

ESTTA Tracking number: **ESTTA327861**

Filing date: **01/20/2010**

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

## Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

### Petitioner Information

Name	Nature#s Way Products, Inc.		
Entity	Corporation	Citizenship	Utah
Address	1375 N. Mountain Springs Parkway Springville, UT 84663 UNITED STATES		

Attorney information	Robyn L. Phillips Workman Nydegger 1000 Eagle Gate Tower 60 E. South Temple Street Salt Lake City, UT 84111 UNITED STATES rphillips@wnlaw.com, mbarlow@wnlaw.com Phone:801-533-9800		
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### Registration Subject to Cancellation

Registration No	3502379	Registration date	09/16/2008
Registrant	LoCarb5, LLC 10540 72nd Street North Largo, FL 33777 UNITED STATES		

### Goods/Services Subject to Cancellation

Class 005. First Use: 2008/06/01 First Use In Commerce: 2008/06/01 All goods and services in the class are cancelled, namely: Nutritional Supplements
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### Grounds for Cancellation

Priority and likelihood of confusion	Trademark Act section 2(d)
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### Mark Cited by Petitioner as Basis for Cancellation

U.S. Application No.	77693231	Application Date	03/17/2009
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	ALIVE!		

Design Mark	<h1>ALIVE!</h1>
Description of Mark	NONE
Goods/Services	Class 005. First use: First Use: 2001/08/16 First Use In Commerce: 2001/08/16 Vitamins, minerals and dietary supplements

Attachments	77693231#TMSN.jpeg ( 1 page )( bytes ) Petition for Cancellation.pdf ( 5 pages )(35349 bytes )
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### Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Robyn L. Phillips/
Name	Robyn L. Phillips
Date	01/20/2010

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

In the matter of Trademark Registration No. 3,502,379  
Registration Date: September 16, 2008  
Mark: BODY ALIVE  
International Class: 005

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<b>NATURE’S WAY PRODUCTS, INC.,</b>	)	Cancellation No. _____
	)	
Petitioner,	)	
	)	<b>PETITION FOR CANCELLATION</b>
v.	)	
	)	
<b>LOCARB5, LLC,</b>	)	
	)	
Registrant.	)	

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Petitioner, Nature’s Way Products, Inc., a Utah corporation (“Petitioner”), believes that it is and will continue to be damaged by the continued registration of the mark “BODY ALIVE”, Registration No. 3,502,379, and hereby petitions the Trademark Trial and Appeal Board for cancellation of the same.

The grounds for the petition are as follows:

1. Upon information and belief, Registrant, LoCarb5, LLC (“Registrant”), a Florida limited liability company having an address of 10540 72<sup>nd</sup> Street North, Largo, Florida, 33777, has registered the mark “BODY ALIVE” as a trademark to be used in connection with “Nutritional Supplements” in International Class 005. Registrant filed United States Trademark

Application Serial No. 77/136,615 for registration of the mark “BODY ALIVE” on March 21, 2007, which application matured into United States Registration No. 3,502,379 (“the ’379 Registration”) with a registration date of September 16, 2008.

2. The records of the United States Patent and Trademark Office list the Attorney of Record for Registrant as Nicholas Mesiti at the law firm Heslin Rothenberg Farley & Mesiti P.C.

3. Petitioner is the holder of all right, title, and interest, including common law rights and associated goodwill, in and to the mark “ALIVE!” used on vitamins, minerals and dietary supplements.

4. Petitioner has used its mark “ALIVE!” in interstate commerce throughout the United States and the world to distinguish its goods from all other goods of the same type, and Petitioner has built up substantial goodwill in its mark through use thereof.

5. Petitioner has used its mark “ALIVE!” as a trademark in commerce to identify its products in the United States since at least August 16, 2001.

6. Petitioner is the owner of United States Registration No. 2,574,627 (“the ’627 Registration”) for the mark “ALIVE!” for goods identified as “Vitamins, minerals and dietary supplements” in International Class 005. Petitioner’s ’627 Registration issued on May 28, 2002. Subsequently, the ’627 Registration went abandoned for an unintentional failure to file a § 8 Affidavit, and was cancelled on March 7, 2009.

7. Although the ’627 Registration was cancelled, Petitioner has continued to use the mark “ALIVE!” to identify its products throughout the United States.

8. Petitioner’s “ALIVE!” mark is distinctive and serves as a designation of origin with respect to the goods offered by Petitioner.

9. Petitioner's "ALIVE!" mark has also acquired secondary meaning to the public and indicates Petitioner as the source of "vitamins, minerals and dietary supplements," bearing Petitioner's mark "ALIVE!" with the result that Petitioner's customers and the general public recognize Petitioner's mark "ALIVE!" and associates said mark with Petitioner and/or its goods.

10. Petitioner is also the owner of United States Trademark Application Serial No. 77/693,231 for the mark "ALIVE!" that is currently pending before the United States Patent and Trademark Office for goods identified as "Vitamins, minerals and dietary supplements" in International Class 005.

11. Petitioner has been denied registration of its mark "ALIVE!", in Serial No. 77/693,231, because of an alleged likelihood of confusion under Section 2(d), 15 U.S.C. § 1052(d) with Registrant's mark "BODY ALIVE".

12. Based upon the records of the United States Patent and Trademark Office, Registrant first used the mark "BODY ALIVE" on goods sold in commerce in the United States on June 1, 2008, almost seven (7) years after Petitioner's first use of its "ALIVE!" mark.

13. Accordingly, upon information and belief, Petitioner's "ALIVE!" mark has priority over Registrant's "BODY ALIVE" mark in the United States.

14. The continued registration of Registrant's mark will result in damage to Petitioner's mark and Petitioner's business.

15. Pursuant 15 U.S.C. § 1064, the '379 Registration for the mark "BODY ALIVE" should be cancelled.

WHEREFORE, Petitioner prays that the '379 Registration for the mark "BODY ALIVE" obtained by Registrant be cancelled and that this Petition be granted.

The fee required under 37 C.F.R. § 2.6(16) is enclosed.

DATED this 20th day of January, 2010.

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

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Attorney for Petitioner  
NATURE'S WAY PRODUCTS, INC.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing **PETITION FOR CANCELLATION** was served on Registrant by mailing a true copy thereof to its attorney of record, by First Class Mail, postage prepaid this 20th day of January, 2010, in an envelope addressed as follows:

LoCarb5, LLC  
10540 72<sup>nd</sup> Street North  
Largo, Florida 33777

Nicholas Mesiti, Esq.  
Heslin Rothenberg Farley & Mesiti P.C.  
5 Columbia Circle  
Albany, NY 12203

/Robyn L. Phillips/

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