

TO: Mail Stop 8 Director of the U.S. Patent and Trademark Office P.O. Box 1450 Alexandria, VA 22313-1450	REPORT ON THE FILING OR DETERMINATION OF AN ACTION REGARDING A PATENT OR TRADEMARK
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In Compliance with 35 U.S.C. § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been
 filed in the U.S. District Court SD/TX P O Box 61010 Houston on the following Patents or Trademarks:

DOCKET NO. H-08-2965	DATE FILED 10/3/2008	U.S. DISTRICT COURT SD/TX P O Box 61010 Houston, TX 77208
PLAINTIFF Evert Fresh Corporation		DEFENDANT Overstock.com, Inc
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 2,359,179		Copy of Complaint mailed to Trademark Office
2 2,280,244		
3		
4		
5		

In the above—entitled case, the following patent(s)/ trademark(s) have been included:

DATE INCLUDED	INCLUDED BY	<input type="checkbox"/> Amendment <input type="checkbox"/> Answer <input type="checkbox"/> Cross Bill <input type="checkbox"/> Other Pleading
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
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In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT

CLERK MICHAEL N. WILEY	(BY) DEPUTY CLERK 	DATE 10/7/2008
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Copy 1—Upon initiation of action, mail this copy to Director Copy 3—Upon termination of action, mail this copy to Director
 Copy 2—Upon filing document adding patent(s), mail this copy to Director Copy 4—Case file copy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EVERT FRESH CORPORATION,

Plaintiff

v.

OVERSTOCK.COM, INC.

Defendant

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§
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Civil Action No. 08-2965

(Jury Demand)

ORIGINAL COMPLAINT

I. THE PARTIES

1. Plaintiff Evert Fresh Corporation ("Evert Fresh") is a Texas corporation having its principal place of business at 1000 Meyer Street, Suite 3, Sealy, Texas 77474.

2. On information and belief, Defendant Overstock.com, Inc. ("Overstock.com") is a Delaware corporation, with a principal place of business located at 6350 South 3000 East, Salt Lake City, Utah 84121, which may be served through its registered agent, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801.

II. JURISDICTION AND VENUE

3. Jurisdiction for all counts arises under 28 U.S.C. §§ 1338(a), 1338(b), 1367(a) and/or 15 U.S.C. § 1121(a).

4. Venue is proper in this district under 28 U.S.C. § 1391(b)-(c).

III. FACTUAL BACKGROUND

5. Plaintiff Evert Fresh is engaged in advertising, selling, licensing and distributing bags for storing and/or preserving fruits and vegetables, hereinafter referred to as "produce preserving storage bags."

6. Plaintiff is the owner of the mark GREEN BAGS® as shown in Registration No. 2,359,179, issued by the United States Patent and Trademark Office ("Trademark Office") on June 20, 2000, for "clear plastic film preserving storage bag for fruit, vegetables and flowers" in International Class 17. A true and correct copy of Plaintiff's GREEN BAGS® registration is attached as Exhibit A. This registration is valid and subsisting, and is incontestable.

7. Plaintiff is also the owner of a mark consisting of the color green. This mark was registered by the Trademark Office on September 28, 1999, under federal Registration No. 2,280,244, for "semi-transparent plastic film preserving storage bags for fruit, vegetables and flowers." This mark is hereinafter referred to as Plaintiff's "color green®" mark. A true and correct copy of Plaintiff's color green® registration is attached as Exhibit B. This registration is valid and subsisting, and is incontestable.

8. Plaintiff has granted a license for certain advertising and distribution rights to its green produce preserving storage bags under the GREEN BAGS® mark and the color green® mark. Such licensed bags are advertised, sold and distributed nationally under the marks Debbie Meyer™ GREEN BAGS®, including in the State of Texas.

9. Plaintiff or its licensee advertise, sell, and distribute Plaintiff's produce preserving storage bags under the GREEN BAGS® mark and the color green® mark throughout the United States, including in the State of Texas.

10. Plaintiff has enjoyed widespread commercial success in the commercialization of its produce preserving storage bags sold under the GREEN BAGS® mark and the color green® mark throughout the United States, including in the State of Texas. A true and correct copy of a web page depicting the packaging of Plaintiff's produce preserving storage bags bearing the GREEN BAGS® and color green® marks is attached as Exhibit C.

11. On information and belief, Defendant Overstock.com is also in the business of advertising, distributing and/or selling produce preserving storage bags.

12. Overstock.com advertises and sells merchandise in interstate commerce via its interactive website located as www.overstock.com.

13. Overstock.com's interactive website has allowed customers to enter into contracts with Overstock.com to purchase merchandise via this website, including produce preserving storage bags.

14. Overstock.com's interactive website has allowed customers to specify the address where merchandise purchased from Overstock.com, including produce preserving storage bags, are to be shipped.

15. Overstock.com's interactive website has allowed customers to pay for items they order from Overstock.com, including produce preserving storage bags, using the customer's credit card and a credit card billing service known as PayPal. A true and correct copy of pages from Overstock.com's interactive website illustrating its transactional capability is attached as **Exhibit D**.

16. Overstock.com also operates an interactive auction site via its website where customers can bid on merchandise advertised on the Overstock.com website and enter into a contract to purchase such merchandise.

17. When items are sold via auction through Overstock.com's website, Overstock.com operates jointly with a third party to sell auctioned merchandise to the public.

18. On information and belief, Defendant Overstock.com has entered into contracts with customers in Texas via its interactive website.

19. On information and belief, since at least as early as 2006, Defendant Overstock.com has continuously and systematically marketed its merchandise to customers in Texas via its interactive website.

20. On information and belief, Defendant Overstock.com advertises, distributes, and/or sells its produce preserving storage bags in several states, including in the State of Texas.

21. Defendant Overstock.com has advertised, sold or distributed produce preserving storage bags bearing a green color that is confusingly similar to Evert Fresh's color green[®] mark.

22. Defendant Overstock.com has advertised, sold or distributed produce preserving storage bags bearing the mark "FOREVER GREEN BAGS" which is confusingly similar to Evert Fresh's GREEN BAGS[®] mark.

23. On information and belief, Overstock.com had advertised FOREVER GREEN BAGS in interstate commerce over the internet, in several states, including the State of Texas. A true and correct copy of the advertising and packaging used by Overstock.com to promote and distribute these bags is attached as Exhibit E.

24. On August 5, 2008, Plaintiff's counsel sent a letter to Overstock.com advising it of Evert Fresh's trademark rights and demanding that Overstock.com cease infringing Evert Fresh's trademarks by selling FOREVER GREEN BAGS or green produce preserving storage bags. A true and correct copy of this letter to Overstock.com is attached as Exhibit F.

25. On information and belief, Jonathan E. Johnson is the President of Overstock.com.

26. On information and belief, Jonathan E. Johnson is the former general counsel of Overstock.com.

27. On information and belief, Jonathan E. Johnson received the letter from Plaintiff's counsel attached as **Exhibit F**.

28. On information and belief, after receiving this August 5, 2008 letter notifying it of Evert Fresh's trademark rights, Overstock.com continued to advertise, sell and/or distribute FOREVER GREEN BAGS bearing a green color through its interactive website. A true and correct copy of the advertising and packaging used by Overstock.com to promote and distribute these bags after August 5, 2008 is attached as **Exhibit G**.

29. On information and belief, after receiving this August 5, 2008 letter notifying it of Evert Fresh's trademark rights, Overstock.com continued to jointly participate with one or more third parties to advertise, sell and/or distribute FOREVER GREEN BAGS bearing a green color through Overstock.com's interactive website.

30. On information and belief, Overstock.com possesses the ability to control what merchandise is sold and/or auctioned on its interactive website.

31. The packaging in which Defendant Overstock.com sells its FOREVER GREEN BAGS touts the food preserving qualities of these bags with statements such as "Produce stays fresh 3 to 10 times longer" (**Exhibit E**, p. 1).

32. On information and belief, the FOREVER GREEN BAGS of Overstock.com have been advertised on the internet and distributed via internet channels of trade, as shown in **Exhibits E and G**. On information and belief, these internet channels of trade reach consumers in several states, including the State of Texas.

33. Produce preserving storage bags are advertised, sold and distributed by Evert Fresh or its licensee under the GREEN BAGS® and the color green® marks in the same market areas in which Overstock.com has advertised and distributed its FOREVER GREEN BAGS.

IV. COUNT 1
INFRINGEMENT OF THE GREEN BAGS® MARK

34. Count 1 arises under 15 U.S.C. § 1114(1).

35. Plaintiff incorporates paragraphs 5-33 by reference.

36. Defendant's advertising, distribution, or sale of its produce preserving storage bags under the mark FOREVER GREEN BAGS infringes Plaintiff's federally registered GREEN BAGS® mark. These acts of trademark infringement are continuing.

37. On information and belief, Defendant's infringement of the GREEN BAGS® mark has been willful.

38. On information and belief, Defendant has been unjustly enriched by these acts of trademark infringement.

39. On information and belief, Defendant's acts of direct and/or contributory trademark infringement of the GREEN BAGS® mark have damaged and continue to damage Plaintiff, causing irreparable harm, for which there is no adequate remedy at law.

40. On information and belief, such unlawful acts and damage will continue to occur unless enjoined by this Court.

V. COUNT 2
INFRINGEMENT OF THE color green® MARK

41. Count 2 arises under 15 U.S.C. § 1114(1).

42. Plaintiff incorporates paragraphs 5-33 by reference.

43. Defendant's advertising, distribution, or sale of its food preserving storage bags bearing a green color infringes Plaintiff's federally registered mark in the color green®. These acts of trademark infringement are continuing.

44. On information and belief, Defendant has been unjustly enriched by these acts of trademark infringement of Plaintiff's registered mark in the color green®.

45. On information and belief, Defendant's acts of trademark infringement of Plaintiff's registered mark in the color green[®] have been willful.

46. On information and belief, Defendant's acts of direct and/or contributory trademark infringement have damaged and continue to damage Plaintiff, causing irreparable harm for which there is no adequate remedy at law.

47. On information and belief, such unlawful acts and damage will continue to occur unless enjoined by this Court.

VI. COUNT 3
COUNTERFEITING OF THE color green[®] MARK

48. Count 3 arises under 15 U.S.C. § 1114(1).

49. Plaintiff incorporates paragraphs 5-33 by reference.

50. Defendant's advertising, distribution, or sale of its food preserving storage bags bearing a green color or trade dress constitutes counterfeiting of Plaintiff's federally registered mark in the color green[®]. These acts of trademark counterfeiting are continuing.

51. On information and belief, Defendant has been unjustly enriched by these acts of trademark counterfeiting of Plaintiff's registered mark in the color green[®].

52. On information and belief, Defendant's acts of trademark direct and/or contributory counterfeiting of Plaintiff's registered mark in the color green[®] have been willful.

53. On information and belief, Defendant's acts of trademark counterfeiting have damaged and continue to damage Plaintiff, causing irreparable harm for which there is no adequate remedy at law.

54. On information and belief, such unlawful acts and damage will continue to occur unless enjoined by this Court.

VII. COUNT 4
COMMON LAW UNFAIR COMPETITION

55. Count 4 arises under the common law of the State of Texas.
56. Plaintiff incorporates paragraphs 5-33 by reference.
57. Defendant's use of the mark FOREVER GREEN BAGS in its advertising campaign and on its produce preserving storage bags trades upon the goodwill established by Plaintiff in its GREEN BAGS® mark and constitutes unfair competition.
58. Defendant's use of the color green in its advertising campaign and on its produce preserving storage bags trades upon the goodwill established by Plaintiff in its color green® mark and constitutes unfair competition.
59. Defendant's acts of unfair competition are continuing.
60. On information and belief, Defendant's acts of unfair competition have been willful.
61. On information and belief, Defendant has been unjustly enriched by these acts of unfair competition.
62. On information and belief, Defendant's acts of unfair competition have damaged and continue to damage Plaintiff, causing irreparable harm, for which there is no adequate remedy at law.
63. On information and belief, such unlawful acts and damage will continue to occur unless enjoined by this Court.

VIII. PRAYER FOR RELIEF

64. WHEREFORE, Plaintiff requests that it be granted:
- a. actual damages for Defendant's acts of trademark infringement and counterfeiting, unfair competition and deceptive trade practices;

- b. an accounting for Defendant's profits for Defendant's acts of trademark infringement and counterfeiting pursuant to 15 U.S.C. § 1117(a);
- c. a trebling of actual damages pursuant to 15 U.S.C. § 1117(a)-(b);
- d. a trebling of Defendant's profits pursuant to 15 U.S.C. § 1117(a)-(b);
- e. punitive damages for Defendant's willful acts of unfair competition;
- f. a preliminary and permanent injunction enjoining Defendant from committing further acts of trademark infringement, counterfeiting, or unfair competition;
- g. an award of attorneys' fees pursuant to 15 U.S.C. §1117(a)-(b);
- h. an award of costs; and
- i. such other and further relief that this Court deems just and appropriate.

IX. DEMAND FOR JURY TRIAL

65. Plaintiff demands a jury trial.

Respectfully submitted,

10/03/08
Date

s/ Richard T. Redano
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