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

Proceeding	91165284
Party	Defendant Regenerated Resources LLC Regenerated Resources LLC 205 Newbury Street Framingham, MA 01701
Correspondence Address	REGENERATED RESOURCES LLC 205 NEWBURY STREET FRAMINGHAM, MA 01701
Submission	Motion to Suspend for Civil Action
Filer's Name	Peter S. Black
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Signature	/s/ Peter S. Black
Date	03/15/2006
Attachments	Mot Suspend 031506.pdf (2 pages) Ex 1 (Complaint).pdf (21 pages)

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

OMS Investments, Inc.,)
 Opposer,)
)
 v.)
)
Regenerated Resources LLC,)
 Applicant.)
)

Opposition Nos. 91165284, 91167061

MOTION TO SUSPEND

Applicant, Regenerated Resources LLC (“Regenerated”), moves to suspend this proceeding until further notice from Applicant pursuant to Trademark Rule 2.117(a). The grounds for this motion are that an action styled *OMS Investments, Inc. v. Regenerated Resources LLC*, No. 20-06-114 is pending in the United States District Court for the Southern District of Ohio, Eastern Division (“the Ohio Action”) involving issues common to this opposition proceeding. In particular, the Ohio Action involves the issue of whether Regenerated’s use of the marks that are the subject matter of the instant Applications conflict with OMS’s alleged trademarks. A true and accurate copy of the complaint in the Ohio Action is attached hereto as Exhibit 1. The Board should exercise its discretion to suspend this proceeding because the resolution of the Ohio Action could resolve some or all of the issues in this proceeding, which resolution could be binding on the Board.

Certificate of Service

I hereby certify that a true and complete copy of the foregoing Motion to Suspend was served on counsel of record for Opposer, OMS Investments, Inc., by mailing said copy on March 15, 2006, via First Class Mail, postage prepaid.

Dated: March 15, 2006

Respectfully submitted,

VERRILL DANA, LLP

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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JAMES BONINI
CLERK

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OMS INVESTMENTS, INC., a Delaware
corporation,

Plaintiff,

v.

REGENERATED RESOURCES LLC, a
Massachusetts corporation,

Defendant.

CASE NO. JUDGE GRAHAM
JUDGE EASTERN DISTRICT OF OHIO
MAGISTRATE JUDGE MAGISTRATE JUDGE KING

1. COMPLAINT FOR:

- (a) Federal Trademark Infringement
- (b) Federal False Designation of Origin
- (c) Federal Trademark Dilution
- (d) State Deceptive Trade Practices
- (e) State Common Law Trademark Infringement
- (f) State Common Law Trademark Dilution
- (h) State Common Law Unfair Competition
- (g) Unjust enrichment

2. DEMAND FOR JURY TRIAL

Plaintiff OMS Investments, Inc. ("OMS" or "Plaintiff"), for its complaint against defendant Regenerated Resources LLC ("Regenerated Resources" or "Defendant"), alleges as follows:

NATURE OF THE ACTION

1. This is an action seeking damages and injunctive relief for Defendant's willful infringement of OMS' numerous federally registered trademarks and service marks, including MIRACLE-GRO, ORGANIC CHOICE AND MIRACLE-GRO ORGANIC CHOICE, which are used in connection with a wide range of goods and services including fertilizers, plants, seeds and other lawn and garden items. Defendant's use of the mark ORGANIC-GRO,

an amalgam of OMS' famous and distinctive MIRACLE-GRO and ORGANIC CHOICE marks, in connection with fertilizers is likely to cause confusion as to a connection with or association between Defendant and OMS, or between the goods and services of each, constituting trademark infringement, dilution and unfair competition in violation of the Lanham Act, 15 U.S.C. § 1051 *et seq.* and related state and common law claims.

THE PARTIES

2. Plaintiff OMS Investments, Inc. is a corporation organized and existing under the laws of Delaware, with an office at 10250 Constellation Boulevard, Suite 2800, Los Angeles, California 90067. Plaintiff is a wholly owned subsidiary of The Scotts Company, LLC.

3. Defendant Regenerated Resources LLC is a corporation organized and existing under the laws of Massachusetts, with an office at 205 Newbury Street, Framingham, Massachusetts 01701.

JURISDICTION

4. This Court has subject matter jurisdiction over this action pursuant to: (i) 28 U.S.C. §1331, as this action arises out of the laws of the United States of America; (ii) 15 U.S.C. § 1121, as this action involves claims under the Lanham Act of 1946, as amended, 15 U.S.C. § 1051 *et seq.*; and (iii) 28 U.S.C. § 1338(a) and (b), as this action arises in part under an Act of Congress relating to trademarks. This court has supplemental jurisdiction over the state law and common law claims asserted herein under 28 U.S.C. § 1367 as such claims are part of the same case or controversy.

VENUE

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b), as this is a judicial district in which a substantial part of the events giving rise to the claims occurred; and (ii) 28 U.S.C. § 1391(c), as Defendant is subject to personal jurisdiction in this district.

FACTUAL ALLEGATIONS

6. The MIRACLE-GRO mark is one of the most recognizable and valuable brands in the consumer lawn and garden industry. In the United States, consumer awareness of

the MIRACLE-GRO brand is several times greater than that of the nearest competitor. MIRACLE-GRO is currently by far the largest selling line of water soluble fertilizers for house plants and lawn and garden use in the United States

7. The MIRACLE-GRO line was first introduced to the American public in 1951, and has been continuously sold ever since. OMS, in conjunction with its parent company, The Scotts Company, LLC, markets a complete line of water soluble plant foods under the famous MIRACLE-GRO trademarks. Among other things, the MIRACLE-GRO line of products includes all-purpose outdoor plant food, all-purpose indoor plant food and plant food for acid-loving plants, evergreens, trees, shrubs, roses, tomatoes and African violets. Plant food products come in a dry formulation as well as in liquid, tablets and spikes. Specialty plant foods include rooting hormone and bloom enhancers. The MIRACLE-GRO line also includes enhanced soils and potting mixes by including MIRACLE-GRO plant food along with other value-added amendments and nutrients tailored to specific uses. In the specialty soil line, the MIRACLE-GRO line includes garden soil for flowers and vegetables, roses, and trees, shrubs and ornamentals, as well as sphagnum peat moss, all enriched with MIRACLE-GRO plant food.

8. In addition to offering one of the world's leading lawn and garden brands, OMS and its affiliates also are leaders in giving back to the community. OMS is a participant in the "Give Back to Grow" initiative, which encompasses numerous programs for community development and environmental stewardship. For instance, OMS and its affiliates are one of the founding sponsors of the National Garden, a living laboratory for environmental, botanical and horticultural education on three acres adjacent to the U.S. Botanical Garden Conservatory in Washington D.C. In the Miracle-Gro Kids Columbus program, the company has adopted a classroom of third graders, providing them with educational, health, family and social support throughout their academic career, culminating in an ensured college tuition. The company also is committed to the environment. OMS and its affiliates are collectively recognized as one of the leading recyclers in the United States. Moreover, the company has won praise for its environmental commitment, being certified to ISO 14001 standards, an international certification

that evaluates a company's ability to apply sound environmental principals. In addition, OMS' parent, The Scotts Company, was elected to receive the Ohio Chemistry Technology Council's 2001 Award for Excellence in Responsible Care.

OMS Trademarks and Service Marks

9. OMS owns numerous trademarks and services marks incorporating its famous and distinctive MIRACLE-GRO mark. Since at least as early as 1951, OMS has used one or more of its MIRACLE-GRO marks in connection with a wide range of goods, including without limitation fertilizers, live plants and seeds, plant growing media and soil conditioners, herbicides, plant containers, flower pots and planters, root stimulating hormones, potting mix and soil, watering cans and work and gardening gloves; and services, including without limitation, lawn and gardening consulting services, all as reflected in the following representative registrations issued on the Principal Register of the United States Patent and Trademark Office ("USPTO"):

Mark	Registration No.
MIRACLE-GRO	668868
MIRACLE-GRO THERAPY & Design	1051605
MIRACLE-GRO	1223038
MIRACLE-GRO	2235973
MIRACLE-GRO PROFESSIONAL EXCEL	2321843
MIRACLE-GRO PROFESSIONAL	2312056
MIRACLE-GRO AGRICULTURE	2321879
MIRACLE-GRO	2345472
MIRACLE-GRO POUR & FEED	2601682
MIRACLE-GRO SELECT PLANTS	2525828
MIRACLE-GRO MOISTURE CONTROL POTTING MIX CONTAINS AQUACOIR & Design	2935663
HAVE YOU USED MIRACLE-GRO LATELY?	2870768
MIRACLE-GRO GARDEN WEED PREVENTER & PLANT FOOD	2618698
MIRACLE-GRO GARDEN WEED PREVENTER	2618699
MIRACLE-GRO SELECT PLANTS & DESIGN	2816031
MIRACLE-GRO SELECT PLANTS & DESIGN	2723181
MIRACLE-GRO FAST ROOT	2787356
MIRACLE-GRO PROFESSIONAL TREE & SHRUB CARE & Design	2758533
MIRACLE-GRO TREE & SHRUB CARE	2809982
MIRACLE-GRO & Design	2820953
MIRACLE-GRO & Design	2822655

MIRACLE-GRO SELECT PLANTS & Design	2900658
MIRACLE-GRO	2856922
MIRACLE-GRO & Design	2856923
MIRACLE-GRO & Design	2856924
MIRACLE-GRO & Design	2906855
MIRACLE-GRO & Design	2906856
MIRACLE-GRO & Design	2996098
HAVE YOU USED MIRACLE-GRO LATELY?	2870768

True and correct copies of these registrations or pages from the USPTO's online database reflecting the registered status of the marks are attached hereto as Exhibit A.

10. OMS also owns pending federal trademark applications for additional marks in its MIRACLE-GRO family of marks, including:

Mark	Application No.
MIRACLE-GRO PROFESSIONAL & Design	75/678225 (Allowed)
MIRACLE-GRO MOISTURE CONTROL POTTING MIX CONTAINS AQUACOIR & Design	76/148905 (Allowed)
MIRACLE-GRO & Design	76/496457 (Allowed)
MIRACLE-GRO Excel	78/355457 (Allowed)
MIRACLE-GRO	78/464648 (Statement of Use filed)
MIRACLE-GRO GARDEN SOIL FLOWERS & VEGETABLES & Design	78/478903 (Pending)
MIRACLE-GRO GARDEN SOIL ROSES & Design	78/478913 (Pending)
MIRACLE-GRO GARDEN SOIL TREES & SHRUBS & Design	78/478917 (Pending)
LET YOURSELF GRO	78/795657 (Pending)
MIRACLE-GRO ORGANIC CHOICE	78/782928 (Pending)
MIRACLE-GRO GARDEN SOIL ROSES (PACKAGE) (COLOR)	78/478913 (Pending)
MIRACLE-GRO GARDEN SOIL TREES & SHRUBS (PACKAGE) (COLOR)	78/478917 (Pending)
MIRACLE-GRO	78/464648 (Allowed)

True and correct copies of pages from the USPTO's online database reflecting these applications are attached hereto as Exhibit B.

11. Due to the national, and indeed, worldwide consumer recognition and goodwill of the MIRACLE-GRO marks, consumers have come to recognize the simple suffix "GRO" as also symbolizing the goodwill inherent in the MIRACLE-GRO marks, and associate the GRO suffix solely with OMS and its line of high quality lawn and garden products. Accordingly, OMS also owns the following trademarks registrations and applications containing

the GRO suffix (together with each of the aforementioned registrations and applications for marks containing MIRACLE-GRO, the "MIRACLE-GRO Marks"):

Mark	Registration/Application No.
PRO GRO	2384652
LET YOURSELF GRO	78795657 (Pending)
SLO-GRO	78614950 (Published)
PRO GRO	78261853 (Allowed)
GARDEN GRO	76653762 (Pending)
LET YOURSELF GRO	76322242 (Allowed)
TOTAL-GRO	76532078 (Allowed)
RA-PID GRO & Design	76441416 (Allowed)
RA.PID GRO & Design	76326830 (Allowed)
GARDEN GRO & Design	76224465 (Allowed)

True and correct copies of pages from the USPTO's online database reflecting the registration and/or applications of these marks are attached hereto as Exhibit C.

12. In the interest of expanding its line of products under its famous and distinctive MIRACLE-GRO Marks, OMS has begun offering a line of fully organic products under the mark ORGANIC CHOICE. Since at least as early as March 2003, OMS has used the mark ORGANIC CHOICE with a wide range of goods, including garden fertilizer, potting and garden soil, and the provision of information services relating to flowers, lawn care, landscape gardening, and the use of products relating to these topics.

13. In fact, OMS owns several federal trademark registrations and applications for ORGANIC CHOICE:

Mark	Registration/Application No.
ORGANIC CHOICE	2,978,064
ORGANIC CHOICE	2,936,644
ORGANIC CHOICE	76/437,836
ORGANIC CHOICE	76/437,835
ORGANIC CHOICE	76/437,834

True and correct copies of pages from the USPTO's online database reflecting the registration and/or applications of these marks are attached hereto as Exhibit D. Notably, each of the applications for these marks was filed on August 2, 2002, which constitutes constructive use of

those marks as of that date, and confers a nationwide right of priority with respect to those marks under Section 7(c) of the Lanham Act (15 U.S.C. § 1057(c)).

14. Importantly, in recognition that the ORGANIC CHOICE line of products is an expansion of OMS' MIRACLE-GRO line, since the introduction of the ORGANIC CHOICE line of products in March 2003, OMS has used the combined mark MIRACLE-GRO ORGANIC CHOICE on its entire line of ORGANIC CHOICE products. OMS also owns United States Trademark Application Serial No. 78/782,928 for MIRACLE-GRO ORGANIC CHOICE for fertilizers for domestic use, potting soil, blood meal, and bone meal. True and correct copies of pages from the USPTO's online database reflecting this application is attached hereto as Exhibit E. True and correct copies of photographs showing the MIRACLE-GRO ORGANIC CHOICE mark used on numerous products are attached hereto as Exhibit F. (Each of the ORGANIC CHOICE marks, including MIRACLE-GRO ORGANIC CHOICE are referred to herein as the "ORGANIC CHOICE Marks;" the MIRACLE-GRO Marks and ORGANIC CHOICE Marks are collectively referred to as the "OMS Marks").

15. Each of the trademark registrations for the OMS Marks are valid and subsisting in full force, unrevoked and uncanceled. Notably, Registrations Nos. 668,868 (MIRACLE-GRO); 1,051,605 (MIRACLE-GRO THERAPY & Design); 1,223,038 (MIRACLE-GRO) and 2,235,973 (MIRACLE-GRO) are incontestable.

16. The distinctiveness of the OMS Marks is buttressed by their widespread secondary meaning in the marketplace. OMS has expended and continues to expend substantial time, money and effort in promoting its MIRACLE-GRO and ORGANIC CHOICE marks in magazines, newspapers, sports sponsorships and through nationally broadcast television and radio commercials. Further, since at least as early as 1997, OMS has operated the popular website *miraclegro.com*, which offers product information on both the MIRACLE-GRO and ORGANIC CHOICE products, as well as other lawn and garden-related information. True and correct copies of representative samples of advertising for the OMS Marks and of several pages of the *miraclegro.com* website are attached hereto as Exhibits G and H, respectively.

17. Moreover, over the years, the OMS Marks and the products associated with those marks have also received a significant amount of unsolicited press and have been the subject of numerous articles in major publications. Indeed, since the introduction of the ORGANIC CHOICE line of products, the mark MIRACLE-GRO ORGANIC CHOICE has also received significant attention from the press. True and correct copies of various press articles discussing the MIRACLE-GRO ORGANIC CHOICE mark and products are attached hereto as Exhibit I.

18. Finally, OMS has a pattern and practice of vigilantly policing and protecting its rights in and to the OMS Marks throughout the United States and the world.

19. As a result of OMS' efforts, both the MIRACLE-GRO and the ORGANIC CHOICE Marks, including MIRACLE-GRO ORGANIC CHOICE, have acquired secondary meaning in that the public has come to recognize OMS as the exclusive source of the goods and services bearing those marks. Clearly, the OMS Marks have become assets of substantial value and symbols of OMS' good will.

Defendant's Wrongful Conduct

20. Upon information and belief, Defendant began using in 2003 and is currently using the trademark ORGANIC-GRO in connection with lawn and garden fertilizer.

21. ORGANIC-GRO branded products are available nationally through retailers such as Lowe's, Do-It-Best Hardware and Target. In particular, Defendant's products are marketed and available for purchase throughout Ohio through retailers such as Lowe's and Do-It-Best Hardware. On information and belief, Defendant's products are also available nationally wholesale. A true and correct copy of printouts from Defendant's website showing Defendant's distribution channels for ORGANIC-GRO branded products in Ohio and nationwide are attached hereto as Exhibit J.

22. Upon information and belief, Defendant prominently advertises its products under the ORGANIC-GRO mark on product labels, Defendant's website at *www.organic-gro.com*, signage, print advertising, and other forms of advertising. True and

correct copies of several pages from Defendant's website showing its ORGANIC-GRO mark are attached hereto as Exhibit K.

23. On or about March 19, 2003 Defendant filed United States Trademark Application Serial No. 78/227,322 for ORGANIC-GRO in Class 1 for fertilizer; and on March 26, 2003 filed United States Trademark Application Serial No. 78/230,217 for ORGANIC-GRO (Stylized) in Class 1 for fertilizer (together, the "ORGANIC-GRO Marks"). Both of these applications are intent-to-use applications, and both were filed well after OMS began use of its distinctive and famous MIRACLE-GRO Marks and after OMS filed its own trademark applications for its ORGANIC CHOICE Marks.

24. Because OMS' first use of its MIRACLE-GRO Marks and its application filing date for each of the ORGANIC CHOICE Marks predates Defendant's first use of and/or application filing date for each of its ORGANIC-GRO Marks, there is no question that the OMS Marks enjoy priority over Defendant's ORGANIC-GRO Marks. Indeed, notwithstanding OMS' distinctive and famous OMS Marks, Defendant, with constructive and actual knowledge of OMS' Marks, adopted and commenced use of its ORGANIC CHOICE Marks with its fertilizer products.

25. Moreover, Defendant's ORGANIC-GRO Marks are confusingly similar to OMS' Marks because they are similar in appearance, sound and commercial impression, pursuant to 15 U.S.C. § 1052(d). Among other things, the sole and dominant elements of Defendant's mark are the word elements ORGANIC and GRO, which are essential elements of OMS' MIRACLE-GRO and ORGANIC CHOICE families of marks. Indeed, by using the hyphenated suffix "-GRO" rather than the independent word "GROW," it is clear that Defendant intended to trade off of consumers' understanding that "-GRO" is uniquely associated with OMS and its MIRACLE-GRO Marks.

26. Given the goodwill and public recognition arising from the association of the OMS Marks with OMS, consumers are likely to believe that OMS has sponsored, endorsed,

approved or otherwise authorized Defendant's use of its ORGANIC-GRO Marks, when this is in fact not the case.

27. Accordingly, on or about April 12, 2005, counsel for OMS sent a letter to counsel for Defendant requesting that Defendant agree to withdraw its applications for and cease all use of its ORGANIC-GRO Marks based on OMS' prior rights in its OMS Marks, particularly, in the MIRACLE-GRO and ORGANIC CHOICE marks. A true and correct copy of this letter is attached hereto as Exhibit L.

28. OMS did not receive any response to this letter. Accordingly, on or about May 13, 2005, OMS filed a Notice of Opposition with the Trademark Trial and Appeal Board ("TTAB") of the USPTO to oppose the registration of Application No. 78/227,322 for ORGANIC-GRO filed by Defendant. Defendant filed its Answer to this notice on or about June 29, 2005.

29. On or about October 21, 2005, OMS filed a Notice of Opposition with the TTAB to oppose the registration of Application No. 78/230,217 for ORGANIC-GRO (Stylized) filed by Defendant. Defendant filed its Answer to this notice on or about November 30, 2005.

30. On or about January 12, 2006, the TTAB consolidated the two opposition proceedings filed by OMS.

31. To date, despite Defendant's actual notice of OMS' prior and senior rights in and to its OMS Marks, including MIRACLE-GRO, ORGANIC CHOICE and MIRACLE-GRO ORGANIC CHOICE, Defendant continues to use its ORGANIC-GRO Marks without OMS' consent. Such wrongful and willful use constitutes trademark infringement, false designation of origin, dilution and unfair competition in violation of the Lanham Act and of Ohio statutory and common law.

32. On information and belief, Defendant adopted its ORGANIC CHOICE Marks with the intention of trading off the goodwill associated with the OMS Marks. Hence, Defendant has deliberately and intentionally violated OMS's rights in its trademarks and services marks.

FIRST CLAIM FOR RELIEF
Trademark Infringement under 15 U.S.C. §§ 1114

33. Plaintiff repeats and realleges the allegations of paragraphs 1 – 32 as if fully set forth herein.

34. Defendant's acts alleged herein constitute use of colorable imitations of OMS' federally registered OMS Marks, including MIRACLE-GRO, ORGANIC CHOICE and MIRACLE-GRO ORGANIC CHOICE, in connection with the advertising and sale of unauthorized goods and services in commerce. These activities create a likelihood of confusion, mistake or deception as to the affiliation, connection or association of Defendant with OMS, or as to the origin, sponsorship or approval of Defendant's goods and services by OMS, in violation of 15 U.S.C. § 1114.

35. Defendant's acts alleged herein are without OMS' consent or authority. In fact, OMS has specifically demanded that Defendant cease and desist using its infringing ORGANIC-GRO mark, which it continues to use.

36. Defendant's acts alleged herein were with full knowledge of OMS' rights, title and interest in the OMS Marks, and were made with the willful intent to trade on the goodwill associated with those marks and to cause confusion, mistake or deception in the minds of the consuming public. Such acts have damaged, impaired and diluted that part of OMS' goodwill symbolized by its famous OMS Marks, to OMS' detriment.

37. Defendant's use of the ORGANIC-GRO Marks, which are confusingly similar to the OMS Marks, constitute trademark infringement in violation of 15 U.S.C. §§ 1114.

38. Defendant's wrongful conduct, unless and until enjoined and restrained by order of this Court, will cause great and irreparable injury to OMS.

39. OMS has no adequate remedy at law, and is entitled to injunctive relief prohibiting Defendant from using the ORGANIC-GRO Marks, or any marks confusingly similar to the OMS Marks in connection with its goods and services.

40. As a direct and proximate result of Defendant's trademark infringement, OMS has been damaged in an amount to be proved at trial.

41. The acts alleged herein constitute an exceptional case under 15 U.S.C. § 1117(a).

SECOND CLAIM FOR RELIEF
(Federal False Designation of Origin under 15 U.S.C. § 1125(a))

42. OMS repeats and realleges paragraphs 1 through 41 of this complaint as if fully set forth herein.

43. Defendant's acts alleged herein constitute use in commerce services of words, terms, names, symbols, devices, false designations of origin and false or misleading descriptions of fact which are likely to cause confusion or to cause mistake as to the origin, sponsorship or approval of Defendant's goods and services with those of OMS in violation of 15 U.S.C. § 1125(a).

44. Defendant's acts alleged herein constitute use in commercial advertising and promotion the words, terms, names, symbols, devices, false designations of origin and false or misleading descriptions of fact which misrepresents the nature, characteristics or qualities of its goods and services in violation of 15 U.S.C. § 1125(a).

45. Defendant's acts alleged herein are without OMS' consent or authority. In fact, OMS has specifically demanded that Defendant cease and desist using its infringing ORGANIC-GRO Marks, which it continues to use.

46. Defendant's acts alleged herein were with full knowledge of OMS' rights, title and interest in the OMS Marks, and were made with the willful intent to trade on the goodwill associated with those marks and to cause confusion, mistake or deception in the minds of the consuming public. Such acts have damaged, impaired and diluted that part of OMS' goodwill symbolized by its famous OMS Marks, to OMS' detriment.

47. Defendant's use of the ORGANIC-GRO Marks, which are confusingly similar to the OMS Marks, constitute a false designation of origin and false advertising in violation of 15 U.S.C. §§ 1125(a).

48. Defendant's wrongful conduct, unless and until enjoined and restrained by order of this Court, will cause great and irreparable injury to OMS.

49. OMS has no adequate remedy at law, and is entitled to injunctive relief prohibiting Defendant from using the ORGANIC-GRO Marks, or any marks confusingly similar to the OMS Marks in connection with its goods and services.

50. As a direct and proximate result of Defendant's trademark infringement, OMS has been damaged in an amount to be proved at trial.

51. The acts alleged herein constitute an exceptional case under 15 U.S.C. § 1117(a).

THIRD CLAIM FOR RELIEF
Trademark Dilution under 15 U.S.C. § 1125(c)

52. OMS repeats and realleges the allegations of paragraphs 1 – 51 as if fully set forth herein.

53. OMS owns the OMS Marks, which are distinctive and famous as defined by Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c) and which are known in the minds of the consuming public as representing goods and services of the highest quality.

54. Defendant began using the ORGANIC-GRO Marks in commerce in the United States after the OMS Marks became famous, which use has caused the dilution of the distinctive quality of the those marks.

55. On information and belief, Defendant's unauthorized use of the ORGANIC-GRO Marks are on goods of a lesser quality than those which OMS' consumers are used to and has resulted in the tarnishing of OMS' reputation and the reputation of the OMS Marks.

56. Defendant's acts alleged herein were with full knowledge of OMS' rights, title and interest in the OMS Marks, and made with the willful intent to trade on the goodwill associated with those marks, to injure OMS' reputation and with the intent to cause dilution of

the OMS marks. Defendant's acts alleged herein were committed after the OMS Marks became famous.

57. Defendant's acts alleged herein constitute dilution, tarnishment, blurring and disparagement of the OMS Marks, and have diminished the value of those marks, in violation of 15 U.S.C. § 1125(c).

58. Defendant's wrongful conduct, unless and until enjoined and restrained by order of this Court, will cause great and irreparable injury to OMS.

59. OMS has no adequate remedy at law, and is entitled to injunctive relief prohibiting Defendant from using the ORGANIC-GRO Marks, or any marks confusingly similar to the OMS Marks in connection with its goods and services.

60. As a direct and proximate result of Defendant's trademark dilution, OMS has been damaged in an amount to be proved at trial.

61. The acts alleged herein constitute an exceptional case under 15 U.S.C. § 1117(a).

FOURTH CLAIM FOR RELIEF
Deceptive Trade Practices Under Ohio Deceptive Trade Practices Act
(O.R.C. § 4165.01 et seq.)

62. OMS repeats and realleges the allegations of paragraphs 1 – 61 as if fully set forth herein.

63. By use in commerce of the ORGANIC-GRO Marks in connection with fertilizer, Defendant has passed off its goods as those of OMS.

64. Such use of the ORGANIC-GRO Marks in commerce has caused a likelihood of confusion or misunderstanding as to the source, sponsorship, approval or certification of Defendant's goods.

65. Such use of the ORGANIC-GRO Marks in commerce has caused likelihood of confusion or misunderstanding as to affiliation, connection or association with, or certification by, OMS.

66. By use in commerce of the ORGANIC-GRO Marks in connection with fertilizer, Defendant has represented that its goods have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have.

67. By use in commerce of the ORGANIC-GRO Marks in connection with fertilizer, Defendant has represented that its goods are of a particular standard, quality, or grade, when this is in fact not the case.

68. Defendant's wrongful conduct is in violation of Ohio's Deceptive Trade Practices Act, Ohio Rev. Code § 4165.01 *et seq.*

69. Defendant's wrongful conduct, unless and until enjoined and restrained by order of this Court, will cause great and irreparable injury to OMS.

70. OMS has no adequate remedy at law and is entitled to injunctive relief prohibiting Defendant from using the ORGANIC-GRO Marks pursuant to Ohio Rev. Code § 4165.03.

71. As a direct and proximate result of Defendant's trademark infringement, OMS has been damaged in an amount to be proved at trial.

FOURTH CLAIM FOR RELIEF
State Common Law Trademark Infringement.

72. OMS repeats and realleges the allegations of paragraphs 1 – 71 as if fully set forth herein.

73. By use in commerce of the ORGANIC-GRO Marks in connection with fertilizer, Defendant has caused a likelihood of confusion or misunderstanding as to the source, sponsorship, approval, affiliation, connection or association of its goods and services with those of Plaintiff.

74. Defendants unauthorized use of ORGANIC-GRO constitutes trademark infringement under the common law of the State of Ohio.

75. Defendant has acted willfully and with the intention and the likely result of confusing, misleading and deceiving customers.

76. By reason of Defendant's conduct, OMS is suffering and will continue to suffer irreparable harm unless and until enjoined and restrained by order of this Court.

77. OMS has no adequate remedy at law and is entitled to injunctive relief.

78. As a direct and proximate result of Defendant's trademark infringement, OMS has been damaged in an amount to be proved at trial.

FIFTH CLAIM FOR RELIEF
State Common Law Dilution.

79. OMS repeats and realleges the allegations of paragraphs 1 – 78 as if fully set forth herein.

80. Defendant's actions in using the ORGANIC-GRO Marks have diluted and will continue to dilute the value of the OMS Marks, and will tarnish the goodwill and high-quality reputation associated with these marks. Additionally, Defendant's actions have caused and will continue to cause a diminution of the "commercial magnetism" and/or selling power of OMS' trademarks.

81. Defendants unauthorized use of ORGANIC-GRO constitutes trademark dilution under the common law of the State of Ohio.

82. By reason of Defendant's conduct, OMS is suffering and will continue to suffer irreparable harm unless and until enjoined and restrained by order of this Court.

83. OMS has no adequate remedy at law and is entitled to injunctive relief.

84. As a direct and proximate result of Defendant's trademark infringement, OMS has been damaged in an amount to be proved at trial.

SIXTH CLAIM FOR RELIEF
Common Law Unfair Competition

85. OMS repeats and realleges the allegations of paragraphs 1 – 84 as if fully set forth herein.

86. Defendant's goods are so marked, made up and described by it as to be calculated to mislead ordinary purchasers and lead them to mistake Defendant's goods for the

goods of Plaintiff. Additionally, Defendant's conduct consists of representations by it for the purpose of deceiving the public that its goods are those of OMS.

87. Defendant's wrongful conduct alleged herein has proximately caused and will continue to cause OMS substantial injury, including loss of customers, dilution of its goodwill, confusion of potential customers, injury to its reputation, and diminution in value of its intellectual property.

88. Defendant's wrongful conduct alleged herein constitute unfair and unlawful practices in violation of the common law of the State of Ohio to the injury of OMS and the public.

89. Defendant's conduct has damaged OMS in an amount to be determined at trial, and unless restrained, will cause great and irreparable injury to OMS.

90. OMS has no adequate remedy at law and is entitled to an injunction restraining Defendant, its officers, directors, employees and agents, and all persons acting in concert with it, from engaging in further such unlawful conduct.

91. As a direct and proximate result of Defendant's actions, OMS is entitled to restitution of those amounts unlawfully obtained by Defendant's wrongful conduct.

SEVENTH CLAIM FOR RELIEF
Unjust Enrichment

92. OMS repeats and realleges the allegations of paragraphs 1 – 91 as if fully set forth herein.

93. OMS has made a substantial investment of time, money and effort in promoting its products and services under the OMS Marks. These trademarks have become assets of substantial value and symbols of OMS' goodwill.

94. By willfully infringing on the OMS Marks, by intentionally misleading customers as to the product Defendant is selling, and by falsely advertising the product it is selling, Defendant has received a benefit in that it has received business actually intended for Plaintiff, and as such, Defendant's actions constitute an unjust enrichment to it.

95. Defendant's use of the ORGANIC-GRO Marks and Defendant's intentional false advertising has allowed Defendant to knowingly and willfully receive a benefit which in justice and equity belongs to Plaintiff.

96. It will be unjust and inequitable for Defendant to benefit from its use of the ORGANIC-GRO mark without payment and/or reimbursement to Plaintiff.

97. By reason of Defendant's conduct, OMS is suffering and will continue to suffer irreparable harm unless and until enjoined and restrained by order of this Court.

98. As a direct and proximate result of Defendant's actions, OMS is entitled to restitution of those amounts by which Defendant was unjustly enriched through its wrongful conduct.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests that judgment be entered in its favor and against Defendant as follows:

1. Ordering that judgment be entered for Plaintiff and against Defendant on all claims alleged herein.

2. Ordering that:

a. Pursuant to 15 U.S.C. §§ 1116 and 1125(c), Ohio Rev. Code § 4165.03, and/or state common law, Defendant and its agents, affiliates, employees, and all persons in active concert or participation with them, are enjoined and restrained from directly or indirectly (i) using, promoting, marketing, advertising, distributing, or selling any good or service bearing or under any of the ORGANIC-GRO Marks or any mark confusingly similar to the OMS Marks, or any other designation that infringes or dilutes the OMS Marks in any manner; and (ii) from continuing any and all of the acts of unfair competition and unfair business practices alleged herein; and

b. Pursuant to 15 U.S.C. § 1118, that all labels, signs, prints, business cards, stationery, packages, wrappers, receptacles, websites, promotional materials, brochures, manuals, educational materials, and advertisements bearing the ORGANIC-GRO Marks or any mark

confusingly similar to the OMS Marks, or any other designation that infringes or dilutes the OMS Marks in any manner, be delivered up and destroyed;

c. Defendant and its agents, affiliates, employees, and all persons in active concert or participation with them are enjoined and restrained from engaging in further acts which constitute unlawful, deceptive, and unfair business practices;

d. Defendant immediately voluntarily abandon United States Trademark Application Serial No. 78/230,217 for ORGANIC-GRO (Stylized) and United States Trademark Application Serial No. 78/227,322 for ORGANIC GRO; and

e. Defendant shall file with the Court and serve on Plaintiff, within fifteen (15) days after service of the Court's injunction and/or judgment as requested herein, a report in writing under oath setting forth the detail the manner and form in which Defendant has complied with the Court's injunction and/or judgment.

3. Declaring this case is an exceptional case under 15 U.S.C. § 1117(a).

4. Ordering that Defendant provide an accounting to Plaintiff for any and all gains, profits, and benefits derived from Defendant's acts of infringement and other violations of law, and for all damages sustained by Plaintiff by reason of Defendant's acts of infringement, dilution, unfair competition and other wrongful acts complained of in this complaint, and that such amounts be deemed to be held in constructive trust for Plaintiff.

6. Awarding Plaintiff:

- a. All profits derived from Defendant's wrongful acts complained of herein;
- b. All damages sustained by reason of Defendant's wrongful acts complained of herein, including those available under 15 U.S.C. § 1117;
- c. Treble the amount of Defendant's profits or actual damages suffered by Plaintiff under 15 U.S.C. § 1117;
- d. Reasonable costs and attorneys' fees pursuant to 15 U.S.C. § 1117(a) and/or state law, or in the alternative, reasonable costs and attorneys' fees on equitable grounds;

- c. Restitution for Defendant's unfair business practices;
- f. Punitive and exemplary damages against Defendant and in favor of Plaintiff in an amount sufficient to deter and punish Defendant for its willful and wrongful acts;
- g. Pre-judgment and post-judgment interest; and
- h. Such other and further relief as this Court deems just and proper.



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DEMAND FOR JURY TRIAL

Plaintiff OMS demands a trial by jury of all issues triable by a jury.



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