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Filing date: **08/10/2007**

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

Proceeding	92047568
Party	Plaintiff A-Live Foods, Inc.
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Submission	Reply in Support of Motion
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Date	08/10/2007
Attachments	3594op-08-10-07 Reply to Nature's Way's Opposition to A-Live's Motion to Strike.pdf (5 pages)(160961 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.)	
_____)	

**REPLY TO NATURE'S WAY'S OPPOSITION
TO A-LIVE'S MOTION TO STRIKE NATURE'S WAY'S
ANSWER AND AFFIRMATIVE DEFENSE AS UNTIMELY AND IMPROPER**

Petitioner, A-Live Foods, Inc. ("Petitioner" or "A-Live") hereby respectfully submits its Reply to Nature's Way's Opposition To A-Live's Motion To Strike Nature's Way's Answer And Affirmative Defense As Untimely And Improper.

A. Respondent's Evidence of "Inadvertent Docketing Error"

Counsel for Nature's Way alleges that there was an inadvertent docketing error due to a change in the date from the email forwarded from Nature's Way to its counsel caused by an alleged electronic automatic date code. See Declaration of Robyn L. Phillips, ¶ 13. Despite numerous attempts, counsel for Petitioner has not been able to repeat the date change allegedly caused by an electronic automatic date code and is unaware of any instance in which this has

occurred in the past. Moreover, no indication of an electronic automatic date code being retained within the body of the email received from the TTAB has been detectable. Nonetheless, based on the representations by counsel for Nature's Way, Petitioner hereby withdraws its Motion to Strike Respondent's Answer as Untimely.

B. Petitioner Maintains Its Motion To Strike Respondent's Affirmative Defense Regarding Geographic Limitations

The rules and procedures regarding the assertion of geographic limitations are straightforward and well established by the Trademark Act, the TBMP, and case law. "Geographic limitations will be considered and determined by the Trademark Trial and Appeal Board *only* in the context of a concurrent use registration proceeding." Trademark Rule 2.133 (c) (emphasis added).

Respondent's Fourth Affirmative Defense is clearly a defense of "geographic limitations"; it states that Petitioner's "marks are *limited in geographic scope* of use and, therefore, no likelihood of confusion exists." (Emphasis added). The present Cancellation proceeding is not a concurrent use proceeding nor has Respondent attempted to initiate a concurrent use proceeding. Therefore, Respondent's Fourth Affirmative Defense is improper, should be stricken, and should not be considered by the Board.

Respondent has attempted to argue that geographic limitations are relevant in a cancellation proceeding and therefore an appropriate affirmative defense by citing case law regarding the geographic remoteness doctrine. The cases, however, cited by Respondent, are inapposite.¹ As stated in *Coach House Restaurant, Inc. v. Coach and Six Restaurants, Inc.*:

¹ Indeed, one decision cited by Respondent, *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90 (1918), was superseded statutorily. See *Foxtrap, Inc. v. Foxtrap, Inc.*, 671 F.2d 636 (D.C. Cir. 1982).

[T]he geographical remoteness issue is not relevant to likelihood of confusion regarding the cancellation petition because the registration of a [trademark] presumes that the registrant has the unlimited right to use the [trademark] anywhere in the United States. Therefore, in examining the merits of a cancellation petition, the registered mark must be judged against challenging marks as if the registered mark was being used everywhere in the nation.

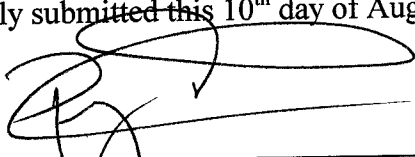
See Coach House Restaurant, Inc. v. Coach and Six Restaurants, Inc., 934 F.2d 1551, 1564 (11th Cir. 1991).

A review of the cases cited by Respondent for the proposition that geographical limitations are relevant to the cancellation of a mark readily makes apparent their inapplicability to Cancellation proceedings pending before the TTAB. None of those cases cited by Respondent involved TTAB proceedings, except for two, both of which involved *concurrent use proceedings*. *See, e.g., In re Beatrice Foods, Co.*, 429 F.2d 466 (C.C.P.A. 1970); *Weiner King, Inc. v. The Weiner King Corp.*, 615 F.2d 512 (C.C.P.A. 1980). Consequently, the cases cited by Respondent are consistent with Petitioner's position and with Trademark Rule 2.133(c) – that the TTAB will not consider or determine geographical limitations, whether asserted as an affirmative defense or otherwise, unless in the context of a concurrent use proceeding. In the present case, there is no pending concurrent use proceeding and therefore Respondent's Fourth Affirmative Defense should be stricken.

C. *Conclusion*

For the foregoing reasons, Petitioner respectfully requests that Respondent's Fourth Affirmative Defense be stricken and an improper attempt to assert the issue of geographical limitations outside of a concurrent use proceeding.

Respectfully submitted this 10th day of August, 2007.

A handwritten signature in black ink, appearing to be "Perry S. Clegg", written over a horizontal line. The signature is somewhat stylized and includes a large loop at the end.


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing REPLY TO NATURE'S WAY'S OPPOSITION TO A-LIVE'S MOTION TO STRIKE NATURE'S WAY'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 10th day of August, 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