

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN, GREEN BAY

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ENCAP, LLC.

Plaintiff,

v.

OLDCASTLE RETAIL, INC.,

OLDCASTLE LAWN & GARDEN, INC.,

OLDCASTLE ARCHITECTURAL, INC.,

Defendants

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CASE NO. 11-C-808

JURY DEMAND

AMENDED COMPLAINT

Plaintiff, ENCAP, LLC ("ENCAP"), by and through counsel, alleges and complains against Defendants, OLDCASTLE RETAIL, INC., OLDCASTLE ARCHITECTURAL, INC. and OLDCASTLE LAWN & GARDEN, INC. (collectively, "OLDCASTLE") as follows:

THE PARTIES

1. Plaintiff, ENCAP, LLC, is a company organized and existing under the laws of the State of Wisconsin, having a principal place of business at 3921 Algoma Road, Green Bay, WI 54311.

2. Upon information and belief, OLDCASTLE RETAIL, INC., Defendant, is a company organized and existing under the laws of the State of Delaware, having a principal place of business at 375 Northridge Road, Suite 250, Atlanta, Ga 30350.

3. Upon information and belief, OLDCASTLE LAWN & GARDEN INC., Defendant, is a company organized and existing under the laws of the State of

Delaware, having a principal place of business at 375 Northridge Road, Suite 350, Atlanta, Ga 30350.

4. Upon information and belief, OLDCASTLE ARCHITECTURAL, INC., Defendant, is a company organized and existing under the laws of the State of Delaware, having a principal place of business at 375 Northridge Road, Suite 250, Atlanta, Ga 30350.

JURISDICTION AND VENUE

5. This is a civil action seeking damages, injunctive relief and attorney's fees for federal claims including patent infringement, trademark infringement, unfair competition, and for state law claims including unfair competition.

6. The jurisdiction of this Court over the federal claims is proper pursuant to 28 U.S.C. §1331 (federal question) and §1338 (patent and unfair competition). This Court has jurisdiction over the state law claims pursuant to 28 U.S.C. §1367 (supplemental), because they form part of the same case or controversy as the federal claims, and also pursuant to 28 U.S.C. §1332 (diversity), because Plaintiff, ENCAP, is a citizen of a different state than any of the defendants and the amount in controversy exceeds \$75,000. Venue is proper in this Court pursuant to 28 U.S.C. §1391 and §1400.

7. This Court has personal jurisdiction over OLDCASTLE due its continuous and systematic business relating to its products in the state of Wisconsin including the sale, offering for sale and/or advertisement of its products in Wisconsin.

8. Defendant, OLDCASTLE RETAIL, INC. manufactures and sells technologically enhanced GREEN 'N GROW Products that infringe certain technology platform patents and trademarks that ENCAP is asserting in this action. The Court has personal jurisdiction over OLDCASTLE RETAIL, INC., because OLDCASTLE RETAIL, INC. advertises, offers for sale and/or sells the infringing technologically enhanced GREEN 'N GROW Products in interstate commerce.

9. Defendant, OLDCASTLE LAWN & GARDEN INC. manufactures and sells technologically enhanced GREEN 'N GROW Products and JOLLY GARDENER PREMIUM FAST ACTING Products, that infringe certain technology platform patents and trademarks that ENCAP is asserting in this action. The Court has personal jurisdiction over OLDCASTLE, LAWN & GARDEN, INC., because OLDCASTLE, LAWN & GARDEN INC. advertises, offers for sale and/or sells the infringing technologically enhanced GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING Products in interstate commerce.

10. Defendant, OLDCASTLE ARCHITECTURAL, INC. manufactures and sells technologically enhanced GREEN 'N GROW Products and JOLLY GARDENER PREMIUM FAST ACTING Products, that infringe certain technology platform patents and trademarks that ENCAP is asserting in this action. The Court has personal jurisdiction over OLDCASTLE ARCHITECTURAL, INC., because OLDCASTLE ARCHITECTURAL, INC. advertises, offers for sale and/or sells the infringing technologically enhanced GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING Products in interstate commerce.

BACKGROUND

11. ENCAP invented and patented many new technologies in the seed, mulch, water management, soil conditioners and fertilizer industries. As a result, ENCAP is known and recognized by Lawn and Garden Industry leaders for its innovative expertise and problem solving abilities. ENCAP has expended millions of dollars in research and development and legal costs to develop and protect these platform technologies. ENCAP is a marketer of products in the Consumer and Commercial Lawn and Garden Industry, selling seed, mulch, fertilizer (and combinations thereof), water management, soil conditioning and related products based on these platform technologies.

12. In 2006, Wisconsin Governor Jim Doyle honored ENCAP with the Governor's Small Business Technology Transfer Award for outstanding achievement moving a technological innovation from idea to commercialization. The award acknowledges ENCAP'S unique technology platforms and innovation advancement business model and its successful results. In November 2006, the Green Bay Chamber of Commerce awarded ENCAP its High Technology Manufacturer of the Year Award recognizing ENCAP for its innovative technology platforms. In 2007, ENCAP was named number 110 in Inc. Magazine's prestigious "Inc. 500 list," which charts America's fastest growing privately held companies based, on sales growth of ENCAP'S platform technology products.

13. U.S. Patent, 7,503,143 ("the '143 patent") was issued on March 17, 2009 from application Serial No. 10/271,072 filed on October 15, 2002, entitled PAM CARRIER. The patent for this platform technology is assigned to ENCAP, LLC. A true

and correct copy of the '143 patent is annexed hereto as Exhibit 1.

14. U.S. Patent 7,874,101 (the '101 patent") was issued on January 25, 2011 from application Serial No. 12/660,804 filed on March 4, 2010, entitled SOIL STABILIZER CARRIER. The patent for this platform technology is assigned to ENCAP, LLC through an assignment dated March 4, 2010 and recorded at the United States Patent and Trademark Office at Reel 024336, Frame 0827. A true and correct copy of the '101 patent is annexed hereto as Exhibit 2.

15. ENCAP is the owner of the mark, FAST ACTING, the subject of U.S. Trademark Application Serial No. 76701408, for fertilizers, soil amendments, conditioners, pesticides, herbicides, fungicides, mulches, or seeds sold in combination with a soil stabilizer. Since at least as early as May 2006, ENCAP has conducted use and extensive sale of technologically enhanced granulated lime products under the FAST ACTING mark and, as a result, the FAST ACTING mark is recognized and known as a mark exclusively identified with ENCAP and designates the goods sold with the mark as a product of the highest quality originating exclusively with ENCAP.

16. ENCAP is the owner of the mark AST, U.S. Trademark Registration 3061639 for mulch and seed for agricultural purposes that are used to contain, carry and/or deliver soil conditioners and soil amendments to the soil.

17. ENCAP is the owner of the mark MCT, the subject of U.S. Trademark Serial No. 76679336 for polymer compositions with fertilizers to prevent runoff and leaching. ENCAP has conducted use and extensive sale of technologically enhanced granulated lime products under the MCT mark and, as a result, the MCT mark is

recognized and known as a mark exclusively identified with ENCAP and designates the goods sold with the mark as a product of the highest quality originating exclusively with ENCAP.

18. ENCAP is the owner of the mark SWT, U.S. Trademark Registration 3585088 for polymer granules that signal when to stop and start watering plants, seeds and lawn.

19. At the National Hardware Show in 2006 ENCAP first presented their FAST ACTING product. OLDCASTLE began to promote its technologically enhanced GREEN 'N GROW product at their show in the fall of 2007.

20. The GREEN 'N GROW product that OLDCASTLE promoted to the public was a knock off of the ENCAP FAST ACTING product and OLDCASTLE designed the GREEN 'N GROW to misinform the public about the ownership of the product.

21. ENCAP used and continues to use the mark FAST ACTING on its bag containing technologically enhanced granulated lime product incorporating the technology of the '143 and '101 patents. OLDCASTLE, without authorization, uses the mark FAST ACTING on its bag containing infringing GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products.

22. ENCAP currently sells and has sold a technologically enhanced granulated lime product incorporating the technology of the '143 and '101 patents in a bag of 30 lbs. OLDCASTLE currently sells and has sold infringing GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime product in a bag of 30 lbs.

23. ENCAP labels its bag containing technologically enhanced granulated lime product containing the technology of the '143 and '101 patents to state that the product covers 5,000 square feet. OLDCASTLE likewise labeled its bag to state that infringing GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products covers 5,000 square feet.

24. ENCAP uses a three letter technology branding acronym on its bag containing technologically enhanced granulated lime product incorporating the technology of the '143 and '101 patents. OLDCASTLE likewise uses a three letter acronym, TRT, on its bag containing infringing GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products.

25. OLDCASTLE uses the same active ingredient and the same quantity of active ingredient in its bag containing infringing GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products as ENCAP.

26. ENCAP uses a before and after picture on the bag of its technologically enhanced granulated lime product incorporating the technology of the '143 and '101 patents. OLDCASTLE uses a before and after picture on the bag of infringing GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products.

27. OLDCASTLE uses some of the same exact selling points on bags containing and on literature advertising and promoting its infringing GREEN 'N GROW

and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products as ENCAP.

28. OLDCASTLE never had authorization to use any of ENCAP'S technology, trademarks, or information on its GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products.

FIRST CAUSE OF ACTION (PATENT INFRINGEMENT)

29. Plaintiff, ENCAP hereby incorporates paragraphs 1-28 as if fully set for the herein.

30. OLDCASTLE'S has been, is, and will continue infringing ENCAP'S '143 patent through its unauthorized manufacture, use, offers for sale and sales of its GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products and threatens to, and will continue to, infringe the '143 patent, causing ENCAP great and irreparable injury and damage unless enjoined by this Court, said infringement being without consent of ENCAP.

31. OLDCASTLE'S actions constitute a deliberate and willful infringement of U.S. Patent 7,503,143 and will continue unless enjoined by this Court.

32. ENCAP has worked to improve and has improved the seed, mulch and fertilizer and lime industry by designing, manufacturing and distributing innovative products and patenting the related platform technologies that help the environment with the a delivery system and method used to apply polyacrylamide (PAM) to soil comprising a solid carrier and water-soluble PAM, wherein application rates of the solid

carrier to the soil is related to desired amount of PAM to be metered to the soil;
wherein the water-soluble PAM binds to the soil in accordance with the '143 patent.

SECOND CAUSE OF ACTION (PATENT INFRINGEMENT)

33. Plaintiff, ENCAP hereby incorporates paragraphs 1-32 as if fully set forth herein.

34. OLDCASTLE has been, is and will continue infringing ENCAP'S '101 patent through its unauthorized manufacture, use, offers for sale and sales of its GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products and threatens to, and will continue to, infringe the '101 patent, causing ENCAP great and irreparable injury and damage unless enjoined by this Court, said infringement being without consent of ENCAP.

35. OLDCASTLE'S actions constitute a deliberate and willful infringement of U.S. Patent 7,874,101 and will continue to do so unless enjoined by this Court.

36. ENCAP has worked to improve and has improved the seed, mulch and fertilizer and lime industry by designing, manufacturing and distributing products that help the environment with the use of a method and delivery system used to apply water-soluble soil stabilizer to soil comprising: a solid carrier and water-soluble soil stabilizer; wherein application rates of the solid carrier to the soil is related to desired amount of the water-soluble soil stabilizer to be metered to the soil; wherein the water-soluble soil stabilizer binds to the soil, in accordance with the '101 patent.

THIRD CAUSE OF ACTION
(TRADEMARK INFRINGEMENT)

37. Plaintiff, ENCAP hereby incorporates paragraphs 1-36 as if fully set forth herein.

38. Beginning on a date long prior to any date upon which OLDCASTLE can rely, ENCAP used the FAST ACTING mark in association with the marketing, promotion and sale of Fertilizers, soil amendments, conditioners, pesticides, herbicides, fungicides, mulches, or seeds sold in combination with a soil stabilizer.

39. As a result, ENCAP is the owner of rights in the FAST ACTING mark used in association with fertilizers, soil amendments, conditioners, pesticides, herbicides, fungicides, mulches, and/or seeds sold in combination with a soil stabilizer, and its products are provided throughout the United States. As a result, the FAST ACTING mark has become a valuable asset of ENCAP and a symbol of ENCAP'S goodwill in the relevant industry.

40. As a result of years of ENCAP use and extensive sale of technologically enhanced granulated lime products under the mark FAST ACTING, the FAST ACTING mark is a recognized name and mark known in the relevant industry as a mark exclusively identified with ENCAP and designates the goods sold with the mark as a product of the highest quality originating exclusively with ENCAP.

41. ENCAP has taken reasonable and substantial steps to protect the value and exclusivity of the FAST ACTING mark, including marking its products with a notice that the FAST ACTING mark is owned by ENCAP.

42. Accordingly, ENCAP is entitled to control all use of the FAST ACTING mark and confusingly similar marks in association with the provision of technologically enhanced granulated lime products, to exclusively advertise and provide products in association with the FAST ACTING mark, to control the quality of products sold in association with the FAST ACTING mark and to have the FAST ACTING mark identify ENCAP as the sole source and origin of its technologically enhanced granulated lime products.

43. Despite the foregoing, OLDCASTLE, without ENCAP'S authorization sells and/or offers for sale and/or supplies its GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products throughout the United States by using ENCAP'S FAST ACTING mark.

44. This wrongful and unauthorized use of ENCAP'S trademark FAST ACTING by OLDCASTLE and their agents includes, but is not limited to use, on the Internet, in marketing materials, brochures, correspondence, sales literature and on the products themselves.

45. Upon information and belief, the unauthorized use of ENCAP'S trademark FAST ACTING was undertaken by OLDCASTLE in order to wrongfully confuse OLDCASTLE'S GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products with ENCAP's products in an attempt to use ENCAP'S goodwill to benefit OLDCASTLE.

46. The use of FAST ACTING by OLDCASTLE on its GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime

products are confusingly similar to and likely to cause confusion with ENCAP'S FAST ACTING mark.

47. The use of FAST ACTING by OLDCASTLE on its GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products is likely to cause mistake, or to deceive as to the affiliation, connection or association of OLDCASTLE with ENCAP, or likely to cause mistake, or to deceive as to the origin, sponsorship, or approval of OLDCASTLE'S goods, services, or commercial activities by ENCAP.

48. OLDCASTLE'S use of ENCAP'S FAST ACTING mark in association with the same type of product, and specifically targets the same channels of trade and the same customer base with its GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products as ENCAP.

49. As a direct competitor of ENCAP, and as an active participant in the lawn and garden market, OLDCASTLE has at all relevant times been aware of ENCAP'S marks, thus OLDCASTLE'S use of the FAST ACTING mark is done with intent by OLDCASTLE to cause confusion, mistake or deception.

50. OLDCASTLE has willfully and knowingly violated and infringed and threatens to further infringe ENCAP'S rights in its mark FAST ACTING in violation of Section 32 of the Lanham Act, 15 USC 1114 with the intention of deceiving and misleading its customers, the relevant industry and the public at large, or wrongfully trading on the goodwill and reputation of ENCAP.

51. OLDCASTLE will continue to unjustly benefit, at ENCAP'S expense from gains, profits and advances derived from the promotion and sale of its technologically enhanced granulated lime products in association with the deliberate use by OLDCASTLE of the ENCAP FAST ACTING mark.

52. Such acts by OLDCASTLE have caused and, unless restrained by this Court will continue to cause serious and irreparable harm to ENCAP and to the goodwill associated with ENCAP'S FAST ACTING mark.

53. As a result of the foregoing, a remedy at law is not adequate to compensate ENCAP for the injury caused and threatened by OLDCASTLE'S infringement of ENCAP's trademark rights and unfair business practices.

54. As a result of the foregoing, ENCAP is entitled to an injunction permanently enjoining OLDCASTLE from using the FAST ACTING mark, from marketing, selling and distributing the OLDCASTLE technologically enhanced granulated lime product through infringing use of ENCAP'S FAST ACTING mark and permanently enjoining OLDCASTLE from converting, disseminating, distributing, exploiting or otherwise capitalizing on such use.

FOURTH CAUSE OF ACTION
(TRADEMARK INFRINGEMENT)

55. Plaintiff, ENCAP hereby incorporates paragraphs 1-54 as if fully set forth herein.

56. Beginning on a date long prior to any date upon which OLDCASTLE can rely, ENCAP used the AST trademark in association with the marketing, promotion and

sale of mulch and seed for agricultural purposes that are used to contain, carry and/or deliver soil conditioners and soil amendments to the soil.

57. Beginning on a date long prior to any date upon which OLDCASTLE can rely, ENCAP used the SWT trademark in association with the marketing, promotion and sale of polymer granules that signal when to stop and start watering plants, seed and lawn.

58. Beginning on a date long prior to any date upon which OLDCASTLE can rely, ENCAP used the MCT trademark in association with the marketing, promotion and sale of polymer compositions with fertilizers to prevent runoff and leaching.

59. ENCAP is the owner of rights in the AST, MCT and SWT and its products are provided throughout the United States. As a result, the AST, MCT and SWT trademarks have become a valuable asset of ENCAP and a symbol of ENCAP'S goodwill in the relevant industry.

60. As a result of years of ENCAP'S use and extensive sale of technologically enhanced granulated lime products under the trademarks AST and MCT, the AST and MCT marks are recognized names and marks known in the relevant industry as marks exclusively identified with ENCAP and designates the goods sold with the marks as a product of the highest quality originating exclusively with ENCAP.

61. ENCAP has taken reasonable and substantial steps to protect the value and exclusivity of the AST, MCT and SWT trademarks.

62. Accordingly, ENCAP is entitled to control all use of the AST, MCT and SWT marks and confusingly similar marks in association with the provision of technologically

enhanced granulated lime products, to exclusively advertise and provide products in association with the AST, MCT and SWT marks, to control the quality of products sold in association with the AST, MCT and SWT marks and to have the AST, MCT and SWT marks identify ENCAP as the sole source and origin of its technologically enhanced granulated lime products.

63. Despite the foregoing, OLDCASTLE, without ENCAP'S authorization, sells and/or offers for sale and/or supplies its GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING, technologically enhanced granulated lime products throughout the United States by using the mark "TRT".

64. This wrongful and unauthorized use of the name TRT by OLDCASTLE and their agents includes, but is not limited to use, on the Internet, in marketing materials, brochures, correspondence, sales literature and on the products themselves.

65. Upon information and belief, the unauthorized use of ENCAP'S trademarks was undertaken by OLDCASTLE in order to wrongfully confuse OLDCASTLE'S GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products with ENCAP'S products in an attempt to use ENCAP'S goodwill to benefit OLDCASTLE.

66. The use of TRT by OLDCASTLE on its GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products are confusingly similar to and likely to cause confusion with ENCAP's AST, SWT and MCT marks.

67. The use of TRT by OLDCASTLE on its GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products is likely to cause mistake, or to deceive as to the affiliation, connection, or association of OLDCASTLE with ENCAP, or likely to cause mistake, or to deceive as to the origin, sponsorship, or approval of OLDCASTLE'S goods, services, or commercial activities by ENCAP.

68. OLDCASTLE'S use of ENCAP's AST, MCT and SWT trademarks in association with the same type of product, and specifically targets the same channels of trade and the same customer base with its technologically enhanced granulated lime products as ENCAP.

69. That as a direct competitor of ENCAP, and as an active participant in the lawn and garden market, OLDCASTLE has at all relevant times been aware of ENCAP's marks, this OLDCASTLE'S use of the TRT mark is done with intent by OLDCASTLE to cause confusion, mistake or deception.

70. OLDCASTLE has willfully and knowingly violated and infringed and threatens to further infringe ENCAP'S rights in the trademarks AST, MCT and SWT in violation of Section 32 of the Lanham Act, 15 U.S.C. 1114 with the intention of deceiving and misleading its customers, the relevant industry and the public at large, or wrongfully trading on the goodwill and reputation of ENCAP.

71. That OLDCASTLE will continue to unjustly benefit, at ENCAP's expense from gains, profits and advances derived from the promotion and sale of its

technologically enhanced granulated lime products in association with the deliberate use by OLDCASTLE of ENCAP registered and common law trademarks.

72. Such acts by OLDCASTLE have caused and, unless restrained by this Court will continue to cause serious and irreparable harm to ENCAP and to the goodwill associated with ENCAP'S AST, MCT and SWT trademarks.

73. As a result of the foregoing, a remedy at law is not adequate to compensate ENCAP for the injury caused and threatened by OLDCASTLE'S infringement of ENCAP's trademark rights and unfair business practices.

74. As a result of the foregoing, ENCAP is entitled to an injunction permanently enjoining OLDCASTLE from using the TRT mark, from marketing, selling and distributing the OLDCASTLE technologically enhanced granulated lime product through infringing use of ENCAP'S AST, MCT and SWT trademarks and permanently enjoining OLDCASTLE from converting, disseminating, distributed, exploiting or otherwise capitalizing on such use.

FIFTH CAUSE OF ACTION
(FALSE DESIGNATION OF ORIGIN AND UNFAIR COMPETITION)

75. Plaintiff, ENCAP hereby incorporates paragraphs 1-74 as if fully set forth herein.

76. OLDCASTLE uses confusingly similar marks, FAST ACTING, and TRT on its GREEN 'N GROW technologically enhanced products that infringe on ENCAP's FAST ACTING, AST, MCT and SWT trademark rights.

77. OLDCASTLE uses confusingly similar marks, FAST ACTING, and TRT on its JOLLY GARDENER PREMIUM FAST ACTING Products that infringe on ENCAP'S FAST

ACTING, AST, MCT and SWT trademark rights.

78. OLDCASTLE'S use of the FAST ACTING and TRT marks are likely to cause confusion or to cause mistake or to deceive as to the affiliation or connection of OLDCASTLE'S GREEN 'N GROW technologically enhanced granulated lime products with technologically enhanced granulated lime products produced by ENCAP.

79. OLDCASTLE'S use of the FAST ACTING and TRT marks is likely to cause confusion or to cause mistake or to deceive as to the affiliation or connection of OLDCASTLE'S JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products with technologically enhanced granulated lime products produced by ENCAP.

80. OLDCASTLE'S use of the FAST ACTING and TRT marks, in an attempt to advertise or promote OLDCASTLE'S GREEN 'N GROW Products, and JOLLY GARDENER PREMIUM FAST ACTING is a misrepresentation of the nature, characteristics, and quality of OLDCASTLE'S technologically enhanced granulated lime products, which said misrepresentation creates a likelihood that the public would affiliate OLDCASTLE'S technologically enhanced granulated lime products with that of ENCAP.

81. OLDCASTLE'S use and threatened use of its FAST ACTING and TRT marks are done in bad faith, knowingly, willfully and with the intent to falsely designate the origin of the mark, even though ENCAP owns the exclusive rights to use the mark in association with technologically enhanced granulated lime products.

82. OLDCASTLE'S use and threatened use of FAST ACTING and TRT marks creates false, deceptive and misleading statements constituting false representations

and false advertising in violation of Section 43(a) of the Lanham Act, 11 USC 1125(a).

83. As a result of the foregoing ENCAP is entitled to injunctive relief as well as monetary damages.

84. As a result of the foregoing, ENCAP is entitled to treble damages.

85. As a result of the foregoing, ENCAP is further entitled to attorney's fees.

SIXTH CAUSE OF ACTION (UNFAIR COMPETITION/TRADE DRESS)

86. Plaintiff, ENCAP hereby incorporates paragraphs 1-85 as if fully set forth herein.

87. ENCAP sells and has sold a technologically enhanced granulated lime in a bag of 30 lbs., labels their bag to state that their product covers 5,000 sq. feet, uses the FAST ACTING name on this bag, uses a three letter technology branding acronym on the bag, and lists the active ingredient as polyacrylamide and lists the quantity of this active ingredient on the bag. ENCAP further uses a before and after picture on their bag, and uses certain marketing information and slogans on the bag. OLDCASTLE uses all of the above on their bags of technologically enhanced granulated lime products.

88. OLDCASTLE copied the distinctive design and information on ENCAP'S technologically enhanced granulated lime products that are recognized in the industry as being ENCAPS. OLDCASTLE did this in order to create a likelihood of confusion with ENCAP'S technologically enhanced granulated lime product.

89. OLDCASTLE'S use of ENCAP'S trade dress was undertaken without the consent of ENCAP.

90. OLDCASTLE used ENCAP'S trade dress in association with the same type of product and specifically targeted the same channels of trade and customer base with its technologically enhanced granulated lime product as does ENCAP.

91. OLDCASTLE'S use of ENCAP'S trade dress in an attempt to advertise or promote OLDCASTLE'S products is a misrepresentation of the nature, characteristics, and quality of OLDCASTLE'S products, said misrepresentation creating a likelihood that the public would affiliate OLDCASTLE'S products with ENCAP'S.

92. OLDCASTLE'S use and threatened use of ENCAP'S trade dress is done in bad faith, knowingly and willfully and with the intent to confuse even though ENCAP owns the exclusive rights to use the trade dress in association with its technologically enhanced granulated lime products.

93. OLDCASTLE'S use and threatened use of ENCAP'S trade dress, creates false, deceptive and misleading statements constituting false representations and false advertising in violation of §43a of the Lanham Act.

SEVENTH CAUSE OF ACTION (UNFAIR COMPETITION)

94. Plaintiff, ENCAP hereby incorporates paragraphs 1-93 as if fully set forth herein.

95. Beginning at a date long prior to any date upon which OLDCASTLE can rely, ENCAP collectively used the FAST ACTING, AST, and MCT marks in association with the marketing, promotion and sale of technologically enhanced granulated lime product throughout the continental United States and other areas of North America.

Such collective use by ENCAP of its FAST ACTING, AST, and MCT marks has been a continuous, uninterrupted and extensive use.

96. ENCAP'S collective use of the marks FAST ACTING, AST, and MCT has been and continues to be on a technologically enhanced granulated lime in a bag weighing 30 lbs.; labeled to state that their product covers 5,000 sq. feet; lists the active ingredient as polyacrylamide; lists the quantity of this ingredient on the bag; uses a before and after picture on their bag; and uses certain marketing information and slogans on the bag.

97. At all times hereinafter mentioned, ENCAP had the right to obtain the full benefit of the good will inherent in the collective use of FAST ACTING, AST, and MCT marks with respect to the conduct of its business and in conjunction with selling technologically enhanced granulated lime in a bag weighing 30 lbs.; labeled to state that their product covers 5,000 sq. feet; lists the active ingredient as polyacrylamide; lists the quantity of this ingredient on the bag; uses a before and after picture on their bag; and uses certain marketing information and slogans on the bag.

98. At a point in time well after the time when ENCAP began to market technologically enhanced granulated lime product under the FAST ACTING, AST, MCT marks, OLDCASTLE commenced the manufacture and sale of GREEN 'n GROW technologically enhanced granulated lime products through an infringing use of ENCAP'S marks and/or tradenames, FAST ACTING and TRT on and in conjunction with its GREEN 'N GROW technologically enhanced granulated lime products on bags weighing 30 lbs.; labeled to state that their product covers 5,000 sq. feet; lists the

active ingredient as polyacrylamide; lists the quantity of this ingredient on the bag; using a before and after picture on their bag; and using certain marketing information and slogans on the bag that are identical or highly similar with the information and slogans on ENCAP'S bag containing original technologically enhanced granulated lime.

99. OLDCASTLE'S use of ENCAP'S trademarks, designs and information in association with the same type of product and specifically targets the same channels of trade and customer base with its technologically enhanced granulated lime product as does ENCAP.

100. Upon information and belief, OLDCASTLE'S copying of ENCAP'S distinctive design, trademarks and information on ENCAP'S technologically enhanced granulated lime products, which is recognized in the industry as being ENCAP'S, was done in order to create a likelihood of confusion with ENCAP'S technologically enhanced granulated lime product.

101. At all times hereinafter mentioned, OLDCASTLE'S collective use of the FAST ACTING and TRT marks and/or tradenames in connection with OLDCASTLE'S GREEN 'n GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products, on bags weighing 30 lbs.; labeled to state that their product covers 5,000 sq. feet; lists the active ingredient as polyacrylamide; lists the quantity of this ingredient on the bag; using a before and after picture on their bag; and using certain marketing information and slogans on the bag that are identical or highly similar with the information and slogans on ENCAP'S bag containing original technologically enhanced granulated lime was likely to and/or did cause confusion,

mistake and/or deception as to the belief that OLDCASTLE'S product was affiliated with ENCAP.

102. At all times hereinafter mentioned, OLDCASTLE'S collective use of FAST ACTING and TRT marks and/or tradenames in connection with the manufacture and sale of its GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products on bags weighing 30 lbs.; labeled to state that their product covers 5,000 sq. feet; lists the active ingredient as polyacrylamide; listing the quantity of this active ingredient on the bag; using a before and after picture on their bag; and using certain marketing information and slogans on the bag that are identical or highly similar with the information and slogans on ENCAP'S bag containing original technologically enhanced granulated lime was intended by OLDCASTLE to mislead the public to the belief that such product and/or business entity was affiliated with ENCAP.

103. OLDCASTLE'S use of the FAST ACTING and TRT marks in association with their GREEN 'N GROW and JOLLY GARDENER PREMIUM FAST ACTING technologically enhanced granulated lime products on bags weighing 30 lbs.; labeled to state that their product covers 5,000 sq. feet; listing the active ingredient as polyacrylamide; listing the quantity of this active ingredient on the bag; using a before and after picture on their bag; and using certain marketing information and slogans on the bag that are identical or highly similar with the information and slogans on ENCAP'S bag containing original technologically enhanced granulated lime misappropriated the goodwill generated by ENCAP through its use of the FAST ACTING, AST and MCT marks and/or tradenames on

similar packaging, for OLDCASTLE's own commercial advantage and to the detriment of ENCAP and was done without the authorization or consent of ENCAP.

104. At all times hereinafter mentioned, the collective use of FAST ACTING and TRT marks and/or tradenames on bags weighing 30 lbs.; labeled to state that their product covers 5,000 sq. feet; lists the active ingredient as polyacrylamide; lists the quantity of this active ingredient on the bag; using a before and after picture on their bag; and using certain marketing information and slogans on the bag that are identical to or highly similar with the information and slogans on ENCAP'S bag containing original technologically enhanced granulated lime by OLDCASTLE was done in bad faith and with the intent to injure ENCAP.

105. At all times hereinafter mentioned, OLDCASTLE had no right to trade off of or take advantage of, the customer goodwill that ENCAP had generated through the manufacture, marketing and sale of its technologically enhanced granulated lime products for its own benefit.

106. OLDCASTLE'S actions misrepresent the nature, characteristic and quality of OLDCASTLE'S technologically enhanced granulated lime products.

107. Accordingly, by virtue of the foregoing, OLDCASTLE, knowing that they had no permission or authority to do so, traded off and/or took advantage of the customer goodwill that ENCAP had generated through the manufacture, marketing, and sale of its GREEN 'N GROW technologically enhanced granulated lime products for OLDCASTLE'S own benefits.

108. That the activity set forth above constitutes unfair competition pursuant section 43(a) of the Lanham Act.

109. That as a result of the foregoing, ENCAP has been damaged and demands a monetary judgment along with punitive damages, treble damages and attorney's fees and full costs.

WHEREFORE, ENCAP prays for the following relief:

A. That United States Patents 7,503,143 and 7,874,101 be adjudged valid and enforceable;

B. That OLDCASTLE be adjudged to have infringed United States Patents 7,503,143, and 7,874,101;

C. That OLDCASTLE'S acts of infringement be adjudged to be willful and deliberate;

D. That OLDCASTLE, its officers, agents, servants, employees and attorneys and any and all persons in active concert or participation with them be preliminarily and permanently enjoined and restrained from infringing United States Patents 7,503,143, and 7,874,101;

E. That OLDCASTLE be ordered to pay pre-judgment and post-judgment interest on the damages awarded against it;

F. That OLDCASTLE be ordered to account for and pay to ENCAP the damage sustained by ENCAP due to OLDCASTLE'S infringement of United States Patents 7,503,143, and 7,874,101;

G. That OLDCASTLE be ordered to account for and pay to ENCAP any profits or royalties for any conveyed sales of products;

H. That ENCAP be awarded its costs and attorney's fees pursuant to 35 USC §285;

I. An Order directing OLDCASTLE to deliver up to the Court for disposition all product and all advertising and promotional materials that are in violation of ENCAP rights;

J. An award to ENCAP of OLDCASTLE'S profits and ENCAP damages;

K. A trebling of the damages and profits awarded to ENCAP on account of OLDCASTLE'S willful infringement of ENCAP;

L. An award to ENCAP of such punitive damages as are appropriate in view of the willful conduct on the part of OLDCASTLE;

M. That OLDCASTLE be found to have infringed ENCAP'S mark FAST ACTING;

N. That OLDCASTLE'S infringement of ENCAP'S trademark FAST ACTING be found willful;

O. A trebling of the damages and profits awarded to ENCAP on account of OLDCASTLE'S willful infringement of ENCAP'S FAST ACTING mark;

P. That OLDCASTLE be found to have infringed ENCAP'S trademarks to AST, MCT and SWT.

Q. That OLDCASTLE'S infringement of ENCAP'S trademarks AST MCT and SWT be found willful;

R. A trebling of the damages and profits awarded to ENCAP on account of OLDCASTLE'S willful infringement of ENCAP'S AST and SWT trademarks;

S. That OLDCASTLE be found to have infringed ENCAP'S trade dress;

T. That OLDCASTLE'S infringement of ENCAP'S tradedress be found willful;

U. A trebling of the damages and profits awarded to ENCAP on account of OLDCASTLE'S willful infringement of ENCAP'S tradedress;

V. That OLDCASTLE be found to have unfairly competed in the marketplace with ENCAP.

W. An award to ENCAP of its costs in this action including its reasonable attorney's fees; and

X. Such other and further relief as the Court may deem just and equitable under the circumstances herein.

Dated this 9th day of April, 2012.

Respectfully submitted,

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