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Filing date: **07/16/2007**

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

Proceeding	92047568
Party	Plaintiff A-Live Foods, Inc. A-Live Foods, Inc. ,
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Attachments	3594ms-07-16-07 Motion to Strike Respondent's Answer.pdf (4 pages)(141330 bytes)

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

In the matter of U.S. Trademark Registration No. 2574627
For the mark ALIVE!
Published in the Official Gazette on November 6, 2001

A-Live Foods, Inc.,)	Cancellation No. 92047568
)	Registration No. 2574627
)	Mark: ALIVE!
Petitioner,)	Filing Date: June 14, 2001
)	Registration Date: May 28, 2002
vs.)	
)	
Nature's Way Products, Inc.)	
)	
Respondent.)	
_____)	

**PETITIONER'S MOTION TO STRIKE RESPONDENT'S
ANSWER AND AFFIRMATIVE DEFENSE AS UNTIMELY AND IMPROPER**

Petitioner, A-Live Foods, Inc. ("Petitioner" or "A-Live") respectfully moves this Honorable Board to strike Respondent Nature's Way Products, Inc.'s Answer, or alternatively, to strike Respondent's Fourth Affirmative Defense, as untimely and improper for the reasons set forth herein.

A. The Board Should Strike Respondent's Answer And Absent A Showing Of Good Cause, Should Enter Default Judgment Against Respondent

Absent an extension, Parties are required to file and serve pleadings within the time periods set by the Board. Thus, "when a Board notification allows the defendant 40 days from the mailing date of the notification in which to file an answer to the complaint, the answer is due on or before the 40th day, not on the 45th day." See TBMP § 310.03(b).

Nature's Way failed to timely file and serve its Answer to A-Live's Petition for Cancellation. The Answer was due by July 5, 2007, but was not filed until the next week on July 9, 2006. Nature's Way did not request an extension of time in which to file its answer prior to expiration of the filing deadline under TBMP § 509.01(a) (*e.g.*, with showing of good cause). Moreover, Nature's Way did not move to reopen the time period under TBMP § 509.01(b) (*e.g.*, with showing of excusable neglect). Likewise, Nature's Way did not request a stipulation from Petitioner for an extension of time or to reopen the period for filing its answer, nor communicate whatsoever with Petitioner regarding the same.

Thus, because the time period for filing the answer had expired and no leave of the Board or stipulation of Petitioner had been granted or even requested by Nature's Way, filing by Nature's Way of the answer outside of the time period set by the Board was improper and the answer should be stricken. Furthermore, absent a showing of good cause by Nature's Way, the Board should enter default judgment against Nature's Way. *See* TBMP § 508 (once the issue of default is raised, "the standard for determining whether default judgment should be entered against defendant, for its failure to file a timely answer . . . requires that the defendant show good cause why default judgment should not be entered against it"). *See also* 37 CFR 2.114(a) ("If no answer is filed within the time set, the petition may be decided as in case of default.").

B. The Board Should Strike Respondent's Fourth Affirmative Defense

Respondent's Fourth Affirmative Defense is based on alleged geographic limitations. It states:

Any rights Petitioner may have in its "A-LIVE FOODS", "PREMIER A-LIVE" and/or "PREMIER ALIVE" marks are limited in geographic scope and 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.


Geographic limitations are an improper basis for an affirmative defense, because the Trademark Trial and Appeal Board will only consider geographic limitations in the context of a concurrent use proceeding. *See* CFR § 2.133(c) ("Geographic limitations will be considered and determined by the Board Trademark Trial and Appeal Board only in the context of a concurrent use registration proceeding."). *See also* TBMP § 311.02(b).

There is no concurrent use proceeding currently pending before the TTAB between Petitioner and Respondent. Therefore, Respondent's Fourth Affirmative Defense, which is based on alleged geographic limitations, should be stricken pursuant to the TTAB Rules.

C. Conclusion

For the foregoing reasons, Petitioner respectfully requests the Board to strike Respondent's untimely answer and, absent a showing of good cause, to enter default judgment against Respondent. Alternatively, Petitioner respectfully requests that the Board strike Respondent's Fourth Affirmative Defense as improper for consideration outside of a concurrent use proceeding.

Respectfully submitted this 16th day of July, 2007.



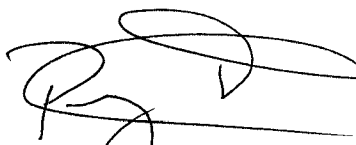
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
PETITIONER'S MOTION TO STRIKE RESPONDENT'S ANSWER AND AFFIRMATIVE
DEFENSE AS UNTIMELY AND IMPROPER was served on Respondent by mailing a true
copy thereof to its attorney of record, by First Class Mail, postage prepaid this 16th day of July,
2007, in an envelope addressed as follows:

Robyn L. Phillips
Matthew A. Barlow
WORKMAN | NYDEGGER
1000 Eagle Gate Tower
60 East South Temple
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Perry S. Clegg