

ESTTA Tracking number: **ESTTA149903**

Filing date: **07/09/2007**

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

|                        |   |
|------------------------|---|
| Proceeding             | 92047568  |
| Party                  | Defendant<br>Nature's Way Products, Inc.<br>Nature's Way Products, Inc.<br>1375 North Mountain Springs Parkway<br>Springville, UT 84663 |
| Correspondence Address | Nature's Way Products, Inc.<br>1375 North Mountain Springs Parkway<br>Springville, UT 84663<br>UNITED STATES<br>gordonwa@naturesway.com |
| Submission             | Answer  |
| Filer's Name           | Robyn L. Phillips   |
| Filer's e-mail         | rphillips@wnlaw.com, scourdy@wnlaw.com  |
| Signature              | /Robyn L. Phillips/   |
| Date                   | 07/09/2007  |
| Attachments            | 001 Response to Notice of Cancellation.pdf ( 6 pages )(169795 bytes )   |

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

In the matter of Trademark Application Serial No. 78/069,142  
Published in the Official Gazette on November 6, 2001  
International Class: 005  
Filed: June 14, 2001  
Mark: **ALIVE!**

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|                              |   |                                  |
|------------------------------|---|----------------------------------|
| A-LIVE FOODS, INC.,          | ) | Cancellation No. 92047568        |
|                              | ) |                                  |
| Petitioner,                  | ) |                                  |
|                              | ) |                                  |
| v.                           | ) | <b>REGISTRANT’S ANSWER TO</b>    |
|                              | ) | <b>PETITION FOR CANCELLATION</b> |
| NATURE’S WAY PRODUCTS, INC., | ) |                                  |
|                              | ) |                                  |
| Registrant.                  | ) |                                  |

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In answer to the Petition for Cancellation, dated May 25, 2007, Registrant Nature’s Way Products, Inc. (“Registrant”) answers the Petition for Cancellation filed by Petitioner A-Live Foods, Inc. (“Petitioner”) as follows:

**ANSWER TO PETITION FOR CANCELLATION**

Registrant lacks knowledge or information sufficient to form a basis to admit or deny that Petitioner is a Utah corporation or that Petitioner’s principal place of business is at 811 East 11000 North, Cedar City, Utah, 84720, and, therefore, denies such allegations. Registrant admits that it is the owner of United States Trademark Registration No. 2,574,627 for the mark “ALIVE!”, registered May 28, 2002 for “Vitamins, minerals and dietary supplements” in International Class 005 (“Registrant’s Mark”). Registrant denies that Petitioner will be damaged

by Registrant's Mark. Registrant denies any and all remaining allegations of the opening paragraph of the Petition for Cancellation.

Registrant hereby answers Petitioner's grounds for cancellation as follows:

1. Registrant admits that a review of the database of the United States Patent and Trademark Office indicates that Petitioner is listed as the owner of United States Trademark Application Serial No. 78/972,826 for the mark "PREMIER ALIVE" in International Class 005 for use on goods identified as "Dietary and Nutritional supplements" (the "PREMIER ALIVE Mark"). Registrant lacks knowledge or information sufficient to form a basis to admit or deny any and all remaining allegations set forth in paragraph 1 of the Petition for Cancellation and, therefore, denies any and all such remaining allegations.

2. Registrant lacks knowledge or information sufficient to form a basis to admit or deny any and all allegations set forth in paragraph 2 of the Petition for Cancellation and, therefore, denies any and all such allegations.

3. Registrant lacks knowledge or information sufficient to form a basis to admit or deny any and all allegations set forth in paragraph 3 of the Petition for Cancellation and, therefore, denies any and all such allegations.

4. Registrant admits that it is the owner of Registrant's Mark.

5. Registrant lacks knowledge or information sufficient to form a basis to admit or deny any and all allegations set forth in paragraph 5 of the Petition for Cancellation and, therefore, denies any and all such allegations.

6. Registrant admits that the filing date for Registrant's Mark is June 14, 2001.

7. Registrant admits that the stated date of first use of Registrant's Mark is at least as early as August 16, 2001.

8. Registrant lacks knowledge or information sufficient to form a basis to admit or deny any and all allegations set forth in paragraph 8 of the Petition for Cancellation and, therefore, denies any and all such allegations.

9. Registrant denies that any right Petitioner possesses in the PREMIER ALIVE Mark is senior to Registrant's rights in Registrant's Mark. Registrant lacks knowledge or information sufficient to form a basis to admit or deny any and all remaining allegations set forth in paragraph 9 of the Petition for Cancellation and, therefore, denies any and all such remaining allegations.

10. Registrant denies any and all allegations set forth in paragraph 10 of the Petition for Cancellation.

11. Registrant denies any and all allegations set forth in paragraph 11 of the Petition for Cancellation.

12. Registrant admits that it has statutory rights in Registrant's Mark. Registrant denies any and all remaining allegations set forth in paragraph 12 of the Petition for Cancellation.

Registrant denies any and all remaining allegations set forth in the Petition for Cancellation.

### **AFFIRMATIVE DEFENSES**

By way of defense to the allegations set forth in the Petition for Cancellation, Registrant asserts the following:

#### **FIRST AFFIRMATIVE DEFENSE**

Registrant's Petition for Cancellation fails to state a claim upon which relief can be granted.

## **SECOND AFFIRMATIVE DEFENSE**

Petitioner's claims are barred by the doctrine of laches, estoppel, acquiescence and/or waiver.

## **THIRD AFFIRMATIVE DEFENSE**

Petitioner is not likely to be damaged by Registrant's Mark and, therefore, lacks standing to petition to cancel the same.

## **FOURTH AFFIRMATIVE DEFENSE**

Any rights Petitioner may have in its "A-LIVE FOODS", "PREMIER A-LIVE" and/or "PREMIER ALIVE" marks are limited in geographic scope of use and, therefore, no likelihood of confusion exists between Petitioner's marks as applied to Petitioner's goods and Registrant's Mark as applied to Registrant's goods.

## **FIFTH AFFIRMATIVE DEFENSE**

Registrant's use of the mark "ALIVE!" will not mistakenly be thought by the public to derive from the same source as Petitioner's goods, nor will such use be thought by the public to be a use by Petitioner or with Petitioner's authorization or approval.

## **SIXTH AFFIRMATIVE DEFENSE**

Registrant's Mark, when used in connection with Registrant's goods, is not likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of Registrant with Petitioner, or as to the origin, sponsorship, or approval of Registrant's goods by Petitioner.

**SEVENTH AFFIRMATIVE DEFENSE**

Any rights that Petitioner may possess in its PREMIER ALIVE mark are junior to Registrant's rights in Registrant's Mark.

**RELIEF REQUESTED**

In view of the foregoing, Registrant respectfully requests that the relief requested by Petitioner be denied, that the Petition for Cancellation be dismissed with prejudice, and that the registration of United States Trademark Registration No. 2,574,627 be upheld.

DATED this 9th day of July, 2007.

By:     /Robyn L. Phillips/  
Robyn L. Phillips, Reg. No. 39,330  
Matthew A. Barlow

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Attorneys for Registrant  
NATURE'S WAY PRODUCTS, INC.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing **REGISTRANT'S ANSWER TO PETITION FOR CANCELLATION** was served on Petitioner by mailing a true copy thereof to its attorney of record, by First Class Mail, postage prepaid this 9th day of July, 2007, in an envelope addressed as follows:

Randall B. Bateman  
Perry S. Clegg  
**BATEMAN IP LAW GROUP**  
8 East Broadway, Suite 550  
Salt Lake City, Utah 84110

/Robyn L. Phillips/

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