

08/22/03 11:00 AM

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



08-22-2003

U.S. Patent & TMO/TM Mail Rpt Dt. #21

OMS INVESTMENTS, INC.,)
)
Petitioner,)
)
v.)
)
JAMES J. MESSINA,)
)
Registrant.)
)

Cancellation No. 32,182

For Reg. No.: 1,726,273

STIPULATION OF JUDGMENT

Registrant, James J. Messina, and Petitioner, OMS Investments, Inc., by their respective counsel, hereby state that they have reached a settlement in the above-referenced cancellation proceeding, as set forth in the Agreement attached hereto as Exhibit A, and hereby jointly stipulate that judgment in this proceeding be entered in favor of Petitioner, and that the subject registration be CANCELLED, and jointly move for an order to that effect.

Respectfully submitted,

JAMES J. MESSINA

OMS INVESTMENTS, INC.

By: Richard T Laughlin / WHO by fel. adv. 8/21/03
Richard T. Laughlin
Graham, Curtin & Sheridan
4 Headquarters Plaza
P.O. Pox 1991
Morristown, NJ 07962
(973) 292-1700

By: William H Oldach III
Cory M. Amron
William H. Oldach III
Vorys, Sater, Seymour and Pease LLP
1828 L Street, N.W.
11th Floor
Washington, D.C. 20036
(202) 467-8810
Attorneys for Petitioner

Attorney for Registrant

Dated: 8/22/03

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SETTLEMENT AGREEMENT

WHEREAS, OMS Investments, Inc. ("OMS"), a Delaware corporation with a place of business at 100 Wilshire Blvd., Suite 1230, Santa Monica, CA 90401, is the owner and assignee of numerous United States Trademark Registrations and Applications for pesticides, herbicides and related goods containing the term "B-GON" (the "B-GON Marks"), including: BUG-B-GON, Reg. No. 2,073,033; FLEA-B-GON, Reg. No. 1,261,432; GRASS-B-GON (stylized), Reg. No. 1,995,777; PEST-B-GON, Reg. No. 433,172; WEED-B-GON, Reg. No. 889,348; WEED-B-GON EXTRA GREEN, Reg. No. 2,074,449; and GRUB-B-GON, Reg. No. 2,236,054;

WHEREAS, James J. Messina, an individual with a place of residence at 58 Califon Road, Long Valley, New Jersey 07853, is the owner of Registration No. 1,726,273 for the mark "DEER-B-GONE" for pest control services, namely, spraying vegetation to repel deer in International Class 37;

WHEREAS, OMS was and is desirous of using the mark "DEER-B-GON" on or in connection with an animal repellant and has filed an intent-to-use (ITU) application to register said mark, Serial No. 76/254,551;

WHEREAS, OMS has filed a Petition to Cancel Messina's registration on the ground that Messina has abandoned his rights in his mark based on non-use thereof, which cancellation proceeding has been assigned number 32,182; and

WHEREAS, the parties are desirous of resolving the cancellation proceeding in an amicable manner.

NOW, THEREFORE, in consideration of the foregoing recitals and the following grants and mutual covenants and other good and valuable consideration, OMS and Messina hereby mutually agree as follows:

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1. **Cancellation of Registration.** Messina hereby agrees that his Registration No. 1,726,273 shall be cancelled and judgment entered against him in the cancellation proceeding. Messina further agrees that he will cease use of the mark "DEER-BE-GONE" effective August 1, 2003 and that he will thereafter use no mark containing the term "B-GON," or any term phonetically equivalent or otherwise confusingly similar thereto.

2. **Consideration.** As consideration for Messina's agreeing to the cancellation of his mark, his cessation of use thereof, and for the releases granted hereunder, OMS agrees to pay Messina the sum of Eight Thousand, Five Hundred Dollars (\$8500.00).

3. **Releases.**

a. With respect to those activities of Messina under the mark "DEER-BE-GONE" prior to August 1, 2003, OMS, on its own behalf and on behalf of its subsidiaries and affiliates (including, without limitation, The Scotts Company), hereby releases Messina, and all his affiliates, partnerships, ventures, and sole proprietorships, and their officers, directors, and employees, from any and all claims, demands, debts, liabilities, obligations, causes of action, suits and costs, whether known or unknown, that OMS asserted or could have asserted against Messina, or which could form the basis of a claim of infringement of OMS' rights in the B-GON Marks. Notwithstanding any provision whatsoever in this Agreement that may be interpreted to the contrary, this release does not apply to any activities marketed in association with the mark "DEER-BE-GONE," or any mark confusingly similar to any of OMS' B-GON Marks, marketed by Messina after August 1, 2003.

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b. Messina, on his own behalf and on behalf of all his affiliates, partnerships, ventures, and sole proprietorships, hereby releases OMS, its subsidiaries, affiliates (including, without limitation, The Scotts Company), officers, directors, and employees, and its distributors, customers, consignees and agents from any and all claims, demands, debts, liabilities, obligations, causes of action, suits and costs, whether known or unknown, that Messina asserted or could have asserted against OMS arising out of OMS' intention to use or use of the mark "DEER-B-GON," or out of OMS' institution of the cancellation proceeding.

4. **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties hereto with respect to the subject matter of this Agreement. This written document supersedes any prior agreements, understandings, communications, discussions, or negotiations.

5. **Modification.** This Agreement shall not be modified by any Party by oral representation made before or after the execution of this Agreement. Any modification must be in writing and signed by the Party against whom such modification is sought to be enforced.

6. **Construction.** This Agreement, or any portion thereof, shall not be construed against the Party who initially prepared it, but shall be construed as if both Parties jointly prepared each and every part thereof, and any uncertainty or ambiguity shall not be interpreted to the detriment of any Party on such basis.

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7. **Choice of Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware without giving effect to Delaware choice of law rules.

8. **No Admission.** This Agreement effects a settlement of claims which are contested and denied. Nothing herein shall be construed as an admission by any Party of any liability of any kind to the other Party. This Agreement shall not be admissible as evidence in any proceeding other than in a proceeding to enforce an obligation of any Party hereunder.

9. **All Acts Necessary.** The Parties, at their own expense, shall execute and deliver all documents and perform all further acts that may be deemed reasonably necessary to give effect to the terms of this Agreement.

10. **Binding Effect.** This Agreement shall be binding on the Parties and their successors and assigns.

11. **Notice.** Any payments or other notices pertaining to this Agreement shall be sent to the following persons associated with each Party:

For OMS:

Ms. Nicole McClelland
OMS Investments, Inc.
100 Wilshire Blvd.
Suite 1230
Santa Monica, CA 90401

With a copy to:

David M. Aronowitz, Esq.
The Scotts Company
14111 Scottslawn Road
Marysville, Ohio 43041

For Messina:

Richard T. Laughlin, Esq.
Graham, Curtin & Sheridan
4 Headquarters Plaza
P.O. Box 1991
Morristown, NY 07962

12. **Counterparts.** This Agreement may be executed in separate counterparts, each of which shall be considered an original but all of which together shall constitute one agreement.

13. **Warrant of Authority.** Each Party represents and warrants that the undersigned has full power and authority to enter into this Agreement and to bind itself to all its terms.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the dates set forth below.

OMS INVESTMENTS, INC.

By: Nicole McClelland
Nicole McClelland
Assistant Treasurer

Dated: 8/18/03

JAMES J. MESSINA

[Signature]


Dated: 07-23-03

08/22/2003 09:00:00

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Stipulation of Judgment has been served upon the following attorney of record for Registrant by depositing a copy of same, postage pre-paid, in the United States Mail on this 22nd day of August, 2003:

Richard T. Laughlin, Esq.
Graham, Curtin & Sheridan
P. O. Box 1911
Morristown, New Jersey 07962


William H. Oldach III