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

Proceeding	91195421
Party	Defendant Faust Bio-Agricultural Services, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

AGRICARE, INC., an Oregon  
corporation,

Opposer,

v.

**FAUST BIO-AGRICULTURAL  
SERVICES, INC.**, a Delaware  
corporation,

Applicant.

**OPPOSITION NO.: 91195421**

**ANSWER**

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**APPLICANT’S ANSWER TO THE NOTICE OF OPPOSITION**

In response to the Notice of Opposition (“Notice”) issued by the Board on June 24, 2010, the applicant, Faust Bio-Agricultural Services, Inc. (“BioAg”), answers the opposition identified above as follows:

**OPPOSER’S ALLEGED FIRST GROUND FOR OPPOSITION**

1. In response to the averments of paragraph 1 of the Notice, BioAg, on information and belief, admits that the opposer, Agricare, Inc. (“Agricare”) has been in the business of selling a humic acid concentrate labeled HUMASOL (the “HUMASOL Product”), but is without knowledge or information sufficient to form a belief as to the averments that Agricare manufactures and distributes soil amendments and other horticultural products, including but not limited to water soluble humic acid concentrate, or humate powder and based thereon denies each and all of these averments and denies all other averments set forth in the paragraph that are not specifically referenced herein.

2. In response to the averments of paragraph 2 of the Notice, BioAg, on information and belief, admits that Agricare has used the mark HUMASOL in interstate commerce. BioAg denies the remainder of paragraph 2 of the Notice.

3. In response to the averments of paragraph 3 of the Notice, BioAg responds that the issue of inherent distinctiveness is a factual determination made by the Board.

*Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 1359. Given the use of the term “humisol” by those who practice soil science to describe a soil type which has a dominantly humic middle tier, the mark HUMASOL is not inherently distinctive, but merely descriptive. BioAg denies the averments set forth in paragraph 3 of the Notice.

4. In response to the averments of paragraph 4 of the Notice, BioAg is without knowledge or information sufficient to form a belief as to the averments that as a result of Agricare’s promotion and sale of Agricare goods under the HUMASOL mark, the HUMASOL mark has gained significant recognition and goodwill among the purchasing public and based thereon denies each and all of these averments and denies all other averments set forth in the paragraph that are not specifically referenced herein.

5. In response to the averments of paragraph 5 of the Notice, BioAg, on information and belief, admits that on September 28, 2009 Agricare filed an application under Section 1(a) of the Lanham Trademark Act to register the mark HUMASOL for Agricare goods in International Class 001, which was assigned Application Serial No. 77/836,768 (the “Agricare Application”) and that the mark published in the Official Gazette on February 9, 2010.

6. In response to the averments of paragraph 6 of the Notice, BioAg admits that on November 25, 2009 it filed an application under Section 1(a) of the Lanham Trademark Act to register the mark HUMISOLVE for “Fertilizers; Fertilizers for agricultural use; Fertilizers for domestic use” (collectively the “BioAg Goods”) in International Class 001, which was assigned Application Serial No. 77/881,219 (the “BioAg Application”) and that the mark published in the Official Gazette on April 27, 2010.

7. In response to the averments of paragraph 7 of the Notice, BioAg admits that in the BioAg Application it indicated September 1, 1996 as the date of first use with respect to the HUMISOLVE mark and that in the BioAg Application it indicated January 30, 1997 as the date of first use in commerce with respect to the HUMISOLVE mark.

8. In response to the averments of paragraph 8 of the Notice, BioAg is without knowledge or information sufficient to form a belief as to the averment that prior to BioAg’s alleged first date of use with respect to the HUMISOLVE mark, Agricare had been using its HUMASOL mark for the Agricare Goods continuously in interstate

commerce for at least eight months and based thereon denies this averment.

Accordingly, BioAg is without knowledge or information sufficient to form a belief as to the averment that Agricare is the senior user and based thereon denies this averment.

BioAg denies the remainder of paragraph 8 of the Notice.

9. In response to the averments of paragraph 9 of the Notice, BioAg admits that the Agricare Application has an earlier filing date than the BioAg Application. In response to the averments of paragraph 9 of the Notice, BioAg denies the averment that the Agricare Application has priority over the BioAg Application. BioAg denies the remainder of paragraph 9 of the Notice.

10. In response to the averments of paragraph 10 of the Notice, BioAg, on information and belief, admits that the goods, on which it uses the mark HUMISOLVE, are almost identical to the HUMASOL Product. BioAg denies the remainder of paragraph 10.

11. In response to the averments of paragraph 11 of the Notice, BioAg, on information and belief, admits that the use of the HUMISOLVE mark in connection with the BioAg Goods is likely to be encountered by the same persons who encounter Agricare goods under such circumstances that are likely to give rise to the mistaken belief that they originate from the same source. BioAg denies the remainder of paragraph 11 of the Notice.

12. In response to the averments of paragraph 12 of the Notice, BioAg, on information and belief, admits that that the word HUMASOL resembles BioAg's mark HUMISOLVE, as identified in its application Serial No. 77/881,219, and that registration of the mark HUMASOL would be likely to cause confusion, mistake, or deception. BioAg denies the remainder of paragraph 12 of the Notice.

13. BioAg denies the averments set forth in paragraph 13 of the Notice.

**OPPOSER'S ALLEGED SECOND GROUND FOR OPPOSITION**

14. BioAg repeats each and every response set forth in paragraphs 1 through 13 of this Answer as if fully set forth herein.

15. BioAg denies the averments set forth in paragraph 15 of the Notice.

16. In response to the averments of paragraph 16 of the Notice, BioAg admits it was located in Hawaii on or about May 7, 1996. BioAg denies the remainder of paragraph 16 of the Notice.

17. BioAg denies the averments set forth in paragraph 17 of the Notice.

18. BioAg denies the averments set forth in paragraph 18 of the Notice.

19. BioAg denies the averments set forth in paragraph 19 of the Notice.

20. In response to the averments of paragraph 20 of the Notice, BioAg, on information and belief, admits that on November 12, 2009 (in a letter dated October 31, 2009), Agircare sent a cease a desist letter (the “Demand Letter”) to BioAg. BioAg admits the Demand Letter stated that Agricare was the exclusive owner of the HUMASOL mark. BioAg denies the remainder of paragraph 20 of the Notice.

21. BioAg admits the averments set forth in paragraph 21 of the Notice.

22. BioAg admits the averments set forth in paragraph 22 of the Notice.

23. BioAg admits the averments set forth in paragraph 23 of the Notice.

24. BioAg denies the averments set forth in paragraph 24 of the Notice.

### **AFFIRMATIVE DEFENSES**

BioAg presents the following affirmative defenses against Agricare’s Notice of Opposition:

#### **ABANDONMENT**

25. On December 10, 1998, Agricare was involuntarily dissolved as a business entity by the Oregon Secretary of State.

26. On July 23, 2003, Agricare was reinstated as a business entity by the Oregon Secretary of State.

27. On information and belief, Agricare did not operate a business for at least four (4) years between December 10, 1998, when it was involuntarily dissolved by the Oregon Secretary of State, and July 23, 2003, when it was reinstated as a business entity by the Oregon Secretary of State.

28. On information and belief, during the four (4) year period of business inactivity between December 10, 1998 and July 23, 2003 Agricare discontinued the use of the HUMASOL mark.

29. On information and belief, during the four year period of business inactivity between December 10, 1998 and July 23, 2003 the HUMASOL mark was abandoned by Agricare within the meaning of Section 45 of the Lanham Trademark Act.

**PRIOR USE**

30. BioAg repeats each and every allegation set forth in paragraphs 25 through 29 of this Answer as if fully set forth herein.

31. In the BioAg Application, BioAg indicated the date of first use as early as September 1, 1996 with respect to the HUMISOLVE mark and indicated the date of first use in commerce as early as January 30, 1997 with respect to the HUMISOLVE mark.

32. Because Agricare abandoned the HUMASOL mark between December 10, 1998 and July 23, 2003, within the meaning of Section 45 of the Lanham Trademark Act, registration of BioAg's HUMISOLVE mark should be granted notwithstanding Agricare's Notice of Opposition.

**RELIEF REQUESTED**

33. The applicant asks that this opposition proceeding be dismissed and that its registration issue forthwith.

Dated: August 3, 2010

Respectfully submitted,

By: /s/ Michelle Vlach-Ing

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**AGRICARE, INC.**, an Oregon corporation,

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**FAUST BIO-AGRICULTURAL SERVICES, INC.**, a Delaware corporation,

Applicant.

**OPPOSITION NO.: 91195421**

**CERTIFICATE OF SERVICE**

**CERTIFICATE OF SERVICE**

I hereby certify that on August 3, 2010, I served the foregoing ANSWER on the individual noted below by mailing a true copy of the original thereof to the last known address of said individual with first class postage prepaid and addressed as follows:

Kohel Haver  
Swider Medeiros Haver LLP  
1420 American Bank Building  
621 S.W. Morrison Street  
Portland, Oregon 97205-3897

Dated: August 3, 2010

                  /s/ Michelle Vlach-Ing                  

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