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

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| Proceeding | 91208923 |
| Party | Plaintiff Mt. Eden Organics, Inc. |
| Correspondence Address | MATTHEW H SWYERS THE TRADEMARK COMPANY PLLC 344 MAPLE AVENUE WEST, SUITE 151 VIENNA, VA 22180 UNITED STATES mswyers@thetrademarkcompany.com |
| Submission | Rebuttal Brief |
| Filer's Name | Matthew Swyers |
| Filer's e-mail | mswyers@TheTrademarkCompany.com |
| Signature | /Matthew H. Swyers/ |
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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

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

REPLY OF PETITIONER MT. EDEN ORGANICS, INC.

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

I. CONTINUING OBJECTION

Opposer maintains its objection more fully set forth in its main brief.

II. APPLICANT’S TRIAL BRIEF

The issue before the Board has effectively been narrowed to one issue: Which party retains priority of use of its respective NATIVE NUTRIENTS trademark? Within this context, Applicant effectively concedes prior in-state sales by the Opposer relegating its defenses to attacks on the credibility of those sales to establish priority of use in the instant matter. As more fully set forth below, Applicant’s attacks are flawed and, ultimately, internally inconsistent and, as a result thereof, Opposer’s opposition must be sustained.

A. Opposer Retained Bona Fide In-State Sales in the State of California Prior to Applicant’s In-State Sales.

As a threshold matter, Applicant sets forth its primary argument that its intrastate use should be sufficient to grant it priority of use in the instant matter. *See* Applicant’s Trial Brief at pp. 26-27. Assuming that intrastate use can be so used to establish said rights, Applicant’s arguments as to why it must retain priority of use still fail in light of Opposer’s legitimate use in intrastate commerce prior Applicant.

First, Opposer produced a receipt from 2008 displaying intrastate use of his trademark NATIVE NUTRIENTS by and through the sale of bulk goods under the trademark to his father’s garden center. *See* Deposition of Lee McPherson dated May 22, 2014 (hereinafter “McPherson Depo.”), Exhibit 17. Opposing counsel spends a significant amount of time in its brief arguing how the product may or may not have been labeled once it reached end consumers following the

distribution of the same from the garden center. What Applicant fails to acknowledge, however, is that the receipt in Exhibit 17 unequivocally sets forth use of the trademark at issue in 2008 to a consumer, the garden center itself. Whether or not that consumer is related to the Opposer is of little relevance. In the end, the Opposer made its first sale of the NATIVE NUTRIENTS product to a garden center in California in 2008 under the name NATIVE NUTRIENTS as is evidenced by the receipt in Exhibit 17.

If then Applicant contends intrastate sales are sufficient to establish priority of use, Opposer's first intrastate sale occurred more than two years prior to the Applicant's. Whether the product was subsequently labeled for individual sale to end consumers is inconsequential as the receipt for said sale clearly demonstrates use of the trademark thereon. Thus, the intrastate sale of the goods bearing the trademark to a consumer in 2008 had already occurred.

Second, even if the intrastate sale to Opposer's father's garden center is not sufficient to satisfy Applicant's intrastate standard for priority of use, certainly the two other invoices in June of 2008 offer substantial corroboration of further intrastate sales in that year. Specifically, Opposer provided two invoices from June of 2008 establishing further intrastate sales. McPherson Depo. at Exh. 16.

Accordingly, under Applicant's own standard for intrastate priority, Opposer established intrastate rights no later than 2008 well before any claimed date of first use in intra or interstate commerce by the Applicant in December of 2010.

B. Opposer's Other Evidence of Business Operation is Relevant to Corroborate Opposer's Use of the Trademark.

Applicant also argues that Opposer's remaining activities, namely leasing barn space, applying for licenses, etc., are not sufficient to establish trademark rights. While the Opposer has set forth the allegation that such activities are sufficient to grant non-technical rights, these

activities are further corroboration that Opposer's intra and interstate use of its trademark began well before any rights asserted by Applicant.

In short, as set forth above, by 2008 Opposer was making bona fide sales to consumers under its NATIVE NUTRIENTS trademark. These sales then led to the need to grow the business as evidenced by the 2010 efforts undertaken by Mr. McPherson as also set forth in Applicant's Trial Brief. Applicant's Trial Brief at pp. 21-25.

Applicant attempts to narrowly construe these submission to state that these acts alone do not constitute trademark use. However, Opposer's efforts cannot be so narrowly construed.

Opposer began sales in 2008 with the first sale to his father's garden center under the trademark NATIVE NUTRIENTS. Opposer sold further products that year to no less than two other individuals under the name NATIVE NUTRIENTS. Recognizing the need to grow the business Opposer undertook the proper steps to do so, namely leasing of warehouse space, obtaining commercial licenses, and insurance for the growing business in 2010. Opposer then launched a web site and began interstate distribution of the product under the name at issue thereafter.

Confining the "other evidence" submitted looks too narrowly upon the bigger picture at issue in this case, namely, the evidence as a whole establishes that Opposer, and not the Applicant, under Applicant's own theory of intrastate use, retains priority of use.

III. CONCLUSION

In the end, 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. Even if we look to intrastate use to establish priority, Mt. Eden's sales date to 2008 with the earliest intrastate sale by Applicant being in December of 2010. 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. This point has not been challenged by the Applicant. The goods, in part, are identical if not highly related. This point has also not been challenged by the Applicant. 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. Again, these points have not been challenged by the Applicant. Finally, both parties testified to having been made aware of actual confusion in the marketplace. As such, the factor strongly favors a finding of a likelihood of confusion.

WHEREFORE based upon Mt. Eden's priority of use of its NATIVE NUTRIENTS trademark both on an interstate and intrastate level 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 18th day of January, 2015.

THE TRADEMARK COMPANY, PLLC

/Matthew H. Swyers/
Matthew H. Swyers, Esq.
344 Maple Avenue West, PMB 151
Vienna, VA 22180
Tel. (800) 906-8626 x100
Facsimile (270) 477-4574
mswyers@TheTrademarkCompany.com
Counsel for Opposer

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| Applicant. | : | |

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of the foregoing this 18th 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
Encino, CA 91436

/Matthew H. Swyers/
Matthew H. Swyers