

ESTTA Tracking number: **ESTTA861849**

Filing date: **12/01/2017**

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 has filed a petition to cancel the registration indicated below.

Petitioner Information

Name	NutriAg Ltd.		
Entity	Corporation	Citizenship	Canada
Address	62 Arrow Road Toronto, ON M9M2L8 CANADA		

Attorney information	Drew Smith Holley & Menker, PA P.O. Box 1650 Bend, OR 97709 UNITED STATES Email: dsmith@holleymenker.com, eastdocket@holleymenker.com Phone: 720-289-2300		
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Registration Subject to Cancellation

Registration No.	3704632	Registration date	11/03/2009
Registrant	AG EXCITE, LLC 701 S. TAYLOR ST., SUITE 501 AMARILLO, TX 79101 UNITED STATES		

Goods/Services Subject to Cancellation

Class 001. First Use: 2009/01/04 First Use In Commerce: 2009/01/07 All goods and services in the class are subject to cancellation, namely: Fertilizers for agricultural use

Grounds for Cancellation

Abandonment	Trademark Act Section 14(3)
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Attachments	Petition to Cancel - US Reg No 3704632.pdf(1924109 bytes)
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Signature	/Drew Smith/
Name	Drew Smith
Date	12/01/2017

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

NutriAg Ltd.,)	
)	
Petitioner,)	
)	
v.)	
)	Reg. No. 3704632
Ag Excite, LLC,)	
)	
Registrant.)	
)	

PETITION TO CANCEL

NutriAg Ltd. (hereinafter “Petitioner”) is or will be damaged by the continued registration of the mark BORMAX, which is set forth in Registration No. 3704632 and owned by Ag Excite, LLC (hereinafter “Registrant”), and hereby requests the cancellation of the same.

As grounds for cancellation, Petitioner, by its attorneys, avers as follows:

1. On February 12, 2009, Registrant’s predecessor-in-interest, OmniAgri Trade Group, LLC, filed application Ser. No. 77669507 with the United States Patent and Trademark Office (“US PTO”) seeking to register the mark BOR-MAX¹ for goods in International Class 1, namely, “fertilizers for agricultural use.”

2. Application Ser. No. 77669507 was filed under Section 1(a) of the Trademark Act based on OmniAgri Trade Group, LLC’s claim of actual use of the mark BORMAX in conjunction with “fertilizers for agricultural use” since at least as early as January 4, 2009.

¹ On July 2, 2009, OmniAgri Trade Group, LLC amended application Ser. No. 77669507 to change the description of the mark from BOR-MAX to BORMAX. The US PTO entered the amendment on July 3, 2009.

3. On May 7, 2009, the US PTO issued an Office Action to application Ser. No. 77669507 wherein it refused the specimen of use filed by OmniAgri Trade Group, LLC on February 12, 2009.

4. On May 11, 2009, OmniAgri Trade Group, LLC filed a substitute specimen of use with the US PTO featuring the BORMAX mark on a label that included a 2008 copyright date and a statement that “[i]nformation about the components of this fertilizer may be obtained by writing to Omni Agri Trade Group, LLC, PO BOX 1027, Arroyo Grande, CA 93421...” OmniAgri Trade Group, LLC submitted a signed affidavit in support of its substitute specimen stating that the label was in use as of February 12, 2009, the filing date for application Ser. No. 77669507. A copy of Registrant’s substitute specimen of use is attached as Exhibit A.

5. On November 3, 2009, the US PTO issued Registration No. 3704632 in the name of OmniAgri Trade Group, LLC for the mark BORMAX covering goods in International Class 1, namely, “fertilizers for agricultural use.”

6. On information and belief, OmniAgri Trade Group, LLC filed a Certificate of Amendment with the Texas Secretary of State on November 5, 2010 to change its name to CoreAgri, LLC.

7. On information and belief, the Texas Secretary of State issued a Certificate of Involuntary Termination for CoreAgri, LLC on January 14, 2013.

8. On information and belief, on August 2, 2013, CoreAgri, LLC executed a Bill of

Sale as part of a foreclosure proceeding wherein it assigned its rights, title, and interests in Registration No. 3704632 to Happy State Bank.

9. On information and belief, on December 17, 2013, Happy State Bank executed an Assignment of Trademarks Agreement wherein it purported to assign its rights, title, and interests in Registration No. 3704632 to Registrant, Ag Excite, LLC.

10. On December 1, 2015, Registrant filed a combined Declaration of Use and Incontestability for Registration No. 3704632 with the US PTO which contained a verified declaration from Registrant's President, Ross Glenn, stating "the mark has been in continuous use in commerce for five consecutive years after the date of registration...and is still in use in commerce on or in connection with all goods/services...listed in existing registration."

11. Registrant's combined Declaration of Use and Incontestability included a specimen of use in the nature of a "digitally photographed label" featuring the BORMAX mark that included a 2008 copyright date and a statement that "[i]nformation about the components of this fertilizer may be obtained by writing to Omni Agri Trade Group, LLC, PO BOX 1027, Arroyo Grande, CA 93421..." A copy of Registrant's December 1, 2015 specimen of use is attached as Exhibit B.

12. On information and belief, the specimen of use filed by Registrant as part of its combined Declaration of Use and Incontestability is the same document that was filed by OmniAgri Trade Group, LLC, Registrant's predecessor-in-interest, with the US PTO on May 11,

2009.

13. On information and belief, one or more of Registrant's predecessors-in-interest abandoned the BORMAX mark in conjunction with "fertilizers for agricultural use" prior to December 17, 2013, the date that Registration No. 3704632 was assigned to Registrant.

14. On information and belief, Registrant was not using the BORMAX mark in conjunction with "fertilizers for agricultural use" as of December 1, 2015, the date that Registrant filed its combined Declaration of Use and Incontestability for Registration No. 3704632 with the US PTO.

15. On information and belief, Registrant is not currently using the BORMAX mark to directly advertise or promote the sale of "fertilizers for agricultural use" as of the filing date of this Petition to Cancel.

16. On information and belief, Registrant and its predecessors-in-interest, through their intentional nonuse and intent not to resume use, have abandoned the mark set forth in Registration No. 3704632.

17. Any goodwill that may have been associated with the mark set forth in Registration No. 3704632 has been destroyed by Registrant and/or its predecessors-in-interest by their intentional abandonment and nonuse of the mark in commerce.

18. On April 28, 2016, Petitioner submitted application Ser. No. 87017729 to the US PTO.

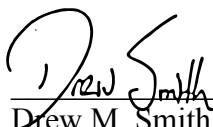
19. Petitioner is or will be damaged by the existence of Registration No. 3704632. Specifically, upon examination, the Examining Attorney is of the opinion that the mark set forth in application Ser. No. 87017729 consists of or comprises a mark which so resembles the mark set forth in Reg. No. 3704632 that when used on or in connection with the respective goods identified in the application and registration, is likely to cause confusion, or to cause mistake, or to deceive, under Trademark Act Section 2(d), 15 U.S.C. § 1052(d).

WHEREFORE, Petitioner respectfully requests that Registration No. 3704632 be cancelled.

The required filing fee is submitted herewith.

Respectfully submitted,

NutriAg Ltd.

By:  _____
Drew M. Smith
James R. Menker

Petitioner's Attorneys
Holley & Menker, P.A.
P.O. Box 1650
Bend, OR 97709
T: (720) 289-2300
eastdocket@holleymenker.com

Exhibit A

BORMAX PLUS

For Soil and Foliar Application

For correction or prevention of boron deficiency in agricultural crops, vegetable crops, turf, and ornamentals

Guaranteed Analysis

Boron (B).....	6.00%
Cobalt (Co).....	0.0005%
Molybdenum (Mo).....	0.0005%

Plant nutrients derived from boric acid, cobalt sulfate, and sodium molybdate.

Information about the components of this fertilizer material may be obtained by writing to Omni Agri Trade Group, LLC, PO Box 1027, Arroyo Grande, CA 93421 and giving the lot number which is found on the container.

Net Weight: 10.0 lbs/gallon
Net Contents: 250 gallons (946 liters)

Lot Number:

CAUTION: This product contains Boron (B) and Molybdenum (Mo). Excessive application of products containing boron or use on sensitive crops may result in boron toxicity. Application of fertilizers containing molybdenum may result in forage crops that contain levels of molybdenum that are toxic to ruminant animals. This may cause foliar damage or serious crop injury. Harmful if swallowed. Avoid contact with eyes, skin, and clothing. Avoid breathing spray mist. Keep out of reach of children. **READ LABEL – FOLLOW DIRECTIONS!**
Refer to MSDS for health, safety and environmental information.

OmniAgri

Omni Agri Trade Group, LLC
PO Box 1027
Arroyo Grande, CA 93421
www.omniagri-tg.com

GENERAL INFORMATION

BORMAX PLUS is a proprietary blend of plant available, micro (Boron, etc) plant nutrients specifically formulated for use in both soil and foliar applications. Boron plays a role in the uptake and translocation of nutrient cations, as well as the transport of carbohydrates. BORMAX PLUS when used along with a sound fertility program, assures that the nutritional demands of the plant are satisfied during the growing season.

DIRECTIONS FOR USE

BORMAX PLUS is compatible with most pesticides and fertilizers, including liquid nitrogen solutions. It may be applied by ground, aerial, or through irrigation systems. Mix in the following sequence: 1) Water, 2) BORMAX PLUS, 3) pesticide or fertilizer. Always conduct a jar test with new tank mixes to verify compatibility. For soil application, apply with sufficient water to give complete coverage. Soil applied boron must be moved into the root zone in order to improve plant uptake. For foliar application, use sufficient water for thorough and uniform coverage of foliage. For best results, apply in multiple applications at low rates during the growing season. Avoid foliar application while plants are under moisture stress. For use in field, vegetable, fruit, and nut crops. Use a minimum of 20 gallons water per acre for ground application and 5 gallons water per acre by air.

RECOMMENDED RATES

The optimum rate and timing of application will depend on local conditions and should always be made as a result of soil and/or plant tissue analysis in consultation with your local agricultural authorities. Local climatic conditions, infestations, and other factors affect the performance of any pesticide or nutritional spray. In the absence of test results, use the following general rates as a guide:

Soil Applications: 1-2 pt/ac as preplant or sidedress application
Foliar Applications: 0.5-1 pt/ac per application, with at least 2 applications required to correct deficiency

WHAT TO DO IN CASE OF CONTACT

If Ingested: Give large amounts of water or milk, if conscious. Contact a physician immediately.
Eye Contact: Flush eyes with clean water for 15 minutes. Seek medical attention immediately.
Skin Contact: Remove contaminated clothing and wash skin with soap and water. Seek medical attention if irritation develops or persists.
If Inhaled: Move to fresh air and seek medical attention if irritation develops or persists.

This product may be corrosive to aluminum, mild steel, and/or brass if not diluted. Store in fiberglass, polyethylene or stainless steel containers/tanks. Check with equipment manufacturer for compatibility of components prior to use with this product.
Storage: Store in cool place out of direct sunlight. Location should be inaccessible to children, pets, domestic animals, and/or wildlife.
Container Disposal: Do not reuse empty containers. Triple rinse (or equivalent) then offer for recycling or disposal by procedures approved by state or local authorities.

WARNING: This product contains chemicals known to the State of California to cause cancer, birth defects, or other reproductive harm.
CONDITIONS OF SALE: Omni Agri Trade Group, LLC (Company) warrants that this product conforms to the chemical description of the label and is reasonably fit for the purposes stated on the label when used in accordance with the directions under normal use. This warranty does not extend to the use of this product contrary to label instruction, or under abnormal use conditions, or under conditions not reasonably foreseen by the Company. **THE COMPANY DISCLAIMS ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING ANY WARRANTY OF FITNESS OR MERCHANTABILITY. THE COMPANY SHALL NOT BE LIABLE FOR CONSEQUENTIAL, SPECIAL, OR INDIRECT DAMAGES RESULTING FROM THE USE OR HANDLING OF THIS PRODUCT, AND THE COMPANY'S SOLE LIABILITY AND BUYER'S AND USER'S EXCLUSIVE REMEDY SHALL BE LIMITED TO THE REFUND OF THE PURCHASE PRICE. BUYER AND SELLER ACKNOWLEDGE AND ASSUME ALL RISKS AND LIABILITY RESULTING FROM HANDLING, STORAGE AND USE OF THIS PRODUCT. THE COMPANY DOES NOT AUTHORIZE ANY AGENT OR REPRESENTATIVE TO MAKE ANY OTHER WARRANTY, GUARANTEE OR REPRESENTATION CONCERNING THIS PRODUCT.**

Exhibit B

BORMAX PLUS

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For correction or prevention of boron deficiency in agricultural crops, vegetable crops, turf, and ornamentals

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Boron (B).....	6.00%
Cobalt (Co).....	0.0005%
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Plant nutrients derived from boric acid, cobalt sulfate, and sodium molybdate.

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If Inhaled: Move to fresh air and seek medical attention if irritation develops or persists.

This product may be corrosive to aluminum, mild steel, and/or brass if not diluted. Store in fiberglass, polyethylene or stainless steel containers/tanks. Check with equipment manufacturer for compatibility of components prior to use with this product.
Storage: Store in cool place out of direct sunlight. Location should be inaccessible to children, pets, domestic animals, and/or wildlife.
Container Disposal: Do not reuse empty containers. Triple rinse (or equivalent) then offer for recycling or disposal by procedures approved by state or local authorities.

WARNING: This product contains chemicals known to the State of California to cause cancer, birth defects, or other reproductive harm.
CONDITIONS OF SALE: Omni Agri Trade Group, LLC (Company) warrants that this product conforms to the chemical description of the label and is reasonably fit for the purposes stated on the label when used in accordance with the directions under normal use. This warranty does not extend to the use of this product contrary to label instruction, or under abnormal use conditions, or under conditions not reasonably foreseen by the Company. **THE COMPANY DISCLAIMS ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING ANY WARRANTY OF FITNESS OR MERCHANTABILITY. THE COMPANY SHALL NOT BE LIABLE FOR CONSEQUENTIAL, SPECIAL, OR INDIRECT DAMAGES RESULTING FROM THE USE OR HANDLING OF THIS PRODUCT, AND THE COMPANY'S SOLE LIABILITY AND BUYER'S AND USER'S EXCLUSIVE REMEDY SHALL BE LIMITED TO THE REFUND OF THE PURCHASE PRICE. BUYER AND SELLER ACKNOWLEDGE AND ASSUME ALL RISKS AND LIABILITY RESULTING FROM HANDLING, STORAGE AND USE OF THIS PRODUCT. THE COMPANY DOES NOT AUTHORIZE ANY AGENT OR REPRESENTATIVE TO MAKE ANY OTHER WARRANTY, GUARANTEE OR REPRESENTATION CONCERNING THIS PRODUCT.**