(d)

above: portion of Petition for Cancellation filed by Petitioner – showing citation of “*Abandonment*”, “*Priority*” and “*Likelihood of Confusion*” as grounds for cancellation of Respondent’s mark.

INTERROGATORY NO. 11:

“If You contend that Petitioner adopted any name or mark in bad faith, for an improper purpose, or otherwise acted with an improper motive, please state all facts, including an identification of all relevant documents and all persons with knowledge of such facts, which support your contention.”

REPLY TO No. 11 – Respondent reasserts the facts presented in question 10 above.

INTERROGATORY NO. 12:

“Describe in detail each inquiry You have ever received or know about as to whether the services and/or goods offered by You in connection with Your Mark are associated with, affiliated with, sponsored by, approved by, and/or connected with Petitioner.”

REPLY TO No. 12 – Respondent has not received inquiries in the manner described in this question.

INTERROGATORY NO. 13:

“If You contend that there has been any actual confusion as the result of any activities by Petitioner or by the use of any name or mark by Petitioner, please state all facts, including an identification of all relevant documents and all persons with knowledge of such facts, which support your contention.”

REPLY TO No. 13 – Respondent reasserts the facts presented in question 10 above.

INTERROGATORY NO. 14:

“If You contend that any likelihood of confusion exists because of any activities by Petitioner or because of any use by Petitioner of any name or mark, please state all facts, and include an identification of all relevant documents and all persons with knowledge of such facts, which support your contention.”

REPLY TO No. 14 – Respondent reasserts the facts presented in question 10 above.

INTERROGATORY NO. 15:

“Identify all persons whom You believe to have knowledge concerning the subject matter of this proceeding, or of each of these interrogatories, and describe the basis of each person's knowledge.”

REPLY TO No. 15 –

There are no other parties beyond those listed in other responses to the Interrogatories, the Admissions and the Request for Documents that Respondent believes to be subject to the terms of this question.

INTERROGATORY NO. 16:

“If You have conducted or caused to be conducted any investigation, survey, shopping test, or consumer reaction test involving "GARDEN ORGANICS", describe in detail each such investigation, survey, shopping test, or consumer reaction test, including the identity the persons who conducted or participated in conducting it.”

REPLY TO No. 16 – Respondent interprets this question to be limited to matters relating to marketing. He has not conducted or caused to be conducted the activities specified in this question.

INTERROGATORY NO. 17:

“Identify each person whom You expect to call as an expert witness, the substance of the facts and opinions to which the expert is expected to testify and grounds for each opinion, and identify all documents reviewed or prepared by such expert with respect to the subject matter of this case.”

REPLY TO No. 17 –

1. Steve Bening, current sales representative for Star Roses in California, prior to working for Star worked as a commercial salesman of fertilizers in southern California – Mr. Bening will confirm his conversations and correspondence with Respondent in early 2007 on the topic of finding distributors for Respondent’s GARDEN ORGANICS products. Mr. Bening will also give his opinion of the current market for organic fertilizers at the retail garden center market. Further, he will speak to the performance of Garden Organics Rose Granola in the garden trials that he conducted during the spring of 2007.
2. Mike Lindsey, Director of Research, Global Organics, Goodyear, Arizona – Mr. Lindsey will speak to his on-going dialogues with the Respondent concerning the development of products suitable for sale in the Garden Organics program.
3. Mark Nuremberg, Sales Representative, Colorgraphics, Los Angeles – Mr. Nuremberg will verify that Respondent printed the Arena Roses catalog for Spring 2004 during the month of November, 2003.
4. Ken Lowe, Owner, Accurate Mailing Service, Paso Robles, California – Mr. Lowe will verify that he mailed 19,555 copies of the Arena Roses 2004 catalog on December 8, 2003.

INTERROGATORY NO. 18:

“For each person or entity that you have become aware of that has used “GARDEN ORGANICS” as part of a trade name, trademark, or service mark, please identify the person or entity and describe any actions you have taken with respect to such person or entity after becoming aware of such person's or entity's use of “GARDEN ORGANICS”.

REPLY TO No. 18 –

Beyond Respondent's own usage, he is aware only of the infringing uses by the Petitioner – as described in this response and his responses to the Admissions and Request For Documents. Respondent continues to wait for the resolution of USPTO actions before deciding upon his own further actions in regards to Petitioner's infringement.

INTERROGATORY NO. 19:

“Describe in detail, including date, jurisdiction, case number, conclusion and status, any litigation, interference, conflicts, opposition, cancellation proceedings, and other proceedings, involving Your Mark.”

REPLY TO No. 19 –

Beyond the current matter at hand, Respondent is not aware of any other “litigation, interference, conflicts, opposition, cancellation proceedings, and other proceedings” that involve his Mark.

-END-

CERTIFICATE OF SERVICE AND MAILING

It is hereby certified that a copy of the foregoing ANSWER TO PETITIONER'S FIRST SET OF INTERROGATORIES is being deposited with the United States Postal Service, first-class postage prepaid, in an envelope addressed to:

Don Thornburgh Law Corporation
Don Thornburgh, Esq.
466 Foothill Boulevard, Suite 220
La Cañada Flintridge, California 91011

Executed this 28th day of March, 2008, at Paso Robles, California.

A handwritten signature in black ink, appearing to read 'Sylvester', followed by a horizontal line.

Sylvester Arena
2070 West Highway 46
Paso Robles, California 93446