

This Opinion is not a  
Precedent of the TTAB

Mailed: June 5, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Mt. Eden Organics, Inc.*

*v.*

*Native Nutrients*  
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Opposition No. 91208923  
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Matthew H. Swyers of The Trademark Company PLLC  
for Mt. Eden Organics, Inc.

Paulo A. de Almeida and Alex D. Patel of Patel & Almeida  
for Native Nutrients.  
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Before Quinn, Kuczma, and Greenbaum,  
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Native Nutrients (“Applicant”) filed an application to register on the Principal Register the mark NATIVE NUTRIENTS (in standard characters) (NUTRIENTS disclaimed) for “fertilizers for agricultural use; marine fertilizer; organic fertilizers; plant growth nutrients” in International Class 1.<sup>1</sup>

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<sup>1</sup> Application Serial No. 85631038, filed May 21, 2012 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging first use anywhere on November 8, 2011 and first use in commerce on February 6, 2012.

Mt. Eden Organics, Inc. (“Opposer”) opposed registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when used in connection with Applicants goods, so resembles Opposer’s previously used mark NATIVE NUTRIENTS for compost, growing media for plants, natural fertilizers, organic fertilizers and plant growth nutrients as to be likely to cause confusion.

Applicant, in its answer, denied the salient allegations in the notice of opposition, and affirmatively asserts that its first use predates Opposer’s first use and, thus, Applicant has priority and Opposer’s Section 2(d) claim must fail.

### **THE RECORD/EVIDENTIARY OBJECTIONS**

Before turning to the merits of this proceeding, we first focus our attention on the parties’ respective evidentiary objections raised in their briefs. Opposer has objected to certain trial evidence introduced by Applicant, contending that Applicant is precluded from claiming any date of first use prior to December 2010 because that is the earliest date for which Applicant provided evidence during discovery. (19 TTABVUE 6).<sup>2</sup> Inasmuch as Applicant claims December 12, 2010 as its date of first use, Opposer’s objection is deemed moot.

Applicant objected to Opposer’s attempt to rely on use analogous to trademark use because Opposer failed to plead this issue, and to Opposer’s attempt to introduce various invoices which, according to Applicant, constitute inadmissible

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<sup>2</sup> Citations to the record or briefs in this opinion refer to the TTABVUE docket entry number, and the electronic page number where the document or argument appears. TTABVUE is the Board’s electronic docketing system.

hearsay and are not subject to the business records exception. (23 TTABVUE 29-31).

For purposes of this proceeding, the pleading of priority in the notice of opposition is presumed to include use analogous to trademark use.

As for the invoices, we consider them to be admissible as business records (just as in the case of Applicant's invoices) and, thus, of record for our consideration. Fed. R. Evid. 803(6). The Board is able to appropriately weigh this evidence, and we will give the invoices whatever probative weight they merit.

Accordingly, Applicant's objections are overruled.

The record consists of the pleadings; the file of the involved application; trial testimony, with related exhibits, taken by each party; and Opposer's responses to Applicant's interrogatories, and official records retrieved from third-party websites, all introduced by way of Applicant's notice of reliance. Both parties filed briefs on the case (with certain portions of the briefs and record designated as "confidential").

### **STANDING**

Opposer established its standing to oppose registration of the applied-for mark by virtue of its use of the mark NATIVE NUTRIENTS in connection with compost. (see discussion, *infra*, regarding Opposer's use of its mark). Further, Applicant does not dispute Opposer's standing. Thus, Opposer has shown that it is not a mere intermeddler.<sup>3</sup> See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842

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<sup>3</sup> Opposer also pleaded ownership of Application Serial No. 85760914, filed October 23, 2012, alleging first use anywhere and first use in commerce on March 21, 2011. Although Opposer did not technically make the registration of record, the parties have referred to the application. Indeed, Applicant acknowledged in its brief the filing and status of Opposer's

(Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

### **LIKELIHOOD OF CONFUSION**

With respect to likelihood of confusion, the parties' marks are identical, namely NATIVE NUTRIENTS. Further, Opposer's goods are fertilizers and compost, and Applicant's goods are fertilizers. Thus, the goods are legally identical or otherwise highly related. The goods are presumed to travel in the same trade channels to the same classes of purchasers.

Accordingly, contemporaneous use of the parties' marks is likely to cause confusion among purchasers in the marketplace.

To this point, Applicant states, in its brief, that the only issue for decision is priority of use:

Applicant does not dispute that the marks are identical and likely to cause confusion; however, Applicant, not Opposer, has priority of use of the mark. Thus, the sole issue in this case to be determined is whether Opposer can show, by a preponderance of the evidence, that it has priority of use of NATIVE NUTRIENTS for its plant fertilizers. (emphasis in original) (23 TTABVUE 5).

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application. (23 TTABVUE 9-10). Accordingly, we deem Opposer's application to be stipulated into the record. Opposer's pending application is to register the mark NATIVE NUTRIENTS for "compost, growing media for plants, natural fertilizers, organic fertilizers and plant growth nutrients"; Applicant has acknowledged that the application currently is suspended on the basis of Applicant's prior-filed pending application involved herein which, according to the Examining Attorney, "may present a bar to registration of Applicant's mark" under Section 2(d) of the Trademark Act. *Id.*

Applicant reiterates this point when it states “the only issue in this case is which party used the mark first.” (23 TTABVUE 10). Opposer confirms this point in its reply 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?” (24 TTABVUE 4).

We agree with the parties’ assessment of the issue before us and conclude that there is a likelihood of confusion between the parties’ marks for their goods. We thus turn to the issue of priority.

#### **PRIORITY OF USE**

Opposer in the notice of opposition alleges that it has used its mark in connection with its goods “since as early as March 2011.” As also shown by its pending application Opposer alleges first use anywhere and first use in commerce of its mark “at least as early as March 21, 2011.” In its answer, Applicant alleges as an affirmative defense that it has priority of use. However, Applicant’s application sets forth a date of first use anywhere “at least as early as November 8, 2011” and a date of first use in commerce “at least as early as February 6, 2012.”

In the present proceeding, each party now claims dates of first use that are earlier than the dates alleged in the respective applications. Rather than March 2011 as its date of first use as set forth in its application, Opposer is now claiming use dating back to 2008, but no later than December 1, 2010. Insofar as Applicant is concerned, Applicant’s alleged first use date as set forth in its application is November 8, 2011; Applicant is now claiming first use on December 12, 2010. Thus,

the new purported first use dates in 2010 are remarkably close in time. Applicant points out that Opposer changed its date of first use to an earlier date after it received Applicant's discovery responses. We would add that Applicant's discovery responses likewise indicated a date of first use earlier than alleged in its application.

Inasmuch as each party is now claiming an earlier first use date, each party is under the same burden to show the earlier date by clear and convincing evidence. In saying this, we frankly add that neither party's "clear and convincing" evidence is any better or worse than the other party's. Priority contests generally are fact intensive, and this case is no exception. The priority determination in this case is complicated by the fact that both parties are small businesses which, especially in their early days, lacked sophisticated business record keeping. The parties' initial sales, involving hand-written invoices and hand-written labels, bear this out; however, even later sales continued to display a lack of business sophistication.

In proving priority, a party is not limited to the date of first use set forth in its application. However, if a party seeks to prove a date earlier than that set forth in its application, it faces a heavier evidentiary burden than the usual preponderance of the evidence. Rather, the party must prove the earlier date by "clear and convincing" evidence. *Hydro-Dynamics, Inc. v. George Putnam & Co.*, 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987); *Threshold.TV Inc. v. Metronome Enterprises Inc.*, 96 USPQ2d 1031, 1036 (TTAB 2010). The reason for the increased evidentiary burden is that the date asserted in the application is considered to be an admission

against interest at the time the application was filed. A change of this position later “requires enhanced substantiation.” *Id.* at 1773-74. *See Brooks v. Creative Arts by Calloway LLC*, 93 USPQ2d 1823, 1832-33 (TTAB 2009), *aff’d on other grounds, Creative Arts by Calloway, LLC v. Brooks*, 09-cv-10488 (S.D.N.Y. December 27, 2012), *dismissed*, No. 13-147 (unpublished) (2d Cir. March 7, 2013).

To meet this heightened burden, the evidence supporting the earlier date must be specific, firm and consistent. Whenever possible, oral testimony should be supported by corroborative documentary evidence. Efforts to prove an earlier date of first use have been rejected where the evidence is characterized by contradictions, inconsistencies or indefiniteness. *See Bass Pro Trademarks LLC v. Sportsman’s Warehouse Inc.*, 89 USPQ2d 1844, 1855-56 (TTAB 2008). Because the parties are claiming first use dates earlier than as alleged in their applications, we consider the alleged earlier dates in the context of “clear and convincing evidence.”

Applicant claims its first sale of its fertilizer under the mark NATIVE NUTRIENTS occurred on December 12, 2010. Tasha Sparks, one of Applicant’s partners, personally sold one 2.5 gallon container of liquid kelp fertilizer to a customer located in Bethel Island, California for a total of \$30, and a receipt memorializes the sale. (Sparks dep., 20 TTABVUE 20-24; Ex. 11, 20 TTABVUE 14). The container bore a hand-written label with the mark NATIVE NUTRIENTS. (Sparks dep., 20 TTABVUE 20). According to Matthew Mattz, another of Applicant’s partners, a second sale to a different customer took place four days later on December 16, 2010 in the amount of \$400. (Mattz dep., 21 TTABVUE 19-20; Ex.

No. 1). Although Applicant suggests, through the testimony of Mr. Mattz, that it had prior sales, it has no documentation for them. Consequently, Applicant contends, for purposes of this proceeding, that its priority date is December 12, 2010. (Brief, 23 TTABVUE 6, 16, 27).<sup>4</sup> Applicant states that it filed its application without the assistance of an attorney, and that it mistakenly relied upon a later date for its date of first use based upon the date when the California Department of Food and Agriculture issued a fertilizing material license to Applicant. (Brief, 23 TTABVUE 9).

Although there is no further testimony explaining the discrepancy in first use dates, Ms. Sparks' testimony, coupled with the documented receipt, is firm and consistent, and is not contradicted by any other testimony or evidence of record. Thus, we find that Applicant has established a date of first use of December 12, 2010 by clear and convincing evidence.<sup>5</sup> Accordingly, Opposer must prove that its use is prior to December 12, 2010.<sup>6</sup>

Opposer bases its earliest date of first use on sales in 2008. Lee McPherson, Opposer's founder, testified that he created the mark NATIVE NUTRIENTS in

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<sup>4</sup> Opposer asserts that this first sale constitutes unlawful use because no sales tax is shown on the receipt. However, as pointed out by Applicant, the state of California provides a sales tax exemption for fertilizer.

<sup>5</sup> Opposer appears to concede as much: "Even if we look to intrastate use to establish priority...the earliest intrastate sale by Applicant [was] in December of 2010." (Reply Brief, 25 TTABVUE 6).

<sup>6</sup> Opposer originally challenged this use on the basis that the use was intrastate with no effect on interstate commerce, but this challenge is ill-founded and was subsequently dropped. Priority may be established through intrastate use. *First Niagara Insurance Brokers Inc. v. First Niagara Financial Group Inc.*, 476 F.3d 867, 81 USPQ2d 1375, 1378 (Fed. Cir. 2007); *Maids to Order of Ohio Inc. v. Maid-to-Order Inc.*, 78 USPQ2d 1899, 1909 (TTAB 2006) ("Priority may be based on intrastate use of a mark.").

2008. (15 TTABVUE 20). More specifically, Mr. McPherson testified that he made his first sale of NATIVE NUTRIENTS mushroom compost to his father's (Jeff McPherson) garden center, McPherson Farm & Garden, located in Zenia, California in "early 2008." (15 TTABVUE 21-22). Mr. McPherson states that Opposer received payment for the compost. The goods apparently were delivered by bulk in the back of a truck. (15 TTABVUE 105). A hand-written receipt dated June 3, 2008 indicates that "Jeff" purchased "Native Nutrients" compost. (15 TTABVUE 32; Ex. No. 17). Mr. McPherson indicated that he was "not sure" if the compost sold in the garden center was branded, either by a label or a sign, when customers encountered the product: "I'm not sure how sales happened at McPherson Farm & Garden." (15 TTABVUE 109). The record includes two receipts issued by McPherson Farm & Garden: one dated June 11, 2008 to "Roger" in Alderpoint, California showing a sale of \$200 worth of "Native Nutrients" compost, and a second dated June 19, 2008 to "Sunshine" in Garberville, California showing a sale of \$190 worth of "Native Nutrients" compost. (15 TTABVUE 30-31; Ex. No. 16).

We find that the record falls short of establishing first use in 2008 by clear and convincing evidence. More specifically, Mr. McPherson lacks personal knowledge of the conditions of sale at his father's garden center.

As Opposer readily concedes, and as confirmed by Mr. McPherson, Opposer "did not make another sale until December of 2010." (Brief, 19 TTABVUE 7-8). We thus turn to examine the next business activity undertaken by Opposer in connection with its mark NATIVE NUTRIENTS in late 2010. Opposer, in October 2010, leased

barn space in Moss Landing, California to store, bag and ship its NATIVE NUTRIENTS product. (15 TTABVUE 15-16; Ex. No. 2).<sup>7</sup> Opposer then obtained a commercial insurance policy as a condition of the lease on November 30, 2010. (15 TTABVUE 19; Ex. No. 4). Opposer ordered, on December 1, 2010, packaging for use in shipping its product under the involved mark. (15 TTABVUE 40-41; Ex. No. 23). On December 3, 2010, Opposer initiated the process to get its labels registered with the California Department of Fertilizer and Agriculture. (15 TTABVUE 17; Ex. No. 3).<sup>8</sup> As shown by two invoices dated December 3, 2010, Opposer took delivery of shipments of mushroom compost that Opposer intended to resell; the invoices from a third-party trucking company, Gabilan AG, are for the transport of the compost to Opposer. (15 TTABVUE 25-22; Ex Nos. 6, 7). The invoices do not show any reference to the NATIVE NUTRIENTS mark.

According to Mr. McPherson, the second sale of Opposer's mushroom compost under the mark occurred on December 1, 2010. The sale was to McPherson Farm &

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<sup>7</sup> Also in October 2010, according to Mr. McPherson, Opposer launched its website under the domain name <mtedenorganics>, and "Native Nutrients" compost was featured on this website at that time. (15 TTABVUE 42-43). We have discounted Mr. McPherson's testimony on this point, given Opposer's contradictory interrogatory responses (Nos. 1, 9; 13 TTABVUE 8-9) which indicate the launch occurred on March 13, 2012. In any event, there is no documentary evidence showing the existence of a website in 2010, and there is nothing in the record to show that there were any visitors to the website, let alone any sales of "Native Nutrients" compost through the website.

<sup>8</sup> To the extent that Opposer contends that these preparatory activities constitute use analogous to trademark use, suffice it to say that the activities fall short of establishing such use. *See Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002); *T.A.B. Sys. v. Pactel Teletrac*, 77 F.3d 1373, 37 USPQ2d 1879, 1881-83 (Fed. Cir. 1996). *See also Couture v. Playdom, Inc.*, 778 F.3d 1379, 113 USPQ2d 2042, 2043 (Fed. Cir. 2015); *Aycock Engineering Inc. v. Airflite Inc.*, 560 F.3d 1350 90 USPQ2d 1301, 1308-09 (Fed. Cir. 2009). The record simply is devoid of evidence to show that Opposer's use rose to a level that it could reasonably be expected to have a substantial impact on the purchasing public.

Garden, still owned by Jeff McPherson, Mr. McPherson's father. Opposer sold one cubic yard directly to the father, but Mr. McPherson does not recall the details of how the product was delivered. While Opposer's price for end users was set at \$25, Opposer was paid \$10 for this sale. (15 TTABVUE 89-93). Mr. McPherson "did not recall" whether the products sold to the father's garden center were labeled with the mark, but he "did not think so." (15 TTABVUE 102-104). Further, Mr. McPherson has no idea whether the mark appeared at the garden center when the compost was sold there. (15 TTABVUE 108).

As with Opposer's purported earlier sale to the elder McPherson in 2008, we find that this purported sale on December 1, 2010, for the purpose of proving priority, is not established by clear and convincing evidence, especially given that the products apparently did not bear Opposer's mark.

Mr. McPherson further testified that Opposer made a sale to an individual named "Brendon L" on December 5, 2010.<sup>9</sup> Brendon L "was a friend of a friend." (15 TTABVUE 111). The bags containing the compost carried labels with the mark NATIVE NUTRIENTS. (15 TTABVUE 106, 109). Opposer sold 2 cubic yards and was paid \$50 in cash. (15 TTABVUE 98, 111). The sale is memorialized in an invoice that has been marked confidential. (15 TTABVUE 98-99; Ex. No. 10). The invoice indicates that it is Invoice #3, and it is dated December 5, 2010; it is stamped "PAID 12/16/2010." Opposer followed up with a second sale to Brendon L

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<sup>9</sup> As indicated earlier, certain portions of the record and briefs were designated as "confidential." Although the parties have designated this customer's name as confidential, Opposer did not identify the individual by his last name, and no other information about this customer is in the record. Thus, we see no reason not to refer to him as done by Mr. McPherson.

on December 16, 2010 (15 TTABVUE 28; Ex. No. 11). This invoice is #4 (also confidential), is dated December 16, 2010, and is shown as “PAID 12/16/2010.” The invoices were generated through the accounting program QuickBooks utilized by Opposer. (15 TTABVUE 99). According to Mr. McPherson, “we process everything through QuickBooks.” (15 TTABVUE 130).

With respect to these sales to “Brendon L,” Applicant raises questions about the credibility of this evidence to establish Opposer’s priority:

When pressed for details, Lee McPherson testified that “Brendon L.” requested the fertilizer verbally in person; that he and Brendon negotiated the purchase price in person after Brendon arrived in his vehicle; that Brenden paid cash for the products; and that Brendon picked up the products in person on the day of the sale, by loading the bags of compost into his van. Thus, according to Lee McPherson, the sale occurred when the cash was exchanged for the products in person. By the stamp appearing on both invoices showing “**PAID 12/16/2010**”, it is clear that Brendon paid cash for the products on December 16, 2010 -- the same day he requested the products, negotiated the sale, and picked up the products in his vehicle. Thus, **the alleged sales to Brendon L. could only have occurred on December 16, 2010**, four days after Applicant's priority of use date of December 12, 2010.

Opposer may argue that there were two sales, one occurring on “12/5/10”, an unexplained date appearing in the upper right corner of one of the invoices. However, Lee McPherson’s testimony does not support a sale on December 5, 2010. For example, Lee McPherson confirmed that he did not furnish the invoice to Brendon by remote means, such as by email or fax. He could not have mailed the invoice because he does not have Brendon’s mailing address; nor does the mailing address appear on the invoice. Rather, he believes he *may* have “handed” the invoice to Brendon sometime “after the sale”, but cannot recall for sure. Because we know

Brendon paid cash on December 16, 2010 by the “PAID 12/16/2010” stamp on the invoice, and Lee McPherson did not furnish the invoice to Brendon prior to the sale, the sale could not have occurred prior to December 16, 2010. At best, Lee McPherson may have created the invoice using his computer on December 5, 2010, but the “PAID” stamp shows *the actual sale was transacted (and cash received) on December 16, 2010*. Accordingly, the alleged sale to “Brendon L.” could only have occurred on December 16, 2010, four days after Applicant’s first sale on December 12, 2010. (Brief, 23 TTABVUE 20-21; citations to the record omitted) (emphasis in original).

With regard to the claim of an earlier first use date, Mr. McPherson originally believed March 21, 2011 was the date of Opposer’s first sale, further indicating that “you know, it’s not my area of expertise to navigate trademark law.” (15 TTABVUE 72). When asked to explain why Opposer changed its first use to a date nearly three years earlier, Mr. McPherson testified that there was a “lot of confusion” surrounding his first use date:

Q. Why did you indicate that your first sale of Native Nutrients products was March 21st, 2011, in your trademark application?

A. Well, I suppose, as you can see, there’s a lot of confusion as to figuring out that exact date. I’m not as well versed in terms of the logistic side of deciding that date. I try to just offer up whatever I have and keep everybody informed as I sort of figure it out as well.

(15 TTABVUE 70). Mr. McPherson reiterated, “Like I said before, there’s just a matter of confusion in navigating the trademark laws that I didn’t understand.” (15 TTABVUE 74); “So it comes down to not understanding the trademark laws.” (15 TTABVUE 79). Mr. McPherson further explained the discrepancy in Opposer’s first use dates: “During the discovery period, the discovery of more invoices, a better

understanding of the terms in the trademark forms....I just hadn't looked back as far as I thought I had." (15 TTABVUE 82-83). Further, "I guess I don't quite understand the difference between interstate and within the state, intrastate." (15 TTABVUE 88).

Applicant sums up its position as follows:

Overall, the evidence shows that Opposer may have been *preparing* to sell NATIVE NUTRIENTS products in "December 2010", but it did not make any actual sales until 2011 or later. This is consistent with Opposer's pleaded first use of "March 2011", the "first use" date appearing in its own complaint, its trademark application, and the vast majority of its evidentiary materials, which generally show sales from 2011 onward. At best, a highly questionable cash sale to an individual vaguely identified "Brendon L." *may* have occurred on December 16, 2010, but this was four days after Applicant's first sale on December 12, 2010. Whether the sale even occurred at all is highly doubtful given Opposer's vague and inconsistent testimony. Last, none of the sales of loose, unlabeled compost by Lee McPherson directly to his own father were "bona fide sales in the ordinary course of trade". These were mere token sales between father and son which could hardly qualify as a legitimate, arms-length transaction with a consuming member of the public. Accordingly, Opposer has failed to show priority of use. (emphasis in original).  
(Brief, 23 TTABVUE 26-27)

We concur with Applicant that portions of Opposer's testimony are confusing and are, at least, superficially inconsistent on collateral issues. For example, we note Mr. McPherson's mistake on the amount of Opposer's sales in 2010, and the inclusion of the sales of other unrelated products in this amount. However, these infirmities have little bearing on the central issue of priority in this case. Much of the confusion stems from Mr. McPherson's lack of understanding the difference

between intrastate and interstate commerce. There is documentary evidence showing a sale one week prior to Applicant's first sale. Although Applicant questions that sale, Opposer's testimony about the December 5, 2010 sale, based on personal knowledge, coupled with an invoice bearing that date, is clear and convincing. The fact that the invoice is marked "PAID" eleven days later does not negate the sale date and first use of the mark NATIVE NUTRIENTS for compost on December 5, 2010, as confirmed by Mr. McPherson and the invoice.

In reaching our decision, we have taken into consideration the Federal Circuit's admonition when we are determining dates of use for priority purposes:

The TTAB concluded that each piece of evidence individually failed to establish prior use. However, whether a particular piece of evidence by itself establishes prior use is not necessarily dispositive as to whether a party has established prior use by a preponderance. Rather, one should look at the evidence as a whole, as if each piece of evidence were part of a puzzle which, when fitted together, establishes prior use. The TTAB failed to appreciate this. Instead, the TTAB dissected the evidence to the point that it refused to recognize, or at least it overlooked, the clear interrelationships existing between the several pieces of evidence submitted. When each piece of evidence is considered in light of the rest of the evidence, rather than individually, the evidence as a whole establishes by a preponderance that West used the "FAST EDDIE'S" mark prior to Jet's admitted first use of the mark.

*West Florida Seafood Inc. v. Jet Restaurants Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994).

Similarly, we have considered all the pieces of the puzzle relating to Opposer's first use of the mark NATIVE NUTRIENTS in connection with compost. The record

shows that Opposer was gearing up for actual sales with its preparatory work in October-December 2010. This preparatory work included leasing warehouse space, getting insurance for the space, ordering packaging for the goods, and beginning the label registration process with the state of California. On December 3, 2010, Opposer took delivery of product that it intended to resell. Then, two days later on December 5, 2010, a sale occurred. We find that, in the words of the Federal Circuit, these pieces of evidence have an “interrelationship”; that is, “when each piece of evidence is considered in light of the rest of the evidence, rather than individually, the evidence as a whole” establishes that Opposer used the mark NATIVE NUTRIENTS prior to Applicant’s first use. We conclude that Opposer’s sale on December 5, 2010, closely following Opposer’s preparatory activities in October-December 2010, establish Opposer’s priority of use. Mr. McPherson’s testimony is based on his own personal knowledge, is credible and is buttressed by corroborating evidence. Thus, Opposer has satisfied its burden of proof to show, by clear and convincing evidence, that it has first use prior to what it previously alleged. In sum, we have allowed Opposer to claim a first use date that is 3.5 months earlier than previously alleged, and Applicant to claim a first use date that is 11 months earlier than previously alleged. Opposer’s first use on December 5, 2010 ultimately is prior to Applicant’s first use on December 12, 2010.

In view of the foregoing, Opposer has proved its priority for a mark that is confusingly similar to Applicant’s mark for overlapping goods.

Opposition No. 91208923

**Decision:** The notice of opposition is sustained, and registration to Applicant is refused.