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Filing date: **09/15/2015**

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

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|------------------------|---|
| Proceeding | 92061980 |
| Party | Defendant Living Fuel, Inc. |
| Correspondence Address | LIVING FUEL INC 800 S HARBOUR ISLAND BLVD TAMPA, FL 33602 UNITED STATES |
| Submission | Answer |
| Filer's Name | Dominick J. Graziano |
| Filer's e-mail | dgraziano@bgrplaw.com, ereynolds@bgrplaw.com, rshertz@bgrplaw.com, ppersonius@bgrplaw.com |
| Signature | /s/ Dominick J. Graziano |
| Date | 09/15/2015 |
| Attachments | ANS - Answer and Affirmative Defenses.pdf(19203 bytes) |

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

IN THE MATTER OF REGISTRATION NO. 2894898

HERBAL POWERS, CORP.

Petitioner,

CANCELLATION NO. 92061980

v.

LIVING FUEL, INC.

Respondent.

_____ /

RESPONDENT'S ANSWER AND AFFIRMATIVE DEFENSES

LIVING FUEL, INC. (Respondent) in answer to Petitioner's Petition to Cancel in Part, states as follows:

1. Admitted.
2. Admitted.
3. Denied as to Petitioner's claims of being damaged by Respondent's Registration.

Respondent is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 3.

4. Admitted.

5. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 5.

6. Respondent is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 6.

7. Denied as phrased. Respondent has owned the Super Berry® Trademark Registration since 2004 in the Class of Nutritional Supplements. Respondent sought to protect

its Super Berry® Trademark from infringement.

8. Denied.

9. Paragraph 9 merely states legal conclusions. To the extent Paragraph 9 forms allegations against Respondent, the allegations are denied.

10. Paragraph 10 merely states conclusions and requests for relief, but does not contain allegations against Respondent. To the extent Paragraph 10 forms allegations against Respondent, the allegations are denied.

11. Paragraph 11 merely states conclusions and requests for relief, but does not contain allegations against Respondent. To the extent Paragraph 11 forms allegations against Respondent, the allegations are denied.

12. Paragraph 12 merely states legal conclusions. To the extent Paragraph 12 forms allegations against Respondent, the allegations are denied.

13. Denied.

14. Denied.

15. Admitted that Respondent does not make nor market Maqui berry. Denied, as to the remaining allegations.

16. Paragraph 16 merely states legal conclusions. To the extent Paragraph 16 forms allegations against Respondent, the allegations are denied.

17. Denied.

AFFIRMATIVE DEFENSES

1. Petitioner's Petition for Cancellation fails to state a basis under the Lanham Act to sustain a cancellation of Respondent's mark.

2. Respondent denies that Petitioner would be or has been damaged by Respondent's

registered mark.

3. Petitioner knowingly infringed upon Respondent's mark as evidenced by Petitioner's continued use of Super Berry® after the U.S. Patent & Trademark Office refused Petitioner's application for MAQUI SUPERBERRY because Petitioner's mark was confusingly similar to Respondent's Super Berry®.

4. Respondent's Super Berry® mark is Incontestable and all Declarations of Continued Use have been timely filed and accepted.

5. Petitioner's Petition for Cancellation fails to state a basis for fraud to sustain a cancellation of Respondent's mark.

6. Petitioner's Petition for Cancellation fails to state a basis for abandonment to sustain a cancellation of Respondent's mark.

7. Petitioner's Petition for Cancellation is barred by the affirmative defense of laches. Petitioner failed to Petition for Cancellation in 2007 when its trademark registration was refused for being confusingly similar to Respondent's Super Berry® mark.

8. Petitioner's Petition for Cancellation is barred by the affirmative defense of unclean hands.

9. Respondent has priority over any rights Petitioner has made or will make as to Super Berry.

10. Petitioner is estopped from bringing this Cancellation as Petitioner is related to an entity that previously used Maqui Superberry and previously agreed to not use the Super Berry® mark due to infringement and being confusingly similar to Super Berry®.

WHEREFORE, Respondent prays:

The Board refuse to sustain the Cancellation and find no basis to support the

Cancellation; the Board dismiss this Cancellation with prejudice; and the Board grant any further relief as may be appropriate.

Dated this 15th day of September, 2015.

BUSH GRAZIANO RICE & PLATTER, P.A.

/s/ Dominick J. Graziano

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 15, 2015, I electronically filed the foregoing with the United States Patent and Trademark Office utilizing the Electronic System for TTAB.

I further certify that I mailed the foregoing document by first-class mail to: J. Mark Pohl, Pharmaceutical Patent Attorneys, LLC, 55 Madison Ave., 4th Floor, Morristown, NJ 07960.

/s/ Dominick J. Graziano

Attorney