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

Proceeding	91208923
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
The Trademark Trial and Appeal Board**

Serial No. 85/631,038  
For the mark: NATIVE NUTRIENTS

Mt. Eden Organics, Inc.	:	
	:	
Opposer,	:	
	:	
vs.	:	Opposition No. 91208923
	:	
Native Nutrients,	:	
	:	
Applicant.	:	

**TRIAL BRIEF OF PETITIONER MT. EDEN ORGANICS, INC.**  
(General Submission)<sup>1</sup>

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<sup>1</sup> Due to the rules concerning confidential information, the instant brief is being submitted in duplicate. The redacted version of the brief will be submitted via the Board’s general portal. The full brief will be submitted through the Board’s confidential portal.

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COMES NOW the Opposer Mt. Eden Organics, Inc. (hereinafter “Opposer” or “Mt. Eden”), by counsel, and respectfully submits its brief in support of the instant *Notice of Opposition*.

**I. PRELIMINARY STATEMENT**

The instant matter comes before the Board on Mt. Eden’s *Notice of Opposition* opposing the registration of U.S. Serial No. 85/631,038 for the trademark NATIVE NUTRIENTS on the grounds that Opposer retains rights in a prior-used trademark which is identical to the applied-for trademark at issue.

The preponderance of the evidence supports that (1) Mt. Eden began use of its NATIVE NUTRIENTS trademark prior to Applicant’s first use of the trademark at issue and (2) based upon the identical nature of the trademarks in conjunction with, in part, the identical goods recited in the subject applications, a likelihood of confusion would exist under *du Pont* should Applicant’s trademark be registered. Thus, on the grounds more fully set forth below, Mt. Eden respectfully requests the Board issue an Order sustaining the instant opposition thus blocking the Applicant’s attempt to register the subject trademark.

**II. THE RECORD BEFORE THE BOARD**

The record before the Board is as follows:

**Trial Testimony**

<u>Witness(es)</u>	<u>Date</u>
Lee McPherson	May 22, 2014
Mathew Mattz	July 15, 2014
Tasha Sparks	July 15, 2014

## Notices of Reliance

### Notice(s) of Reliance

### Filed

Applicant's Notice of Reliance

July 22, 2014

## Applications(s)

Serial No. 85/631,038

Serial No. 85/760,914

## III. OBJECTION

During the deposition of Matthew Mattz, witness for the Applicant, Applicant attempted to illicit testimony from Mr. Mattz concerning a date of first use of the subject trademark which preceded any date of first use provided during the course of discovery.

Specifically, counsel attempted to have Mr. Mattz testify that he had sold products under the name NATIVE NUTRIENTS prior to December of 2010, the date of first use provided in discovery. *See* Deposition of Matthew Mattz of July 15, 2014 (hereinafter "Mattz Depo.") at pp. 9-10. Counsel for Mt. Eden timely objected to this line of questioning as evidence concerning Applicant's priority of use date had been requested in discovery and the earliest date or evidence provided by Applicant during discovery was that of in-state use (California) in December of 2010.

Wherefore, as all information concerning priority of use was requested in discovery of this matter and the earliest date(s) identified by Applicant was in December 2010 in response to Opposer's discovery requests Applicant should be precluded from introducing or relying upon any testimony or exhibits before the Board which predate December 2010.

#### IV. STATEMENT OF FACTS

##### A. Mt. Eden

Mt. Eden was founded in 2010 by Mr. Lee McPherson (hereinafter “Mr. McPherson”). See Deposition of Lee McPherson dated May 22, 2014 (hereinafter “McPherson Depo.”) at pp. 9-10. The sole purpose of the company was to market and sell NATIVE NUTRIENTS mushroom compost. *Id.* at pp. 10, 17.

Mushroom compost is a soil substrate specialty fertilizer that can be used augment soils. McPherson Depo. at p. 10. The product is used for gardeners to have better soil in which to grow their crops. See *id.* From 2010 through the present Mt. Eden has sold this mushroom compost under the name NATIVE NUTRIENTS. *Id.* at pp. 10-11.

Mr. McPherson created the name NATIVE NUTRIENTS in early 2008 based upon a two-fold rationale. McPherson Depo. at p. 16. As Mr. McPherson explained, at that time there was a significant amount of foreign fertilizers dominating the U.S. market. Mr. McPherson reasoned that a U.S.-based fertilizer may be enticing to U.S. farmers and gardeners. *Id.* Thus, he came upon the term NATIVE to suggest a product made here in the U.S. *Id.* In a form of double entendre, the term NATIVE also was meant to suggest that it was already native to the soil from where it came. *Id.* In regard to the term NUTRIENTS, Mr. McPherson testified that the term was chosen to refer to the nutrients in soil. *Id.* at pp. 16-17.

In early 2008 Mr. McPherson made his first sale of his mushroom compost under the NATIVE NUTRIENTS trademark. Specifically, he made the sale to his father’s garden center McPherson Farm & Garden located in Zenia, California. McPherson Depo. at p. 18. Mr. McPherson received compensation for this sale. *Id.* Thereafter, he did not make another sale

until December of 2010. *Id.* After that point, more regular sales began to occur. *See generally id.* at pp. 21 – 28. *See also* McPherson Depo., Exhibits 6-14, 16-17.

On or about October 21, 2010 Mt. Eden entered into a commercial lease for barn space to store, bag, and ship its product sold under its NATIVE NUTRIENTS trademark. McPherson Depo. at pp. 11-12. *See also* McPherson Depo., Exhibit 2. The barn was located at 1272 Highway One, Moss Landing, California. *Id.* Given the commercial nature of the space, Mt. Eden was also required to secure a commercial insurance policy on or about this time as a condition of the lease. McPherson Depo. at pp. 14-15. *See also* McPherson Depo., Exhibits 4, 5.

In December of 2010 Mt. Eden applied to register its NATIVE NUTRIENTS label with the California Department of Fertilizer and Agriculture or CDFA. McPherson Depo. at pp. 12-14. *See also* McPherson Depo., Exhibit 3. The CDFA oversees the regulation of fertilizer labels in the State of California. *Id.* at p. 13.

After the labels were approved Mt. Eden began printing the same for use in connection with their NATIVE NUTRIENTS product. McPherson Depo. at p. 35; McPherson Depo., Exhibit 22. The labels were ordered on or about January 9, 2011. McPherson Depo. at p. 35; McPherson Depo., Exhibit 22.

Thereafter, Mt. Eden developed a relationship with Gardening Unlimited to distribute their NATIVE NUTRIENTS mushroom compost up and down the West Coast. McPherson Depo. at pp. 19-20. Gardening Unlimited is based in Santa Cruz, California but has stores in California, Oregon, Colorado, and New York as well as other states. McPherson Depo. at p. 19. Mt. Eden's first sale of its mushroom compost to Gardening Unlimited occurred in May of 2011. *Id.* at pp. 19-20.

At this time, Mt. Eden was actively seeking other nationwide distributorships for its NATIVE NUTRIENTS product. Specifically, Mr. McPherson would ship samples of the compost to distributors as far away as Indiana in an effort to establish said relationship. *See* McPherson Depo. at pp. 28-30; McPherson Depo., Exhibit 18.

In mid to late 2011 Mt. Eden began discussions with a second distributor to distribute its NATIVE NUTRIENTS product. McPherson Depo. at pp. 20-21. Specifically, Mt. Eden contracted with Hydrofarm based in Petaluma, California to distribute their NATIVE NUTRIENTS compost nationally. *Id.* By April of 2012 Hydrofarm was distributing Mt. Eden's NATIVE NUTRIENTS branded compost nationally including to Pennsylvania, Florida, and Oregon. *Id.* *See also* McPherson Depo. at pp. 35-37 (concerning bulk packaging materials from ULINE for shipment of the NATIVE NUTRIENTS branded materials); McPherson Depo., Exhibit 23.

Based upon the foregoing use in interstate commerce, Mt. Eden decided to file to protect their trademark NATIVE NUTRIENTS with the U.S. Patent and Trademark Office. The application was filed for in 2012. McPherson Depo. at p. 31. In the application Mt. Eden provided that its date of first use in interstate commerce was March 2011 as, at the time, Mr. McPherson believed based upon his understanding of trademark law, to be his date of first use of the NATIVE NUTRIENTS trademark. *Id.*

From a regulatory context, Mt. Eden had also filed and registered its NATIVE NUTRIENTS product with the following states no later than 2012: Maine, New York, Oregon, and Rhode Island. McPherson Depo. at 55-56; McPherson Depo. Exhibit 32.

Mt. Eden advertises its trademark NATIVE NUTRIENTS by and through point-of-sale displays or signs, trade shows, a web site, radio and magazine advertisements, as well as Google

and other search engine pay-per-click advertising campaigns. McPherson Depo. at pp. 33-35, 37; 39-42; McPherson Depo., Exhibits 21, 24-25.

In regard to its web site, Mt. Eden registered the domain name mtedenorganics.com in late 2010. McPherson Depo. at pp. 37-38. Mt. Eden first posted a web site to mtedenorganics.com in or about October of 2010. *Id.* at p. 38. The purpose of the web site was to advertise Mt. Eden's product as well as to inform consumers where they can locate the same. *Id.* Since the date of posting in 2010 until the present Mt. Eden's NATIVE NUTRIENTS compost has been featured on the web site continuously. *Id.* at pp. 38-39.<sup>2</sup>

To augment its web presence, Mt. Eden also ran a Google Adwords pay-per-click advertising program as well as advertisements on Facebook. McPherson Depo. at pp. 48-51. These ads occurred in 2012. *Id.*

Mt. Eden has also maintained a company page on Facebook. McPherson Depo. at p. 50. The page has been active since 2012. *Id.*

Mt. Eden has advertised its NATIVE NUTRIENTS products in regional magazines. Specifically, Mt. Eden advertised in The Trader, a magazine that's distribution includes California and Oregon. McPherson Depo. at pp. 43-45. This form of advertisement occurred in 2012 but, admittedly, stopped in that same year. *Id.*

Mt. Eden also has advertised on FM band radio. Specifically, Mt. Eden advertised its NATIVE NUTRIENTS product on radio ads originating from a station in Eureka, California in 2012. McPherson Depo. at pp. 47-48; McPherson Depo., Exhibit 27.

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<sup>2</sup> Mt. Eden's response to Applicant's Interrogatory No. 8 indicated a date "no later than" a date in 2012 for the launch date for Mt. Eden's web site. *See* Applicant's Notice of Reliance, Exhibit A. The actual date is more specifically reflected in Opposer's testimony.

In total, Mt. Eden estimates that it has spent in excess of \$20,000 in marketing its NATIVE NUTRIENTS trademark since inception of the brand. *See* Applicant's Notice of Reliance, Exhibit A, Answer to Interrogatory No. 27.

In regard to channels of trade, Mt. Eden primarily provides its products through distributors who then, in turn, distribute the products through retail store locations. McPherson Depo. at p. 51. Mt. Eden's NATIVE NUTRIENTS products are also offered on other retailers' web sites. Specifically, Mt. Eden's products are offered on ehydroponics.net as well as hydrofarm.com. *Id.* at pp. 52-53; McPherson Depo., Exhibits 29-30. They have been offered on these sites as least as early as April of 2012 and continuing to the present. McPherson Depo. at pp. 52-53; McPherson Depo., Exhibits 29-30.

As a result of the efforts referenced above, Mt. Eden has sold in excess of 26,253 units of its product labeled with its NATIVE NUTRIENTS trademark. *See* Applicant's Notice of Reliance, Exhibit A, Interrogatory No. 26. Sales in 2010 were approximately \$11,000. *See* Applicant's Notice of Reliance, Exhibit A, Interrogatory No. 25. In 2011 they increased to approximately \$69,000. *Id.* In 2012, they increased again to about \$79,000. *Id.* In 2013, when Mt. Eden's answers to interrogatories were completed giving rise to this data, sales-to-date in 2013 had already eclipsed roughly \$39,000 on pace to outpace 2012's roughly \$79,000. *Id.*

Mt. Eden has seen the Applicant at trade shows giving rise to a concern that Mt. Eden's and Applicant's products are traveling in the same channels of trade as one another. McPherson Depo. at pp. 56-57. Mt. Eden has even been made aware of actual confusion in the marketplace by the relevant consumer base as between their NATIVE NUTRIENTS product and the trademark at issue in the instant proceeding. *Id.*

## **B. Native Nutrients**

Matthew Mattz, Tasha Sparks, and Kirk Sparks formed a partnership “sometime” in 2010 known as Native Nutrients. Mattz Depo. at p. 13. According to Mr. Mattz, Native Nutrients, the Applicant, sold a liquid kelp fertilizer under the trademark NATIVE NUTRIENTS. *Id.* The product was named NATIVE NUTRIENTS in part in reference to Mr. Mattz’s native American heritage. *Id.* at 14.

According to Ms. Sparks, Native Nutrients’s first sale of a product under the contested trademark occurred on December 12, 2010. Deposition of Tasha Sparks dated July 15, 2014 (hereinafter “Sparks Depo.”) at p. 10; Sparks Depo., Exhibit 11. This sale was to an in-state customer (California). Sparks Depo., Exhibit 11.

According to Mr. Mattz, Native Nutrients’s first sale of products under the NATIVE NUTRIENTS trademark occurred four days later on December 16, 2010. Mattz Depo. at p. 16. *See also* Mattz Exhibit, Exhibit 1. It was one unit of the product also sold to an in-state customer named Bob Adams (California). *Id.* at pp. 22-23.

Native Nutrients provided evidence of one sale in the State of Washington on or about January 10, 2011. Sparks Depo. at pp. 12-15.; Sparks Depo., Exhibit 11. The sale was for 4 gallons of product and was personally delivered by Ms. Sparks. Sparks Depo. at pp. 12-15. On cross examination, however, Ms. Sparks conceded that this out-of-state sale was made to her childhood friend whom she had known since sixth grade, though middle and high school, and had even roomed with during her tenure at the University of California at Santa Barbara. *Id.* at pp. 54-58.

The remaining few sales for which receipts were produced or made of record detail sales solely in the State of California. Sparks Depo., Exhibits 12-14.



## V. STANDING

To oppose the registration of a mark on the principal register an opposer must show that "(1) it has standing to challenge the continued presence on the register of the subject registration; and (2) there is a valid ground why the registrant is not entitled under law to the registration." *See Young v. AGE Corp.*, 152 F.3d 1377, 1379 (Fed. Cir. 1998) (citing 37 § 2.112(a) (1997)). The record demonstrates that both elements are satisfied here. Moreover, to establish standing, a petitioner must have a personal interest in the outcome of the case beyond that of the general public. *Ritchie v. Simpson*, 170 F.3d 1092, 1095 (Fed. Cir. 1999).

In the instant matter, Mt. Eden has been using the trademark NATIVE NUTRIENTS in interstate commerce in connection with its fertilizer and mushroom compost since prior to Applicant's first use of the opposed trademark in interstate commerce. In that regard, Mt. Eden's efforts to register its trademark for NATIVE NUTRIENTS has been preliminarily denied by the U.S. Patent and Trademark Office on account of a potential likelihood of confusion with the instant pending trademark application.

Applicant's attempt to register its NATIVE NUTRIENTS trademark is denying Mt. Eden the benefit of registration for its NATIVE NUTRIENTS trademark. As a result, Mt. Eden is being and is likely to continue to be damaged by the instant application and certainly has an interest in the outcome of this proceeding beyond that of the general public. *Jewelers Vigilance Committee, inc. v. Ullenberg Corp.*, 823 F.2d 490, 493 2 USPQ 2d 2021, 2023 (Fed. Cir. 1987) (rejection of a trademark application pursuant to Lanham Act § 2(d) is sufficient to establish standing).

## VI. ARGUMENT

### A. *Priority of Use*

#### 1. *Mt. Eden Retains Priority of Use of its Trademark*

Mt. Eden's first sale under its trademark NATIVE NUTRIENTS occurred in early 2008. McPherson Depo. at p. 18. The sale was a bona fide albeit in-state (California) sale to his father's garden supply store. *Id.* Thereafter, regular sales did not begin to occur under the brand until 2010. *See generally id.* at pp. 21 – 28. *See also* McPherson Depo., Exhibits 6-14, 16-17. These initial sales, however, remained in-state (California).

In an effort to branch out beyond California, Mt. Eden registered the domain name mtedenorganics.com in late 2010. McPherson Depo. at pp. 37-38. Mt. Eden first posted a web site to mtedenorganics.com in or about October of 2010 advertising its products under the NATIVE NUTRIENTS trademark. *Id.* at p. 38.

During that time, on or about October 21, 2010, Mt. Eden entered into a commercial lease for barn space to store, bag, and ship its product sold under its NATIVE NUTRIENTS trademark. McPherson Depo. at pp. 11-12. *See also* McPherson Depo., Exhibit 2. In December of 2010 Mt. Eden applied to register its NATIVE NUTRIENTS label with the California Department of Fertilizer and Agriculture or CDFA. McPherson Depo. at pp. 12-14. *See also* McPherson Depo., Exhibit 3. After the labels were approved Mt. Eden began printing the same for use in connection with their NATIVE NUTRIENTS product. McPherson Depo. at p. 35; McPherson Depo., Exhibit 22. The labels were ordered on or about January 9, 2011. McPherson Depo. at p. 35; McPherson Depo., Exhibit 22.

At this time Mt. Eden was also actively seeking other nationwide distributorships for its NATIVE NUTRIENTS product. Mr. McPherson would ship samples of the compost to

distributors as far away as Indiana in an effort to establish said relationship. *See* McPherson Depo. at pp. 28-30; McPherson Depo., Exhibit 18.

Initially, Mt. Eden developed a relationship with Gardening Unlimited to distribute their NATIVE NUTRIENTS mushroom compost up and down the West Coast. McPherson Depo. at pp. 19-20. Gardening Unlimited is based in Santa Cruz, California but have stores in California, Oregon, Colorado, New York as well as other states. McPherson Depo. at p. 19. Mt. Eden's first sale of its mushroom compost to Gardening Unlimited occurred in May of 2011. *Id.* at pp. 19-20. As such, as of May 2011 Mt. Eden was regularly using its NATIVE NUTRIENTS trademark in interstate commerce (California, Colorado, New York).

In mid to late 2011 Mt. Eden began discussions with a second distributor to distribute its NATIVE NUTRIENTS product. McPherson Depo. at pp. 20-21. Specifically, Mt. Eden contracted with Hydrofarm based in Petaluma, California to distribute their NATIVE NUTRIENTS compost nationally. *Id.* By April of 2012 Hydrofarm was distributing Mt. Eden's NATIVE NUTRIENTS branded compost nationally including to Pennsylvania, Florida, and Oregon. *Id. See also* McPherson Depo. at pp. 35-37 (concerning bulk packaging materials from ULINE for shipment of the NATIVE NUTRIENTS branded materials); McPherson Depo., Exhibit 23. Thus, by late 2011 they had expanded their distributorship of their product under the NATIVE NUTRIENTS trademark to Pennsylvania and Florida.

Accordingly, Mt. Eden's first sale of its NATIVE NUTRIENTS trademark product occurred in 2008 in California beginning with regular interstate sales in May of 2011 when it entered into the distributorship agreement with Gardening Unlimited. As set forth above, Mt. Eden's sales under the trademark have now eclipsed 26,000 units sold with revenues averaging more than \$50,000 per year in interstate sales.

An opposer may establish prior proprietary rights in a mark through technical trademark use, that is "use in commerce" as contemplated by Sections 2(d) and 45 of the Trademark Act, or through "nontechnical" use of the designation in connection with a product or service in interstate or intrastate commerce in a manner analogous to trademark use, i.e., through use in advertising, use as a trade name, or any other manner of public use, provided that it is an open and public use of such nature and extent as to create, in the mind of the relevant purchasing public, an association of the designation with the plaintiff's goods or services. *See Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981); *Jim Dandy Co. v. Martha White Foods, Inc.*, 458 F.2d 1397, 173 USPQ 673 (CCPA 1972); and *Jimlar Corp. v. The Army and Air Force Exchange Service*, 24 USPQ2d 1216 (TTAB 1992). *See also T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879 (Fed. Cir. 1996); and *In re Cedar Point, Inc.*, 220 USPQ 533 (TTAB 1983).

It is submitted that based upon the foregoing, Mt. Eden's in-state sales combined with its open and public use of the trademark NATIVE NUTRIENTS on a web site advertising its products, registration with the CDFA, and leasing of barn space for the business was sufficient nontechnical use to grant it trademark rights in its trademark no later than October 2010, when Mt. Eden launched mtedenorganics.com to advertise its goods. McPherson Depo. at pp. 37-38.

In the alternative, Mt. Eden achieved technical trademark use no later than May of 2011 when it entered into its first distributorship agreement with Gardening Unlimited and began distributing and selling products on an interstate basis. McPherson Depo. at pp. 19-20.

In sum, Mt. Eden first began use of its trademark in-state in 2008 and acquired interstate trademark rights in the same as early as October of 2010 but no later than May of 2011.

## ***2. Applicant's Junior Use***

Applicant's first in-state sale of products under its NATIVE NUTRIENTS trademark did not occur until December of 2010. Sparks Depo. at p. 10; Mattz Depo. at pp. 22-23. These initial sales were in-state in the State of California and did not affect interstate commerce as required by the Act.

In January of 2011 Applicant allegedly made one interstate sale to one of the Applicant's partner's childhood friend in Seattle, Washington. But examining the conditions surrounding this sale it was token at best. Applicant has provided no other evidence of interstate sales.

Examining the law on point, the definition of use in commerce was amended by the Trademark Law Revision Act of 1988 (TLRA), Public Law 100-667, 102 Stat. 3935, to add the phrase "the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark." The primary purpose of the amendment was to eliminate the practice of "token use," or use made solely to reserve rights in a mark.

The factors to consider when determining compliance with the statutory requirement for a "bona fide use of a mark in the ordinary course of trade" are: (1) the amount of use; (2) the nature or quality of the transaction; and (3) what is typical use within a particular industry. *See Clorox Co. v. Salazar*, 108 USPQ2d 1083, 1086 (TTAB 2013) (finding that applicant had not made bona fide use of its mark in commerce, as applicant had not sold or transported goods bearing the mark in commerce as of the application filing date).

In the instant matter, the Applicant has produced only a handful of receipts only one of which established one small sale outside of the State of California. *See* Sparks Depo. at p. 12; Sparks Depo., Exhibit 11. On cross-examination, however, the witness reluctantly conceded that this one out-of-state sale was made to a childhood friend and college roommate her friend having

learned of the product during a private conversation between herself and Ms. Sparks. Sparks Depo. at pp. 54-58.

Returning to the standard at hand, Applicant has only produced a handful of receipts for sales under its NATIVE NUTRIENTS name all of which are in the state of California save for this one sale to a friend outside of the state of California. The quality of this sole interstate transaction is highly suspect as it was made to a childhood friend based upon a private conversation and not the result of any open or public marketing efforts by the Applicant.

Turning next to what is typical in the industry, Mt. Eden, during this same period, made on average \$50,000 in sales per year selling over 26,000 units bearing its NATIVE NUTRIENTS trademark. Is it reasonable to permit one token sale of a product to a childhood friend who learned of the product in a private conversation with a principal of the company and not through marketing or otherwise to trump the legitimate sales of thousands of units and dollars of an entity that had clearly commenced use of their trademark by this time?

It is thus submitted that this one token sale is insufficient to have garnered trademark rights for the Applicant superior to those acquired by Mt. Eden. Applicant has failed to submit sufficient evidence of sales on an interstate basis of enough quality to conclude that bona fide use of the trademark was occurring.

Moreover, as conceded by Mr. Mattz in his deposition, even if we assume once online sales commenced of Applicant's product they may establish interstate use, said online sales did not commence until 2012, after interstate sales commenced for Mt. Eden's goods in May 2011. See Mattz Depo. at pp. 40-42. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

As such, it is respectfully submitted that the earliest date of first use which could possibly be relied upon by the Applicant is 2012 when vague testimony sets forth they began sales online. However, given the limited nature of the sales prior to that point, the in-state use of the same, coupled with one token sale to a childhood friend, Applicant cannot claim a priority date that is superior to that of Mt. Eden.

***B. Analysis of the du Pont Factors***

Mt. Eden must establish that there is a likelihood of confusion by a preponderance of the evidence. The Board's decision is based upon a determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*du Pont*"). *See also In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). These factors are discussed below.

***1. The Trademarks Are Identical***

The trademarks at issue in the instant case are identical. The opposed trademark is a standard character trademark for NATIVE NUTRIENTS. Ser. No. 85/631,038. Mt. Eden's applied-for trademark is also for the standard character service mark NATIVE NUTRIENTS. Ser. No. 85/760,914. Both trademarks even voluntarily disclaim NUTRIENTS apart from the mark as shown. *See* Ser. No. 85/631,038, Ser. No. 85/760,914.

Accordingly, it is respectfully submitted that as the respective trademarks at issue are identical and that this first *du Pont* factor necessarily favors a finding of a likelihood of confusion as between the trademarks at issue.

**2. *The Goods Are Identical, In Part, or Otherwise Highly Related***

Mt. Eden applied to register the trademark NATIVE NUTRIENTS in connection with the following goods in International Class 1:

Compost; Compost; Growing media for plants; Natural fertilizers; ***Organic fertilizers; Plant growth nutrients.***

Ser. No. 85/760,914.

The opposed trademark is filed in connection with the following goods in International Class 1:

Fertilizers for agricultural use; Marine fertilizer; ***Organic fertilizers; Plant growth nutrients.***

Ser. No. 85/631,038.

In this regard, the identified goods of the parties directly overlap. Moreover, even if we look outside of the respective identification of goods, Mt. Eden is providing plant growth nutrients and fertilizer in the form of mushroom compost under the trademark NATIVE NUTRIENTS. McPherson Depo. at pp. 10-11, 17. The Applicant, in turn, is providing a natural kelp-based fertilizer. Mattz Depo. at p. 13. It is submitted that given the parties' respective identifications in conjunction with the purpose of the goods, namely, nutrient enrichment for plants, even if the goods are deemed not to be identical based upon the testimony in the case and not limited to the identifications in the applications at issue, the goods are highly related as they are both fertilizer or plant-nutrient related.

Accordingly, it is respectfully submitted that this second *du Pont* factor also favors a finding of a likelihood of confusion as between the trademarks at issue.

**3. *Similarity of Marketing and Trade Channels***

In the instant case, the goods of the parties, in part, directly overlap. As such, it cannot be said that they are dissimilar. Moreover, as there are no limitations as to the channels of trade

or presumed marketing channels of the goods as identified in the application and registration, the goods of the Applicant are presumed to travel in the same channels of trade and are further presumed to be marketed in the same manner of those goods identified in Mt. Eden's application. *See Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); and *In re Optica Int'l*, 196 USPQ 775, 778 (TTAB 1977); *Octocom Systems, Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed").

But even looking beyond this presumption, both sides offered testimony in this case that their respective goods are marketed by and through trade shows as well as through web sites on the Internet. Testimony was even adduced that the parties have attended the same trade shows. Moreover, both parties' products under the NATIVE NUTRIENTS trademarks are available online at third-party web sites. McPherson Depo. at pp. 33-35, 37-42, 56-57; McPherson Depo., Exhibits 21, 24-25. *See also* Mattz Depo. at pp. 51-56.

Accordingly, it is respectfully submitted that these two factors, similarity of marketing and trade channels, must also favor a finding of a likelihood of confusion under *du Pont* as between the trademarks at issue not only due to the presumption thereof, but the actual overlap of marketing and trade channels as established by the testimony submitted to the Board.

#### **4. Actual Confusion**

Finally, there have been at least two instances of actual confusion as between Applicant's use of its NATIVE NUTRIENTS trademark and use of the same name by Mt. Eden. McPherson Depo. at pp. 56-57. *See also* Mattz Depo. at p. 59.

Accordingly, it is respectfully submitted that this *du Pont* factor also favors a finding of a likelihood of confusion as between the trademarks at issue.

### **VII. CONCLUSION**

Mt. Eden began interstate use of its NATIVE NUTRIENTS trademark in connection with its mushroom compost as early as October of 2010 but no later than May of 2011. Applicant did not begin interstate use of its trademark until, at the earliest, 2012 and possibly 2013. Accordingly, priority of use in this matter is clear: Mt. Eden has established, by a preponderance of the evidence, that it retains priority of use in the NATIVE NUTRIENTS service mark over any use alleged by Applicant.

Turning to the *du Pont* factors in this matter, the trademarks are identical. The goods, in part, are identical if not highly related. Accordingly, these first two factors must favor a finding of a likelihood of confusion. Turning to marketing and trade channels, as there are no marketing or trade channel limitations on either the relied-upon application nor the subject registration, the services of the parties are presumed to travel in the same channels of trade and to be marketed in the same manner to one another. Moreover, the testimony also establishes the direct overlap as between these channels by the respective parties. As such, these two factors also favor a finding of a likelihood of confusion. Finally, both parties testified to having been made aware of actual confusion in the marketplace. As such, the factor also favors a finding of a likelihood of confusion.

WHEREFORE based upon Mt. Eden's priority of use of its NATIVE NUTRIENTS trademark in conjunction with the *du Pont* factors favoring a finding of a likelihood of confusion Mt. Eden respectfully requests that the Board enter an Order sustaining the instant opposition proceeding.

Respectfully submitted this 2<sup>nd</sup> day of January, 2015.

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
The Trademark Trial and Appeal Board**

Serial No. 85/631,038  
For the mark: NATIVE NUTRIENTS

Mt. Eden Organics, Inc.	:	
	:	
Opposer,	:	
	:	
vs.	:	Opposition No. 91208923
	:	
Native Nutrients,	:	
	:	
Applicant.	:	

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I caused a copy of the foregoing this 2<sup>nd</sup> day of January, 2015, to be served, via first class mail, postage prepaid, upon:

Paulo A. de Almeida  
Patel & Almeida, P.C.  
16830 Ventura Blvd., Ste. 360  
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/Matthew H. Swyers/  
Matthew H. Swyers