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

Proceeding	91210559
Party	Plaintiff NetCloud, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

NetCloud, LLC)
)
 Opposer,)
)
 v.) Opposition No. 91210559
)
East Coast Network Services, LLC)
)
 Applicant.)
 _____)

TRIAL BRIEF OF OPPOSER NETCLOUD, LLC

TABLE OF AUTHORITIES

<u>AUTHORITY</u>	<u>PAGES</u>
<i>Han Beauty Inc. v. Alberto-Culver Co.</i> 236 F.3d 1333, 57 U.S.P.Q.2d 1557 (Fed. Cir. 2001).....	12
<i>In re Concordia Int’l Forwarding Corp.</i> 222 U.S.P.Q. 355 (TTAB 1983).....	14
<i>In re Dixie Rests. Inc.</i> 105 F.3d 1405, 41 U.S.P.Q.2d 1531 (Fed. Cir. 1997).....	12
<i>In re E.I. du Pont de Nemours & Co.</i> 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973).....	12, 13, 16
<i>In re Majestic Distilling Co., Inc.</i> 315 F.3d 1311, 65 U.S.P.Q.2d 1201 (Fed. Cir. 2003).....	12, 13
<i>In re Melville Corp.</i> 18 U.S.P.Q.2d 1386 (TTAB 1991).....	14
<i>In re Shell Oil Co.</i> 992 F.2d 1204, 26 U.S.P.Q.2d 1687 (Fed. Cir. 1993).....	13
<i>Liqwacon Corporation v. Browning-Ferris Industries, Inc.</i> 203 U.S.P.Q. 305 (TTAB 1979).....	6
<i>Octocom Systems Inc. v. Houston Computers Services Inc.</i> 918 F.2d 937, 16 U.S.P.Q.2d 1783 (Fed. Cir. 1990).....	16
<i>Reflange Inc. v. R-Con International</i> 17 U.S.P.Q.2d 1125 (TTAB 1990).....	6
TBMP § 309.03(c).....	6

TABLE OF CONTENTS

Issues Presented for Review..... 4

Statement of the Case.....4-5

Description of the Evidentiary Record..... 5-6

Legal Argument

 I. Priority and Likelihood of Confusion

 Priority..... 6-12

 Likelihood of Confusion..... 12-17

Conclusion..... 17

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OPPOSER’S TRIAL BRIEF

Pursuant to 37 C.F.R. § 2.128(a), Opposer NetCloud, LLC (“Opposer”) hereby files this brief in support of its position that its Notice of Opposition against Application Serial No. 85777557 for the trademark NETCLOUD be sustained and that registration to Applicant be refused.

ISSUES PRESENTED FOR REVIEW

Should the Board sustain Opposer’s opposition to the registration of Applicant’s NETCLOUD trademark on the basis of priority and likelihood of confusion with Opposer’s NETCLOUD trademark?

STATEMENT OF THE CASE

On November 12, 2012, Applicant filed an application under §1(a) seeing to register the mark NETCLOUD for “computer monitoring service which tracks application software performance, performs periodic maintenance and provides reports and alerts concerning such performance; computer services, namely, cloud hosting provider services; computer services,

namely, computer system administration for others; computer services, namely, filtering of unwanted e-mails; computer services, namely, integration of private and public cloud computing environments; computer services, namely, on-line scanning, detecting, quarantining and eliminating of viruses, worms, trojans, spyware, adware, malware and unauthorized data and programs on computers and electronic devices; computer services, namely, remote and on-site management of the information technology (IT) systems of others; hosting the software, websites and other computer applications of others on a virtual private server; providing virtual computer systems and virtual computer environments through cloud computing,” in International Class 42. Applicant’s application for NETCLOUD was assigned Serial No. 85777557.

On May 12, 2013, Opposer filed a Notice of Opposition against Applicant’s application on the basis of priority and likelihood of confusion with Opposer’s common law use of NETCLOUD for identical and related services. Because the evidence of record clearly demonstrates that Opposer has met its burden of proof, Opposer respectfully requests that the Board sustain its Notice of Opposition and that registration of Applicant’s mark be refused.

DESCRIPTION OF THE EVIDENTIARY RECORD

The evidentiary record consists of the following:

1. Applicant’s application for NETCLOUD (Serial No. 85777557).
2. One Notice of Reliance submitted by Opposer (D.N. 8).¹
3. Testimony deposition of Opposer’s witness Mehul Satasia and exhibits thereto (D.N. 9). Mr. Satasia is the founder and managing member of Opposer. Satasia Depo., 6:12-17.

¹ In light of the fact that Applicant submitted no evidence during its trial period, Opposer has no need to rely on the document submitted under its Notice of Reliance.

4. Testimony deposition of Opposer's witness Raj Viradia and exhibits thereto (D.N. 10). Mr. Viradia is the former owner of the NETCLOUD trademark. Viradia Depo., 6:7-21.

LEGAL ARGUMENT

I. PRIORITY AND LIKELIHOOD OF CONFUSION

A. The Board Should Sustain Opposer's Notice of Opposition Because Opposer Has Priority of Use in Its NETCLOUD Trademark.

In an opposition proceeding based on Trademark Act §2(d), an opposer must prove priority of use. TBMP § 309.03(c). It must prove proprietary rights in its pleaded mark that are prior to an applicant's rights in the challenged mark. *Id.* Such rights may be shown by service mark use that is prior to applicant's service mark use. *Id.* It is the commercial usage of a trademark which creates trademark rights. *Reflange Inc. v. R-Con International*, 17 U.S.P.Q.2d 1125, 1130 (TTAB 1990). Such usage can consist of use analogous to trademark use and need not be a technical trademark use. *Id.* The manner of use must be calculated to attract the attention of potential customers or customers in the applicable field of trade so as to create an association of the term with a single source. *Liqwacon Corporation v. Browning-Ferris Industries, Inc.*, 203 U.S.P.Q. 305, 308 (TTAB 1979).

In this case, Applicant's application for NETCLOUD was filed under §1(a) on November 12, 2012. Although Applicant's application recites a first use date at least as early as November 10, 2012, Applicant submitted no evidence whatsoever during its trial period. Therefore, Applicant is entitled to rely only on its November 12, 2012 filing date in this proceeding.

Opposer's use of NETCLOUD unquestionably predates November 12, 2012. In approximately November 2009, an individual named Raj Viradia commenced use of the name NETCLOUD in connection with the advertising and sale of web hosting services, cloud hosting

services, data backup, email service and support, and technical support. Viradia Depo., 6:10 – 7:6, 8:18-25, 9:25 – 10:8. This business was located in Atlanta, Georgia. Viradia Depo., 7:10-11. Mr. Viradia operated his business as a sole proprietor and served individuals and small businesses located in Georgia and Tennessee. Viradia Depo., 9:1-6, 9:10-13. Potential clients would generally order Mr. Viradia’s services over the phone and would pay for such services with cash or check. Viradia Depo., 9:19-24.

In approximately November or December of 2011, Mr. Viradia decided to also use the name NETCLOUD as the brand name for his business. Viradia Depo., 10:9-13. Mr. Viradia made this transition because he was getting bored with keeping the books at the construction company of which he was part owner and wanted to get more serious about growing his web hosting business. Viradia Depo., 10:14-22. To that end, Mr. Viradia commenced negotiations with a domain seller for the <netcloud.com> domain and eventually purchased the domain for \$25,000 in January 2012. Viradia Depo., 10:23 – 11:16. Mr. Viradia had looked into acquiring the <netcloud.com> domain when he first adopted the NETCLOUD trademark in 2009, but it was too expensive. Viradia Depo., 13:10-15.

Mr. Viradia primarily advertised his services through word-of-mouth, flyers, and business cards. Viradia Depo., 9:14-16. In approximately November 2009, Mr. Viradia hired a company named Webproslys to create a marketing flyer to advertise his web hosting services. Viradia Depo., 11:20 – 12:20, Ex. 1. This flyer prominently displays the NETCLOUD trademark in connection with the offering of three different web hosting plans. Viradia Depo., Ex. 1. Mr. Viradia handed out this flyer to individuals in the Indian community during its frequent social functions in order to inform them about his services. Viradia Depo., 12:10-14.

Mr. Viradia also designed business cards to hand out to prospective clients which advertised web hosting services. Viradia Depo., 14:7 – 15:5, Ex. 2. One such business card was created around November 2011 when Mr. Viradia decided to use NETCLOUD as the name of his business. Viradia Depo., 14:17-21, Ex. 2. This business card prominently displays the NETCLOUD trademark in connection with the offering of three different web hosting plans. Viradia Depo., Ex. 2. This business card was distributed at social events and to people Mr. Viradia thought needed a web presence. Viradia Depo., 15:3-5.

Furthermore, Mr. Viradia created a marketing flyer around the same time he created the business card in November 2011. Viradia Depo., 15:14-23, Ex. 3. This flyer was distributed in the same manner as the business card. Viradia Depo., 15:24 – 16:3. This flyer prominently displays the NETCLOUD trademark in connection with the offering of three different web hosting plans. Viradia Depo., Ex. 3.

During its trial period, Opposer submitted into evidence eight separate paid invoices dating between December 1, 2009 and November 16, 2009 stemming from Mr. Viradia's sale of web hosting services. Viradia Depo., Exs. 4-11. Each one of these invoices shows payment for a "Netcloud hosing service" to be provided between certain dates. Viradia Depo., Exs. 4-11. Mr. Viradia testified as to each one of these invoices that (1) web hosting services were actually provided to the client shown on the invoice, (2) the name of the web hosting service to be provided to the client was "NetCloud Hosting," and (3) the invoice was actually paid by the client. Viradia Depo., 16:15 – 24:15.

During its trial period, Opposer also submitted into evidence a ninth invoice dated November 15, 2011. Viradia Depo., Ex. 12. Again, Mr. Viradia testified that this invoice shows payment for web hosting services provided to the client named on the invoice. Viradia Depo.,

25:1-9. However, unlike the other eight invoices, this invoice prominently displays the NETCLOUD name on the very top rather than in the description of services rendered. Viradia Depo., Ex. 12. This is because this invoice was issued around the same time Mr. Viradia decided to adopt NETCLOUD as the name of his business rather than just as the name for a specific suite of cloud hosting plans. Viradia Depo., 25:10-21.

Mr. Viradia decided to sell his NETCLOUD business when his partners in the construction company pressured him to focus solely on the construction company if he wanted to remain a partner. Viradia Depo., 27:14-20. So, in February 2012, Mr. Viradia sold his NETCLOUD web hosting business to an individual named Mehul Satasia. Viradia Depo., 26:10 – 27:1, Ex. 13; Satasia Depo., 19:5-12, Ex. 6. Mr. Viradia met Mr. Satasia through a family friend and had known him for a couple of years. Viradia Depo., 6:5-6. Mr. Satasia agreed to pay a total of \$26,656.50 for the assets of the business. Viradia Depo., 27:12-13, Ex. 13. The vast majority of the purchase price was essentially reimbursement for the <netcloud.com> domain Mr. Viradia purchased in January 2012 for \$25,000. Viradia Depo., 28:10-17. To be sure, Mr. Viradia was not attempting to make a profit off the sale of the business. Viradia Depo., 29:1-3. Rather, his primary goal was to simply divest himself of the NETCLOUD business because he needed to become fully involved in his job at the construction company. Viradia Depo., 29:4-7. Mr. Satasia did, in fact, pay the purchase price to Mr. Viradia. Viradia Depo., 29:8-9; Satasia Depo., 21:6-12.

The sale of the NETCLOUD business included all accounts, customer lists, customer records, domain names, trademarks, service marks, and goodwill. Viradia Depo., 27:5-9, Ex. 13; Satasia Depo., 19:13-24, Ex. 6. This sale specifically included the NETCLOUD trademark and its associated goodwill. Viradia Depo., 27:10-11, Ex. 13. Mr. Viradia intended to transfer the

NETCLOUD trademark and its associated goodwill to Mr. Satasia, and Mr. Viradia did in fact transfer the NETCLOUD trademark and associated goodwill to Mr. Satasia upon execution of the Asset Purchase Agreement. Viradia Depo., 30:3-8; Satasia Depo., 20:6-14. Mr. Viradia did not retain any rights whatsoever in the NETCLOUD trademark after the Asset Purchase Agreement was signed. Viradia Depo., 30:9-11. All assets listed in the Asset Purchase Agreement were transferred to Mr. Satasia. Viradia Depo., 29:21-23, Ex. 13; Satasia Depo., 20:3-5, 21:13-15. This included the domains <netcloud.com> and <netcloud.us>. Satasia Depo., 20:15-20, Ex. 6.

Mr. Satasia continued to provide cloud hosting and email service under the NETCLOUD trademark after purchasing the business from Mr. Viradia. Satasia Depo., 29:11 – 30:6, Ex. 12; Satasia Depo., 30:23 – 31:16, Ex. 13. He also continued to actively advertise his business under the NETCLOUD mark through the distribution of flyers at business networking events and meet-ups. Satasia Depo., 27:19 – 28:17, Ex. 11. Furthermore, throughout 2012, Mr. Satasia was renting servers from a company called Linode.com in order to host his clients' websites and to host his own business operations. Satasia Depo., 31:22 – 36:6, Exs. 14-18. Mr. Satasia also maintained and paid for the web hosting account that was transferred to him by Mr. Viradia as part of the Asset Purchase Agreement. Satasia Depo., 40:14 – 41:16, Ex. 21. Mr. Satasia was using this account to host his clients' websites while he was in the process of acquiring his own server resources. Satasia Depo., 41:3-7. Finally, Mr. Satasia started developing his website for <netcloud.com> by hiring and paying Webprosys, which is the company Mr. Viradia used to design his marketing flyer back in 2009. Satasia Depo., 36:14 – 38:4, 38:10 – 39:5, Exs. 19-20. The website was launched towards the end of 2012. Satasia Depo., 40:14-21.

On December 11, 2012, Mr. Satasia formed Opposer in the State of Texas. Satasia Depo., 22:7-12, Ex. 7. Mr. Satasia is the founder and managing member of Opposer. Satasia Depo., 6:12-17. Opposer is an active limited liability company. Satasia Depo., 22:16-20. The original Certificate of Filing for Opposer states an Effective Date of January 1, 2013. Satasia Depo., Ex. 7. However, Mr. Satasia filed a Certificate of Correction with the State of Texas to amend the Effective Date to December 28, 2012. Satasia Depo., 23:5-14, Ex. 8. The State of Texas issued an updated Certificate of Filing for Opposer with an Effective Date of December 28, 2012. Satasia Depo., 24:3-17, Ex. 9.

On December 31, 2012, Mr. Satasia transferred all assets of his web hosting business to Opposer. Satasia Depo., 25:3-14, 26:5-11, Ex. 10. This included all tangible and intangible assets, including the service mark NETCLOUD and its associated goodwill. Satasia Depo., 26:12-22, Ex. 10. Mr. Satasia retained no ownership interest in any of the assets transferred to Opposer, including the NETCLOUD service mark. Satasia Depo., 26:23 – 27:4, 27:8-10.

Opposer has always used the NETCLOUD trademark to advertise and sell its services and has never done business under a different name. Satasia Depo., 8:17-25. The public does not know Opposer or its services by any other name. Satasia Depo., 9:5-10. Opposer continues to provide cloud hosting services, backups, systems monitoring, and system administration support, along with other unadvertised services that go along with these services. Satasia Depo., 8:8-16.

Opposer currently advertises its services on its publicly accessible website located at www.netcloud.com. Satasia Depo., 12:13-16, 13:22 – 16:15, Exs. 1-3. The public can order and pay for Opposer's services electronically through its website. Satasia Depo., 12:24 – 13:3, 13:11-14, 14:22 – 15:3, Exs. 1-3. Opposer also uses Facebook and Twitter to publicly promote

its services under the NETCLOUD name. Satasia Depo., 16:20 – 18:8, Exs. 4-5. Opposer currently serves approximately 170 clients located throughout the United States and in a number of foreign countries. Satasia Depo., 11:20 – 12:9.

In view of the above, there can be no doubt that Opposer (though its predecessors-in-interest) commenced use of NETCLOUD at least three years prior to the filing of Applicant's application for NETCLOUD, and that such use has continued uninterrupted for approximately four and a half years. As such, Opposer has established its priority in the NETCLOUD trademark.

B. The Board Should Sustain Opposer's Notice of Opposition Because a Likelihood of Confusion Exists Between Applicant's NETCLOUD Trademark and Opposer's NETCLOUD Trademark.

In every case turning on likelihood of confusion, it is the duty of the Board to find, upon consideration of all the evidence, whether or not confusion appears likely. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 U.S.P.Q. 563, 568 (C.C.P.A. 1973). A likelihood of confusion determination is based on the Board's analysis of all of the probative facts in evidence relevant to the issue of likelihood of confusion (the *du Pont* factors). *Id.* at 567. "Not all of the *DuPont* factors may be relevant or of equal weight in a given case" and "any one of the factors may control a particular case." *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 1315, 65 U.S.P.Q.2d 1201, 1204 (Fed. Cir. 2003), *citing In re Dixie Rests. Inc.*, 105 F.3d 1405, 1406, 41 U.S.P.Q.2d 1531, 1533 (Fed. Cir. 1997). Therefore, the Board may focus on the factors it finds dispositive. *See Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336, 57 U.S.P.Q.2d 1557, 1559 (Fed. Cir. 2001), *citing In re Dixie*, 105 F.3d at 1406-07.

The factors most relevant to this proceeding include (1) the similarity of the Parties' marks, (2) the similarity of the Parties' services, (3) the channels of trade in which the Parties'

services are offered, and (4) the conditions under which the Parties' sales are made and the class of purchasers to whom sales are made.

1. SIMILARITY OF THE MARKS

A determination of similarity or dissimilarity under *du Pont* requires an examination of the marks in their entireties. *In re E.I. du Pont de Nemours & Co.*, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973). A key issue is the similarity of the marks "as to appearance, sound, connotation, and commercial impression." *In re Majestic Distilling Co., Inc.*, 65 U.S.P.Q.2d 1201, 1203 (Fed. Cir. 2003).

In this case, Applicant's NETCLOUD mark is **identical** to Opposer's NETCLOUD mark in terms of appearance, sound, connotation, and commercial impression. Satasia Depo., 8:17-19, Exs. 1-5, 11-12; Viradia Depo., 6:19-21. Exs. 1-12. There is simply no evidence in the record that indicates otherwise.

In sum, because Applicant's NETCLOUD mark is identical to Opposer's NETCLOUD mark when compared in their entireties, this *du Pont* factor weighs extremely heavily in Opposer's favor.

2. SIMILARITY AND RELATEDNESS OF THE SERVICES

In testing for likelihood of confusion under §2(d), the similarity or dissimilarity and nature of the services as described in an application or registration or in connection with which a prior mark is in use must be considered. *In re E. I. Du Pont De Nemours & Co.*, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973). The more similar the marks at issue, the less similar the services need to be for the Board to find a likelihood of confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 26 U.S.P.Q.2d 1687, 1688-1689 (Fed. Cir. 1993). When the marks are substantially identical, it is only necessary that there be a viable relationship between the services to support a

finding of likelihood of confusion. *In re Concordia Int'l Forwarding Corp.*, 222 U.S.P.Q. 355, 356 (TTAB 1983). The services need not be identical or even competitive in order to support a finding of likelihood of confusion. *In re Melville Corp.*, 18 U.S.P.Q.2d 1386, 1388 (TTAB 1991). Rather, it is enough that the services are related in some manner or that the circumstances surrounding their marketing are such that they would likely be seen by the same persons under circumstances which could give rise to a mistaken belief that they originate from the same source or that there is an association between the sources of the services. *Id.*

In this case, the services listed in Applicant's application for NETCLOUD are "computer monitoring service which tracks application software performance, performs periodic maintenance and provides reports and alerts concerning such performance; computer services, namely, cloud hosting provider services; computer services, namely, computer system administration for others; computer services, namely, filtering of unwanted e-mails; computer services, namely, integration of private and public cloud computing environments; computer services, namely, on-line scanning, detecting, quarantining and eliminating of viruses, worms, trojans, spyware, adware, malware and unauthorized data and programs on computers and electronic devices; computer services, namely, remote and on-site management of the information technology (IT) systems of others; hosting the software, websites and other computer applications of others on a virtual private server; providing virtual computer systems and virtual computer environments through cloud computing."

Similarly, Opposer provides cloud hosting services, backups, systems monitoring, and system administration support, along with other unadvertised services that go along with these services. Satasia Depo., 8:8-16. Mr. Satasia testified that some of the services listed in Applicant's application are either identical or very strongly related to the services offered by

Opposer under the NETCLOUD mark. Satasia Depo., 9:23 – 11:16. Opposer is hired to host and monitor its clients’ websites and software applications, as well as to have online backup storage. Satasia Depo., 18:21 – 19:4. Many of the documents Mr. Satasia identified during his testimony indicate that Opposer provides cloud hosting services and support. Satasia Depo., Exs. 1-5, 11-12. Furthermore, Mr. Viradia testified that at least some of the services listed in Applicant’s application are identical to the services he previously provided under the NETCLOUD mark. Viradia Depo., 7:21 – 8:6. Many of the documents Mr. Viradia identified during his testimony indicate that he provided web hosting services and support. Viradia Depo., Exs. 1-12.

There is no legitimate dispute that the services rendered by Opposer and its predecessors-in-interest wholly overlap with the “computer services, namely, cloud hosting provider services,” and “hosting the software, websites and other computer applications of others on a virtual private server” services recited in Applicant’s application. Moreover, there is, at a minimum, a close relationship between Opposer’s services and the “computer system administration for others,” “computer services, namely, remote and on-site management of the information technology (IT) systems of others,” and “providing virtual computer systems and virtual computer environments through cloud computing” listed in Applicant’s application.

Based on the foregoing, there can be no doubt that at least some of the services listed in Applicant’s application for NETCLOUD are identical or very strongly related to the services provided by Applicant under its NETCLOUD mark. Therefore, this *du Pont* factor clearly weighs in favor of Opposer.

3. CHANNELS OF TRADE

In testing for likelihood of confusion under §2(d), the similarity or dissimilarity of established, likely-to-continue trade channels must be considered. *In re E.I. du Pont de Nemours & Co.*, 177 U.S.P.Q. 563, 567 (C.C.P.A. 1973). Opposer currently advertises its services on its publicly accessible website located at www.netcloud.com. Satasia Depo., 12:13-16, 13:22 – 16:15, Ex. 1-3. Opposer also uses Facebook and Twitter to publicly promote its services under the NETCLOUD name. Satasia Depo., 16:20 – 18:8, Exs. 4-5. In addition, Opposer utilizes online banner ads and email to market its services. Satasia Depo., 12:10-12.

In this case, there are no specific restrictions in Applicant's identification of services regarding the channels of trade. Therefore, the Board must presume that Applicant's services move in all normal and usual channels of trade, including social media, online banner ads, email marketing, websites, etc. *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 U.S.P.Q.2d 1783, 1787 (Fed. Cir. 1990). As such, this factor weighs in favor of Opposer.

4. CONDITIONS OF SALE AND CLASS OF PURCHASERS

The final *du Pont* factor relevant to the determination of likelihood of confusion between Applicant's NETCLOUD mark and Opposer's NETCLOUD mark is the conditions under which, and the buyers to whom, sales are made. In this case, Opposer provides its services to individuals and small businesses. Satasia Depo., 11:17-19. These individuals and businesses would hire Opposer to host and monitor their websites and software applications, as well as to have online backup storage. Satasia Depo., 18:21 – 19:4. Opposer's customers are located throughout the United States and in a number of foreign countries. Satasia Depo., 11:20 – 12:5.

The public can order and pay for Opposer's services electronically through its website. Satasia Depo., 12:24 – 13:3, 13:11-14, 14:22 – 15:3, Exs. 1-3.

There is no reason to believe that Applicant could not provide its services to individuals and small businesses located throughout the United States. Moreover, there is no reason to believe that the public could not electronically order and pay for Applicant's services through a website. Finally, there is no language in Applicant's identification of services which either (1) limits or restricts the provision of Applicant's services to a particular segment of the purchasing public, or (2) limits or restricts the means by which Applicant's services may be purchased. Therefore, the Board must presume that both Opposer and Applicant offer their services to identical and overlapping segments of the purchasing public. As such, this *du Pont* factor weighs very heavily in Opposer's favor.

CONCLUSION

In conclusion, Opposer has clearly demonstrated that it has prior use of the NETCLOUD mark and that there is a strong likelihood of confusion between its mark and Applicant's NETCLOUD mark. As such, Opposer respectfully request that the Board sustain Opposer's Notice of Opposition and refuse registration of Applicant's mark.

Respectfully submitted,

NETCLOUD, LLC

By: _____/met20/

Dated: _____ 9/26/2014 _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing has been served by emailing said copy on _____ 9/26/2014 _____ to:

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Morris E. Turek, Attorney for Opposer