

ESTTA Tracking number: **ESTTA290438**

Filing date: **06/17/2009**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

| | |
|---------------------------------------|---|
| Name | Agrotain International, LLC |
| Granted to Date of previous extension | 06/17/2009 |
| Address | #1 Angelica Street St. Louis, MO 63147 UNITED STATES |
| Attorney information | Jason Ross Greensfelder, Hemker & Gale, P.C. 10 South Broadway Suite 2000 St. Louis, MO 63102 UNITED STATES jlr@greensfelder.com, dtb@greensfelder.com, krh@greensfelder.com, gae@greensfelder.com, hly@greensfelder.com Phone:314-241-9090 |

Applicant Information

| | | | |
|------------------------|---|------------------------|------------|
| Application No | 77295286 | Publication date | 02/17/2009 |
| Opposition Filing Date | 06/17/2009 | Opposition Period Ends | 06/17/2009 |
| Applicant | Agrium Inc. 13131 Lake Fraser Drive, S.E. Calgary, T2J7E8 CANADA | | |

Goods/Services Affected by Opposition

Class 001. First Use: 1954/00/00 First Use In Commerce: 1954/00/00
All goods and services in the class are opposed, namely: Fertilizers

Applicant Information

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|------------------------|---|------------------------|------------|
| Application No | 77295316 | Publication date | 02/24/2009 |
| Opposition Filing Date | 06/17/2009 | Opposition Period Ends | |
| Applicant | Agrium Inc. 13131 Lake Fraser Drive, S.E. Calgary, T2J7E8 CANADA | | |

Goods/Services Affected by Opposition

Class 001. First Use: 1954/00/00 First Use In Commerce: 1954/00/00
All goods and services in the class are opposed, namely: Granular fertilizer ingredients of blended

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|-------------|
| fertilizers |
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Grounds for Opposition

| | |
|---|---|
| The mark comprises matter that, as a whole, is functional | Trademark Act section 2(e)(5) |
| <i>Torres v. Cantine Torresella S.r.l.Fraud</i> | 808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986) |
| Other | (1) The mark is not distinctive of Applicant's goods; (2) the mark is ornamental; (3) Applicant is collaterally estopped from registering the mark; and (4) Applicant has abandoned its rights in the mark. |

| | |
|-------------|---|
| Attachments | Notice of Opposition.pdf (20 pages)(773727 bytes) Exhibit A - Notice of Opposition.pdf (10 pages)(763701 bytes) Exhibit B - Notice of Opposition.pdf (11 pages)(941552 bytes) Exhibit C - Notice of Opposition.pdf (10 pages)(546254 bytes) Exhibit D - Notice of Opposition.pdf (10 pages)(589652 bytes) Exhibit E - Notice of Opposition.pdf (11 pages)(637253 bytes) Exhibit F - Notice of Opposition.pdf (11 pages)(636093 bytes) Exhibit G - Notice of Opposition.pdf (11 pages)(692568 bytes) Exhibit H - Notice of Opposition.pdf (11 pages)(647372 bytes) Exhibit I - Notice of Opposition.pdf (5 pages)(351073 bytes) |
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

| | |
|-----------|-----------------|
| Signature | /Jason L. Ross/ |
| Name | Jason Ross |
| Date | 06/17/2009 |

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

In the matter of Application Serial No. 77/295,286 published in the *Official Gazette* on February 17, 2009, and Application Serial No. 77/295,316 published in the *Official Gazette* on February 24, 2009

| | | |
|--------------------------------|---|-------------------------------------|
| Agrotain International, L.L.C. |) | Opposition No.: _____ |
| |) | |
| |) | Trademark: Color Blue |
| Opposer, |) | |
| |) | Application Serial Nos.: 77/295,286 |
| v. |) | 77/295,316 |
| |) | |
| Agrium Inc. |) | |
| |) | |
| Applicant. |) | |
| _____ |) | |

Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

NOTICE OF OPPOSITION

Opposer Agrotain International, L.L.C. (“Agrotain” or “Opposer”) hereby opposes Applicant Agrium Inc.’s (“Agrium’s” or “Applicant’s”) registration as its trademark the color **Blue** (“Color Blue”) when used on granules of fertilizer, Application Serial Nos. 77/295,286 and 77/295,316 (collectively, the “Applications,” submitted herewith as **Exhibits A & B** and incorporated herein by reference), because such registrations will injure Opposer. Applicant filed the Applications on October 3, 2007, which were published in the *Official Gazette of the United States Patent and Trademark Office* on February 17 and 24, 2009, respectively. This Notice of Opposition is timely filed within the extended due dates for filing oppositions – June 17 and June 24, 2009, respectively.

The grounds for the opposition are as follows:

INTRODUCTION

1. Applicant and Opposer have been competitors in the fertilizer industry for many years. During that time, both parties, their respective predecessors, as well as other competitors, have manufactured, marketed and sold blue-colored fertilizers. The color blue is used throughout the industry to, *inter alia*, indicate to consumers that the fertilizer is nitrogen-infused. In pursuing the Applications, Applicant has taken the unprecedented, anti-competitive step of trying to secure exclusive rights to this popular color. If Applicant succeeds, it will receive *prima facie* exclusive rights to the Color Blue, and Opposer and other competitors will be put in a severe competitive disadvantage by being forced to adopt another color that consumers do not associate with nitrogen-infused fertilizer.

2. Notably, Applicant's efforts to monopolize a color don't end with the Color Blue. Since October 2007, Applicant has sought no less than six (6) other trademark registrations for two other very common fertilizer colors: green and tan. Together, Applicant is striving to monopolize the right to use three common colors in the fertilizer industry. If Applicant succeeds, Opposer and other competitors will be forced to switch to colors that consumers are completely unfamiliar with. With the loss of this familiarity, consumers will no longer recognize Opposer's goods and will instead falsely conclude that Opposer has changed its product.

3. Applicant's registrations for the Color Blue should be denied on the basis that the Color Blue is generally used throughout the industry to indicate the presence of nitrogen as well as serves numerous other utilitarian and aesthetic functions or, alternatively, is purely ornamental.

4. In addition, Applicant's conduct bars these registrations for the Color Blue. Applicant and its predecessors have abandoned any and all rights to the Color Blue by knowingly allowing their competitors, including Opposer, to use the Color Blue for decades without objection.

Moreover, Applicant has committed fraud on the U.S. Patent and Trademark Office through numerous, knowingly false statements made during the application process. In fact, a federal district court has previously held that Applicant's predecessor does not have any enforceable trademark rights in the Color Blue. Yet Applicant fraudulently submits these applications claiming that it does.

5. For all of the above reasons, Applicant will be injured if the subject registrations are issued and, therefore, the Applications should be denied.

FACTS COMMON TO ALL COUNTS

I. Opposer's Use of the Color Blue

6. Opposer Agrotain International, L.L.C., is a limited liability company organized and existing under the laws of the State of Missouri, with a place of business at One Angelica Street, St. Louis, Missouri 63147.

7. Opposer is the world's largest producer of proprietary nitrogen-stabilized fertilizers. Opposer markets its fertilizers under the brands AGROTAIN[®], AGROTAIN[®] PLUS, SuperN[®] SuperU[®], HYDREXX[®], UMAXX[®] and UFLEXX[™] (collectively, "Opposer's Products"). Opposer's award-winning nitrogen stabilizer technology has a proven track record, backed by worldwide research studies, in reducing nitrogen losses and extending plant-available nitrogen for healthier plants and higher yields.

8. Since at least as early as 1984, Opposer and Opposer's predecessor(s)-in-interest have continuously manufactured, marketed and sold in interstate commerce blue-colored fertilizers under numerous different brands.

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