

ESTTA Tracking number: **ESTTA338529**

Filing date: **03/22/2010**

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

|                        |   |
|------------------------|---|
| Proceeding             | 92043663  |
| Party                  | Plaintiff<br>SMART WORLD ORGANICS INC.  |
| Correspondence Address | SHYAM N.S. DIXIT JR.<br>TRENAM KEMKER SCHARF BARKIN FRYE O'NEILL<br>2700 BANK OF AMERICA PLAZA POST OFFICE BOX 1102<br>TAMPA, FL 33601<br>UNITED STATES |
| Submission             | Plaintiff's Notice of Reliance  |
| Filer's Name           | Abby Dritz Salzer   |
| Filer's e-mail         | asalzer@trenam.com  |
| Signature              | /abby dritz salzer/   |
| Date                   | 03/22/2010  |
| Attachments            | Smart World Notice of Reliance OA1.pdf ( 6 pages )(212245 bytes )   |

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

GUSTAFSON, L.L.C.

Petitioner

v.

CIRCLE ONE INTERNATIONAL, INC.

Registrant

CIRCLE ONE INTERNATIONAL, INC. and  
SMART WORLD ORGANICS, INC.

Petitioner,

v.

GUSTAFSON, L.L.C.

Registrant

Cancellation No. **92041710**,

Registration No. **2271859**

**CONSOLIDATED WITH**

Cancellation No. **92043663**

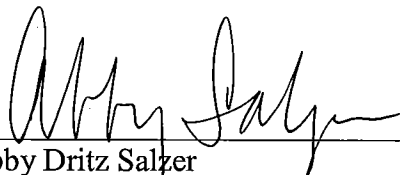
Registration No. **2846341**

**NOTICE OF RELIANCE**

Notice is hereby given that the party identified below offers into evidence, and will rely upon Office Action No. 1 to Serial No. 78/055392, its relevance to the present proceeding is the Examining Attorney's refusal of registration because of a likelihood of confusion with Registrant's mark, PROSPER, U.S. Registration No. 2,271,859.

Date: **March 22, 2010**

Respectfully submitted,

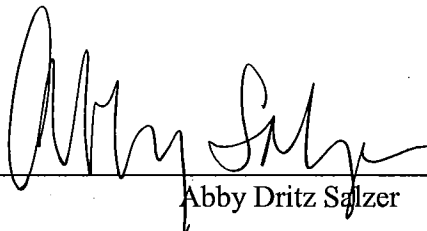


Abby Dritz Salzer  
TRENAM, KEMKER, SCHARF, BARKIN, FRYE,  
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ATTORNEYS FOR REGISTRANT

**CERTIFICATE OF TRANSMISSION**

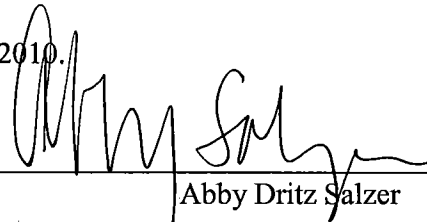
I hereby certify that this Brief on the Case is being transmitted to the United States Patent and Trademark Office, Trademark Trial and Appeal Board, via electronic filing through its website located at <http://esta.uspto.gov> on March 22, 2010.



Abby Dritz Salzer

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of Notice of Reliance has been served on **Anthony J. Barbieri, Esq.** at Kessler & Collins, P.C., 2100 Ross Avenue, Suite 750, Dallas, Texas 75201, via U.S. Mail, postage prepaid, on March 22, 2010.



Abby Dritz Salzer

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**SERIAL NO.**  
78/055392 **APPLICANT**  
Gustafson, L.L.C.

**MARK**  
PROSPER

**ADDRESS**  
ANTHONY J. Barbieri  
KESSLER COLLINS P C  
5950 SHERRY LN STE 222  
DALLAS TX 75225-6536

**ACTION NO.**  
01

**MAILING DATE**  
07/20/01

**REF. NO.**

FORM PTO-1525 (5-90)

U.S. DEPT. OF COMM. & TM OFFICE

PAPER NO.

**ADDRESS:**

Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513  
www.uspto.gov

If no fees are enclosed, the address should include the words "Box Responses - No Fee."

Please provide in all correspondence:

1. Filing Date, serial number, mark and Applicant's name.
2. Mailing date of this Office action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and ZIP code.

**A PROPER RESPONSE TO THIS OFFICE ACTION MUST BE RECEIVED WITHIN 6 MONTHS FROM THE DATE OF THIS ACTION IN ORDER TO AVOID ABANDONMENT.** For your convenience and to ensure proper handling of your response, a label has been enclosed. Please attach it to the upper right corner of your response. If the label is not enclosed, print or type the Trademark Law Office No., Serial No., and Mark in the upper right corner of your response.

RE: Serial Number: 78/055392

The assigned examining attorney has reviewed the referenced application and determined the following.

**REGISTRATION REFUSED--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. 2271859 as to be likely to cause confusion, to cause mistake, or to deceive. TMEP section 1207. See the enclosed registration.

The examining attorney must analyze each case in two steps to determine whether there is a likelihood of confusion. First, the examining attorney must look at the marks themselves for similarities in appearance, sound, connotation and commercial impression. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Second, the examining attorney must compare the goods or services to determine if they are related or if the activities surrounding their marketing are such that confusion as to origin is likely. *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978); *Guardian Products Co., v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978).

The applicant has applied for registration of the proposed mark, PROSPER. The registrant's mark is also PROSPER.

The examining attorney must compare the marks for similarities of sound, appearance, meaning or connotation. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Similarity in any one of these elements is sufficient to find a likelihood of confusion. *In re Mack*, 197 USPQ 755 (TTAB 1977).

In the present case, the respective marks are identical in appearance, sound, meaning and connotation.

If the marks of the respective parties are identical or highly similar, the examining attorney must consider the commercial relationship between the goods or services of the respective parties carefully to determine whether there is a likelihood of confusion. *In re Concordia International Forwarding Corp.*, 222 USPQ 355 (TTAB 1983).

The applicant's goods are identified as "seed-applied fungicide and/or insecticide product for agricultural use." The registrant's goods are identified as "fertilizers, namely, biological fungi and bacteria, organic stimulants, predatory microorganisms, all for agricultural use."

The goods of the parties need not be identical or directly competitive to find a likelihood of confusion. They need only be related in some manner, or the conditions surrounding their marketing be such, that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Products Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

In the present case, the goods of the parties could well be presumed to be from the same source inasmuch as the goods of the parties relate to agriculture fungicides and insecticides. Consequently, the goods of the present parties clearly move in the same normal channels of trade, are available to all potential customers and may be utilized for the same or similar (i.e., related) purposes by the same classes of purchasers.

Accordingly, based on the identical nature of the marks and the similarity of the goods of the parties, there is a likelihood of confusion under Section 2(d) of the Trademark Act.

Although the examining attorney has refused registration, the applicant may respond to the refusal to register by submitting evidence and arguments in support of registration.

If the applicant chooses to respond to the refusal to register, the applicant must also respond to the following informality.

#### **IDENTIFICATION OF GOODS**

The identification of goods is unacceptable as indefinite because as worded, the exact nature of the goods is unclear. The applicant may adopt the following identification, if accurate:

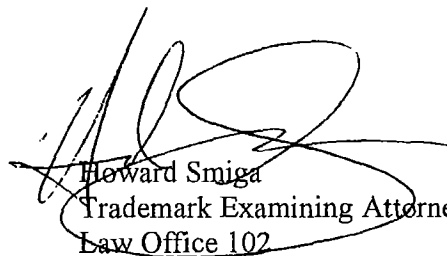
“Seed-applied fungicide and insecticide for agricultural use,” in International Class 5.

TMEP section 804.

Please note that, while an application may be amended to clarify or limit the identification, additions to the identification are not permitted. 37 C.F.R. Section 2.71(b); TMEP section 804.09. Therefore, the applicant may not amend to include any goods that are not within the scope of goods set forth in the present identification.

PLEASE NOTE: Because it delays processing, submission of duplicate papers is discouraged. Unless specifically requested to do so by the Office, parties should not mail follow up copies of documents transmitted by fax. TMEP 702.04(e); *Cf. ITC Entertainment Group Ltd. V. Nintendo of America Inc.* 45 USPQ2d 2021 (TTAB 1998).

If the applicant has any questions or needs assistance in responding to this Office action, please telephone the assigned examining attorney.



Howard Smiga  
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[Typed Drawing]

Mark

PROSPER

Goods and Services

IC 001. US 001 005 006 010 026 046. G & S: Fertilizers, namely, biological fungi and bacteria, organic stimulants, predatory microorganisms, all for agricultural use. FIRST USE: 19940303. FIRST USE IN COMMERCE: 19940902

Mark Drawing Code

(1) TYPED DRAWING

Serial Number

75462372

Filing Date

April 6, 1998

Publication for Opposition Date

June 1, 1999

Registration Number

2271859

Registration Date

August 24, 1999

Owner Name and Address

(REGISTRANT) Circle One International, Inc. CORPORATION FLORIDA 16209  
Flight Path Drive Brooksville FLORIDA 34609

Type of Mark

TRADEMARK

Register

PRINCIPAL

Live Dead Indicator

LIVE

\*\*\* Search: 9 \*\*\* Document Number: 41 \*\*\*