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

Proceeding	92052684
Party	Defendant NutriScience Corporation
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Submission	Motion to Amend/Amended Answer or Counterclaim
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Date	05/23/2011
Attachments	AmendedAnswerandCounterClaim.pdf ( 6 pages )(104912 bytes )

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

NATURAL SUPPLEMENTS AND REMEDIES, INC.,	)	
	)	Cancellation No. 92052684
Petitioner,	)	
v.	)	Reg. No.: 3237960
	)	
NUTRISCIENCE CORPORATION,	)	Mark: VITAENERGY
	)	
Registrant.	)	
	)	

**REGISTRANT’S AMENDED ANSWER TO PETITION FOR CANCELLATION**  
**AND**  
**AMENDED COUNTERCLAIM FOR CANCELLATION**  
**OF**  
**U.S. REG. NO. 2440741**

Registrant, Nutriscience Corporation (“Registrant” or “Nutriscience”), through its undersigned attorneys, hereby submits its Amended Answer and Amended Counterclaims to the Petition to Cancel filed by Natural Supplements and Remedies, Inc. (“Petitioner” or “Natural”) against the registration of the mark VITAENERGY, Reg. No. 3237960, registered May 1, 2007, as follows:

Unless otherwise expressly admitted herein, each allegation contained in the Petition to Cancel is denied.

1. As to paragraph 1 of the Petition for Cancellation, Registrant admits that Petitioner is seeking to cancel Registration No. 3237960 for the mark VITAENERGY for the goods identified in such registration. Registrant denies any other allegations in said paragraph.

2. As to paragraph 2 of the Petition for Cancellation, Registrant lacks knowledge and information sufficient to admit or deny the allegations asserted in Paragraph 2 and therefore denies the same.

3. As to paragraph 3 of the Petition for Cancellation, Registrant lacks knowledge and information sufficient to admit or deny the allegations asserted in Paragraph 3 and therefore denies the same. Registrant denies the mark has been in continuous use since 1991 as a mark.

4. As to paragraph 4 of the Petition for Cancellation, Registrant admits that Exhibit A purports to be a printout from the USPTO TARR database for Registration No. 2440741. As to any remaining allegations of paragraph 4, Registrant lacks knowledge and information sufficient to admit or deny the allegations asserted in Paragraph 4 and therefore denies the same.

5. As to paragraph 5 of the Petition for Cancellation, said paragraph contains conclusions of law to which no response is required. As to all other allegations of Paragraph 5, Registrant denies each and every other allegation therein.

6. As to paragraph 6 of the Petition for Cancellation, Registrant admits that Exhibit B purports to be a printout from the USPTO TARR database for Registration No. 3237960. As to any remaining allegations of Paragraph 6, Registrant lacks knowledge and information sufficient to admit or deny the allegations asserted in Paragraph 6 or such allegations contain conclusions of law to which no response is required and Registrant denies the same in their entirety.

7. As to paragraph 7 of the Petition for Cancellation, Registrant lacks knowledge and information sufficient to admit or deny the allegations asserted therein and therefore denies the same.

8. As to paragraph 8 of the Petition for Cancellation, said paragraph contains conclusions of law to which no response is required or Registrant lacks information sufficient to admit or deny the allegations asserted in Paragraph 8 and therefore Registrant denies the same in their entirety.

9. Denied.

#### **FIRST AFFIRMATIVE DEFENSE**

10. Petitioner has waived any and all claims against Registrant over the use of the VITAENERGY Mark.

#### **SECOND AFFIRMATIVE DEFENSE**

11. Petitioner is not entitled to relief because Petitioner's mark is generic or descriptive and incapable of serving as an indicator of source.

**THIRD AFFIRMATIVE DEFENSE**

12. Petitioner lacks standing to bring this Cancellation.

**FOURTH AFFIRMATIVE DEFENSE**

13. Petitioner's claim is barred by the doctrine of estoppel. Petitioner is estopped from canceling Registrant's Mark through acts of Petitioner upon which Registrant relied to its detriment.

**FIFTH AFFIRMATIVE DEFENSE**

14. Petitioner's claim is barred by laches in that Petitioner's delay in asserting its rights has caused injury or prejudice to Registrant.

**SIXTH AFFIRMATIVE DEFENSE**

15. Petitioner's claim is barred since acts or omissions by Petitioner implied Petitioner's acquiescence in Registrant's activities. In addition Petitioner has acquiesced to the use of the Registered Mark by acquiescing to the long existence of Registrant's Mark.

**SEVENTH AFFIRMATIVE DEFENSE**

16. Petitioner's claim is barred since Petitioner's alleged mark is not inherently distinctive and purchasers do not associate the Petitioner's mark with Petitioner alone.

**FIRST COUNTERCLAIM**  
**FOR**  
**ABANDONMENT OF REGISTRATION NO. 2440741**

1. Registrant-Counterclaimant, Nutriscience Corporation is a California corporation located at 1140 Highland Avenue, Suite 100, Manhattan Beach, CA 90266 ("Nutriscience").

2. Petitioner-Counterdefendant, Natural Supplements and Remedies, Inc., has alleged it is a corporation under the laws of Florida, having an address at 8770 S.W. 72<sup>nd</sup> Street #363, Miami, FL 33173 ("Natural").

3. Nutriscience is the owner of federal trademark registration No. 3237960 for VITAENERGY in International Class 5 for "Nutritional supplements; Dietary supplements;

Herbal supplements; Mineral supplements; Multi-vitamins; Vitamins and minerals; Dietary and herbal supplements; Herbal and plant derived products, namely herbal nutritional supplements; Food supplements, namely, anti-oxidants, homeopathic supplements; Nutraceuticals for use as a dietary supplement; Dietary supplements, namely supplements containing botanicals; Herbal supplements for sports nutrition; Anti-oxidants; Homeopathic supplements; Vitamin and mineral supplements” (“960 Registration”) and Nutriscience has common law rights to the mark.

4. On information and belief, Natural claims to be the owner of a federal trademark registration for the mark VITANERGY (“VITANERGY Mark”), which is currently registered for services listed as “Distributorships in the field of pills, tablets, capsules, containing natural ingredients for providing nutrition and promoting health” which was issued U.S. Reg. No. 2440741 by the USPTO. (“’741 Registration”).

5. On information and belief, Natural and/or its predecessor-in-interest was not using the VITANERGY Mark for all of the services identified in the application, that eventually matured into the ’741 Registration, at the time of filing and had never used or had discontinued, without an intent to resume, any and all use of the VITANERGY Mark for the services listed in the application at the time of filing.

6. On information and belief, Natural was not using the VITANERGY Mark for all of the services identified in the application at the time of filing and had never used or had discontinued, without an intent to resume, any and all use of the VITANERGY Mark for the services listed in the application at the time of filing.

7. On information and belief, Natural has never used the VITANERGY Mark for all of the services listed in Application No. 75929208 that eventually matured into the ’741 Registration.

8. On information and belief, Natural has abandoned any use of the VITANERGY mark, and therefore is no longer entitled to maintain its registration.

9. Natural’s non-use of the VITANERGY mark for more than three (3) consecutive years as a trademark is prima facie evidence of abandonment pursuant to Lanham Act 15 U.S.C. § 1127.

Nutriscience reserves the right to add additional counterclaims in the event discovery reveals other information that provides an additional basis for cancellation. WHEREFORE, Nutriscience will be damaged if Natural is able to assert its registration for the ’741 Registration

against the '960 Registration and Nutriscience requests that Natural's '741 Registration be immediately cancelled and the Petition filed by Natural be dismissed in its entirety. Nutriscience has previously submitted the requisite filing fee in the amount of \$300 for the Counterclaim.

Respectfully submitted,

**NUTRISCIENCE CORPORATION**

Dated: May 23, 2011

By:

  
Kurt Koenig

KOENIG & ASSOCIATES  
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Santa Barbara, CA 93101  
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Email: Kurt@incip.com

Attorney for Registrant

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing  
**“REGISTRANT'S AMENDED ANSWER TO PETITION FOR CANCELLATION AND  
AMENDED COUNTERCLAIM FOR CANCELLATION OF U.S. REG. NO. 2440741”**  
was served on **May 23, 2011** by first-class mail, postage prepaid, to Petitioner’s counsel  
addressed as follows:

Oliver Alan Ruiz, Esq.  
Malloy & Malloy, P.A.  
2800 S.W. Third Avenue  
Miami, FL 33129

  
Kurt Koening

Dated: May 23, 2011

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**CERTIFICATE OF ELECTRONIC FILING**

I hereby certify that this correspondence is being transmitted by electronic mail to the  
United States Patent and Trademark Office via ESTTA on the date identified below.

Dated: May 23, 2011

  
Kurt Koening

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