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Filing date: **08/06/2007**

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

Proceeding	92047568
Party	Defendant Nature's Way Products, Inc.
Correspondence Address	Robyn L. Phillips WORKMAN NYDEGGER 60 East South Temple, Ste. 1000 Salt Lake City, UT 84111 UNITED STATES rphillips@wnlaw.com
Submission	Opposition/Response to Motion
Filer's Name	Robyn L. Phillips
Filer's e-mail	rphillips@wnlaw.com, scourdy@wnlaw.com
Signature	/Robyn L. Phillips/
Date	08/06/2007
Attachments	006 Opposition to Motion to Strike.pdf ( 9 pages )(381645 bytes ) 006 Phillips Decl.pdf ( 16 pages )(424231 bytes ) 006 Marsing Declaration.pdf ( 9 pages )(216980 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>NATURE'S WAY'S OPPOSITION TO</b>
	)	<b>PETITIONER'S MOTION TO STRIKE</b>
NATURE'S WAY PRODUCTS, INC.,	)	<b>NATURE'S WAY'S ANSWER AND</b>
	)	<b>AFFIRMATIVE DEFENSE AS</b>
Registrant.	)	<b>UNTIMELY AND IMPROPER</b>
	)	

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Registrant Nature's Way Products, Inc. ("Nature's Way" or "Registrant") respectfully submits its Opposition to Petitioner's Motion to Strike Respondent's Answer and Affirmative Defense as Untimely and Improper ("Motion to Strike").

**I. INTRODUCTION**

In its Motion, Petitioner A-Live Foods, Inc. ("Petitioner") requests that the Board strike Nature's Way's Answer and enter default judgment against Nature's Way on the basis that the Answer to the Petition for Cancellation was filed four (4) days late. Nature's Way respectfully submits that in the present Opposition it makes the requisite showing of good cause. Further, the law strongly favors determination of cases on their merits and disfavors the entry of default judgment in most instances. See *CTRL Sys. Inc. v. Ultraphonics of North America Inc.*, 52 USPQ2d 1300, 1301 (TTAB 1999). Accordingly, entry of default judgment would be improper and Petitioner's motion to strike Nature's Way's Answer should be denied.

In the alternative, Petitioner seeks to have Nature's Way's Fourth Affirmative Defense stricken. As shown below, Nature's Way's Fourth Affirmative Defense is a proper defense to the Notice of Cancellation because Petitioner does not own any United States Trademark registrations for its "A-LIVE FOODS, INC.," "PREMIER A-LIVE" or "PREMIER ALIVE" marks (collectively "Petitioner's Marks") and its claim is based entirely on its alleged common law rights. At best, Petitioner arguably possesses only limited common law rights in these marks and Nature's Way is entitled to discover the scope of these rights.

**A. Nature's Way's Unintentional Delay in the Filing of Its Answer is Excusable Under the Good Cause Standard**

The issue of whether a default judgment should be entered against a defendant for failure to file a timely answer turns on whether the defendant can show good cause. *See* TBMP § 312.01. "Good cause ... is usually found when the defendant shows that (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action." TBMP § 312.02. If the defendant is able to make a satisfactory showing of good cause, default judgment will not be entered. *Id.*

**1. The Delay in Filing the Answer Was Not the Result of Willful Conduct or Gross Neglect**

As explained in more detail below, the delay in the filing of Nature's Way's Answer was the result of an inadvertent docketing error. Petitioner filed a Petition for Cancellation on May 25, 2007. In response to this filing, the Trademark Trial and Appeal Board ("TTAB") issued a Scheduling Order with a mailing date of May 26, 2007. [*See* Declaration of Robyn L. Phillips in Support of Nature's Way's Opposition to Petitioner's Motion to Strike ("Phillips Decl."), ¶ 3 and Exh. A.] The TTAB sent an electronic version of the Scheduling Order to Nature's Way by e-mail that same day (Saturday, May 26, 2007). [*Id.* ¶ 4.] Upon returning to the office after the Memorial Day weekend, Nature's Way forwarded the e-mail correspondence from the TTAB to its counsel. [Phillips Decl., ¶ 5 and Exh. B.] Upon receiving the e-mail from

the client containing the Scheduling Order from the TTAB, counsel for Nature's Way printed off the e-mail and sent it directly to the firm's docketing department.<sup>1</sup> [*Id.* ¶ 8.]

Pursuant to normal practice, the due date of Nature's Way's answer was calculated from the mailing date shown on the Scheduling Order (*i.e.* May 29, 2007), which in this case was part of the e-mail correspondence that had been forwarded by the Nature's Way. [*Id.* ¶ 9; Declaration of Amy L. Marsing in Support of Nature's Way's Opposition to Petitioner's Motion to Strike ("Marsing Decl."), ¶ 6.] This date was used as the "action base date" for the docketing and to calculate the due date for the Answer. [*Id.* ¶ 9 and Exh. C; Marsing Decl., ¶ 6 and Exh. B.] Accordingly, the due date for Nature's Way's Answer was calculated to be forty (40) days from the May 29 date or July 8, 2007.<sup>2</sup> [*Id.* ¶ 10 and Exh. C; Marsing Decl., ¶ 7 and Exh. B.] Since July 8, 2007 fell on a Sunday, pursuant to 37 C.F.R. § 2.196 and TBMP § 112, Nature's Way filed its Answer to the Petition for Cancellation on July 9, 2007. [Phillips Decl., ¶ 11.]

It was not until receiving Petitioner's Motion to Strike that it was discovered that the electronic version of the Scheduling Order sent by the TTAB to Nature's Way, which was then forwarded by e-mail to counsel, shows a date of mailing different than the hard copy of the Scheduling Order available on the website of the PTO. [Phillips Decl., ¶ 12; *compare* Phillips Decl., Exh. B to Exh. A.] The Scheduling Order contained in the e-mail from Nature's Way shows a mailing date of May 29, 2007 (Phillips Decl., Exh. B), while the official copy of Scheduling Order from the TTAB files on the PTO database shows a mailing date of May 26,

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<sup>1</sup> In order to prevent any oversights with respect to deadlines, Workman Nydegger utilizes several docketing and procedural mechanisms. [Phillips' Decl., ¶ 6; Declaration of Amy L. Marsing in Support of Nature's Way's Opposition to Petitioner's Motion to Strike ("Marsing Decl."), ¶ 3.] For instance, any correspondence which is delivered to the offices of Workman Nydegger from the United States Patent and Trademark Office, including the TTAB, is directed to the firm's docketing department. [*Id.*] The docketing department reviews each correspondence and enters any deadlines the correspondence may set into the docketing system. [Phillips Decl., ¶ 7; Marsing Decl., ¶ 4.] The correspondence is then returned to the attorney responsible for the proceeding to which the correspondence relates to verify that the dates have been correctly docketed. [*Id.*]

<sup>2</sup> The five days for mailing provided under 37 C.F.R. § 2.119(c) was not included in this calculation. All parties agree that the five (5) day extension for mailing by First Class Mail does not apply to a due date for an Answer. *See* TBMP § 113.05.

2007. [Phillips Decl., Exh. A.] It appears that the Scheduling Order included in the e-mail to Nature's Way contained an electronic automatic date code, and as a result, the paper copy of the e-mail with the Scheduling Order that was printed by counsel reflects the date it was printed to be sent to docketing. [Phillips Decl., ¶ 4.]

Similar errors in docketing have been found to satisfy the "good cause" requirement for setting aside a default judgment. *See Paolo's Assocs. Ltd. P'ship v. Bodo*, 21 USPQ2d 1899, 1903-1904 (ComrPats 1990) (denying a motion for default judgment after respondent filed its answer 20 days after a 30-day extension expired, in which the respondent submitted evidence that the late filing was due to an inadvertent docketing error). Further, where it is the attorney rather than the party itself that is responsible for the error, as is true of the instant case, courts are likely to forego default judgment. *Id.* at 1902 (citing *Trust Co. Bank v. Tingen-Millford Drapery Co.*, 119 F.R.D. 21, 22 (E.D.N.C. 1987)).

Based on the foregoing, Nature's Way respectfully submits that there was no willful conduct or gross neglect on the part of Nature's Way in inadvertently filing its Answer four days late.

## **2. Petitioner Will Not Be Substantially Prejudiced by the Delay**

The prejudice to Petitioner by the denial of an entry of default judgment is minimal at best. Notwithstanding the delay in filing the Answer, written discovery has been served by both parties. The action has progressed as if there had been no delay. As such, the Petitioner cannot claim substantial prejudice by the inadvertent delay of four (4) days in filing the Answer.

## **3. Nature's Way Has a Meritorious Defense to the Cancellation**

Nature's Way's Answer to the Petition for Cancellation shows that Nature's Way has a meritorious defense in this action. Indeed, the TTAB need not make an evaluation of the merits of the case at this time; rather, "[a]ll that is required is a plausible response to the allegations in the [Petition for Cancellation]. TBMP § 312.02. Nature's Way's Answer sets forth such a "plausible response" to Petitioner's allegations.

Therefore, Nature's Way has met the elements required to show good cause. Accordingly, Petitioner's Motion to Strike the Answer as untimely should be denied.

**B. Nature's Way's Fourth Affirmative Defense Is Proper**

In the alternative, Petitioner moves that Nature's Way's Fourth Affirmative Defense be stricken because it allegedly improperly seeks a determination of geographic limitations to the registration. (See Motion to Strike, p. 3). As an initial matter, the standard for an Answer, including affirmative defenses, is notice pleading. Under the Federal Rules of Civil Procedure, "all the Rules require is a 'short plain statement of the claim' that will give the [Petitioner] fair notice of what [Nature's Way's defense] is and the grounds upon which it rests." See *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957), *abrogated on other grounds by Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007); *Phonometrics, Inc. v. Hospitality Franchise Sys., Inc.*, 53 U.S.P.Q.2d 1762,1764-65 (Fed. Cir. 2000). "The purpose of pleading is to facilitate a proper decision on the merits." *Conley*, 355 U.S. at 48.

In this case, Petitioner has asserted that it has common law rights sufficient to merit cancellation of Nature's Way's registration. Nature's Way's Fourth Affirmative defense provides notice to Petitioner that the scope of the alleged prior use will be an issue. Nature's Way is entitled to discover the scope (amount and extent) of the alleged prior use of these asserted common law marks.

Further, there is a policy of encouraging prompt registration of marks by rewarding those who first seek registration of marks under the Lanham Act. *Weiner King, Inc. v. Wiener King Corp.*, 615 F.2d 512, 523-24 (C.C.P.A. 1980) (quoting *In re Beatrice Foods Co.*, 429 F.2d 466, 474 n.13 (C.C.P.A. 1970)). Those rewards include a presumption that the federal registration is valid and that the registrant enjoys a nationwide right of exclusive use in the mark. 15 U.S.C. § 1115(a). Where the registrant is in fact the junior user of the mark, the senior user may retain a right to use the mark in the geographic area wherein that user accrued common law rights superior to the registrant prior to the date of registration. 15 U.S.C. § 1065. This right to use

requires a showing of “clear entitlement.” *Scott Paper Co. v. Scott’s Liquid Gold, Inc.*, 589 F.2d 1225, 1231 (3rd Cir. 1978); *Natural Footwear Lt. v. Hart, Schaffner & Marx*, 760 F.2d 1383, 1397, 225 USPQ 1104 (3d Cir. 1985). Any rights that an alleged senior user has against a good faith registrant “shall apply only for the area in which . . . continuous prior use is preserved.” 15 U.S.C. § 1115(b)(5); *see also Natural Footwear*, 760 F.2d at 1397, 225 USPQ at 1113. This language of the Lanham Act requires that the extent of the senior users alleged use be scrutinized including examining the sales, advertising and reputation of the alleged senior user on either a state-by-state or region-by-region basis and performing a market penetration analysis. *Natural Footwear*, 760 F.2d at 1397, 225 USPQ at 1113; *Sweetarts v. Sunline, Inc.*, 380 F.2d 923, 929 (8th Cir. 1967).

If Petitioner were determined to be a senior user, a fact that is contested here, its rights would, at best, be rights at common law that are limited to the specific geographical area in which it uses its mark. The rights of the senior user against a junior user who registers his mark are typically restricted to its “actual trade area” as of the date of the federal registration. *Weiner King*, 615 F.2d at 523-24; 5 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §§ 26:53-54 (4th ed. 2007).

As Nature’s Way is the owner of a federal registration, it is entitled to use of its mark in all areas of the United States, except those where Plaintiff can prove it had market penetration prior to the date Nature’s Way’s trademark registration was issued. *Solutech, Inc. v. Solutech Consulting Servs.*, 153 F. Supp.2d 1082, 1089 (E.D.Mo. 2000). “A senior user cannot force the cancellation of a junior user’s registration merely because of prior use in a remote area.” *Id*; *see also United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 100, 39 S.Ct. 48, 51-52 (1918).

Petitioner here is seeking to cancel all the rights conferred to Nature’s Way by virtue of its federal registration. In numerous other cases, cancellation of a registration did not result from the prior use of the mark in a remote area. *See Natural Footwear*, 760 F.2d at 1394-95; *Weiner King*, 615 F.2d at 522; *Burger King of Florida, Inc. v. Hoots*, 403 F.2d 904 (7th Cir. 1968);

*V & V Food Prods., Inc. v. Cacique Cheese Co., Inc.*, 683 F. Supp. 662, 666-667 (N.D.Ill.); *Great Basin Brewing Co. v. Healdsburg Brewing Co.*, 44 U.S.P.Q.2d 1751 (Nev. 1997); *Architemps Inc. v. Architemps Ltd.*, 11 U.S.P.Q.2d 1885, 1887 (S.D.N.Y. 1989). Thus, discovery regarding the amount and extent, including the geographic scope, of Petitioner's use, is necessary in this proceeding and based on Petitioner's allegation of having prior common law rights, Nature's Way is entitled to probe the extent of such rights.<sup>3</sup>

As the extent and scope of the alleged prior use by Petitioner of its mark (including geographic scope) is completely relevant and critical to the issues raised in this proceeding, Nature's Way's Fourth Affirmative Defense is a proper and valid defense in this action. Accordingly, Nature's Way's Fourth Affirmative Defense should not be stricken, and Petitioner's Motion to Strike should be denied.<sup>4</sup>

## **II. CONCLUSION**

Nature's Way has demonstrated good cause as to why default judgment should not be entered. Further, as identification of the extent and scope of Petitioner's alleged use of its mark is necessary to the issues raised in this proceeding, Nature's Way's Fourth Affirmative Defense is a proper and valid defense in this action. As such, Nature's Way respectfully requests that Petitioner's Motion to Strike be denied in its entirety.

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<sup>3</sup> Further, it is early in the proceedings. This portion of the Motion to Strike involves an affirmative defense. Nature's Way seeks to discover the scope (time, amount and extent) of the allegedly prior use by Petitioner. At this point, Nature's Way has not asked the Board to make a determination of the geographic scope. As such, 37 C.F.R. § 2.113(c) does not apply and Petitioner's Motion to Strike Nature's Way's Fourth Affirmative Defense is premature.

<sup>4</sup> In the event that the Board is inclined to grant Petitioner's Motion to Strike as it relates to Nature's Way's Fourth Affirmative Defense, Nature's Way moves that it be granted leave to amend its Answer. It is well established that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).



DATED this 6th day of August, 2007.

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

WORKMAN | NYDEGGER  
1000 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, Utah 84111  
Telephone: (801) 533-9800  
Facsimile: (801) 328-1707

Attorneys for Registrant  
NATURE'S WAY PRODUCTS, INC.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing **NATURES WAY'S OPPOSITION TO PETITIONER'S MOTION TO STRIKE NATURE'S WAY'S ANSWER AND AFFIRMATIVE DEFENSE AS UNTIMELY AND IMPROPER** was served on Petitioner by mailing a true copy thereof to its attorney of record, by First Class Mail, postage prepaid this 6th day of August, 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/

J:\10265171\006 Opposition to Motion to Strike.DOC

**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>DECLARATION OF ROBYN L.</b>
	)	<b>PHILLIPS IN SUPPORT OF</b>
NATURE'S WAY PRODUCTS, INC.,	)	<b>NATURE'S WAY'S OPPOSITION TO</b>
	)	<b>PETITIONER'S MOTION TO STRIKE</b>
Registrant.	)	
	)	

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I, Robyn L. Phillips, hereby state:

1. I am a shareholder in the firm Workman Nydegger, counsel for the Plaintiff, Nature's Way Products, Inc. ("Nature's Way").
2. I make this declaration based upon my own personal knowledge, and based upon records maintained by Workman Nydegger in the ordinary course of business, to which I have access in the course of fulfilling my duties for the firm and its clients.
3. In response to the Petitioner filing its Petition for Cancellation, the Trademark Trial and Appeal Board ("TTAB") issued a Scheduling Order with a mailing date of May 26, 2007. Attached hereto as Exhibit A is a true and correct copy of the Scheduling Order for this matter obtained from the TTAB's files on the web site of the United States Patent and Trademark Office ("PTO").

4. The TTAB sent an electronic version of the Scheduling Order to Nature's Way by e-mail on May 26, 2007.

5. On May 29, 2007, Nature's Way forwarded to me the e-mail correspondence it had received from the TTAB notifying Nature's Way that a Petition for Cancellation had been filed and setting the schedule for these proceedings. Attached hereto as Exhibit B is a true and correct copy of said e-mail.

6. In order to prevent any oversights with respect to deadlines, Workman Nydegger utilizes several docketing and procedural mechanisms. For instance, any correspondence which is delivered to the offices of Workman Nydegger from the PTO, including the TTAB, is directed to the firm's docketing department.

7. The docketing department reviews each correspondence and enters any deadlines the correspondence may set into the docketing system. The correspondence is then returned to the attorney responsible for the proceeding to which the correspondence relates to verify that the dates have been correctly docketed.

8. Consistent with the firm policy, upon receiving the e-mail from Nature's Way containing the Scheduling Order from the TTAB, I printed off the e-mail and sent it directly to the firm's docketing department.

9. Pursuant to normal practice, the due date of Nature's Way's answer was calculated from the mailing date shown on the Scheduling Order (*i.e.* May 29, 2007) that was part of the e-mail correspondence I received from the client. This date was used as the "action base date" for the docketing and to calculate the due date for the Answer. Attached hereto as Exhibit C is a true and correct copy of the docketing form indicating that it was docketed on June 1, 2007 and showing an "action base date" of May 29, 2007.

10. The due date for Nature's Way's Answer was calculated to be forty (40) days from the May 29 date or July 8, 2007. A true and correct copy of my personal docket report for the week of July 5, 2007 is attached hereto as Exhibit D.

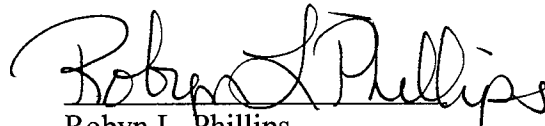
11. Because July 8, 2007 fell on a Sunday, pursuant to 37 C.F.R. § 2.196 and TBMP § 112, I filed Nature's Way's Answer to the Petition for Cancellation on July 9, 2007.

12. It was not until receiving Petitioner's Motion to Strike that I discovered that the electronic version of the Scheduling Order sent by the TTAB to Nature's Way, which I received by e-mail from Nature's Way, had a date of mailing different from the hard copy of the Scheduling Order that I printed off the website of the PTO.

13. It appears that the Scheduling Order included in the e-mail to Nature's Way contained an electronic automatic date code. As a result, the Scheduling Order from the e-mail I received from Nature's Way has a mailing date that is the same as the day I printed it off to send to docketing.

I declare under penalty of perjury under the laws of the United States of America that the statements set forth hereinabove are true and correct to the best of my knowledge and understanding.

DATED this 6 th day of August, 2007.

  
Robyn L. Phillips

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing **DECLARATION OF ROBYN L. PHILLIPS IN SUPPORT OF NATURE'S WAY'S OPPOSITION TO PETITIONER'S MOTION TO STRIKE** was served on Petitioner by mailing a true copy thereof to its attorney of record, by First Class Mail, postage prepaid this 6th day of August, 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/

J:\10265171\006 Phillips Decl.doc

# **EXHIBIT A**

**UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451**

Mailed: May 26, 2007

Cancellation No. 92047568  
Reg. No. 2574627

Nature's Way Products, Inc.  
1375 North Mountain Springs Pkwy  
Springville, UT 84663  
UNITED STATES

A-Live Foods, Inc.

V.

Nature's Way Products, Inc.

Perry S. Clegg  
Bateman IP Law Group  
8 East Broadway, Suite 550  
Salt Lake City, UT 84111  
UNITED STATES

**Angela Campbell, Paralegal Specialist:**

A petition, a copy of which is attached, has been filed to cancel the above-identified registration.

**ANSWER IS DUE FORTY DAYS** after the mailing date hereof.  
(See Trademark Rule 2.196 for expiration date falling on Saturday, Sunday or a holiday).

Proceedings will be conducted in accordance with the Trademark Rules of Practice, set forth in Title 37, part 2, of the Code of Federal Regulations. Notices concerning the rules changes, as well as the *Trademark Trial and Appeal*



Board Manual of Procedure (TBMP), are available on the TTAB's web page at [www.uspto.gov/web/offices/dcom/ttab/](http://www.uspto.gov/web/offices/dcom/ttab/).

The parties are particularly referred to Trademark Rule 2.126 pertaining to the form of submissions. Paper submissions, including but not limited to exhibits and depositions, not filed in accordance with Trademark Rule 2.126 may not be given consideration or entered into the case file.

Discovery and testimony periods are set as follows:

Discovery period to open: 6/15/07

Discovery period to close: 12/12/07

30-day testimony period for party  
in position of plaintiff to close: 3/11/08

30-day testimony period for party  
in position of defendant to close: 5/10/08

15-day rebuttal testimony period  
for plaintiff to close: 6/24/08

A party must serve on the adverse party a copy of the transcript of any testimony taken during the party's testimony period, together with copies of documentary exhibits, within 30 days after completion of the taking of such testimony. See Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

**NOTE:** The Board allows parties to utilize telephone conferences to discuss or resolve many interlocutory matters that arise in inter partes cases. See TBMP § 502.06(a) (2d ed. rev. 2004).

If the parties to this proceeding are (or during the pendency of this proceeding, become) parties to another Board or civil proceeding involving related marks or other common issues of law or fact, they shall notify the Board immediately, so that the Board can consider consolidation or suspension of proceedings, if appropriate.

**New Developments at the Trademark Trial and Appeal Board**

For faster handling of all papers, the TTAB strongly encourages electronic filing whenever possible. TTAB forms for electronic filings are available at <http://estta.uspto.gov>. Images of TTAB proceeding files can be viewed using TTABvue at <http://ttabvue.uspto.gov>.

# **EXHIBIT B**

**Robyn L. Phillips**

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**From:** Gordon Walker [gordon.walker@nauresway.com]  
**Sent:** Tuesday, May 29, 2007 9:53 AM  
**To:** Robyn L. Phillips  
**Subject:** FW: TTAB Response

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**From:** ESTTA@uspto.gov [mailto:ESTTA@uspto.gov]  
**Sent:** Saturday, May 26, 2007 6:19 AM  
**To:** Gordon Walker  
**Subject:** TTAB Response

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Mailed: May 29, 2007

Cancellation No. 92047568  
Reg. No. 2574627

Nature's Way Products, Inc.  
1375 North Mountain Springs Parkway,  
Springville, UT 84663  
UNITED STATES

A-Live Foods, Inc.

V.

Nature's Way Products, Inc.

Perry S. Clegg  
Bateman IP Law Group  
8 East Broadway, Suite 550,  
Salt Lake City, UT 84111  
UNITED STATES

**Angela Campbell, Paralegal Specialist:**

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Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

**NOTE:** The Board allows parties to utilize telephone conferences to discuss or resolve many interlocutory matters that arise in inter partes cases. See TBMP 502.06(a) (2d ed. rev. 2004).

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**New Developments at the Trademark Trial and Appeal Board**

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# EXHIBIT C

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# Actions Due

Thursday, July 19, 2007

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Docket Number: 10265.171-US

File #: 10265.171

Matter Type: DISPUTE

Status: Active

Title: re the mark "ALIVE!"

Attorney: PHI

Action Type: USTM OPP ANSWER

Action Base Date: 29-May-2007

Response Sent Date:

Due Date(s)	Due Date	Indicator	Taken
reminder	23-Jun-2007	Reminder	
Reminder	24-Jun-2007	Reminder	
Warning 1 week	01-Jul-2007	Reminder	
Answer Due	08-Jul-2007	Due Date	

Remarks: Nature's Way's response to Petition for Cancellation, cancellation no. 92047568 is due 07/08/07.

For Your Review  
And Approval

\_\_\_ Approved

User ID: apalmer

Date Created: 01-Jun-2007

Last Update: 22-Jun-2007



# **EXHIBIT D**

Thursday, July 05, 2007

Due Date List By Attorney

Page 11

05-Jul-2007 To 09-Jul-2007

Attorney: PHI Robyn L. Phillips

Due Date Indicator	Action Due	Action Type	Docket No/SubCase Country	Status Client	App Number Pat Number	App/Eff Date Iss Date	File Number Term Disclaimer	Other Attys
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08-Jul-2007	Answer Due	USTM OPP ANSWER	10265.171-US	Active Murdock International			10265.171	
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*Matter Title:* re the mark "ALIVE!"

*Remarks:* Nature's Way's response to Petition for Cancellation, cancellation no. 92047568 is due 07/08/07.

"Redacted"

**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>DECLARATION OF AMY L.</b>
	)	<b>MARSING IN SUPPORT OF</b>
NATURE'S WAY PRODUCTS, INC.,	)	<b>NATURE'S WAY'S OPPOSITION TO</b>
	)	<b>PETITIONER'S MOTION TO STRIKE</b>
Registrant.	)	
	)	

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I, Amy L. Marsing, hereby state:

1. I am employed in the docketing department at the firm of Workman Nydegger, counsel for Nature's Way Products, Inc. ("Nature's Way").

2. I make this declaration based upon my own personal knowledge and based upon records maintained by Workman Nydegger in the ordinary course of business, to which I have access in order to fulfill my responsibilities in the docketing department of Workman Nydegger.

3. In order to prevent any oversights with respect to deadlines, Workman Nydegger utilizes several docketing and procedural mechanisms. For instance, any correspondence which is delivered to the offices of Workman Nydegger from the PTO, including the TTAB, is directed to the firm's docketing department.

4. The docketing department reviews each correspondence and enters any deadlines the correspondence may set into the docketing system. The correspondence is then returned to the attorney responsible for the proceeding to which the correspondence relates to verify that the dates have been correctly docketed.

5. Consistent with the firm policy, upon receiving the e-mail from Nature's Way containing the Scheduling Order from the TTAB, the document was forwarded to the docketing department. Attached hereto as Exhibit A is a true and correct copy of the e-mail from the client that was sent to docketing.

6. Pursuant to normal practice, the due date of Nature's Way's answer was calculated from the mailing date shown on the Scheduling Order (*i.e.* May 29, 2007) that was part of the e-mail correspondence that we received from the client. I used this date as the "action base date" for the docketing and to calculate the due date for the Answer. Attached hereto as Exhibit B is a true and correct copy of the docketing form indicating that it was docketed on June 1, 2007 and showing a "base date" of May 29, 2007.

7. The due date for Nature's Way's Answer was calculated to be forty (40) days from the May 29 date or July 8, 2007.

I declare under penalty of perjury under the laws of the United States of America that the statements set forth hereinabove are true and correct to the best of my knowledge and understanding.

DATED this 10th day of August, 2007.

  
AMY L. MARSING

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing **DECLARATION OF AMY L. MARSING IN SUPPORT OF NATURE'S WAY'S OPPOSITION TO PETITIONER'S MOTION TO STRIKE NATURE'S WAY'S ANSWER AND AFFIRMATIVE DEFENSE AS UNTIMELY AND IMPROPER** was served on Petitioner by mailing a true copy thereof to its attorney of record, by First Class Mail, postage prepaid this 6th day of August, 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/

J:\10265171\006 Marsing Decl.doc

# **EXHIBIT A**

**Robyn L. Phillips**

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**From:** Gordon Walker [gordon.walker@naturesway.com]  
**Sent:** Tuesday, May 29, 2007 9:53 AM  
**To:** Robyn L. Phillips  
**Subject:** FW: TTAB Response

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**From:** ESTTA@uspto.gov [mailto:ESTTA@uspto.gov]  
**Sent:** Saturday, May 26, 2007 6:19 AM  
**To:** Gordon Walker  
**Subject:** TTAB Response

**UNITED STATES PATENT AND TRADEMARK OFFICE**  
**Trademark Trial and Appeal Board**  
**P.O. Box 1451**  
**Alexandria, VA 22313-1451**

Mailed: May 29, 2007

Cancellation No. 92047568  
Reg. No. 2574627

Nature's Way Products, Inc.  
1375 North Mountain Springs Parkway,  
Springville, UT 84663  
UNITED STATES

A-Live Foods, Inc.

V.

Nature's Way Products, Inc.

Perry S. Clegg  
Bateman IP Law Group  
8 East Broadway, Suite 550,  
Salt Lake City, UT 84111  
UNITED STATES

**Angela Campbell, Paralegal Specialist:**

A petition, a copy of which is attached, has been filed to cancel the above-identified registration.

**ANSWER IS DUE FORTY DAYS** after the mailing date hereof. (See Trademark Rule 2.196 for expiration date falling on Saturday, Sunday or a holiday).

Proceedings will be conducted in accordance with the Trademark Rules of Practice, set forth in Title 37, part 2, of the Code of Federal Regulations. Notices concerning the rules changes, as well as the *Trademark Trial and Appeal Board Manual of Procedure* (TBMP), are available on the TTAB's web page at [www.uspto.gov/web/offices/dcom/ttab/](http://www.uspto.gov/web/offices/dcom/ttab/).

The parties are particularly referred to Trademark Rule 2.126 pertaining to the form of submissions. Paper submissions, including but not limited to exhibits and depositions, not filed in accordance with Trademark Rule 2.126 may not be given consideration or entered into the case file.

Discovery and testimony periods are set as follows:

Discovery period to open:	6/15/07
Discovery period to close:	12/12/07
30-day testimony period for party in position of plaintiff to close:	3/11/08
30-day testimony period for party in position of defendant to close:	5/10/08
15-day rebuttal testimony period for plaintiff to close:	6/24/08

A party must serve on the adverse party a copy of the transcript of any testimony taken during the party's testimony period, together with copies of documentary exhibits, within 30 days after completion of the taking of such testimony. See Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

**NOTE:** The Board allows parties to utilize telephone conferences to discuss or resolve many interlocutory matters that arise in inter partes cases. See TBMP 502.06(a) (2d ed. rev. 2004).



If the parties to this proceeding are (or during the pendency of this proceeding, become) parties to another Board or civil proceeding involving related marks or other common issues of law or fact, they shall notify the Board immediately, so that the Board can consider consolidation or suspension of proceedings, if appropriate.

#### New Developments at the Trademark Trial and Appeal Board

For faster handling of all papers, the TTAB strongly encourages electronic filing whenever possible. TTAB forms for electronic filings are available at <http://estta.uspto.gov>. Images of TTAB proceeding files can be viewed using TTABvue at <http://ttabvue.uspto.gov>.

# **EXHIBIT B**

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# Actions Due

Thursday, July 19, 2007

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**Docket Number:** 10265.171-US

**File #:** 10265.171

**Matter Type:** DISPUTE

**Status:** Active

**Title:** re the mark "ALIVE!"

**Attorney:** PHI

**Action Type:** USTM OPP ANSWER

**Action Base Date:** 29-May-2007

**Response Sent Date:**

<b>Due Date(s)</b>	<b>Due Date</b>	<b>Indicator</b>	<b>Taken</b>
reminder	23-Jun-2007	Reminder	
Reminder	24-Jun-2007	Reminder	
Warning 1 week	01-Jul-2007	Reminder	
Answer Due	08-Jul-2007	Due Date	

**Remarks:** Nature's Way's response to Petition for Cancellation, cancellation no. 92047568 is due 07/08/07.

For Your Review  
And Approval

\_\_\_\_ Approved

**User ID:** apalmer

**Date Created:** 01-Jun-2007

**Last Update:** 22-Jun-2007